



**International Environmental
Law Research Centre**

WATER, LAW AND THE COMMONS

8-10 December 2006, New Delhi

WORKSHOP REPORT

As a part of the larger project entitled ‘Legal Issues Related to Water Sector Restructuring: Human Rights, Environment, Agriculture and Socio-economic Aspects’, the International Environmental Law Research Centre organised a three day workshop entitled ‘Water, Law and the Commons’. It was held from 8 to 10 December 2006, at PRIA, Tughlakabad Institutional Area, New Delhi. Nearly 25 participants representing academia, civil society organisations and activists, participated in this workshop.

The workshop was organised in the context of the water sector restructuring that is being undertaken in India. The water sector restructuring has so far led to a number of changes, including reforms of the legal and regulatory framework, corporatisation of public sector water utilities, increased farmers’ participation in irrigation management, increased water rates, privatisation of urban water supply, regulation of ground water, and a clear policy shift to accommodate private interests. Some of the states where water reforms are being undertaken include Andhra Pradesh, Arunachal Pradesh, Karnataka, Tamil Nadu, Maharashtra and Madhya Pradesh. The focus of the workshop was the legal reforms in the water sector, in the context of the broader debate on water and the commons. More specifically, the workshop was designed to:

- Evaluate the trends in water sector legal and institutional restructuring frameworks.
- Analyse through case studies the impact of water restructuring in India.
- Examine the role of the financial institutions in water sector restructuring.
- Study the legal issues arising under national and international law, impacting the jurisprudence of environmental law, administrative law, trade law and human rights provisions.
- Explore practical and innovative suggestions to problems identified with existing water restructuring project, with a specific focus on equity, justice and democracy issues.
- Reflect on newer understanding of traditional and more current issues in water management, through an inter-disciplinary approach.

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Thus, the workshop sought to create a platform for discussion on the important legal and policy issues arising in the context of ongoing water sector reforms. This workshop was seeking to ensure a broader understanding of the conceptual framework informing existing water law and ongoing law reforms.

SELECTED CONCLUSIONS OF THE WORKSHOP

The workshop was divided according to themes. The agenda, the list of participants, the keynote addresses and the full text of the papers presented at the workshop are available at http://www.ielrc.org/activities/workshop_0612/. This workshop report summarizes the key points raised during the discussions and highlights some of the outcomes of the three-day workshop.

1. Human right to water and right to water

- Whether we consider water rights as human needs or as human rights, or as both? In discussing the human right to water, several concerns were raised about the content and formulation of the right. It is increasingly evident that when we are talking about rights, we are doing away with the cultural aspect. In the context of water, it becomes more important because water is very closely connected with many cultures.
- Do we need an explicit right to water? Or can it continue to be a derivative right? Do we need an explicit provision for water in Part IV and V of the Constitution?
- The limits of law in ensuring the realization of the human right to water were also pointed out.
- We need to examine the judicial interpretation of the right to life, right to food and the right to water to understand the judicial underpinnings.
- Article 39 (b) – that the ownership and control of the material resources of the community are distributed so as to best serve the common good. Can this be invoked in the case of water?
- Conflicting water uses – how has this been addressed by the General Comment 15 and other policy documents.
- Inter-generational equity needs to be incorporated into the human rights context.
- Can the state deny the basic right to water by claiming that they have no access to water?
- We need to examine in greater detail the problems in implementation of the right to water.
- Is the human right to water only about the delivery of water? Is there a need to review the content of the debate which sometimes is viewed exclusively from a consumerist lens?
- Access, equity, participation and sustainability need to be greatly stressed in the notion of rights.

2. Other legal concepts and discourses

- Eminent Domain and the need to relook at it from the perspective of the original user/owner.

- Property rights and an examination of the concepts underlying it.
- Public Trust doctrine and an examination of its contours.
- The resurgence of contract law in the recent decade and its impact on water law.
- Philosophical debates that inform our understanding need to be examined and deconstructed.
- A critical look at the role and limitations of the law in addressing the water issues.
- Greater focus on conjunctive use of surface and ground water in the laws regulating their use.

3. Role of the State

- The redefinition or recasting of the role of the state, in the context of water.
- Top down approach – is it different if it is imposed by the state or if it carried out in pursuance of a World Bank conditionalities?
- Greater analysis required on why corporatisation is objectionable?

4. Water Regulation

- The state is being called to participate in order to ensure that all sectors of the population get equal access to water. The participants acknowledged that rolling back the state would be detrimental to interests of the poor and vulnerable sections of society and the realization of the human right to water.
- The difficulty in giving a coherent shape to water regulation in the light of the changing nature of the understanding of the resource was highlighted in the discussions. The nature of water involves the questions like basic rights, water as an economic good and the concept of common property resource associated with water.
- A user oriented regulatory framework for water becomes impossible since the number of users in India is enormous and at varying levels.
- Another area of difficulty, identified is the nature of federalism and the consequent difficulties in regulation. Federalism paves way for competitive populism by the states, to the detriment of conservation and sustainability of the resource.
- Is efficient regulatory framework a weapon to avoid adverse effects of privatization? If yes, what norms the regulatory framework needs to be taken care of? Or does the problem lie with the basic norms of privatization?

5. Ownership of Water

- Legal implications- ownership issues; eminent domain; fragmented or divergent laws on water.
- Need for a combination of human rights and economic approach to water is needed. A basic water requirement could be classified under ‘rights’ category. However, fundamental right need not be provided free.

- Ownership of water: usufructuary right, community right and private rights. Which is the viable approach of governance of water, public trust doctrine or common property resource or private property regime or the regime of eminent domain control?
- Increasing emphasis on corporatisation with the language of promoting efficiency overlooks the root causes of inefficiency in the State system and the consequent remedial measures, which could be deployed within the system; and the lack of accountability by the corporations when they fail to perform satisfactorily.
- Social inequities continue to exist and fail to be appropriately addressed in the reform measures.

6. Law and implementation

- Laws that fix responsibility and accountability already exist – but what happens to these? Why are they not being implemented?
- Ethnographic studies on the effects and impact of existing laws.

7. Water Users Associations

- Has the setting up of WUAs impacted the land relations in the region?
- Harmonising the role of Water User Associations and PRIs.
- Is revival of community rights at micro level or micro level management a solution to the existing water sector problems?
- WUAs-when there is no availability of water what is the scope of conferring rights without envisaging remedies in the event of negation of rights; responsibilities of WUAs for violation; limitation on the powers of WUAs.
- What should be the extent of divestment of rights and responsibilities in the participatory system? The scope of ‘democratisation’ in sustainable water resource management? The present system of WUAs is often criticized as the responsibilities being divested but not actual powers and rights. The actual power still lies with the central units.

8. Conflicts

- What documentation is out there on water conflicts? How do we address, mediate and take forward the issues that are thrown up while examining the water conflicts? Analyzing and understanding conflicts?

9. Parallel realms of law

- The substantive legal framework on water varies from the operative legal framework. There is a need to examine this variance to fully understand their import.
- The parallel realms of ‘laws’ on water (customary and non-formal domains) needs closer examination alongside a review of the grey areas where there is no ‘law’.
- Strong necessity for correlation and harmonisation of customary law and formal law. In fact customary rules have not been taken into consideration by the formal laws.

10. Other issues that need examination

- The need to examine the impact of populism (such as subsidies, free electricity, pollution, irrigation) and water resources.
- The debate on full economic pricing and what it portends for the human rights debate. How much free water can be distributed, if there is a fundamental right to free water in the country?
- The need to examine the market efficiency argument.
- The need to examine commons and groundwater and their regulation.
- Comparative discourses on the different regulatory frameworks.
- What other models exist? What are the alternatives? What kind of a normative framework?
- What role for Panchayat Raj Institutions?
- Water also needs to be examined in the background of agrarian relations.
- Social inequities and their impact on the reform process.
- Water and the environmental impacts.
- The impact of international water sharing treaties on domestic water policy.
- Changing subjectivities – and how that impacts the implementation of the laws.
- Intersectoral and interdisciplinary studies need to be emphasized while simultaneously acknowledging the limits of the law.
- Reexamine the discourse on the commons and water.
- Scope and extent of democratisation of water management.
- Jurisprudence to deal with the situation of scarcity?
- Water: gender and caste issues?
- Importance of research on water shed management.
- The legal position on quality and quantity of water.
- Lastly, the interface between technology and law; modernity and traditional structures; formal and informal; the political, economic and social; the rights discourse and the debates on the role of the state – these need a more integrated approach in understanding water laws.

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