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The Evolution of the Right to Water in India

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Abstract: Water is indispensable to human life. From references to water in numerous international treaties to ultimately, the adoption of United Nations (U.N.) General Assembly resolutions emphasising separate recognition of the "right to water" in 2010, we now have a freestanding human right to water. In this paper, I review the constitutional and legal framework underlying the right to water in India, and present a comprehensive analysis of judicial decisions that have enforced this right, based on insights from two original datasets. The first dataset is a compilation of all water laws, and the second is a compilation of all High Court and Supreme Court judicial decisions on the right to water. My review of the articulation of the "right to water" in India shows that this articulation has occurred largely oblivious of the international human rights movement on water. Apart from the mainstream articulation of the "right to water", I also describe specific articulation of the right by two marginalised groups, namely *Dalits* and *Adivasis*. In so doing, I show how the articulation of the "right to water" has strengthened the claims of the former, but not those of the latter group.

Keywords: human right to water; courts; drinking water; irrigation; marginalised groups; indigenous communities; social and economic rights; human rights critiques; right to life; right to environment

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1. Introduction

Water is indispensable to life. Human beings can survive for three weeks without food, but only three days without water [1]. Moreover, there can be no food cultivation without water. Conceptually, therefore, the human right to life, regarded as the most basic and fundamental of all rights, must include within it a right to water. In international human rights law, however, this correlation has been made only since the late 1970s. The human right to water evolved from initial references to water in numerous international treaties, including the Convention on the Elimination of All Forms of Discrimination against Women, 1979 [2], the Convention on the Rights of the Child, 1990 [3], and the Convention on the Rights of Persons with Disabilities, 2008 [4]. Ultimately, in 2010, the United Nations ("U.N.") General Assembly adopted resolutions on the "Human Right to Water and Sanitation" [5] and on the "Human Rights and Access to Safe Drinking Water and Sanitation" [6] emphasising separate recognition of the "right to water". As a result, we now have a freestanding human right to water [7]. In 2002, the U.N. Committee on Economic, Social, and Cultural Rights ("E.S.C.R".) adopted General Comment 15 noting that "The human right to water is indispensable for leading a life with human dignity". The Committee also defined the core content of the "right to water" to include "everyone's right to sufficient, safe, acceptable and physically accessible and affordable water for personal and domestic uses".

While the right to water has been included as a constitutional right in many domestic constitutions [8], in India, the "right to water" has been read into expressly enunciated fundamental or constitutional rights, namely, the "right to life" through judicial interpretation. Despite extensive recognition of the "right to water" in both constitutional and international law, the content of the right and its enforcement vary greatly across national contexts [9]. Nevertheless, the recognition of the "right to water" as an international human right implies that every individual in every country of the world must have access to a

certain quantity of affordable and good quality water, and states are under an obligation to provide the same "subject to the maximum of their available resources".

In this paper, I review the underlying constitutional and legal framework and present a comprehensive analysis of judicial decisions that have enforced the right to water in India. Based on this review, I describe how the content of the right to water in India evolved in light of underlying water statutes and common law principles that developed during the colonial period as a result of colonial policies that prioritised irrigation over drinking water supply. Despite the developmental ambitions of the independent Indian state, in so far as these laws and policies were grandfathered during the post-colonial period [10], without an express constitutional obligation to provide basic drinking water to the people of India, the independent Indian state's focus shifted only very gradually to recognising a legal obligation to provide drinking water to the population. This happened, in great part, due to judicial articulation of a right to clean drinking water, derived from the right to a "healthy environment" which in turn was read into the "right to life" under Article 21 of the Constitution.

Apart from the judicial articulation of a generally applicable "right to water", I also describe the articulation of this right on behalf of two marginalised groups. The first group includes *Dalits* or Scheduled Castes that constitute 16% of India's population, who have historically faced systematic discrimination within mainstream Hindu society based on their caste. Originating in ancient India, and transformed by medieval elites, and later by British colonial rule, the caste system in India was a system of social stratification that consigned people in different castes to different hereditary occupations, social status, and ways of life [11]. *Dalits* or untouchables were placed outside the caste hierarchy and were denied access to common sources of food and water. The second group includes *Adivasis* or indigenous peoples that constitute 8.6% of India's population, who have been historically marginalised because they have lived largely in geographical isolation in hills and forests, and have distinct cultures and ways of life that are outside mainstream Indian society [12].

Historically, *Dalits* have sought integration and respect within mainstream Hindu caste society which has been denied to them for centuries, in accordance with the dominant development paradigm. On the other hand, *Adivasis* have sought development on their terms outside mainstream Indian society. As a result, *Dalit* articulation of the "right to water" seeks not only to secure state provisioning of water in the traditional vertical exercise of their rights against the state but also to ensure enforcement of access to that water provision through the horizontal application of the right in criminal law against upper castes that block such access [13]. For *Adivasis*, however, articulation of the "right to water" is inextricably linked to their rights to land and forest, seen as part of one indivisible ecosystem.

The period from the late 1970s onwards is widely regarded as a period of burgeoning human rights in the world with increasing recognition for various social and economic rights. Since the dawn of the millennium, the U.N. E.S.C.R. has articulated the core content of many social and economic rights including the rights to food, health, water, housing, work, and social security, and nondiscrimination in accessing all of these rights. The same period has also witnessed a frontal attack on the human rights movement, derived primarily from Marxist and legal realist critiques of rights. Marx critiqued individual rights as rights of egoistic beings, arguing that beneath the veneer of "liberal rights for all", existed a highly unequal and inegalitarian society [14]. The legal realist critique of rights was similar to the Marxist critique in its dismissal of the public/private distinction as describing the reality of our political and legal experience. Legal realist scholars do not deny the importance of individual rights but argue that there is no such thing as a pre-political private sphere, a state of nature, which precedes the state. The private sphere itself is constituted by the state, and by law because it depends on the state for the provision and enforcement of norms, which regulate relations within that sphere. Moreover, these norms cannot be deduced from abstract ideas of rights but rather require contextualized normative choices made by state actors [15].

Human Rights critics such as David Kennedy have contended that the idolatry of human rights standards has led activists to overburden the concept with ever more ambi-

tious social and economic rights, whilst preventing them from considering other solutions to these issues. The expression of vague values as legal norms opens them to selective interpretation and gives an advantage to litigious sections of society aware of how to manipulate the legal system to protect their interests [16]. Through a historical review of the human rights movement, echoing Marx, Sam Moyn has argued that human rights norms selectively emphasize one aspect of social justice, neglecting the distributional victory of the rich. They grant status equality, not distributive equality [17]. Human rights politics, including with respect to the emergence of social and economic rights, sensitize us to visible indigence and repression, but not to welfare. Consequently, human rights are a guarantee of sufficient provision, not a constraint on inequality [17]. Moyn argues that even though post-colonial states deployed the language of rights effectively to agitate against global injustice of hierarchy and power [17] (p. 125), they fared worse than developed states in combining concerns of sufficiency and equality. Moyn does not, however, explain why this has been the case.

In this paper, I examine the salience of these human rights critiques through an evaluation of how the right to water has evolved in India as a legal, and later a constitutional right, from the colonial period to the present. In doing so, I show that in the context of post-colonial states that broadly retained the legal and administrative structure of the colonial state, the shift in the state providing for basic needs of citizens, including the rights to food and water happened only gradually. Moreover, in these post-colonial states, before the state distributed the pie, it needed to enlarge the same, something developed countries did not need to do. This led to a focus on economic development, understood mainly as economic growth to be achieved largely through industrialisation and capital formation, which in turn, led to increased resource extraction, including that of water resources.

Moreover, since ensuring basic food needs of the population was a key focus of the post-colonial Indian state, water resources continued to be diverted to agriculture. In the absence of a recognised obligation to provide drinking water to the population, the constitutional right to water carved out of the "right to a healthy environment" played an important role in shifting the state's focus from appropriation of water for irrigation purposes to protection of water resources from overuse, exploitation, and pollution. These developments in India occurred before the international recognition of the human right to water. I show that the recognition of the right to water as part of the fundamental "right to life" has led to greater accountability of state and private actors with respect to overuse and pollution of water resources which was absent during colonial times, and also resulted in reclaiming resources appropriated by the colonial state through the articulation of the "public trust" doctrine [18].

2. Materials and Methods

In this paper, I trace the evolution of the "right to water" in India by reviewing two original datasets of all water laws, numbering 156, and all High Court and Supreme Court decisions, numbering 248, that turned on the articulation and formulation of the right. I compiled these datasets with the help of researchers at the Land Rights Initiative. In addition, I review all constitutional law provisions relevant to the articulation of the "right to water" and all national water policies of the Government of India. I supplement my analysis wherever appropriate with the help of secondary literature on the "right to water" in India and internationally.

For the first dataset on "water laws", we compiled a near-comprehensive set of all water laws from the colonial period until the present. We started with a set of twenty-four water laws we had originally compiled for the Initiative's Mapping Indian Land Laws project [19]. We then supplemented this original set with laws collected based on keyword searches relating to "water law" for every state and union territory in India. In addition, we used the following keyword searches corresponding with entries in the state list of the Constitution, namely, "water supply", "irrigation", "drinking water", "water pollution", "drainage", "canals", and "tanks". We also collected all local self-government laws in rural

and urban areas with provisions pertaining to water supply, drinking water, and minor irrigation. Based on this, we created a dataset of 156 laws.

For the second dataset, we attempted to create a comprehensive set of all judicial decisions on the "right to water" from the colonial period to the present. Collecting a comprehensive and/or representative set of water rights cases is difficult since not all cases are published in case reporters and those that are reported are not necessarily available in legal databases and/or searchable through legal search engines. At the Land Rights Initiative, we collected our set of cases through keyword searches on four legal search engines, including *Manupatra*, *Westlaw*, *SCC Online*, and *Indian Kanoon*. These cases were compiled using the search term "right to water". In the first stage of analysis, all cases where the "right to water" appeared somewhere in the text of the cases were included. Through a careful examination of the cases, all cases where the textual appearance of the "right to water" had no bearing on the dispute involved in the case were excluded. These cases were then supplemented by additional cases that were collected using the search terms, "access to water", "pollution of water bodies", "conversion of water bodies", "privatisation of water bodies", "irrigation", "drinking water", "water dispute", "*Dalits* and water", "*Adivasi* and water", and "water and women". Through this process, a dataset of 248 judicial decisions was created which had some bearing on the articulation and enforcement of the "right to water". The dataset included 59 Supreme Court and 189 High Court decisions. It may be noted that interstate river water disputes were excluded from this set because they did not include any references to the human right to water, nor were these cases caught while using the search term "right to water".

3. India's Water Challenge: Scarcity, Quality, and Inequality

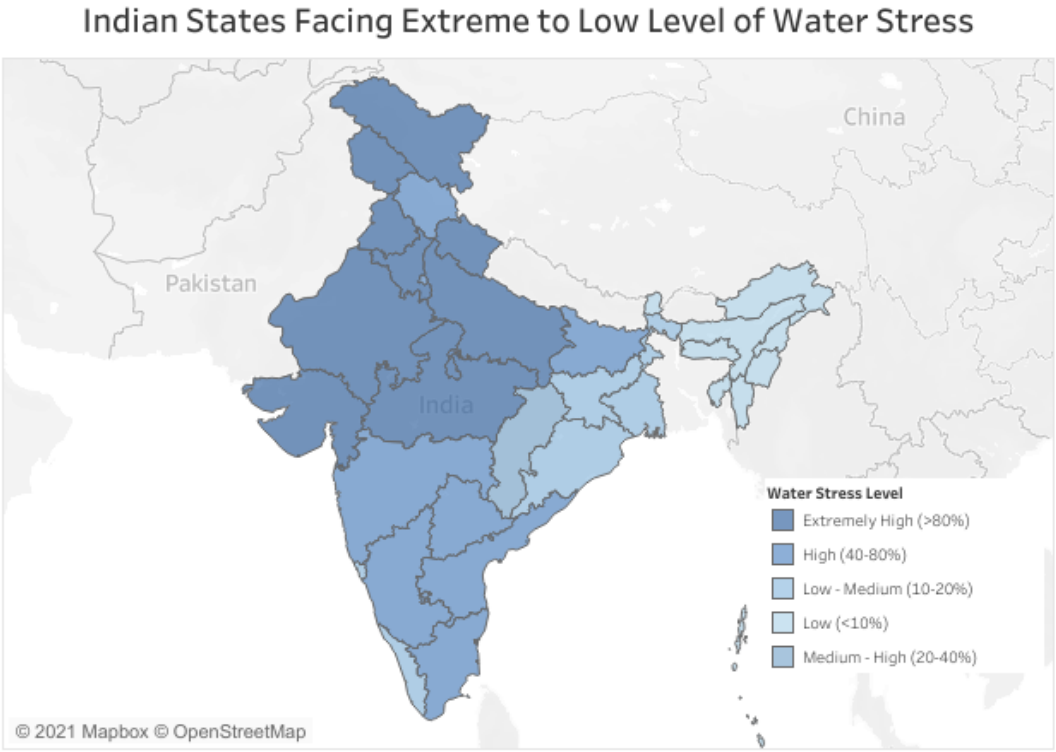
India is the world's largest democracy. Home to over a billion people, constituting 18% of the world's population, India has only 4% of global renewable water resources within its territory [20]. According to World Bank data, India is the second-most populous country in the world but the seventh largest in terms of land area. Table 1 contains the basic population, land area, and per capita availability of water data for India [21].

Table 1. Basic population, land area, and water data for India.

Population	Land Area	Population Density	Renewable Internal Fresh Water Resources Per Capita
1.38 billion	2,973,190 km^2	464 people per km^2	1080 m^3

The World Resources Institute estimates that India is the world's 13th most water-stressed country [22]. According to the *NITI Aayog*, the government's think tank, nearly 600 million Indians are dealing with high-to-extreme water stress wherein over 40% of the annually available surface water is used every year [23]. Unequal distribution of surface water resources, population growth, and urbanisation, are responsible for water scarcity in many parts of India [24]. Extreme climatic phenomena, such as droughts and floods, are common and expected to be exacerbated by climate change. Scheme 1 below shows the state-wise distribution of water stress in India [25].

A recent report by the Central Water Commission and Indian Space Research Organisation estimates that India's per capita water availability in 2011 reduced to 1651 m^3/year from 1820 m^3/year in 2001. The report projects that the per capita availability will drop to 1228 m^3/year in 2051, approaching the "water scarce" condition [26]. However, India's water challenges are not just about scarcity in terms of quantity of water available, but also involve issues of quality and access seen in the form of "unsafe and depleting groundwater reserves, inequities in access, polluted rivers, and water bodies, and their adverse impacts on people's health and productivity" [27]. Extreme water scarcity between different regions has resulted in recurring interstate water disputes not just between states within India's federal framework, but also districts and communities [27].



Scheme 1. State-wise distribution of water stress in India.

In 2015, 88% of the total population had access to at least basic water. This access was greater in urban areas, with 93% of the population having access to water as compared with 85% in rural areas [28]. In rural India, only 49% of households had exclusive access to a primary source of drinking water on their premises. At 58%, this ratio was marginally better for the urban population [29]. Apart from the rural–urban disparities, these figures also mask huge social inequalities in the availability and quality of water to individuals. For instance, only 28% of *Dalits* in rural areas have access to water within their premises.

4. Legal and Policy Framework Governing Provision of Access to Water

Despite extensive powers to own, access, regulate, and control water, neither the colonial state nor the independent Indian state asserted or recognised any explicit obligation to provide drinking water to its teeming millions. Colonial policy on water, as in the case of land [30] and forests [31], was focused on ensuring greater state control over the resource to maximise revenue generation for the British Crown. The century and a half old Easements Act, 1882, still active today, preserved the right of the government to regulate the collection, retention, and distribution of water of rivers and streams flowing in natural channels, and of natural lakes and ponds, or the water flowing, collected, retained or distributed in, or by any channel or other work constructed at the public expense for irrigation [32]. Irrigation canals were at the forefront of British imperial policy in India ostensibly as a "development" mechanism to prevent recurring and widespread famines but were poorly planned and implemented, in part because they were motivated less by the needs of the local population and more by the need for good returns on capital invested by a gentlemanly elite of landed aristocracy and city financiers [33]. Irrigation laws were enacted to acquire land and appropriate water for the purposes of building these canals [34]. Such laws only recognised an obligation to compensate for the loss of drinking water as a result of the construction of canal works. A few other laws enabled municipalities to prohibit contamination of drinking water and to make available public drinking fountains for general public use and provision of water in case of emergencies [35].

The Easements Act, 1882, also recognised the rights of landowners to all surface and groundwater [36]. Thus, the colonial legal framework recognised rights of water as appurtenant to those of land and to be used for purposes of drinking water, personal and domestic uses, and irrigation. Other legislation pertained to water taxes in accordance with the imperial goal of maximising state revenue [37]. Thus, the British imperial state's ambitions were focused more on state control of water resources and making water available for purposes of generating food, rather than ensuring adequate, accessible, and affordable drinking water to the population.

The Government of India Act, 1935, enacted in response to Indians' demands for greater autonomy for British India specifically gave power to provinces concerning water supply, irrigation, canals, drainage and embankments, water storage, and hydropower. Following independence in 1947, India opted for a federal system of government with a unitary bias ordained by the Indian Constitution that was adopted in 1950. The Union Parliament and executive not only have greater powers of legislation and execution [38] but also have primacy in areas of concurrent jurisdiction [39] and residuary powers [40] of legislation. The Constitution retained the framework of the Government of India Act by including "water" in the state list. Law-making power and executive responsibility for water and sanitation services fall squarely within the purview of state legislatures [41], with the exception of river water disputes, which fall within the purview of Parliament [42]. The Interstate River Water Disputes Act, 1956, provides the statutory framework for adjudication of disputes between upstream and downstream states along the lines of common law principles regarding sharing of water between riparian landowners, suitably adapted to the conditions of Indian states. The Act also constitutes a tribunal to adjudicate disputes between states parties. Water scarcity, especially in the water-stressed states, frequently leads to interstate water disputes, and increasingly between districts and communities. However, as described in Section 2, these disputes have been excluded from this paper as they do not involve any articulation of the "right to water".

Pursuant to Article 252, which empowers Parliament to make laws on a state subject if asked to do so by two or more states, Parliament also enacted the Water (Prevention and Control of Pollution) Act, 1974 (the "Water Act"), and Environment (Protection) Act, 1986 (the "EPA"). The Water Act provides for the constitution of central and state boards with powers to consent to the establishment of particular industries upon fulfilment of conditions under the Act; to enter, inspect, and sanction the same for pollution. The EPA is an umbrella legislation designed to provide a framework for central government coordination of activities of various central and state authorities established under previous laws, such as the Water Act and the Air (Prevention and Control of Pollution) Act, 1981.

For the first four decades post-independence, India did not have a national water policy. In 1987, the government drafted the first National Water Policy followed by two policies in 2002 and 2013. The National Water Policy, 1987, recognised the need for a nationally coordinated policy to tackle water stress and the situation of floods and droughts in the country. The policy noted that the principal consumptive use of water until then had been for the purposes of irrigation [43], and affirmed the government's commitment to providing adequate drinking water facilities to the rural and urban population by 1991 [43] (para. 9). The policy also recognised the need to regulate the use of groundwater to avoid overexploitation and also to ensure coordinated policies with respect to surface and groundwater [43] (para. 7). Finally, the policy also stressed the necessity for planning water resource development projects while maintaining the "ecological balance" and preserving the environment [43] (para. 4.1). In 1992, following constitutional amendments that sought to bring about greater decentralisation of power, state governments were mandated to devolve functions relating to drinking water and sanitation in urban areas to institutions of local government, i.e., municipalities, and in rural areas with *panchayats* [44]. Rural *panchayats* now have powers and responsibilities with respect to drinking water supply, minor irrigation, water management, watershed development, and fisheries.

The National Water Policy, 2002, largely echoed the 1987 policy. The National Water Policy, 2012, articulated for the first time the need to evolve a National Framework Law as an umbrella statement of general principles governing the exercise of legislative and/or executive (or devolved) powers by the centre, the states, and local governing bodies. The policy reiterated the interdependent nature of surface and groundwater and advocated water recharge and prevention of overexploitation of groundwater. In a nod to neoliberal water policies, it also introduced some guidelines for water pricing [45]. A total of 16 states and union territories in India have adopted policies in accordance with the National Water Policy, 2012 [46].

Following the National Water Policy, 2012, the central government circulated a draft National Water Framework Bill for comments from states in 2016. This bill contains provisions for an overarching national legal framework with principles for protection, conservation, regulation, and management of water as a vital and stressed natural resource [47]. Recognising that "water is a finite substance", the bill for the first time presents an integrated framework for groundwater and surface water management. The bill broadens the definition of "water for life" to include the basic safe water requirements for realising the fundamental right to life of each human being, including drinking, cooking, bathing, sanitation, personal hygiene, and related personal or domestic uses, with an additional requirement for women for their special needs; and includes water required for domestic livestock. The bill emphasises that the right will be available to all irrespective of "caste, creed, religion, community, class, gender, age, disability, economic status, land ownership and place of residence" [48]. The preamble to the bill specifically states that the articulation of the "right to water" in the bill is in accordance with the Indian Supreme Court's articulation of the "right to water" pursuant to the fundamental "right to life". The bill also imposes a corollary obligation on the government to ensure every person's right to safe water. The bill makes no reference to the human right to water as articulated in General Comment 15. It also leaves the prescription of what would constitute a "sufficient" quantity of water to the discretion of the state government. However, to date, the bill remains in draft form. Enacting the National Framework Water Bill into law would go a long way in imposing a binding obligation upon the central and state governments to provide water to all Indians.

At the Land Rights Initiative, we compiled a near-comprehensive dataset of all water laws from the colonial period until the present. As Figure 1 shows, only 22 laws (14%) were enacted before the adoption of the Constitution, while the remaining 135 laws (86%) were enacted post-1950.

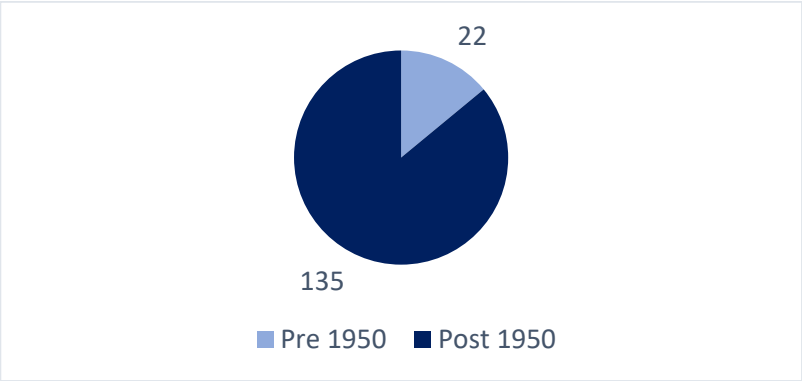


Figure 1. Distribution of water laws pre- and post-1950.

As Figure 2 shows, the laws in the dataset largely pertain to six major water categories, namely, drinking water supply, irrigation, water tax, groundwater regulation, water pollution, and planning and management of water bodies.

Figure 3 shows a timeline distribution of laws. In line with the discussion above, we find that nearly half of the 22 colonial laws pertained to irrigation. These laws only impose an obligation on the state to compensate for the loss of drinking water due to

the construction of irrigation works. The remaining half of the laws correspond to water taxes. Irrigation laws continued to dominate legislation on water in the first two decades post-independence and received another fillip in the post-liberalisation era in the 1990s.

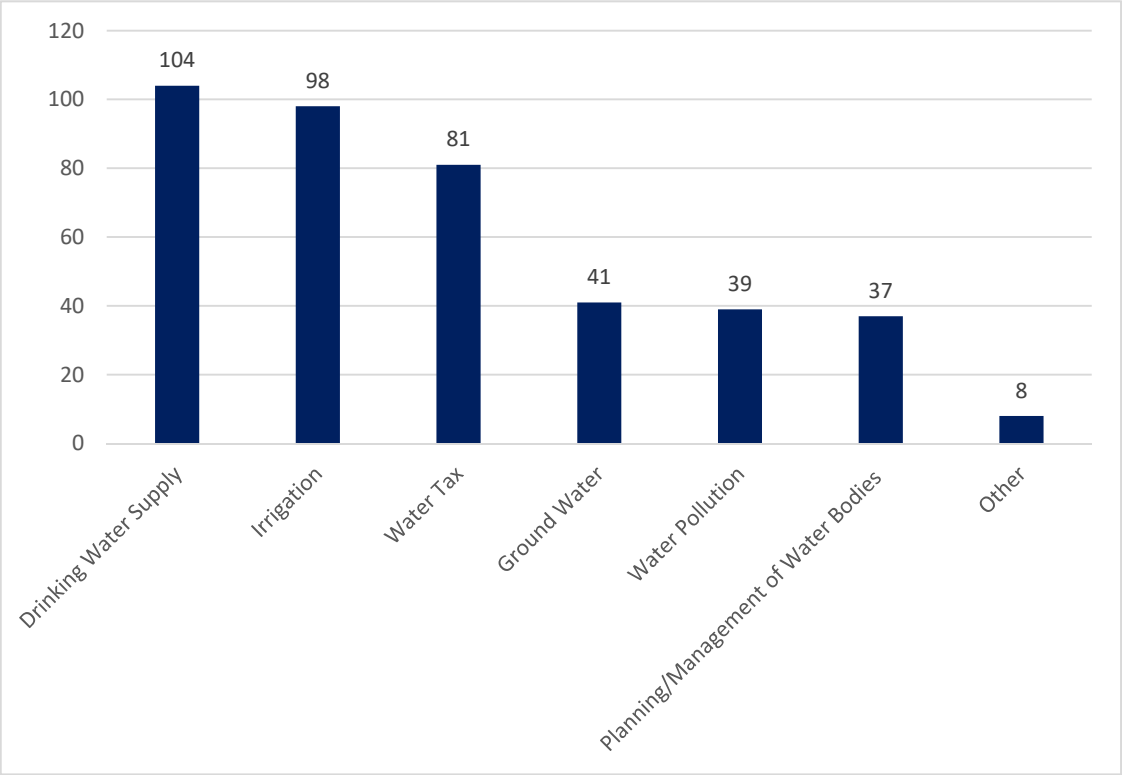


Figure 2. Major categories for water laws.

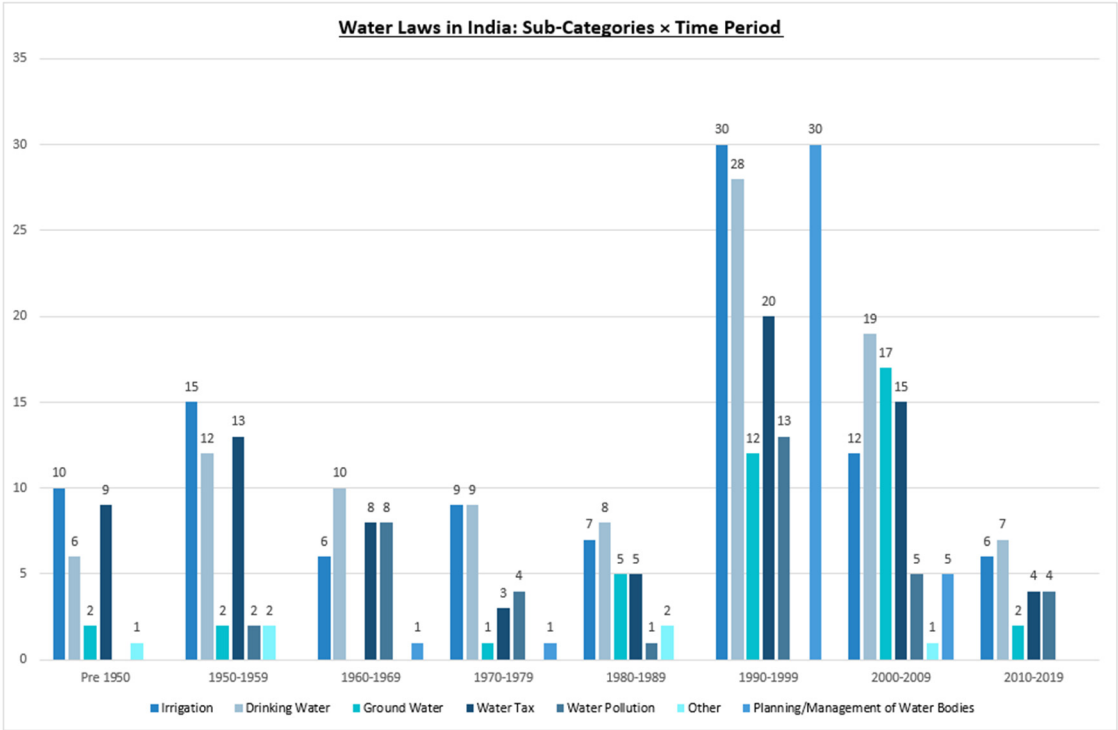


Figure 3. Timeline distribution of different categories of water laws in India.

In contrast, we see no legislation containing an affirmative obligation on part of the state to provide drinking water until the 1990s. Even the laws enacted post-1990 only impose affirmative obligations to increase drinking water supply through management of water bodies and through protection of water from encroachment and pollution. These laws do not contain any obligation on part of the government to ensure drinking water to every household but give local self-governing bodies, *panchayats*, and municipalities powers to draft schemes that would ensure provision of drinking water to households. None of these laws or national water policies recognise the human right to drinking water. They largely adopt a governance, not a rights framework to the provision of drinking water.

Many laws containing provisions against pollution of water were enacted post the 1990s, following the enactment of the Water Act and the EPA. These laws seek to protect the quality of water. Finally, we see an attempt to reverse the unchecked overuse of groundwater that was permissible under the liberal provisions of the Easements Act, 1882, through the enactment of legislation regulating overuse of groundwater post-1980.

5. Constitutional Right to Water in India

Part III of the Indian Constitution guarantees certain fundamental rights, including the rights to life (Article 21), liberty (Article 19), and equality (Article 14). These rights correspond with rights guaranteed under the International Covenant for Civil and Political Rights [49]. There is no express articulation of the "right to water" as a human right in the Indian Constitution. Particular to the Indian context, Article 17 in the Fundamental Rights Chapter abolishes "untouchability" and forbids its practise in any form. This provision reflects the dignitarian impulses of the "rights discourse" underlying the drafting of the Fundamental Rights chapter, premised on the dignity of individuals and their right to realise their full potential as human beings and equal citizens of newly independent India [50]. The Untouchability Offences Act, 1955, renamed as the Protection of Civil Rights Act, 1976, provides penalties for preventing a person from bathing in or taking water from a sacred tank, well, spring, or water-course, which is one of the critical ways in which *savarnas* or upper castes in Indian society practice untouchability towards *Dalits* or lower castes. Discrimination usually arises only when the *Dalit* settlement does not have its own water source, and the entire village (*savarna* and *Dalit* habitations) have to use the same well/tank/tap. *Dalits* often have no direct access to community sources of water. Patterns of discrimination include a *savarna* person collecting water and filling the containers of the *Dalit* residents; separate queues for *Dalits*, and special time allocation for *Dalits* to fill water from community taps. According to the 2011 Census, only 28% of *Dalit* households in rural areas have water facilities within their premises [51].

Although the Constitution does not enshrine any special protections for women, it is well documented that the burden of making water accessible to Indian families in both rural and urban areas primarily falls on women. The position is worse for *Dalit* women whose access to water is curtailed both by the limited availability of water and social discrimination against *Dalits*. Discrimination patterns may range from waiting for long periods before being allowed to fill their pots, abusive language, and even physical violence and humiliation at the hands of upper caste people [52].

Part IV of the Constitution lists the "Directive Principles of State Policy", which must be applied by the state in making laws but are unenforceable as rights [53]. These principles correspond with rights guaranteed under the International Covenant on Economic, Social, and Cultural Rights [54]. Even though there is no obligation upon the state to provide "drinking water" to its population, Article 47 of the Constitution obliges the state "to raise the level of nutrition and the standard of living and to improve public health" as its "primary duties". In 1976, the Forty Second Amendment to the Constitution introduced Articles 48A and 51A. Article 48A obliges the state to "endeavour to protect and improve the environment and to safeguard the forests and wild life of the country". Article 51A created fundamental duties on part of citizens, which include, inter alia, the right to protect

and improve the natural environment including forests, lakes, rivers, and wild life, and to have compassion for living creatures.

6. Judicial Articulation of the "Right to Water"

Judicial articulation of the "right to water" as a legal right predates the Indian Constitution. As described in the previous section, in colonial India with a primarily agrarian economy and society, the "right to water" was articulated by litigants in the form of common law and statutory principles pertaining to claims for irrigation, easement rights of access to water by the dominant owner on the servient heritage [55], and sharing of water between upper and lower riparian owners [56].

Post-adoption of the Constitution and establishment of the Supreme Court in 1950, we see judicial articulation of the "right to water" as a fundamental or constitutional right by the Supreme Court and High Courts in the exercise of their power of judicial review. In what may be considered another instance of unitary bias within India's federal structure, the Constitution creates a unified judiciary with the Supreme Court at the apex. The law declared by the Supreme Court is binding on all courts in India [57]. It is important to note here that while the Supreme Court was created for independent India by the Constitution in 1950, some High Courts in India have continuously existed since the nineteenth century [58].

Articles 32 and 226 of the Constitution empower the Supreme Court and High Courts to grant appropriate remedies for violations of fundamental rights. Having asserted its power of judicial review as a "basic feature" of the Constitution, the Supreme Court has used its review powers extensively [59].

There exist several qualitative studies of judicial decisions rendered by the Supreme Court and High Courts on the right to water in India. These include reviews by Philippe Cullet [60] and Vrinda Narain [61]. However, a comprehensive qualitative and quantitative study of all Supreme Court and High Court cases on the "right to water" has not been conducted thus far. The "right to water" dataset created at the Land Rights Initiative included 59 Supreme Court and 189 High Court decisions. As mentioned above, all the Supreme Court decisions were rendered post the adoption of the Constitution and the creation of the Supreme Court in 1950. However, since many High Courts predate the adoption of the Constitution and creation of the Supreme Court, 79 High Court decisions were rendered prior to 1950 and 110 decisions were rendered post-1950. It may be noted that this dataset excludes cases decided by lower courts, such as civil and criminal courts, and tribunals such as the interstate river disputes tribunals and the national green tribunals.

The articulation of the "right to water", both as a legal and a constitutional right in the Indian context, has always included rights to drinking water, along with water for livelihood needs, usually for irrigation of agricultural land. Figure 4 shows the overlapping distribution of categories of claims for 79 High Court cases decided prior to the adoption of the Constitution. Of these 79 decisions, the overwhelming majority of cases (62) involved claims for water for irrigation of agricultural land either as easement rights or rights of upper or lower riparian owners. This is consistent with the colonial state's policy emphasis on building irrigation canals, and the enactment of laws to acquire land and appropriate water for these purposes, as described in Section 4 earlier.

Only seven decisions specifically articulated legal rights to drinking water. This is unsurprising given that no colonial-era statute gave primacy to drinking water rights. In the earliest reported case from the nineteenth century, the Madras High Court noted that "riparian owners are entitled to use and consume the water of the stream for drinking and household purposes, for watering their cattle, for irrigating their land, and for purposes of manufacture, subject to three conditions, namely, (i) that the use is reasonable, (ii) that it is required for their purposes as owners of the land, and (iii) that it does not destroy or render useless or materially diminish or affect the application of the Act by riparian owners below the stream in the exercise either of their natural right or their right of easement if any". Subsequent cases from the twentieth century established rights of access to water in naturally occurring water sources, such as wells or tanks, against both the government [62]

and individual riparian owners [63] who obstructed such access to the detriment of the lower riparian owner, or other inhabitants accessing the water source [64]. During this period, the legal "right to water" included expansive access to water in the context of "drinking and household purposes, for watering their cattle, for irrigating their land, and for purposes of manufacture". In the absence of legislation, however, High Courts did not recognise the rights of inhabitants against pollution of water sources through the discharge of industrial effluents [65].

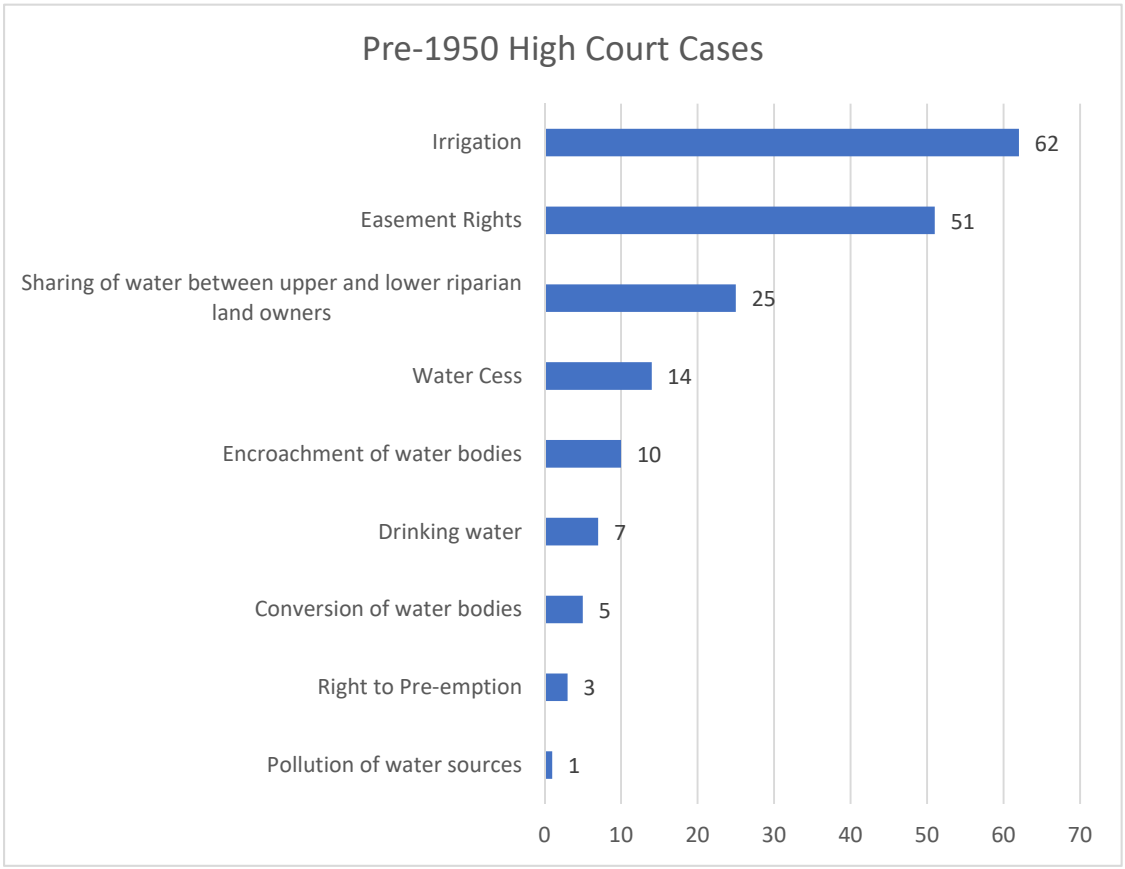


Figure 4. Overlapping distribution of claims decided by High Courts pre-1950.

The situation changes remarkably when we look at the volume of decided Supreme Court cases post-adoption of the Constitution in 1950. Figure 5 shows the overlapping distribution of categories of claims decided by the Supreme Court post the adoption of the Constitution. Of the 59 Supreme Court decisions reviewed, nearly half the cases (25) involved articulation of a fundamental or constitutional right to drinking water, whereas a slightly lesser number of cases (22) involved claims for irrigation.

All of the 25 judicial decisions involving articulations of the "right to drinking water" were rendered post-1980. There are two plausible explanations for this. The first explanation refers to the Supreme Court's activist role in the post-emergency period. Despite having previously invalidated constitutional amendments that contravened fundamental rights [66], the Court's credibility was severely damaged when it ruled that fundamental rights could be suspended during a period of emergency [67]—thereby lending legitimacy to the regime's practice of political repression. In part out of atonement for the failings of the Emergency era, the Supreme Court subsequently adopted an increasingly activist role to "extend legal protection to the interests of the weak and underprivileged sections of society" [68].

The Court liberalised rules of standing [69] to facilitate access to justice for disadvantaged groups, thereby expanding access to legal aid and entertaining petitions that were submitted as letters to the Court [70]. Over the same period, the Court expanded the nature

and scope of fundamental rights through an expansive interpretation of the right to life [71] as the right to live a life with dignity [72], which includes housing [73], education [74], health [75], food [76], and water [77]—thus making social rights justiciable. In so doing, the Court has characterised fundamental rights and Directive Principles of State Policy as complementary, with "neither part being superior to the other" [78].

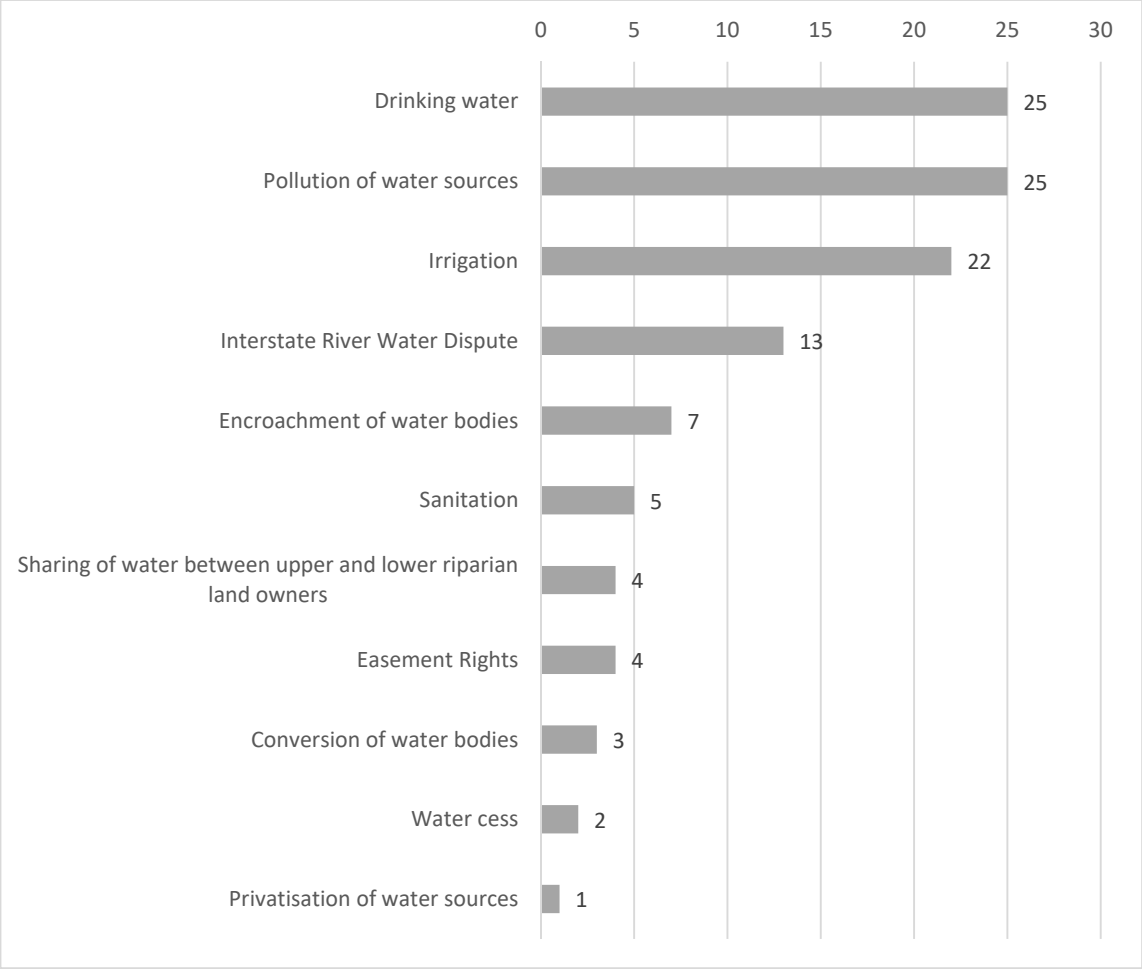


Figure 5. Overlapping distribution of claims decided by the Supreme Court post-1950.

The second explanation lies in the enactment of the Water Act in 1974, the Air Act in 1981, and the EPA in 1986. As India went through an unchecked industrial transformation, these laws provided statutory bases for many of the drinking water claims brought before the Supreme Court. Such claims were either grounded in provisions prohibiting pollution of water resources or conversion of water bodies for industrial or government use. As described earlier, in the absence of such statutory or constitutional basis prior to 1950, High Courts were reluctant to grant relief.

As in the case of the Supreme Court, we see a shift in judicial decisions rendered by the High Court in the post-1950 period. Figure 6 shows the overlapping distribution of categories of claims decided by the Supreme Court post the adoption of the Constitution. Of 110 cases decided by various High Courts post-1950, 41 cases, which is almost a third of total cases, involved drinking water claims, whereas only a slightly higher number, 48 cases, involved claims for irrigation. Contrast this with the fact that there were 62 cases involving irrigation claims, and only 7 cases involving drinking water claims, prior to 1950.

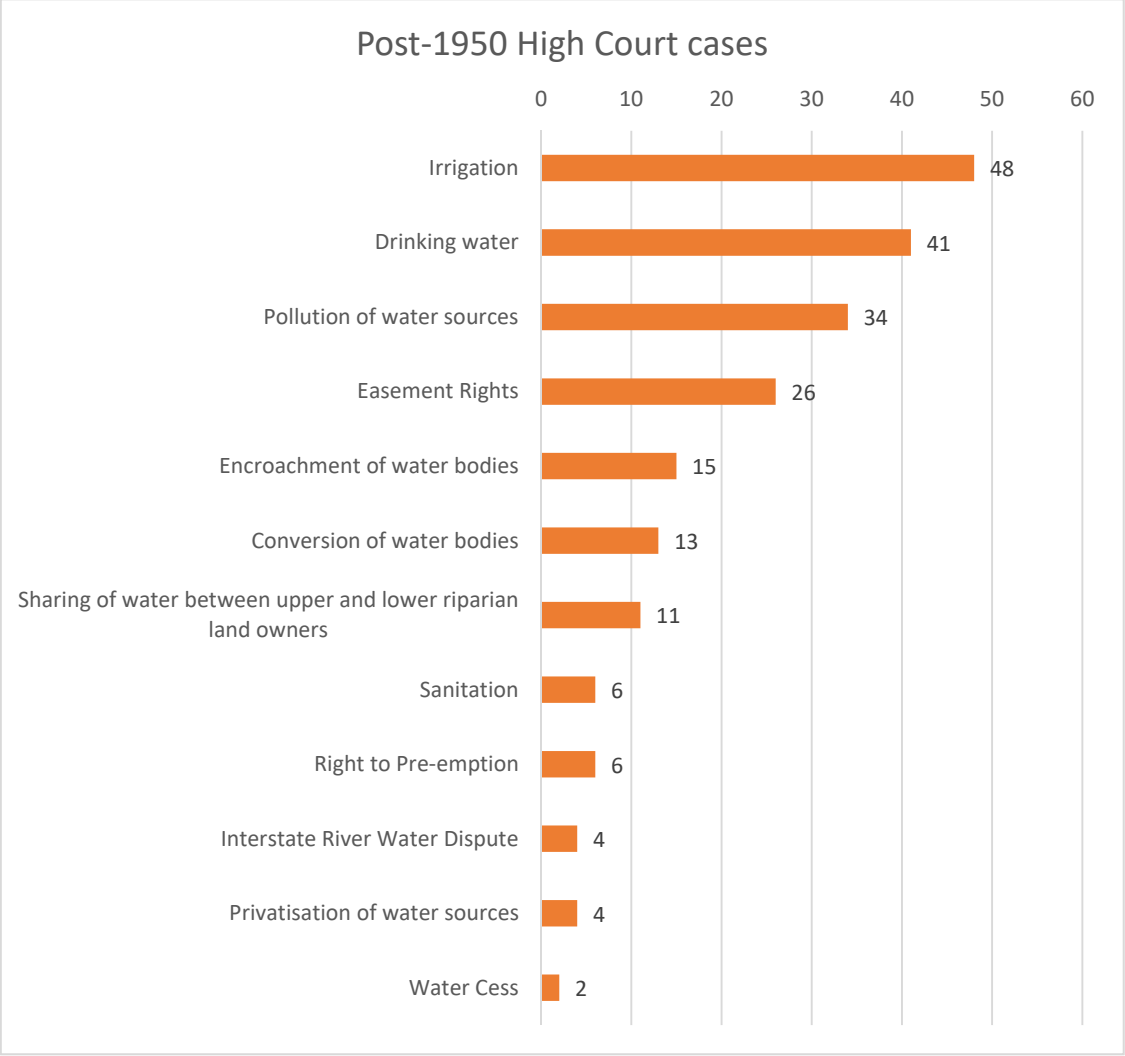


Figure 6. Overlapping distribution of claims decided by High Courts post-1950.

Both Supreme Court and High Court decisions have mostly grounded the right to access clean water for drinking, household, and irrigation purposes in the "fundamental right to life" under Article 21, which includes the right to live with dignity. For instance, the Supreme Court has held that the "fundamental right to life" includes the "right of enjoyment of pollution free water and air for full enjoyment of life" [79]. The Court went on to note that "if anything endangers or impairs the quality of life in derogation of laws, a citizen can approach the Court under Article 32 for removing the pollution of water or air which may be detrimental to the quality of life". In many cases involving water pollution, the Supreme Court has derived the "right to water" as part of the "right to a healthy environment", which in turn has been derived from the "right to life". The Supreme Court has mandated the cleaning up of water sources including rivers [80], the coastline [81], and even tanks [82] and wells. The court has also issued mandatory directions to polluters for restoring soil and ground water post pollution [83]. The court has also applied the "precautionary principle" to prevent the potential pollution of drinking water sources consequent upon the setting up of industries in their vicinity [84].

It must be noted that none of these decisions impose an obligation on part of the government to provide clean drinking water to all the people of India. Instead, they merely impose a duty on the government to ensure that there is no pollution of water sources that are in fact providing, or are likely to provide, water to individuals and groups.

Occasionally, the High Courts and Supreme Court have also grounded the state's obligation to provide clean water in Articles 47 and 51 A of the Constitution. Article 47 of the Constitution imposes a non-judicially enforceable obligation upon the state to "raise the level of nutrition and the standard of living and improvement of public health" of the people of India [85]. Article 51 A (g) of the Constitution imposes a fundamental duty upon Indian citizens to "protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures". In 1997, the Supreme Court also articulated the "public trust" doctrine, which limited the state's sovereign authority to appropriate and regulate all water bodies, and imposed a legal duty on the state to protect all natural resources, including water bodies [86]. A detailed discussion of the "public trust" doctrine is beyond the scope of this paper, but it marks a reversal, *albeit* imperfect, of the state's unchecked appropriation of commonly held natural resources such as land and water that happened through colonial-era laws.

High Court decisions have been somewhat more progressive about the content of the "right to water". Both the Andhra Pradesh and Kerala High Courts have placed an affirmative obligation on the state to provide potable drinking water to the population [87]. Moreover, the Andhra Pradesh High Court has held that the municipal water supply board could not terminate drinking water supply to the owner even if title over the property were in dispute, thereby disassociating the right to water from property ownership [88]. A detailed qualitative examination of judicial decisions articulating the "right to water" in the Indian context shows that this articulation has happened independently of the movements and processes that have influenced the adoption of the "human right to water" in 2010. While there is a rare reference to the 1997 U.N. resolution and other international precedents in some cases, there is almost no reference to the 2010 articulation.

Interestingly, the trajectory of the "right to water" has been somewhat distinct from that of other social and economic rights articulated by the Supreme Court as part of the "right to life". This is perhaps because of the existence of statutes outlining the obligations of state authorities with respect to water resources before the judicial articulation of the fundamental "right to water". This was not the case with respect to the rights to food, health, education, and housing. With respect to some of these rights, judicial articulation of the right was followed by constitutional amendments and the enactment of statutes. For instance, the fundamental right to education under Article 21A of the Constitution (inserted by the 86th constitutional amendment) was the outcome of judicial articulation of the "right to education" under the "right to life" enshrined in Article 21 following a series of judicial pronouncements [89]. The Right of Children to Free and Compulsory Education Act, 2009, was subsequently enacted to provide machinery to enforce the constitutional guarantee under Article 21A.

7. The "Right to Water" for Marginalised Groups

Within the broad articulation of the "right to water" for individuals and communities, there have been two specific articulations of the "right to water" on behalf of *Dalit* and *Adivasi* groups. As described in Section 1, while *Dalits* have been marginalised on account of systematic discrimination within Hindu society, *Adivasis* or indigenous peoples have been marginalised for their pursuit of a way of life outside mainstream Indian society. As mentioned previously, discriminatory practices against *Dalits* often manifested themselves in the form of denial of access to common sources of water such as wells and tanks. Such practices have continued to a significant degree in independent India. *Dalits* have occasionally sought to enforce their rights to access water through criminal prosecutions under the Protection of Civil Rights Act, 1976. Although criminal courts were largely outside the purview of research for this paper, I found five decisions, one Supreme Court case [90], and four High Court cases which involved criminal prosecutions under the Protection of Civil Rights Act, wherein *Dalits*, usually women, who have the highest burden of fetching water in all communities faced discrimination in accessing a common water source or one belonging to an upper caste [91]. Although the human right to

sanitation is outside the scope of this paper, it must be noted that the Supreme Court in a landmark judgment has ordered the eradication of dry latrines and the practice of manual scavenging which disproportionately affected the *Dalit* community, through enforcement of the "Prohibition of Employment as Manual Scavengers and their Rehabilitation Act, 2013" [92]. A total of 95% of manual scavengers in India are *Dalits* or belong to the Scheduled Castes, and face severe social and economic discrimination and exploitation as a result of being forced to pursue their "traditional occupation".

Social movements of Scheduled Tribes or *Adivasi* groups have articulated their rights to "*jal*, *jungle*, *zameen*", literally translated as "water, forest, land". However, within this understanding, land and water rights are not separate, but part of one indivisible ecosystem that is crucial to the preservation of *Adivasis*' "right to life". An *Ekta Parishad* study of social movements making these claims shows that there are extensive and widespread *Adivasi* movements articulating the right to water but they seldom use the courts to enforce their right to water. This is because contrary to the hegemonic understanding of the "right to water", for *Adivasi* groups, water rights are intricately linked to land rights.

Adivasis have faced disproportionate state-sanctioned displacement as a result of the construction of dams and irrigation projects. *Adivasis* constitute only 8.6% of the total population but comprise 40% of the population that has been displaced due to dams and irrigation projects, wildlife parks, and sanctuaries [12]. Such projects have been justified both under statute and enforced by courts for protecting drinking water and irrigation claims of the non-*Adivasi* majority. For instance, in *Narmada Bachao Andolan* v. *Union of India* [93], the Supreme Court justified the construction of "30 major, 135 medium and 3000 small dams" that would displace 320,000 *Adivasis* and other communities that were not covered by the government's rehabilitation and resettlement plans [94] on grounds that the dam was necessary to protect the right to drinking water of millions of Indians under the "right to life" [93]. The Supreme Court has, however, insisted on the state's obligation to provide potable drinking water supply through hand pumps, and wells in rehabilitation sites for displaced *Adivasi* groups in line with its judicial articulation of the "right to water" for the non-*Adivasi* majority [95].

Thus, even though the dignitarian rights discourse underlying the "right to drinking water" may have strengthened the claims of one marginalised group to water, namely, *Dalits*, it has served to further impoverish and marginalise the claims of another marginalised group, namely the *Adivasis*. Although Moyn completely ignores the claims of indigenous people in his critique of the human rights movement, in fact, his critique has greatest salience with respect to marginalisation of indigenous communities not merely in India, but as described in other papers in this special issue, in other parts of the world.

8. Discussion: Revisiting the Articulation of the "Right to Water" in India

The international recognition of the human right to water in 2010 has occurred alongside a fierce attack on the human rights movement. Human Rights critics such as Kennedy [16] and Moyn [17] have argued that human rights create status equality, not distributional equality. Focusing on human rights, therefore, prevents activists from finding other solutions to inequality. They also allow litigious sections of society to manipulate the legal system to their advantage, further exacerbating these distributional failures.

In India, judicial articulation of a "right to water" as a legal right predates the Constitution. In colonial India with a primarily agrarian economy and society, the "right to water" was articulated by litigants through common law and statutory principles pertaining to claims for irrigation, easement rights of access to water by the dominant owner on the servient heritage, and sharing of water between upper and lower riparian owners. This is because British colonial policy on water, as in the case of land and forests, had focused on ensuring greater state control over the resource to maximise revenue generation for the British Crown. Despite extensive powers on part of the state to own, access, regulate, and control water, neither the colonial state nor the independent Indian state asserted or recognised any explicit obligation to provide drinking water to its teeming millions.

The Indian Constitution adopted in 1950 outlined a new social and economic order for Indians emerging from colonial rule, but largely retained the federal distribution of powers regarding the provision of access to water as obtained in colonial times. While the Constitution does not include an express guarantee of a minimum content of the "right to water", following its adoption, we see the judicial articulation of the "right to water" as a fundamental right derived from the justiciable "right to life" under Article 21, and as part of the obligation of the state "to raise the level of nutrition amongst the population" under Article 47, by both the Supreme Court and High Courts. The "right to water" includes rights to drinking water and water needed for livelihood, including for the purposes of irrigation of agricultural land. In India, though drinking water supply claims are more frequent after the adoption of the Constitution than before, the articulation of a "right to water" also frequently includes water for livelihood. Both the Supreme Court and the High Courts have articulated the core content of the "right to water", but High Courts have rendered more progressive decisions regarding the content of this right by, for instance, disassociating the right to water from property ownership.

Beyond the mainstream judicial articulation of the "right to water", we find two different articulations of the "right to water" by marginalised groups in India. The first articulation of the "right to water" is by *Dalits*, who have historically faced discrimination in accessing common sources of water due to the caste system [51]. The burden of this discrimination has been disproportionately borne by *Dalit* women [52]. The *Dalit* articulation of the "right to water" shows that in societies with entrenched discrimination, formal or status equality *does* matter, and may be necessary for securing the rights of marginalised groups, even if not by itself sufficient protection to fully secure these rights in the absence of accompanying legislation and appropriate enforcement.

The second articulation of the "right to water" is by *Adivasis*, for whom the "right to water" is inextricably linked to rights to land and forest. The mainstream articulation of the "right to water" in India has been used to justify the construction of large dams and irrigation canals that have displaced Scheduled Tribes or *Adivasi* groups [94]. Such displacement insofar as it has deprived *Adivasis* of their land and access to sources of water has resulted in further impoverishing and marginalising them. Even though *Adivasis* have a distinct articulation of the "right to water" expressed through extensive social movements [95], this articulation has been given short shrift because it runs counter to the mainstream articulation of the "right to water". Sadly, the concerns of indigenous people have been largely ignored both by the international human rights movement in its articulation of the "human right to water", and its critics.

9. Conclusions

The Indian Constitution does not include an express guarantee of a "right to water" but following its adoption in 1950, both the Supreme Court and the High Courts have judicially articulated the "right to water" as a fundamental right derived from the justiciable "right to life" under Article 21. The "right to water" includes both the rights to drinking water and water needed for livelihood, including for the purposes of irrigation of agricultural land. Through a detailed qualitative examination of judicial decisions articulating the "right to water" in this paper, I have shown that this articulation has happened independently of the movements and processes that have influenced the adoption of the international "human right to water" in 2010. While there is a rare reference to the 1997 U.N. resolution and other international precedents in some cases, there is almost no reference to the 2010 articulation.

It is clear that judicial articulation of the "right to water" in India has not necessarily resulted in the just and equitable provision of easily accessible, clean, and sufficient water to all Indians. It has, however, imposed a growing obligation on the state to provide accessible, available, and good quality water for drinking and irrigation purposes. This is significant because despite water scarcity, and challenges of quality, and inequalities in access to water, the Indian Government did not even have the provision of water as a national policy priority until 1987, and to date does not have a binding legal obligation to provide water to

the people of India. Attempts to create such a binding legal obligation on central and state governments through the National Water Framework Bill, 2016, have not succeeded so far as the bill remains in draft form. The fact that the bill's preamble specifically states that the bill's content is in accordance with the Indian Supreme Court's articulation of the "right to water", only emphasises the importance of the judicial articulation of the "right to water" in shaping the Indian state's obligations to provide water to the people of India.

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66. C. Golaknath v. State of Punjab. A.I.R. 1967 S.C. 1643 (Holding that Fundamental Rights were sacrosanct and could not be modified, restricted, or impaired by Parliament); Kesavananda Bharati v. State of Kerala. A.I.R. 1973 S.C. 1461 (Power of judicial review is a "Basic Feature" of the Constitution).
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69. Bandhua Mukti Morcha v. Union of India. A.I.R. 1984 S.C. 803 (Relaxing the Rule of *locus standi* to address the rehabilitation of bonded labourers).
70. Sunil Batra v. Delhi Administration. A.I.R. 1978 S.C. 1675 (Considering a letter written by a prison inmate as a writ petition); PUDR v. Union of India. A.I.R. 1982 S.C. 1473 (Permitting PIL by "public spirited citizens" on behalf of socially or economically disadvantaged groups who are unable to approach the Court, for which standing should be liberally considered).
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73. Olga Tellis and Others v. Bombay Municipal Council. (1985) 2 Supp. S.C.R. 51 ("No one has the right to make use of a public property for a private purpose without requisite authorisation").
74. Mohini Jain v. State of Karnataka. A.I.R. 1992 S.C. 1858 (the Right to Life includes the "facilities for reading, writing and expressing oneself"); Unni Krishnan, J. P. and Others v. State of Andhra Pradesh and Others. A.I.R. 1993 S.C. 217 (Right to Education up to age of Fourteen is an enforceable Fundamental Right).
75. Francis Coralie Mullin v. The Administrator, Union Territory of Delhi. (1981) 2 S.C.R. 516; Parmanand Katara v. Union of India. (1989) 4 S.C.C. 286 (Affirming that "Health is an integral part of the Right to Life").
76. People's Union for Civil Liberties v. Union of India and Others. W.P. (C) No. 196 of 2001. Deciding on 9 July 2007 (Affirming the "Right to Food" under the "Right to Life").

77. Subhash Kumar v. State of Bihar. A.I.R. 1991 S.C. 420 ("Fundamental Right to Life" Includes the "Right of enjoyment of pollution free water and air for full enjoyment of Life").
78. State of Kerala v. N. M. Thomas. (1976) 2 S.C.C. 310. Para134 (Considering the extended period for passing special tests for promotion of employees belonging to Scheduled Castes and Scheduled Tribes); State of Madras v. Champakam Dorairajan. 1951 S.C.R. 525 ("Noting that Directive Principles have to conform to and run subsidiary to the chapter on Fundamental Rights"); Kesavananda Bharati v. State of Kerala. A.I.R. 1973 S.C. 1461 (Defining the extent to which the Government can restrict the Right to Property: "In Building up a just social order it is sometimes imperative that the Fundamental Rights should be subordinated to Directive Principles").
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80. For orders relating to pollution of the River Ganga, see M.C. Mehta v. Union of India. A.I.R. 1988 S.C. 1037, 1115 and (1997) 2 S.C.C. 411. For an important decision regarding closure of a hotel resort which was polluting the Beas River in Himachal Pradesh, see M.C. Mehta v. Kamal Nath. (1997) 1 S.C.C. 388.
81. S. Jagannath v. Union of India. (1997) 2 S.C.C. 87.
82. In Hinch Lal Tiwari v. Kamala Devi. (2001) 6 S.C.C. 496 ("Noting that the material resources of the community like forests, tanks, ponds, hillock, mountain etc. are Nature's Bounty [and] need to be protected for a proper and healthy environment which enables people to enjoy a quality of life which is the essence of the guaranteed right under Article 21 of the Constitution of India").
83. In Re Bhavani River-Shakti Sugars Ltd. (1998) 6 S.C.C. 335. In Indian Council for Enviro-Legal Action v. Union of India. (1995) 3 S.C.C. 77 (Granting a compensation package for farmers affected by pollution of their only source of irrigation, a river in Andhra Pradesh, by discharge of untreated effluents by industries alongside its banks).
84. A.P. Pollution Control Board v. Prof. M.V. Nayudu. (1999) 2 S.C.C. 718; A.P. Pollution Control Board (II) v. Prof. M.V. Nayudu. (2001) 2 S.C.C. 62.
85. Hamid Khan v. State of M.P. A.I.R. 1997 M.P. 191 (Noting that under Article 47 of the Constitution of India, it is the responsibility of the state to raise the level of nutrition and the standard of living of its people and the improvement of public health which includes an obligation to provide unpolluted drinking water).
86. M. C. Mehta v. Kamal Nath. (1997) 1 S.C.C. 388 (Declaring that "the state is the trustee of all natural resources which are by nature meant for public use and enjoyment").
87. P.R. Subas Chandran v. Govt. of A.P. and Others. 2001 (6) A.L.T. 133; Vishala Kochi Kudivella Sam. Samithi v. State of Kerala. 2006 (1) K.L.T. 919.
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89. See, Unni Krishnan, J.P. & Others v. State of Andhra Pradesh & Others A.I.R. 1993 S.C. 217.
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92. Safai Karamchari Andolan and Others v. Union of India. (2014) 11 S.C.C. 224.
93. Narmada Bachao Andolan v. Union of India. A.I.R. 2000 S.C. 375, 274. The Supreme Court noted that, "Water is the basic need for the survival of human beings and is part of the "right to life" enshrined under Article 21 of the Constitution".
94. See Wahi, N. The Tension between Property Rights and Socioeconomic Rights: A Case Study of India. In *Social and Economic Rights in Theory and Practice: Critical Inquiries*; Alviar, H., Klare, K., Williams, L., Eds.; Routledge: London, UK, 2014.
95. Narmada Bachao Andolan v. Union of India. (2000) 10 S.C.C. 664.