



# **Water Rights, Equity and Water Law Reforms**

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# Structure of the presentation

- In three parts:
  - Part 1: Bio-physical and social peculiarities of water
  - Part 2: Need for an integrated and innovative approach
  - Part 3: legal and regulatory frameworks

# Part 1: Bio-physical and social peculiarities of water

- Water is an ecosystem resource
  - water is a resource embedded within ecosystems; not a freely manipulable resource; nor is it a resource to be indiscriminately mined
  - concept of ecological flows, minimum flow required for the preservation of ecosystem services
  - issues related to water quality: who is returning how much of water to the ecosystem and in what condition

# Part 1: Bio-physical and social peculiarities of water

- Water is a common pool resource and has competing uses
  - water is not a public good
  - common pool character of water irrespective of what property regime it operates
  - divisible and amenable to sharing
  - has multiple uses and users and so there are resultant tradeoffs involved
  - inherent problem of excludability; the exclusion costs involved are often very high

# Part 1: Bio-physical and social peculiarities of water

- Water is both a local and non-local resource
  - water is present at many scales
  - the way water is planned, used and managed causes externalities
  - unidirectionality and asymmetric relationship
  - limits of slogans like '*gaonka pani gaonme*'
  - it needs an approach that nests different scales - from micro watershed upwards to basins and further up to states and countries

# Part 1: Bio-physical and social peculiarities of water

- this has implication for our viewpoint about rights
  - can we say that local communities should have *full* right over it in their areas?
  - What about inter-watershed or basin-level equity?
- every community has a *proportional* right to water as part of a collective right to assured livelihoods
- water use beyond fulfillment of livelihood needs, does not form part of this *right* and moreover cannot be at the cost of others' livelihoods

# Part 1: Bio-physical and social peculiarities of water

- Peculiarities of water as `private property`
  - `ownership` of water is basically an entitlement to use water in a certain way at certain points and times
  - entitlements: not in an absolute sense; but relative or proportionate share in a common pool
  - Issue of variability: sharing of surpluses and shortages
  - each of these characteristics of ownership of water moves it further and further away from classical private property ownership that is the basis of most of our laws
  - water never was a commodity prior to the advent of modernity or capitalism: capitalises nature more and more and convert it into private property

# Part 1: Bio-physical and social peculiarities of water

- In short:
  - because of the peculiar nature of water both as an ecosystem and common pool resource, it cannot be treated as private property in the classical sense
  - the instruments like classical market mechanisms that are supposed to be efficient instruments for the management of classical private property also cannot work efficiently because water lacks the reliability, the ready manipulability and the constancy that other private property has
  - all these characteristics have a bearing on water related institutions including law



## Part 2: Need for an integrated and innovative approach

- The starting point: equity, basic service, minimum water assurance and entitlements to water
  - equitable access to water is treated as a matter of *minimum* assurance to water required for livelihood needs *irrespective* of their ownership of assets (for example land)
  - minimum water assurance is here seen as a *right* that vests in *people* by virtue of their right to an adequate livelihood
  - the degree and extent of this right has to be assessed within a framework of assurance of needs
  - basic service that is necessary to fulfill basic livelihood needs (drinking and domestic water, water for cattle, water for basic production/processing or needs imposed by the way one earns livelihoods including cash income needs)

## Part 2: Need for an integrated and innovative approach

- The starting point: equity, basic service, minimum water assurance and entitlements to water
  - distinction between basic service and economic service
  - in a sense it separates the entitlement into one based on rights and one based on economic opportunities
  - separation is an important one because water has features of both; basic right as well as economic good and law must first distinguish between and demarcate them
  - debate about social good vs. economic good
  - basic service to be provided at a high degree of dependability and at affordable rates; economic service to be made available on full cost recovery
  - This gives us certain norms for water pricing

## Part 2: Need for an integrated and innovative approach

- Integration of exogenous and local water
  - large vs. small controversy
  - can livelihoods be met only from local water?
  - integration, where large exogenous sources supplement and stabilise small and local sources, has the potential to overcome the limitations of both kinds of sources - large and small
  - access to exogenous water on the condition of fully developing the local water system

## Part 2: Need for an integrated and innovative approach

- Integration of surface and groundwater
- Integrated approach to assured and variable water
  - livelihood needs should be ensured with a high degree of dependability (assured component); the extra water available in better years (variable water) should be effectively used

## Part 2: Need for an integrated and innovative approach

- Issue of privatisation
  - Privatisation of service delivery
  - Privatisation of rights: water rights and their tradability
  - The biggest challenge is to stop the privatisation of rights under the name of privatisation of service
- Moving towards a process of greater socialisation and collective management: moving away from both statism (centralisation of powers in the state, bureaucratisation) and privatisation
  - The centralised state is something like an inverted pyramid; we need to make the pyramid stand on its base!
  - does participatory irrigation management offer a way out?

## Part 3: Legal and regulatory frameworks

- Indian jurisprudence and case law on water have evolved from many different directions and underlying conceptual frameworks; sometimes incompatible and contradictory
- Two strands of thinking:
  - treats water as property, mostly enjoyed through ownership of land
    - water as property tied to land (groundwater)
    - "eminent domain" - state supremacy and control over water
  - sees water from a framework of human, natural or basic rights
    - as part of right to life; also restricted to drinking water; water for livelihoods does not form part of it

## Part 3: Legal and regulatory frameworks

- Union, state, natural and customary laws
  - water basically a state subject
  - disputes over inter-state rivers: entry 56 gives considerable leeway to Union; River Boards Act 1956
  - efforts at decentralisation: 73<sup>rd</sup> and 74<sup>th</sup> amendments - local water bodies to be brought under the Panchayati Raj institutions
  - in the rural, especially tribal areas, water related practices are often governed by religious or customary practices
  - basically a chaotic welter of legal frameworks, provisions and instruments
  - Issue is not about diversity of laws or customs (or legal pluralism); the issue is that there is no underlying common principles or normative framework underlying water sector policy and legislation

## Part 3: Legal and regulatory frameworks

- Changing legal terrain: issues related to rights
  - pressure from two directions: one from rights perspective and the social movements around water; and two from the reform process as part of the LPG regime since the 90s
    - some of the recent policies and Acts in Maharashtra like the Maharashtra State Water Policy (2003), Maharashtra Management of Irrigation System by Farmers Act (2005), and Maharashtra Water Resources Regulatory Authority Act (2005) are all examples of LPG regime let reform process



## Part 3: Legal and regulatory frameworks

- Changing legal terrain: issues related to rights
  - Right to water should include on the minimum:
    - potable water of adequate quantity for all
    - water for livelihoods
    - minim environmental flows
  - The legal framework must take as its starting point an articulated hierarchy of these rights

## Part 3: Legal and regulatory frameworks

- Changing legal terrain: regulation and LPG regime
  - Increasing international pressure for reforms of certain type and the legal frameworks in the country have been changing in response to this pressure
- The interconnectedness of law and policy in the water sector
  - Need for both legal and policy reforms
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## Part 3: Legal and regulatory frameworks

- Movements from below are challenging the present legal and policy framework
  - They are bringing in new agenda and these civil society initiatives presage the needs of the future and legislation must look towards developing the necessary inclusive framework and sufficient space and institutional support for negotiation and renegotiation around the critical issues confronting the water sector
  - civil society initiatives for legislative reform be based on a radically and fundamentally different normative framework that takes into account the biophysical and social peculiarities of water