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REVISITING THE HUMAN RIGHT TO WATER

Pooja Parmar^{*}

1.0 INTRODUCTION

Plachimada is a small village in the Palakkad district of Kerala in south India. It is a place where people, primarily *dalit* and *adivasi*¹ landless agricultural labourers, depend on groundwater for domestic and agricultural purposes. In 2000, Hindustan Coca-Cola Beverages (P) Ltd., a subsidiary of the Coca-Cola Company, set up a plant in Palakkad. As with similar bearers of ‘development’ and ‘progress’, the plant was initially welcomed by many in the area. Soon however, a noticeable deterioration in the quality and quantity of groundwater led to a campaign against the plant.² The plant ceased operations in 2004, primarily as a result of the campaign, even though related disputes have been through several rounds of litigation. The case is currently pending adjudication before the Supreme Court of India.³

The campaign in Plachimada was spearheaded by Mailamma, a local *adivasi* woman — a mother, a grandmother, and a farmhand. Her commitment to the campaign until her death in January 2007 reflected her belief that the loss of access to water was attributable to the excessive exploitation of groundwater by the beverage plant. The belief arises from her ‘everyday experiences’⁴ that involve ensuring availability of water for her family and for agriculture. This belief is shared by all those who remain committed to the struggle. It is shared by the women and men in Plachimada who have participated in sit-ins and protest marches since 2002 despite opposition, violent action by the police, and judicial set-backs.

There are several ways of understanding struggles like the one in Plachimada. Legal analyses could involve a focus on relevant international human rights and environmental law

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¹ *Dalit* translates primarily as ‘oppressed’ and refers to the former ‘untouchable’ castes in India. *Adivasi* refers to indigenous peoples in India.

² Plachimada’s story presented here is based on a study of secondary sources comprising of two judgments of Kerala High Court, several media reports and other texts available online. For detailed references see author’s unpublished thesis titled *Revisiting the Human Right to Water* (2006) submitted to the University of British Columbia, available in the UBC Law library.

³ The struggle in Plachimada is the focus of my ongoing research. Preliminary research suggests that Plachimada offers significant insights into the nature, scope and potential of human rights law in the twenty first century.

⁴ Smith Dorothy *The Everyday World as Problematic* University of Toronto Press 1987.

principles, instruments and institutions, or a critique of Indian national and provincial statutes on water, in order to determine their 'lawness'. Plachimada also presents an opportunity for studying and commenting on India's legal system, policies of the government, or on the general state of human rights in the third world. Such studies would certainly make a valuable contribution to the growing scholarship on issues related to water rights.

I, however, want to start with a different set of questions. What does the current formulation of a 'human right to water' within international legal discourse offer women and men who use the language of rights to state their claims? What does it offer to those who, as in Plachimada, commit themselves to long and difficult struggles against all odds, risking all, on the basis of a belief: the belief that they have a right to water that *includes* a right to say 'No' to Coca-Cola? The struggle in Plachimada is one of numerous similar struggles around the world today. Such struggles are inevitable given that water is essential for life and is non-substitutable. In a world where over a billion people lack access to safe water,⁵ the recognition of a human right to water by the United Nations Committee on Economic, Social and Cultural Rights in 2002 was an important step towards making access to water a priority.⁶ The right is supported by many scholars and organizations committed to the cause of ensuring access to water for all. There are also others who do not support the concept. Even though the idea of a human right to water continues to be controversial,⁷ it arrives with a promising vision of ensuring access for all people. Women and men engaged in the struggle against Coca-Cola in Plachimada believe they have a right to water.⁸ Stories like that of Plachimada suggest that, for many, human rights are not limited to international human rights law. The value of the human rights idea lies primarily in its emancipatory potential. Unfortunately, the current formulations of a human right to water reduce this potential.

I suggest that the mainstream discourse on a right to water is narrow and inadequate.⁹ It fails to represent the lived experiences of many like Mailamma who are involved in struggles over access to water, and is susceptible to being co-opted by the very forces that such a right seeks to challenge. This is because the mainstream discussions on a right to water fail to contest the exclusions and limitations of the dominant rights discourse. Having evolved through developments in the fields of human rights law and sustainable development (itself a troubled

⁵ World Health Organization *The Right to Water* WHO France 2003 p 7.

⁶ Committee on Economic, Social and Cultural Rights *General Comment No. 15 The Right to Water* UN ESC 29th Sess. UN Doc. E/C.12/2002/11 (2002) para 1. This General Comment is non-binding and therefore the right enumerated therein is largely considered as 'soft law' that expands and clarifies the right to water which is derived and inferred from other human rights. See Salman M. A. Salman and McInerney-Lankford Siobhan *The Human Right To Water: Legal And Policy Dimensions* The World Bank Washington DC 2004.

⁷ For accounts of the reluctance of the 'international community' to accept the right to water see Salman as above; Gleick Peter H. *The World's Water 2004–2005: The Biennial Report on Freshwater Resources* Island Press Washington 2004.

⁸ This is primarily the basis of their claim, as reflected by the use of the rights language in a Water Policy drafted in 2006 by those involved in the struggle. See *The Southasian* 'Plachimada Resistance Drafts Water Policy' (2006) online: <http://www.thesouthasian.org/archives/2006/plachimada_resistance_drafts_w.html> (accessed: 16 August 2006).

⁹ I use the phrase 'mainstream discourse' to refer to scholarship that views international human rights law primarily as a tool for positive change and excludes any serious engagement with international law as a means of oppression. See also Gathii James Thuo 'Rejoinder: Twailing International Law' (2000) 98 *Michigan Law Review* 2066. Gathii describes mainstream scholarship as the 'liberal/conservative consensus in international law'.

merger of environmental concerns and the right to economic development), the current discourse on a right to water reproduces their problematic assumptions and collective histories of exclusions. What is most crucial is that current mainstream formulations of the right are unlikely to address their stated purpose — universal respect for a human right to water. This paper does not make a case for discarding the idea of a human right to water. Nor is the critique of the mainstream discourse here an attempt to discredit the significant contribution its diverse strands continue to make to the emerging law on human rights to water *in certain contexts*. My focus is rather on identifying the inclusions and exclusions of both values and interests that the discourse represents. The identification of these limitations paves the way for overcoming them, primarily by writing peoples' lived experiences into human rights law.

2.0 THEORIZING LIVED EXPERIENCES

In 'starting off thought'¹⁰ from Plachimada, I draw upon scholarship that focuses on third world peoples' perspectives while engaging with international human rights law, and upon critiques of development discourse. I further draw upon feminist standpoint epistemology as a means of exploring 'situated knowledges',¹¹ and seek to illustrate how the 'vision is better from below the brilliant space platforms of the powerful'.¹² This *particular* TWAIL (Third World Approaches to International Law) lens¹³ enables the recognition of ways in which the mainstream right to water discourse is inadequate. TWAIL represents the multifaceted and complex Third World engagement with international law that includes 'resistance, allure, exploitation and co-optation'.¹⁴ While theoretically, a TWAIL approach raises questions that enable recognition of international law as a space created by and through the language of law for contestation and negotiation, a significant contribution of TWAIL as a methodology is that it also provides the tools for opening up that space 'from below'.

Third World approaches to international law basically focus on problematizing the legitimacy of international law by contesting the dominant, historically Eurocentric, and inevitably Western accounts of its origin, neutrality, universalism, justice and equity. It is thus a project that

¹⁰ See Harding Sandra 'Rethinking Standpoint Epistemology: What is "Strong Objectivity"?' in Nagy Hesse-Biber Sharlene & Yaiser Michelle (eds) *Feminist Perspectives on Social Research* Oxford University Press New York 2004.

¹¹ Haraway Donna J. 'Situated Knowledges: The science question in feminism and the privilege of partial perspective' in Haraway Donna J. *Simians, Cyborgs, and Women: The Reinvention of Nature* Routledge New York 1991

¹² As above at 190–191.

¹³ The emphasis on 'particular' here is to highlight the fact that TWAIL represents a diverse range of philosophical and ideological leanings — socialists, post-structuralists, postcolonial, and feminists, to name a few. See Mickelson Karin 'Rhetoric and Rage: Third World voices in international legal discourse' (1997–1998) 16 *Wisconsin International Law Journal* 353; Okafor Obiora Chinedu 'Newness, Imperialism, and International Legal Reform in our time: A TWAIL Perspective' (2005) 43:1 *Osgoodeball Law Journal* 171.

¹⁴ Rajagopal Balakrishnan 'Counter-hegemonic International Law: Rethinking Human Rights and Development as a Third World Strategy' (2006) 27:5 *Third World Quarterly* 767 at 768.

seeks to ‘provincialize Europe’¹⁵ — an insistent decentering of the master narratives that does not *necessarily* imply an absolute rejection in favour of an alternative grand theory. TWAIL is not a ‘monolithic school of thought,’¹⁶ but rather, a ‘chorus of voices that blend, though not always harmoniously, in attempting to make heard a common set of concerns.’¹⁷ What binds this diverse group is not any essentialised notion of Third World or its peoples, but rather the ideology of Third Worldism — an ideological resistance to domination.¹⁸ It involves addressing mainstream international law from a particular position that emerges out of the ‘lived experiences’ of Third World peoples. The most crucial premise that underlies TWAIL scholarship is that of the untold story of mainstream international law in all its manifestations.¹⁹ This basic idea runs through the major themes and objectives that feature prominently within TWAIL scholarship, i.e. contesting universal truths, meanings and assumptions; commitment to take world history — that includes histories other than that of the Europe — very seriously; focus on Third World peoples as agents of change; and theorizing resistance to hegemonic conceptions of international law.²⁰ It is within this framework that I will first look at the nature and meanings of human rights generally before revisiting the mainstream discourse on a human right to water.

3.0 CRITIQUING HUMAN RIGHTS

Human rights are rights that inhere in a person by virtue of being human. They are described as rights that are derived from the inherent dignity of the human person, and are inalienable.²¹ It is this foundation of the recognition of the dignity of *every* human person that holds the potential for emancipation to those denied such recognition. It is this core that also makes critiquing human rights a highly problematic and even agonizing experience. What makes it a necessary one, however, is that the rights of some humans are taken more seriously than those of the less-than-humans — reincarnated throughout human history as women, slaves, the uncivilized, the undeveloped, the uneducated, the poor, the ‘lower’ castes, the ‘inferior’ races, the indigenous, the

¹⁵ Chakrabarty Dipesh *Provincializing Europe: Postcolonial Thought and Historical Difference* Princeton University Press Princeton 2000.

¹⁶ Okafor above note 13 at 176.

¹⁷ Mickelson above note 13 at 360.

¹⁸ Baxi Upendra ‘What May the “Third World” Expect from International Law?’ (2006) 7:5 *Third World Quarterly* 713 at 714. Baxi describes Third Worldism as ‘the project of ideological resistance to the “imperialism of the Same” ...’ [reference in text omitted].

¹⁹ See Mickelson above note 13 at 361–362.

²⁰ This brief summary does not do justice to the range and richness of existing TWAIL scholarship. A detailed and comprehensive analysis of the theoretical and methodological implications of TWAIL is pending investigation. In addition to references above, see Mutua Makau ‘What is TWAIL?’ (2000) 94 *American Society of International Law Proceedings* 31; Chimni Bhupinder S. ‘Third World Approaches to International Law: A Manifesto’ (2006) 8 *International Community Law Review* 3; Gathii James Thuo ‘Alternative and Critical: The Contributions of Research and Scholarship on Developing Countries to International Legal Theory’ (2000) 41 *Harvard International Law Journal* 273.

²¹ Universal Declaration of Human Rights, 1948; International Covenant on Economic, Social and Cultural Rights 1967; International Covenant on Civil and Political Rights 1967.

refugees, and so on. Human rights mean different things to different people. As noted by Upendra Baxi, '[t]here is no simple way of reading forms of plurality and multiplicity of [this] fecund expression'.²² The consequence of this plurality is that everything about human rights — its meanings, sources, norms, forms and languages — remains deeply contested.²³ It has been argued that as a language of a cohesive 'global' morality, human rights in fact represent values derived from Western liberal ideology, and exclude all other values and interests.²⁴ It is this language that is primarily enshrined in international human rights *law*. The dominant 'universal' human rights discourse is in fact 'a globalised Western localism'.²⁵ The assumptions of the superiority of the West, and the blindness towards the rest, both result in projects seeking to 'bring' human rights to the rest of the world thereby justifying the violence of replacing the multiple cultures of the 'pluriverses' people inhabit with a 'monoculture'.²⁶ As a result, a discourse that is aimed at minimizing human suffering ironically remains oblivious of many forms of suffering and violence.²⁷

In his recent analysis of the future of human rights, Baxi points to the necessity of revisiting the dominant Euro-American discourse of human rights, including 'the originary meta-narratives of the past of human rights' that remain confined within 'the timespace of the European imagination, even in its critical postmodern incarnations'.²⁸ This revisiting, however, does not necessarily lead to abandoning human rights. It is not the human rights ideals — dignity of the human person and equality — that are rendered meaningless by the limitations of the Western liberal paradigm. Rather, this paradigm reduces the emancipatory potential of these ideals.

A basic premise that underlies my revisiting of the human right to water is that human rights *law* does not embody all that rights mean to those who adopt the language of rights. The notion of human rights represents much more than what is found in the 'rigid script'²⁹ of human rights law. In fact, human rights 'have a symbolic valence' that regulation lacks.³⁰ Human rights, for many who are denied rights, are also aspirational. It is in these aspirations that the greatest potential for transformation lies as human rights continue to 'open up sites of resistance and struggle'.³¹ A useful way to understand peoples' struggles that adopt rights languages to state their claims, therefore, is not to conceive of rights as instruments or ends, but as articulations of what

²² Baxi Upendra *The Future of Human Rights* 2nd ed. Oxford University Press New Delhi 2006 p 12.

²³ As above.

²⁴ See Mutua Makau *Human Rights: A Political and Cultural Critique* University of Pennsylvania Philadelphia 2002.

²⁵ Santos Boaventura de Sousa *Toward a New Legal Common Sense: Law, Globalization, and Emancipation* 2nd ed. Butterworths LexisNexis London 2002 p 271.

²⁶ See Esteva Gustavo and Prakash Madhu Suri *Grassroots Postmodernism: Remaking the Soil Cultures* Zed Books London 1998. Also see Mutua above note 23; Žižek Slavoj 'Against Human Rights' (2005) 34 *New Left Review* 115.

²⁷ See Baxi above note 22; Rajagopal Balakrishnan *International Law from Below: Development, Social Movements, and Third World Resistance* Cambridge University Press Cambridge 2003.

²⁸ Baxi as above at 40.

²⁹ Mutua above note 23 at 9. Mutua suggests that the potential of human rights can be realized only by going beyond its 'rigid script'.

³⁰ Pahuja Sundhya 'Rights as Regulation: The Integration of Development and Human Rights' in Morgan Bronwen *The Intersection of Rights and Regulation* Ashgate (2007) [forthcoming] p 167 at 168.

³¹ See Baxi above note 22 at 46.

they can be.³² The ideals enshrined in international human rights law — universality, equality, human dignity, and freedom — are therefore not only valuable for what they are, but more so for what they can be.³³ It is, however, this very capacity of rights to be ‘something other than what they determinately are’ that is the cause of their ‘abstractness’ and ‘vacuity’.³⁴ Further, it is this vacuity that at times renders rights susceptible to co-optation by hegemonic forces. And yet, it is this same vacuity that ‘shields human rights from definitive subjection to any power.’³⁵ Herein lies the emancipatory potential of human rights — the immense possibilities of pursuing a ‘politics *for* human rights.’³⁶

3.1 Human Rights and Human Suffering

A TWAIL sensibility enables the recognition of the fact that for many in the Third World, human rights *languages* (and not the one *approved* language) offer hope — the possibility of the ‘bettering of the bad’ which has the potential of creating a ‘just and humane’ world in the long run.³⁷ It is however, also a TWAIL sensibility that makes it impossible to ignore the fact that human rights languages are every day being co-opted in ways that not only limit their emancipatory potential, but also reinscribe oppression. This is where the paradox lies. Human rights are at times ‘all that we have to interrogate the barbarism of power,’³⁸ and yet human rights are also at other times the guise for barbaric power, making them ultimately ‘that which we cannot not want.’³⁹ This paradox demands a different theory of human rights than what is currently available. A starting point for such a theory would have to be lived human experiences. The advantage of starting from this position is that it enables us to identify the many ways in which human rights law is unrelated to everyday experiences. This has enormous implications for all ‘violated peoples’ whose ‘reality of ... suffering remains unnameable.’⁴⁰ If human rights are to have meaning for such peoples, a theory of human rights must begin by ‘transport[ing] the *unnamable* into the sphere of the *named*.’⁴¹ What is called for is that human rights be responsive to human suffering. This suffering human, however, is not the one found at the core of the ‘savage-victim-saviour’⁴² discourse of human rights. This human is not the helpless silent victim waiting to be saved. While such a human is

³² See Brown Wendy ‘Suffering Rights as Paradoxes’ (2000) 7:2 *Constellations* 230 at 240.

³³ See Baxi above note 22; Brown above note 32; Žižek above note 26.

³⁴ Fitzpatrick Peter ‘Is Humanity Enough? The Secular Theology of Human Rights’ (2006) Human rights and Human welfare Working Paper no. 32 at 15 [Online <http://www.du.edu/gsis/hrhw/working>].

³⁵ As above at 16.

³⁶ See Baxi above note 22 for the distinction between ‘politics *for* human rights,’ an alternate politics, and the ‘politics *of* human rights’ which tends to align with hegemonic global agendas.

³⁷ As above at 3.

³⁸ As above at 4 [emphasis omitted].

³⁹ Brown above note 32 at 230. Brown draws upon Spivak’s depiction of liberalism and ‘other modernist emancipatory formations’. See Spivak Gayatri *Outside in the Teaching Machine* Routledge New York 1993.

⁴⁰ Baxi above note 22 at 8 [emphasis removed].

⁴¹ As above [emphasis in original].

⁴² See Mutua as above note 23 for a critical examination of human rights as the ‘savages-victims-saviors’ metaphor.

usually constructed as a ‘single and monolithic’ ‘socially stigmatized legal subject’, she is in fact ‘complex, compound, and internally diverse’.⁴³

A TWAIL lens with its focus on history and recognition of the agency of the Third World peoples, shows that there has always been resistance to oppression. Therefore, human rights discourse that takes suffering seriously, has to also take into account resistance. Such a theory of human rights must relate not only to the voices of suffering, but also to voices of struggle and resistance.⁴⁴ It necessitates the translations of human experiences — of suffering as well as of resistance and hope — into human rights standards and norms.⁴⁵ This entails a re-writing of human rights not only *for* people and communities, but also *by* them.⁴⁶ The question I began with: ‘what does the mainstream understanding of a human right to water offer people in Plachimada?’ is a step towards initiating that process of re-writing.

4.0 REVISITING THE HUMAN RIGHT TO WATER

In revisiting the mainstream discourse on right to water, my focus is on problematizing three of its essential aspects: the relationship between a human right to water and development discourse; the right to water as an entitlement; and the right as a consumer right. I further identify and explore the concept of a human right to water as a freedom — a theme that holds immense potential for overcoming the limitations of the mainstream discourse, but has so far been marginalized in the mainstream discourse.

4.1 *Right to Water and the Development Discourse*

Human rights today represent the designated path towards modernity, primarily via development, distinguishing ‘progressive’ states and peoples from those stuck in a pre-modern stage. Pursuit of human rights is considered intrinsic to ‘development’, forming (along with democracy) a ‘hegemonic political ideal’, and defining legitimacy.⁴⁷ There is a human right to development — sustained economic development is a necessary precondition for the protection and fulfilment of human rights — yet, neither of these is realisable in the absence of democracy and good governance. All of them are therefore considered as mutually constitutive.⁴⁸ Each one of them legitimizes the others, thereby justifying the involvement of the ‘international community’⁴⁹ in the

⁴³ Brown above note 32 at 237. Brown explores the paradoxical relationship between human rights and such constructions of the suffering subject in law and public policy.

⁴⁴ Baxi above note 22.

⁴⁵ As above at 181.

⁴⁶ For recognition of peoples and communities as the ‘primary authors of human rights’ see as above.

⁴⁷ See Donnelly Jack ‘Human Rights, Democracy, and Development (1999) 21 *Human Rights Quarterly* 608.

⁴⁸ But see as above for challenges to the assumption that democracy, human rights and development are interdependent and mutually reinforcing.

⁴⁹ For insightful perspectives on ‘international community’ see Buchanan Ruth and Pahuja Sandhya, ‘Law, Nation and (Imagined) International Communities’ in Dauvergne Catherine & Pue W. Wesley (eds) *Challenging Nation* (2004) 8 *Law Text Culture*.

project of 'bringing' democracy, human rights and good governance, in the pursuit of development, prosperity and peace, to every corner of the world.⁵⁰

The adoption of the Declaration on the Right to Development⁵¹ by the United Nations General Assembly in 1986 has played a significant role in bringing together human rights and development discourses.⁵² Despite the potential of a right to development for bringing about a 'fundamental transformation' in the way development is 'done',⁵³ development is understood primarily, as economic growth with the basic framework provided by the catching-up-with-the-West rationale.⁵⁴ The pervasiveness of development discourse ensures that the human rights discourse remains blind to the violence caused by the dominant economic model, the market and development.⁵⁵ The 'developmentalization of human rights', described by Rajagopal as the process whereby the 'human-rights discourse became part of a larger discourse of development',⁵⁶ leads to non-recognition of various forms of human suffering by the mainstream rights discourse. This marginalization of lived experiences proceeds in two ways: firstly, by strengthening the trade-offs arguments, i.e. forgoing human rights in the pursuit of economic development; and secondly, by establishing a rationale for sacrificing the human rights of some (primarily the lesser humans) in order to protect the rights (including the right to development) of others.⁵⁷

I suggest that the relationship between human rights and development has a significant impact on the mainstream formulations of a human right to water. A detailed analysis of relevant international legal instruments and prominent scholarly analyses shows that the evolution of the right to water within international law is inextricably linked to the concepts of human rights, environmental rights and the right to development.⁵⁸ On the one hand this strengthens the case

⁵⁰ There are a large number of projects based on these goals. See e.g. Canadian International Development Agency's 'Policy for CIDA on Human Rights, Democratization and Good Governance' that explains the relationship as follows: 'Respect for human rights, democratization and good governance are important, in their own right, for the security of individual children, women and men and the development of the societies in which they live. These three issues are integral to CIDA's purpose, to promote sustainable development in developing countries in order to reduce poverty and to contribute to a more secure, equitable and prosperous world.' CIDA Publication (December 1996) Catalogue No.: E94-239/1996E.

Online:< <http://www.acdi-cida.gc.ca/CIDAWEB/acdicida.nsf/prnEn/REN-218124821-P93>> (date accessed: 21 May 2006).

⁵¹ UNGA *Declaration on the Right to Development* GA Res. 41/128, GA 97th Plen., UN Doc. A/Res/41/128 (1986).

⁵² For a detailed discussion see Rajagopal above note 27 at 216–222. See also Pahuja above note 30.

⁵³ Rajagopal as above at 222.

⁵⁴ For critiques of 'development as a particular worldview' see Sachs Wolfgang (ed) *The Development Dictionary: A Guide to Knowledge as Power* Zed Books New York and London 1992. For a Foucauldian analysis of the development discourse see Escobar Arturo 'The Making and Unmaking of the Third World Through Development' in Rehnema Majid and Bawtree Victoria (eds) *The Post-Development Reader* Zed Books London 1997.

⁵⁵ For a discussion on the reasons for this blindness see Rajagopal above note 27 at 197–202.

⁵⁶ As above at 208.

⁵⁷ See Rajagopal as above.

⁵⁸ This proposition is based on an in-depth study of several international legal instruments and the manner in which they are interpreted within current scholarship on human right to water. Some of these are: *Convention on Rights of the Child*, 1989; *Convention on Elimination of all forms of Discrimination Against Women*, 1979; *Geneva Convention relative to the Treatment of Prisoners of War*, 1949; *Geneva Convention relative to the Treatment of Civilian Persons in Time of War*, 1949; *Declaration of the United Nations Conference on Human Environment*, 1972; UNESCO World Water Assessment Programme, 'Milestones 1972–2003: From

for a human right to water. However, in grounding the right to water on the universalistic assumptions of the human rights and development discourses, the current mainstream conception of a right to water replicates the process of ‘developmentalisation of rights’.

The fact that water is essential for economic development is acknowledged by all and is regularly mentioned in environment and development related conferences and declarations.⁵⁹ The relationship between the ‘right to water’ and development, and also, the right to water as a *means* of furthering development is endorsed in the literature dealing with the right. Better management of water resources is advocated for the purpose of sustaining economic development, and the formulation of an international human right to water is seen as an effective measure in this regard.⁶⁰ However, increasing awareness of the costs of economic development to the environment has raised consciousness about the need for thinking not just about the present, but also the future. ‘Sustainable development’ seeks to guarantee for present and future generations the simultaneous fulfilment of the rights to development and environment, as well as furthering the cause of human rights. This widely accepted and celebrated idea also finds a place of prominence in mainstream water discourse. The fact is evident from several recent international initiatives, especially the UN General Assembly Resolution on the International Decade of Action, ‘Water for Life’ 2005-2015. The Resolution emphasizes at the very outset that ‘water is critical for sustainable development, including environmental integrity and the eradication of poverty and hunger, and is indispensable for human health and well-being’.⁶¹

The General Comment on a human right to water by the UN Committee on Economic, Social and Cultural Rights also incorporates the idea of sustainable development by requiring States to ‘ensure that there is sufficient and safe water for present and future generations’.⁶² The measures it suggests for achieving this include the reduction of depletion through unsustainable extraction, diversions and dams; reducing contamination; monitoring water reserves; and ensuring that proposed developments do not interfere with access to adequate water and encouraging efficient use.⁶³ Such suggestions are however unlikely to change substantially the way development is actually done unless there are substantial shifts in way the concept of

Stockholm to Kyoto’ ; Report of the United Nations Water Conference, Mar del Plata, 1977; Rio Declaration on Environment and Development, 1992; The Dublin Statement on Water and Sustainable Development, 1992; Report of the World Commission on Environment and Development, 1987; United Nation Millennium Declaration, 2000. For detailed analysis see above note 2.

⁵⁹ See paragraph 12 of the *The Right to Development*, GA Res. 54/175, UN GA, 54th Sess. UN Doc. A/RES/54/175 (1999) which ‘[r]eaffirms that, in the full realization of the right to development, *inter alia*: (a) The rights to food and clean water are fundamental human rights and their promotion constitutes a moral imperative both for national Governments and for the international community’; paragraph 19 of the The UN Millennium Development Goals.

⁶⁰ McCaffrey Stephen C. ‘A Human Right to Water: Domestic and International Implications’ (1992) 5 *Geo. International Environmental Law Review* 1 at 24. McCaffrey sees international human rights law as an effective means of encouraging governments to manage their water resources in a manner that will sustain economic development. Also see Gleick Peter H. ‘The Human Right to Water’ (1998) 1 *Water Policy* 487 for relationship between right to water and ‘human development’.

⁶¹ UNGA *International Decade of Action, ‘Water for Life’ 2005–2015*, GA Res. 58/217, GA 58th Sess., UN Doc. A/Res/58/217 (2004).

⁶² General Comment above note 6 para 28.

⁶³ As above.

development is itself understood. It requires a move away from imposed notions of development towards change brought about by local transformative practices. As I will illustrate, the ‘developmentalisation’ of a human right to water disallows this shift.

The mainstream discourse on the right to water reproduces the assumptions upon which the dominant development discourse is based. Within the ‘catching-up’ framework of this discourse, the world is divided into regions that are ‘developed’ (primarily in the West) and those that are ‘developing’ (the rest) with the idea that the rest have to focus all efforts and energy in pursuit of ‘development’ as achieved by the West. This single-minded pursuit necessitates and even legitimates the suffering of many.

Rajagopal provides an illustration of the way that human rights language is adopted in the context of water in justifying the suffering of some.⁶⁴ In proceedings related to the Sardar Sarovar dam before the Supreme Court of India, the state of Gujarat argued that the controversial dam was necessary to enable the state to fulfil its duty ‘to guarantee the human right to water to its population’.⁶⁵ The Court accepted this position of the state’s obligation to fulfil a ‘basic need’ of people as one of the justifications for the dam project that has resulted in the displacement of large number of *adivasis* from the Narmada valley.⁶⁶ This adoption of human rights language by the state is part of its overall stance that the dam is necessary for the ‘development’ of Gujarat — a position that entails treating any criticism of the dam or of the inadequate rehabilitation measures for the displaced as ‘anti-development’. The meaning of the ‘right to water’ in this instance remains limited to renewing commitments to ‘development’ understood as ‘catching up’ with the West. Within this framework it appears natural to favour large dams, water treatment plants requiring huge investments, and ‘modern’ water supply systems while doing away with indigenous ways of water management and governance. This invariably leads to the marginalization of the suffering of some (such as the displaced villagers in the Narmada valley) in order to facilitate provision of water required for development elsewhere.

The Gujarat example points to the dangers of narrow interpretations of the human right to water. I suggest it illustrates the limitations of the mainstream understanding of a right to water that fails to recognize and incorporate the alternative visions that contest most of its basic assumptions. In practice this non-recognition facilitates the validation of ‘modernizing’ of water supply and mega-projects that require millions of dollars, and rules out any local alternatives. This is a result of the merger of rights and development that does not take into account local practices that emerge from lived experience. It also results from a narrow focus on the right to water as an entitlement to water.

⁶⁴ Rajagopal Balakrishnan ‘Limits of Law in Counter-Hegemonic Globalization: The Indian Supreme Court And the Narmada Valley Struggle’ in Santos Boaventura de Sousa and Rodriguez-Garavito Cesar (eds) *Law and Globalization from Below: Towards a Cosmopolitan Legality* Cambridge University Press New York 2005.

⁶⁵ As above at 210.

⁶⁶ See Rajagopal as above for a detailed account of the legal and political struggles over the construction of dams on the river Narmada.

4.2 *Entitlement to Water*

Contemporary discourse on the right to water focuses chiefly on the right to water as an entitlement to fulfilment of a basic need.⁶⁷ As per this view, a human right to water is not a right to an unlimited amount of water,⁶⁸ instead, such a right should apply only to the ‘basic needs’ or a basic water requirement (BWR) which ranges from 20 to 50 litres per person per day depending on the needs — drinking, food preparation, bathing and sanitation — that are considered.⁶⁹ It is also suggested that an overall BWR to meet basic domestic needs be adopted by international organizations ‘independent of climate, technology and culture’.⁷⁰

The UN General Comment 15 also highlights the importance of the right to water as an entitlement to ‘sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses’.⁷¹ Subsequent commentaries on the human right to water, its normative contents, justiciability, scope and necessity of prioritizing competing needs also focus mainly on the right as an entitlement to access water for meeting basic needs.⁷² It has been suggested that the right to water ‘can more accurately be characterized as a *need* or an *entitlement* embodied as a right’.⁷³ Water is in fact necessary for life; therefore my focus on its characterization as a need is not to suggest that it is not. My purpose is rather to shed light on the consequences of an uncritical adoption of the idea of ‘basic needs’ which has been described as ‘the most insidious legacy left behind by development’.⁷⁴ Since the right arises from and also remains anchored to the ‘need’, it is this need that is translated into an entitlement. I suggest that tying the right to water exclusively to ‘basic needs’ reflects yet again a marginalization of lived experiences, and limits the potential of the right in significant ways. In being so tied together, rights and needs can be used interchangeably leading to the dilution of the language of rights.⁷⁵ A recent analysis of the origin and evolution of the right to water also offers crucial insights in this regard. While referring to various international instruments which vacillate between declaring water as a ‘right’ or a ‘need’, the authors note the lack of any attempts to define or distinguish between these two words.⁷⁶ They further suggest that ‘[t]he term “need” implies some sense of charity, and represents the recipients as passive beneficiaries, whereas “right” conveys a sense of legal entitlement, which

⁶⁷ See McCaffrey above note 60 at 7, 12; Gleick above note 60 at 501.

⁶⁸ Gleick as above at 494–495.

⁶⁹ As above at 495. Gleick recommends 50 liters per person per day as the basic water requirement for four human domestic needs — drinking (5 liters), sanitation services (20 liters), bathing (15 liters), and preparation of food (10 liters). There are however other views on the minimum requirement of water for these activities. See WHO above note 5 at 17.

⁷⁰ Gleick as above. He qualifies the same, however, by adding that a ‘specific number’ is less important than setting a goal.

⁷¹ General Comment above note 6 para 2.

⁷² In addition to references above, see also Cahill Amanda ‘The Human Right to Water: A Right to Unique Status’ (2005) 9:3 *International Journal of Human Rights* 389; Kiefer Thorsten & Brolmann Catherine ‘Beyond State Sovereignty: The Human Right to Water’ (2005) 5 *Non-State Actors and International Law* 183.

⁷³ Salman above note 6 at 66 [emphasis added, footnote omitted].

⁷⁴ Illich Ivan ‘Needs’ in Sachs above note 54 at 88.

⁷⁵ See Gleick Peter H. *The World’s Water 2004–2005: The Biennial Report on Freshwater Resources* Island Press Washington 2004 p 204–205, 208–209 for accounts of the manner in which the word ‘right’ is replaced by ‘needs’ in ministerial declarations that followed the first three World Water Forums.

⁷⁶ Salman above note 6 at 7–16.

should, in turn, result in a corresponding duty'.⁷⁷ In order to determine where this 'sense of charity' comes from, it is necessary to take a closer look at the dominant notions of 'need' for water.

Visualizing and discussing needs (especially the needs of others) in universal terms — as a given — renders the mainstream water-rights discourse problematic. Specifying a basic minimum requirement for water is *one* possibly effective way of approaching the issue, but it is by no means the only way. Moreover, I suggest that it is a limited and limiting approach. This is because the need for water is determined less by a scientifically measured human requirement and more by 'habits of needing'.⁷⁸ Thus talking about needs without considering the habits of needing does more harm than good, the greatest harm being that despite the good intentions that produce them, the 'prescribed needs'⁷⁹ can end up disempowering the people they are meant to empower. As noted by Ivan Illich, within modern development discourse needs are 'neither necessities nor desires'.⁸⁰ It is rather 'a device for reducing people to individual units with input *requirements*'.⁸¹

A TWAIL lens shows that this reduction of some humans into less-than-humans, and determining the needs of such lesser humans is not new to international law. This is in fact largely the story of dominant understandings of human rights. The focus on needs in the right to water discourse is merely a continuation of this story. This approach is unaware, even dismissive, of other ways of living with limits of nature, and the countless ways in which peoples have adapted to limited availability of water. For instance, the 'basic water requirement' for bathing is 15 litres and for sanitation services is 20 litres per day as per one recommendation.⁸² Such a recommendation is, however, based on a certain lifestyle that is neither shared nor preferred by all.

People in areas that have less water, such as deserts, might even consider the use of such quantities as waste. In fact, it is said that while forbidding excessive use of water, Prophet Mohammed (PBUH) set an example for others by bathing in two litres of water and performing ablutions with half a litre.⁸³ Given the fact that Islam as a religion was born in a 'water scarce' part of the world, combined with the fact that it accords great importance to personal cleanliness, this illustration is significant for understanding the cultural variability of the 'need' for water. Another illustration that comes to mind is that of the use of water for cleaning dishes. Any suggestion of the possibility of cleaning dishes without water is likely to elicit responses ranging from surprise to a shocked disbelief from most people today. However, in several parts of the world dishes were cleaned with sand, ash, coconut husk, lemon or some combination of these requiring little or no water. Such practices have now, by and large been replaced by ones that involve use of

⁷⁷ As above at 15–16.

⁷⁸ I borrow this expression from Ivan Illich, above note 74.

⁷⁹ As above at 89.

⁸⁰ As above at 90.

⁸¹ As above at 98.

⁸² See Gleick 1998 above note 60 at 496.

⁸³ Al-Khayyat Mohamed Haitham 'On the Preservation of the Environment: An Islamic Perspective' (1998) The Hassanian Lectures, quoted in Morgan-Foster Jason 'Third Generation Rights: What Islamic Law Can Teach the International Human Rights Movement' (2005) 8 *Yale Human Rights & Development Law Journal* 67 at 91–92.

chemical cleansers and, increasingly, dishwashers adding large quantities of fresh water to the basic water requirements. Such ‘progress’ however does not take into consideration the limited availability of water in many parts of the world.

It is evident that a universally defined ‘need’ for water ignores innumerable ecologically sustainable ways of coping with limited available water, primarily because it is based on a technical construction of necessity.⁸⁴ Immense increase in the use of water has resulted from changes in personal habits and ‘scientific progress’.⁸⁵ Lifestyles perceived as ‘modern’ prescribe that we ‘need’ more water than what is really required to sustain life. The fact that the average daily domestic use of water per capita is more in the ‘developed’ industrialized countries than in the ‘developing’ countries illustrates this.⁸⁶ However, unmindful of the environmental limits, many people in ‘developing’ countries (primarily in the urban areas), inspired by the ‘developed’ lifestyles are rapidly moving towards unsustainable practices.⁸⁷ The ‘adequate standard of living’ that many in non-Western societies aspire to prescribes a lifestyle that often disregards local conditions. Familiar practices are discarded and ‘modern’ ones adopted. As discussed above, such practices and lifestyles often require more water than is available in most places. Thus even as we talk about ‘water scarcity’ and ‘basic water needs’, it is important to determine how much of the scarcity of water is in fact a result of the prescribed needs.

Once measured and prescribed, needs are translated into entitlements.⁸⁸ The anchoring of the right to water solely to an entitlement to such prescribed needs for water is a problematic formulation as it limits the scope of the right. It does so by limiting the ‘right’ to entitlements against the state, and if that fails, increasingly to the market. It makes the human right to water dependant on the ability or willingness of the state or the market to fulfill the ‘needs’ of those who are struggling for access to water.

Such a formulation also denies the possibility of alternatives to people. This is because the ‘needs’ are no longer the familiar ‘coping with the historically given’, or what is available.⁸⁹ The universalization of problems and solutions marginalizes the efforts inspired by the natural human urge to evolve and find better ways to deal with a situation *within a certain context*. Faced with needs governed by the ‘habits of needing’ people feel powerless to look for and develop solutions that might work for them, and instead simply wait for their ‘needs’ to be fulfilled by those who have assumed such a responsibility. The right to water can, however, be thus tied to ‘needs’ only within the dominant perceptions of human rights. The alternate conception that is always tied to recognition of the agency of the ‘needy’ suggests a different formulation.

⁸⁴ See Illich above note 74; WHO above note 5 at 10, where it is stated that a ‘rights-based approach may deliver more sustainable solutions because decisions are focused on what communities and individuals require, understand and can manage, rather than what external agencies *deem is needed*’ [emphasis added].

⁸⁵ Smith H A. ‘The Economic Uses of International Rivers’ (1931), ref. in McCaffrey above note 60 at 4.

⁸⁶ See Rosegrant Mark W. and Cai Ximing *Global Water Outlook to 2025* International Food Policy Research Institute (2002) at 5.

⁸⁷ See also Swain Ashok *Managing Water Conflict: Asia, Africa and the Middle East* Routledge London 2004.

⁸⁸ See Illich above note 74.

⁸⁹ For this argument I draw upon Illich’s analysis of the construction of ‘poverty’ in the development discourse. See as above.

The entitlement approach is further rendered problematic by the different perceptions of entitlements themselves and the resultant variations in the relationship between rights and duties around the world. Even though duties of individuals towards other individuals and communities are acknowledged by the core instruments of human rights law, mainstream human rights discourse does not accord the necessary importance to duties in relation to rights. This is because the term 'duty' is not a 'fundamental word'⁹⁰ within the normative universe created by Western liberal thought or legal culture. It is nevertheless a fundamental word that seeks to address issues of welfare and justice outside of this culture. Many practices around the world reflect people's respect for nature, and the duty to protect and preserve it. A careful use and protection of water sources in order to ensure continued access to safe water are, accordingly, a way of life for many.⁹¹ The attention to water conservation for the benefit of all living creatures in Islam, as noted above, is another illustration. Duty to offer water to the thirsty is also reflected in social practices. Examples include the practice of setting up *piyaos*, providing free water for the public and for travellers in India, and the fast disappearing Indian custom of offering water to anyone who knocks on one's door, especially during the hot summer months.

Such concepts of one's duties vis-à-vis water clearly show that there are many possible interpretations of the right to water that are presently missing from the mainstream rights discourse with its focus on entitlement to the basic 'need' for water, despite being invaluable to the stated goal — access to water for all. Water *is* a basic requirement for life. A focus on entitlement to safe water and consequent rights and obligations is therefore essential. The everyday hardships, faced especially by the woman who primarily does the walking and carrying of water for her family, clearly make it important to talk about entitlements. A universally recognized right to water would enable that woman to make a claim — to demand that access to safe water be a priority. As stated above, entitlement to water is accorded due importance in the water rights discourse, however, in uncritically framing the right as only an entitlement to a basic need, the mainstream discourse also negates the agency of that woman and reduces the potential of the right itself.

4.3 *Right to Water as a Consumer Right*

Another aspect of the mainstream discourse that reduces the potential of a human right to water is the use of 'market-friendly' language in recent initiatives relevant to the right to water, and the consequent blurring of distinction between a human right and a consumer right to water.⁹² This phenomenon is a consequence of the narrow framing of the right to water and needs to be problematized. I suggest that this alarming trend is primarily based on a particular understanding of humans, and of social and economic rights — an understanding once again, not shared by all. The acceptance of the idea of transformation of a human right to water to a consumer right

⁹⁰ Cover Robert M 'Obligation: A Jewish Jurisprudence of the Social Order' (1987) 5 *Journal of Law & Religion* 65.

⁹¹ The World Health Organization mentions the Karen in Myanmar as an example of such practices. See WHO above note 5 at 27.

⁹² See especially Morgan Bronwen 'The Regulatory Face of the Human Right to Water' (2004) 15: 5 *Water Law* 179.

reduces the emancipatory potential of the right and can only lead to a further disempowerment of people.

One reason for the trend towards a ‘consumer right’ within the water rights discourse is that the mainstream discourse on the human right to water, with its focus on entitlement to a supply of water, is predominantly set in the context of privatization of water supply systems. Arguments in support of and against a right to water draw upon the significant but narrower debate between the supporters and opponents of private sector involvement in water supply systems.⁹³ Such ‘free water versus cost of water’ kind of diversionary debates⁹⁴ suggest that the controversy over the human right to water is nothing more than a contest between those who want free water and those that advocate ‘better’ water management and governance that ‘necessitates’ cost recovery.

The unprecedented increase in privatization of municipal water supply systems⁹⁵ makes it imperative to look closely at its impacts in different parts of the world, and a human rights approach to access to water is likely to play an important role in this debate. I suggest, however, that the exclusive focus on the debate over private sector involvement in water supply services has restricted the emerging human right to water by limiting the entire discussion to municipal water supply and to entitlements against state and the market. Discourse on the right needs to go beyond the confines of the framework provided by this debate in order to be meaningful for many.

Another factor that has led to the transformation of human beings to nothing more than consumers is the uncritical adoption of the idea of the *homo oeconomicus* by the mainstream discourse on the right to water as its subject. Such a self-interest maximizing being can easily be classified as a consumer. Viewing human beings simply as consumers makes it possible to suggest, unproblematically, that ‘socio-economic rights are in practice little different from consumer rights’.⁹⁶ The idea of transformation of a human right to a consumer right, increasingly in a market-led provision of water, is however, extremely problematic. Such a view might provide some limited solutions in certain contexts, such as in some cases of urban municipal supply of water. It does not however, offer anything to those who do not access water within such systems. Such a conception of a right to water is meaningless for struggles like Plachimada. The

⁹³ For the privatization debates see e.g. Winpenny James *Managing water as an Economic Resource*, Routledge London and New York 1994; Shiva Vandana *Corporate Hijack of Water: How World bank, IMF and GATS-WTO Rules are Forcing Water Privatization* Navdanya New Delhi 2002; Shiva Vandana *Water Wars: Privatization, Pollution and Profits* Between the Lines Toronto 2002; Petrella Riccardo *The Water Manifesto*, trans. Patrick Camiller Zed Books London 2001; Macrory Richard ‘The Privatisation and Regulation of The Water Industry’ (1990) 53:1 *The Modern Law Review* 78; Gottlieb Henry ‘Gold at the End Of the Pipeline: Privatize or Regionalize?’ (1996) 146 *N.J.L.J.* 1009; Bond Patrick ‘Water Commodification and Decommmodification Narratives: Pricing and Policy Debates from Johannesburg to Kyoto to Cancun and Back’ (2004) 15:1 *Capitalism Nature Socialism* 7.

⁹⁴ I call these debates diversionary because such debates present the controversy over the human right to water merely as between those who want free water and those that advocate ‘better’ water management and governance that ‘necessitates’ cost recovery. In doing so, the debates evade the deeper issues of questioning the fundamental premises of either view, some of which are highlighted in this paper.

⁹⁵ See Morgan above note 72 who notes an increase of 7300 percent has been noted in the private sector annual investment in the water sector.

⁹⁶ As above at 182.

acceptance of the idea of transformation of a human right to water to a consumer right further becomes problematic once we look beyond the imagined universality of the relationship between human beings and water that appears to underlie the mainstream rights discourse. It is in fact unimaginable if we consider the innumerable alternative perspectives on the relationship between human beings and water, which are not necessarily focused merely upon 'consumption' of water as a commodity. Within the current formulation there is no place for respect for water as an intrinsic part of nature, and for practices of 'conservation' as a way of life as opposed to 'consumption' of water,⁹⁷ or the sharing of water as a commons as against establishing individual ownership over it by 'buying' it. There is also no acknowledgement of the absence of wasteful and environmentally damaging use of water in many rural areas despite the water being 'free'. All these factors challenge the very basis of prescribing a *universal value* of water that is currently sought.⁹⁸ The human right to water, I suggest, has to go beyond such limiting formulations to be meaningful.

4.4 *Right to Water as a Freedom*

The idea of freedom has a prominent place in the story of human rights. Within mainstream human rights law discourse, it is of course associated more often with civil and political rights than with social, economic and cultural rights.⁹⁹ Within the latter, the language of entitlements (to food or water) is privileged while freedom is usually discussed as 'freedom from' (hunger, poverty, and so on). Similarly, while the mainstream discourse places significant emphasis on the right to water as an entitlement, the human right to water as a freedom is not accorded due significance.¹⁰⁰ The marginalization of this crucial aspect within the mainstream discourse further reduces the potential of the right for many.

While General Comment 15 categorically states that the right to water contains both entitlements and freedoms, the document essentially focuses on the former. This is most clearly reflected in paragraph 37 that enumerates the core obligations of states that are of immediate effect. Even where specifically mentioned, freedoms are primarily understood as 'freedom from' as against 'freedom to'. Given the different implications of these two expressions,¹⁰¹ and their impact on law and policy, it is necessary to take a closer look at the understanding of freedom within mainstream discourse.

As noted by Fuller, the notion of 'freedom from' conveys a particular understanding of freedom that essentially amounts to a denial of agency. He argues that the expression 'X is free

⁹⁷ For a critique of 'consumption' and 'degeneration of people into consumers' generally see Esteva & Prakash above note 26.

⁹⁸ For different visions of the 'value' of water see Shiva above note 93 at 137–138.

⁹⁹ While this is not the place to delve into the problematic history and politics behind this categorization of human rights, it should be noted that human rights are not necessarily imagined in such distinct categories within subaltern conceptualizations.

¹⁰⁰ The analysis of right to water as a freedom I present in this section is a work in progress. This discussion, however, clearly indicates that freedom must be central to any re-writing of the human right to water.

¹⁰¹ See Fuller Lon L. 'Freedom — A Suggested Analysis' (1955) 68:8 *Harvard Law Review* 1305.

from *Y* contains a frame of thought that does not even require *X* to be ‘a living being’.¹⁰² On the other hand, ‘*X* is free to do *Y*’ conveys a different thought process and carries different implications. Firstly, it implies that ‘*X* is a living creature capable of purposive action,’ and secondly, it indicates the presence of ‘an alternative or a range of alternatives.’¹⁰³ Fuller further notes that the shift of focus from ‘freedom to’ to ‘freedom from’ has led to the ‘progressive deterioration’ of the meaning of freedom.¹⁰⁴

This analysis provides crucial insights into the understanding of freedom in the context of human rights in general, and the right to water in particular. Paragraph 10 of General Comment 15 is of particular significance here. It states:

10. The right to water contains both freedoms and entitlements. The freedoms include the right to maintain access to existing water supplies necessary for right to water, and the right to be *free from* interference, such as the right to be *free from* arbitrary disconnections or contamination of water supplies. By contrast, the entitlements include the right to a system of water supply and management that provides equality of opportunity for people to enjoy the right to water. [Emphasis added]

While *freedom from* arbitrary disconnection and contamination is not in any manner insignificant, and must, in fact, ‘be presupposed in every *freedom to*,’¹⁰⁵ it clearly does not convey all that the idea of freedom represents. And because it is primarily understood as a negative obligation of the state, it does not convey the sense of what Fuller calls ‘purposive action’, which freedom should. As I have noted earlier, negation of the agency of the subject of human rights is a feature of the mainstream rights discourse. The water rights discourse, unfortunately, reproduces this denial of agency.

When freedom is understood, on the other hand, primarily as ‘freedom to’ it brings into focus many freedoms that could be associated with the right to water. These, I suggest, would mean much more to those involved in struggles over water. To begin with, the freedom to explore alternatives to access water based on situated knowledges, local experiences, and community practices. It would mean the freedom to define and determine one’s ‘need’ for water, the freedom to protect water resources from exploitation for profits, and the freedom to reject imposed notions of sustainability, progress and development. To the women and men in Plachimada, it also means the freedom to say ‘no’ to Coca-Cola. Without these freedoms, the right to water fails to deliver its promise.

An important expression of such ‘freedom to’ can be found in the initiatives of the local people in creation of *Johads*,¹⁰⁶ traditional structures for harvesting rain water, in the desert area of

¹⁰² As above at 1306.

¹⁰³ As above at 1307.

¹⁰⁴ As above at 1305.

¹⁰⁵ As above at 1313.

¹⁰⁶ A *johad* is described as a ‘concave structure’ where rain water is collected and stored. See ‘Rajendra Singh’ An interview, online: IndianNGOs.com <<http://www.indianngos.com/interviews/allinterviews/rajendrasingh.htm>>.

Rajasthan in western India.¹⁰⁷ Decades of mining and commercial exploitation of forests had contributed to the destruction of forests and damage to the watershed in parts of the state. The rivers, streams and wells in the area dried up adversely affecting the agriculture. The shortage of water resulted in widespread migration from the area. Those that stayed, primarily women and children, continued to face immense hardships, such as walking for miles in search of water. This scenario is typical of many parts of the world that face shortage of water. What is most significant in this story is that people of this region did not wait for the state, the market or the international community to provide for their 'entitlement to water,' or to bring about a freedom *from* thirst. Instead, they revived an abandoned practice of building *jobads*.¹⁰⁸ This technique of rain water harvesting has led to recharging of wells and revival of rivers in several parts of the region and has benefited agriculture. It has also enabled many who had migrated to cities to return to the area.¹⁰⁹

Clearly, people here understand their right to water as a *freedom to* explore alternatives. Freedom, understood thus, is more important than an entitlement to *provision* of water by the state or the market. Ironically, the government is now planning to privatize the revived sources of water in the state in order to fulfil its obligation to ensure access to water for all, a move opposed by many.¹¹⁰ I suggest that it is important to recognize that here freedom is not linked to any imposed idea of development of water resources. It is, rather, linked to the idea of being free to choose from a range of alternatives. It is the freedom to deal with the issue of water shortage with solutions that are connected to everyday experiences of suffering and constant struggle. Any efforts to bring about privatization led 'development' cannot therefore be seen as freedom, but rather as a cause of unfreedom — an understanding that is unfortunately missing from many uncritical celebrations of 'development as freedom'.¹¹¹

A TWAIL analysis suggests that the marginalization of freedoms (especially 'freedom to') is in consonance with the dominant human rights narrative. It is a narrative that continues to

¹⁰⁷ See 'Thirst' (2004), a documentary film by Alan Snitow and Deborah Kaufman Snitow-Kaufman Productions; see also information available on the website of Tarun Bharat Sangh

< <http://www.tarunbharatsangh.org>>; For more information on community based rain water harvesting initiatives see Centre for Science and Environment, 'Community Based Water Management Initiatives' online: <<http://www.rainwaterharvesting.org/Rural/Bhaonta-Kolyala.htm>>.

¹⁰⁸ This local initiative was led by Rajendra Singh who also received the Ramon Magsaysay Award for community leadership in 2001. See Sabastian Sunny 'The Water Man of Rajasthan' (2001) 18: 7 *Frontline* online: <<http://www.frontlineonnet.com/fl1817/18170810.htm>>.

¹⁰⁹ See Kishore Ambuj 'Taking Control of their Lives' (2003) 11:3 *Ecologist Asia*, online: [sanctuary asia](http://www.sanctuaryasia.com/features/detailfeaturescategory.php?id=558&catid=41) <<http://www.sanctuaryasia.com/features/detailfeaturescategory.php?id=558&catid=41>>; Tarun Bharat Sangh above note 83.

¹¹⁰ Tarun Bharat Sangh above note 107.

¹¹¹ See Sen Amartya *Development As Freedom* Oxford University Press New Delhi 2000. Sen presents significant arguments in support of this thesis that require detailed analysis which is beyond the scope of this paper. The point I, however, wish to make here is that every celebration of development as freedom is incomplete without an engagement with development that brings about various unfreedoms. This necessarily requires a turn to questions of 'whose development and freedom', which remain absent from the current attempts to merge human rights and development. For a recent critique of Sen's view see Pahuja above note 30.

underlie discussions on the human right to water.¹¹² The language of ‘entitlement to needs’ is familiar terrain for international human rights law and policy. Talking about entitlements, and to an extent, using the language of ‘freedom from’ helps maintain the status quo. It reproduces and rejuvenates the story of the developed western ‘giver’ and the third world ‘receiver’ of human rights that lacks agency. Shifting the focus to the right to water as a ‘freedom to’ on the other hand, not only takes human rights law into uncharted, much more controversial waters by posing challenges to its fundamental premises, but also enables resistance to hegemonic co-optation of rights discourse.¹¹³

I suggest that in Plachimada, the right to water is not imagined solely as an entitlement, but also, and more significantly, as a *freedom to* resist extraction of groundwater by Coca-Cola. It calls for a re-writing of human rights that begins with alternative understandings of freedom. Struggles like Plachimada illustrate the limitations of rights discourse that disregards everyday experiences of women like Mailamma — defined not only by their struggles to access water, but also by their visions for transformation. Being devoid of engagement with human rights practices that emerge from below, the mainstream discourse on the right to water falls short of its promise, and its potential.

5.0 CONCLUSION

Even as the ideal of a universal human right to water is a worthy aspiration, the discourse that seeks to formulate the right in fact limits it. I have highlighted some of these limitations here. When seen through a particular TWAIL lens, these limitations appear to be largely attributable to the fact that water-rights discourse uncritically draws upon and reproduces the deeply contested standard narratives of human rights and development. The principal concepts that the right-to-water discourse is built upon derive their meanings from a predominantly Western liberal understanding. The anchoring of the right to ‘accepted’ sources of international law prevent the discourse from expanding beyond narrow confines. An alternate conception that recognizes people as authors of human rights carries a greater potential for ensuring access to water for everyone. The language provided by mainstream rights discourse on water neither facilitates the recognition of all kinds of suffering related to struggles over water, nor does it offer to those involved in such struggles hope for the mitigation of suffering. Such a human right, being formulated from above, despite its potential and promises, becomes meaningless for many. In order to understand this failure, however, it is important to understand how the right to water is imagined by those involved in struggles like Plachimada. It is also crucial to understand how such

¹¹² In a discussion on right to water the authors suggest that ‘*those upon whom the human right to water is conferred*’ have obligations. Despite the authors’ well meant efforts to make a strong case for a human right to water, statements as this show that despite being repeatedly contested, the standard narrative of human rights remains unchanged. Salman above note 6 at 74.

¹¹³ See Fuller above note 101 at 1306 where he notes that ‘there is little inclination by the enemies of freedom to embrace, or to tamper with, the notion of “freedom to.”’

visions can shape more meaningful human rights law on water. This would, however, require going beyond the 'rigid script' of international human rights law.

The aspirations of a universal respect for the right to water (aspirations that I believe have led to the evolution of the right so far) make it necessary for international human rights law to overcome the limitations of mainstream discourse and recognize alternative discourses and practices. It requires a shift from considering people merely as the objects of human rights norms to recognition of people as sources of norm creation itself. A re-examination and re-formulation of the human right to water therefore has to begin by writing everyday lived experiences of people like Mailamma into human rights law and practice. It must begin with recognition of not just Mailamma's suffering over access to adequate and safe water, but also her leadership and spirit, her struggles and hopes. Struggles like Plachimada have much to offer to the future of human rights, provided we begin by recognizing the importance of the question: what do human rights offer Plachimada? More than anything else, this revisiting of the human right to water is an attempt to move this question from the margins to the heart of human rights discourse. ●