



**International Environmental
Law Research Centre**

EXPERT CONSULTATION ON WATER RIGHTS, EQUITY AND WATER LAW REFORMS IN INDIA

International Environmental Law Research Centre (IELRC)

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INTRODUCTION

Significant changes have been carried out in the water sector and the legal framework in the last decade. Water sector reforms have been proposed in many countries as a way to address diminishing per capita availability of water, increasing water pollution and increasing competition for control, access and use of available freshwater. The process of reform in India formally started in the late 1980s with the adoption of the first national water policy and has since then led to a number of changes in both policy and legislation, both at the national level and in a number of states.

The existing water law framework in India is characterized by the co-existence of a number of different principles and irrigation acts from the colonial period as well as more recent legislations and judicial pronouncements to regulate water pollution. More recent efforts at reform, do not seek to consolidate and build a comprehensive legislation on water laws. Adhoc legislations (copied at times, verbatim from another state legislation) persuaded onto the statute books either by IFIs and other donors, essentially characterize the water law reforms in the post 1990s. This project, over the last one year, has attempted to map these changes – both at the level of the policy and also the legal framework.

OBJECTIVES OF THE CONSULTATION

During the first year of the project, our research has thrown up several challenging questions that need deeper investigation. The main thrust of the reforms is an attempt to make water an economic good which is to be managed like any other commodity. This however, is the more articulated and vigorously debated aspect of the reforms. Other aspects such as the legal framework over groundwater, human right to water, decentralization and greater participation of water users and notably, the land –water linkage bearing a direct impact on the access and control over water resources, have largely been sidelined in popular debates around water sector reforms. It is these less explored areas and their legal aspects that are the focus of this consultation.

IELRC has organized two workshops in December 2006 and April 2007. Outcomes of these workshops have been encouraging but also highlight the need to revisit some unexamined legal terrain. This consultation seeks to bring together experts working in the area of water, to enable a more involved reflection on some key research areas and themes outlined below.

BACKGROUND TO THE IELRC WATER LAW RESEARCH PROJECT

In the face of growing water crises, most countries of the world are taking steps to use their water resources in a more sustainable way and implementing systemic changes to the use of water resources and water services. Since there is a direct link between economic development and water, this raises difficult environmental, social and legal issues from the need to balance ecological and human requirements for water resources and water services. While in most countries water has been seen as a common heritage or as a common pool resource, and the supply and use of water has traditionally been a domain of public entities at the national, regional or local level, this traditional model is being challenged. The bias against the private appropriation of water along the lines of private property rights regimes established for other resources is increasingly being challenged in policy and law.

There has consequently been a push towards a greater involvement of the private sector in the provision of different types of water services. The current international policy context tends to push developing countries towards seeing water as an economic good. This is an approach which has already been tried in a number of developed countries and which is being transplanted in new environments. Policies now often encourage private, and in case of developing countries often foreign investment in water services. The water use scenario over the past decade has been one of rapid restructuring in some countries and some sectors. Policy changes in developing countries often foreign, investment in water services. This has become increasingly controversial in a number of developing countries because the emerging international market for water services puts pressure on public or communal schemes of water supply. Moreover, the decision-making process in terms of water use restructuring often takes place without adequate dissemination of information and involvement of civil society at large.

This project proposes to analyse the framework associated with the changing policy context for water use. The legal regime for the allocation of water covers a number of areas including water distribution to households, irrigation, industrial use and wastewater treatment. This is dealt with from a range of perspectives - human rights to agriculture development and trade - and from the local to the national and international levels. This project will provide a theoretical framework for understanding the place of water in law and in particular, the tension between the focus on water as an economic good and the focus on water as a human right. The project aims to contribute to a deeper understanding of the multi-faceted water related legal frameworks that govern water resources use at the local, national and international levels.

CONSULTATION THEMES AND EXPECTED OUTCOMES

Though not entirely structured along these lines, the broad themes that the consultation hopes to explore are enumerated here:

THEME I: WATER LAW FRAMEWORKS AND WATER RIGHTS

Aims: To understand, critique and refine the contours of the rights debate around water resources, keeping in mind the realities of the developing countries and their societal needs. Examine the need for a regulatory framework to ensure protection of rights and to critically evaluate the trajectory of the water law reforms undertaken, in the recent past.

Water is a state subject and hence, the legal framework differs from state to state. Though not uniform, the state legislations are not drastically different in content and provide for similar entitlements and regulations. The new legislations follow this primary format, allowing for an analysis of the concepts and ideas contained in these legislations

The right to water as a fundamental right is only a derivative right under the Indian Constitution. The need for a specific right has been further emphasized by the debate on the human right to water. How do we define the right? What elements contained in the General Comment 15 needs further debate? How do we incorporate concerns stemming from the social and cultural context into the rights debate? How do we incorporate intergenerational equity into the water rights discourse? How do we protect basic rights and ensure transparency and accountability, in the absence of state actors? Access, equity, participation and sustainability need to be greatly stressed in notion of rights. Intricacies of the water rights debate, needs a more in-depth exploration, both from a practical and a theoretical perspective.

THEME II: WATER PRIVATISATION

Aims: Understanding and outlining the need for a comprehensive legislation which regulates and protects the rights of parties, with a specific focus on human rights, in the case of privatization of the water sector. More specifically, laying down the norms that need to be legally complied with, in the event of privatization.

The recasting of the state from a primary provider of services to a facilitator or regulator of services to the public needs a closer examination. In the absence of a specific law and a regulatory authority governing contracts enabling privatization efforts that provide detailed guidelines for adequate service, the user's rights and liabilities, the tariffs policy, the bidding process, requirements of a contract, the duties of the granting authority and concessionaire, and appropriate conditions for intervention and termination of the contract, the accountability of private companies and the enforceability of fundamental rights, what legal remedies can be explored to protect the interests of the most vulnerable sections of society. In this section, we also closely examine the corporatisation of the water sector and its legal implications, and the feasibility of public-public partnerships as a viable alternative to privatization.

THEME III: NEW DIRECTIONS

Aims: An open forum to discuss areas that do not get covered in the earlier themes, including the broader debate on the political economy of the water sector. Additionally, to attempt the creation of a space for activists to build a campaign for water rights and to build a resource base on water laws and policies.

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 'law' on water (customary and non-formal domains) needs closer examination alongside a review of the grey areas where there is no 'law'. Common property resources and need for acknowledgement of their importance in conserving and ensuring sustainability of water resources is vital. New institutional frameworks that are being explored as a part of the water sector reforms need to be imbued with ideas of community participation and community control of resources. To this end, decentralization and its importance in managing water resources, needs further exploration.

Additionally, this session will examine the nexus between global policy changes and their impact on domestic policy. It will raise questions of how current international law addresses the need for sound use of increasingly scarce water resources, what are the different standards established by different and competing branches of international law in terms of privatization of water resources, and how the varying international standards impact on the water use decision making at the national and local levels.

EXPECTED OUTCOMES

- Review of the legal issues arising under national and international law, impacting the jurisprudence of water law.
- Determining the exact scope of water resource rights concerning both surface and ground water.
- Analysis of existing water restructuring initiatives having been taken over the past decade or so in several Indian states.
- 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.