CHAPTER FOUR

INTERNATIONAL TRENDS IN WATER RIGHTS ALLOCATION

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In a basic sense the water rights issues in the developing and developed countries are non-comparable. Whereas in the former the priority issues are access to clean drinking water for the vast majority and subsistence level availability of water for agriculture, in the developed countries the priority matter is one of 'proper' management to increase productivity and efficiency in water distribution, given that some water is available to all for drinking and irrigation purposes. Nonetheless, in so far as the Third World tends to adopt the Western models of 'development', (neglecting its priority issues) and water management, (even for a minority of its population), the legislative strategies for this minority sector (who consume or utilize a greater amount of water) become comparable. Notwithstanding the disparities between the First and the Third World, a comparative analysis also has the advantage of exposing the strength and shortcomings of various alternative legal models which the nations may or may not adopt. In what follows, I shall briefly outline the dominant trends in water legislations in some countries, which I consider relevant to the Indian experience, without making any comparison with India or drawing any conclusions for the country. This needs to be done separately.

A review of the legislations of various countries allows one to draw two major conclusions. First, there are indications that the ancient residual (Roman law) notion of water being a private property of an individual, held under a riparian or appropriative right of enjoyment (servitude or easement), are on the decline. Second that law makers are becoming increasingly aware that water resources cannot be viewed independently of the land resources, hence water management must necessarily be viewed in the light of land management. What follows is a review of the legislation in some countries from the point of view of rights and not management. This is not to say that management is a matter of lesser significance. A review from the point of view of legislative strategies for water resources management in general, would make the task too large and demand a seperate work in itself. The discussion here, hence, is limited to the issue of water rights alone in these various legislative strategies. From the point of view of management the significant fact that needs to be noted is that in many countries, such as Spain, China, Hungary and others, the water law does not treat surface and groundwater separately, it integrates both in a comprehensive way. In India, like the U.S.A. or U.K., the surface water law is different from the groundwater law, the first, often, is not complementary to the other. In some countries, such as Czechoslovakia, Hungary and France, the notion of integration and comprehensiveness goes even further to treat land issues along with ground and surface water. Under the French and Hungarian laws, for example, river basins and whole watershed areas are treated as units for protection or conservation and not the water areas alone. There is much to be said for such an integrated view.Evidently water cannot be protected or

conserved if the watershed is not protected. Similarly, forests cannot be protected if its water sources are not conserved. Land desertification cannot be stopped if deforestation is not curbed. Any land, forest or water, use policy and practice must necessarily take the inter-relations into account and the laws must reflect this. Forest laws must address themselves to water issues and water laws to forest and land issues. As noted, a beginning has already been made in some countries in this direction. The alternatives need to be explored in detail. The task here, however, is limited to slicing and cutting through just one perspective from amongst these various alternatives – that of water rights, so that this central slice will reveal some of the main features and issues involved in water resources management.

De-privatization of Water Rights

Under common law rights to use of water have been available only to those whose lands border on the stream or where water is found under the owner's land, – restricted only to the limit that the quality and quantity of water will pass undiminished to downstream riparian owners. This, as we have seen, is also the position taken by the Indian Easement Act. In the last two decades, however, drastic changes in water rights have taken places as the national economics have moved from 'economy of the plenty' to 'economy of the scarce resources', vis-a-vis water. Jordan's Water Authority Act of 1983, (Temporary Law No.34 of, 1983) declares all water to be state property, and so does the Ethopian water law of 1981. One may assume that under conditions of desertification state ownership of all water resources is inevitable for proper management. But this move from private to public domain is not only true for deserts. In Spain the new water legislation of 1985 (Act No.29 of 2nd August 1985), has brought all groundwater within the fold of the state's domain. Prescription or customs is no longer a valid mode of claiming water rights. The Spanish water law fixes a maximum limit of 75 years to all grants (or concessions) made prior to 1985, (50 years in case of groundwater). In addition, such grants are subject to review during their life-span and also subject to compensation if the grant is modified to adjust it to the provisions of water plans under the law. The Spanish water law confirms a trend which is explicit in the actions taken by a number of South American legislators, notably, those of Colombia, Chile, Peru, Ecuador and Argentina.

It is interesting to note that under a comprehensive water management legislation currently pending before the Australian state of Victoria, all vestiges of common law riparianism are intended to be abolished, and user rights are conferred upon the state with respect to both ground and surface water. Only limited rights for domestic and stock purposes are recognised. This fact is interesting because in developed countries there has always been a resilience of notions of water being virtually the user's property. The best example of this resilience is, of course, United States, the upholder of the inviolable right to private property. United States, specially the western states, tends to subscribe to the view that water appropriation sanctioned by an administrative permit or court judgment is tantamount to a property right – sacrosanct and inviolable. However, even in United States this virtual inviolability of water rights held under an administrative or court issued permit, have been dealt a severe blow by the California Supreme Court in 1983, in which it invoked a new 'public trust' doctrine for shared ownership. We shall return to this 'public trust' doctrine

subsequently, here it is important to describe the American water law situation in some detail because of its pecularity and difference both from the European situation and the Indian one.

In 1950, in *U.S.* v. *Gerlach Livestock Co.*[1] the U.S. Supreme Court reaffirmed the ancient Justinian and common law review of water being *res communes* – things common to all and property of none. Characterizing water as *res communes* does not limit it from becoming property under the usual riparian rights doctrine which makes the rights available only to those whose land border the stream. The common law approach survived the long trip across the Atlantic from England and became the basis for water law not only in the humid Eastern two-thirds of the United States but also in the Pacific Coast states of Washington, Oregon and California. In the more arid regions of the U.S., however, a new doctrine emerged, called the "Colorado" or the "appropriation" doctrine, as laid down for the first time in *Coffin* v. *Left Hand Ditch Company*[2]. This doctrine asserts that in the absence of express statutes to the contrary, the first appropriator of water from a natural stream has, with the qualifications contained in the Constitution, a prior right, to the extent of appropriation. The Colorado Constitution provides:

> "The water of every natural stream... is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the state, subject to appropriation as hereinafter provided."[3]

Making water a property of the public does not, of course, stop people from gaining property rights over it. It only makes the procedure different in Colorado. Each western state, except Colorado, issues permits for the use of water. These permits are issued by a designated officer or board and may be confirmed by a court adjudication, although the permit itself is evidence of water right. In Colorado the right is inaugurated by the diversion of water and its application to beneficial use.The confirmation of that right is later accomplished by court decree which establishes the priority data, quantity, point of diversion and place and type of use. The water use rights given through a permit is universally recognized in the U.S. as a property right and not a mere revocable privilege. The nature of this right as a property right was explicitly laid down in 1951, in *Brighton Ditch Co.* v. *City of Engelwood*[4]. Moreover, since water right is a property right it can be transferred. The principles for this was laid down in *Woods* v. *Sargent*[5].

An irrigation right is the U.S. is usually transferred separate and apart from the land. As a result a lively market now exists for water rights in the U.S., and many farmers and ranchers have opted to sell their water rights so as to be released from the labour of farming or ranching.

This buying, selling and transfer of water rights has had both a positive and negative effect.On the positive side it has allowed the growing municipal and industrial needs to expand by simply transferring water use. However, on the negative side, with the increased number of transfers of irrigation water out of the basin of origin, and the consequent reduction in irrigated acreage, complaints arose from the area of origin. Tax revenues and business declines were immediately observed in the towns supported by farm economy. Some states, such as Colorado, have now imposed statutory prohibitions on the

transferability of water to solve this "area of origin protection" problem. Each decree approving an out of basin transfer requires that the acreage previously irrigated must be permanently withdrawn from irrigation. Otherwise an injurious reduction of return flow would result. This law, however, is interpreted to apply only to conservancy districts. The California statute on the same matter explicitly covers both the districts as well as cities.[6]

One of the most critical cases of water rights transfer, which brought the major issues to the forefront and forced the courts to evolve a new doctrine of 'public trust' to tackle the problem, has been the Mono Lake case in California. In 1940 the Division of Water Resources of California granted the Los Angeles Department of Water and Power a permit to appropriate virtually the entire flow of four of the five streams that supplied Mono Lake. The Department constructed facilities which now take almost the entire flow of these streams. As a result the level of the lake has dropped; the surface area has diminished by one third and one of the two principal islands in the lake has become a peninsula exposing it to total degradation. In 1979, the National Auduboan Society field suit in superior court seeking injunctive and declaratory relief regarding the diversion, on the theory that the shores, bed and waters of Mono Lake were protected by a public trust.In 1983 the California Supreme Court, in this National Audubon case, dealt directly with the issue accommodating the environmental values to the property rights values. Relying on the public trust doctrine it held that the state must consider the public trust values when allocating title to state water resources unless the state legislature specifically stated otherwise.[7]

The doctrine – that the state is not an absolute owner of vital natural resources, such as air and water, but holds it only as a trustee for public good, did not arise in the National Audubon case, it has a long history in American law itself and is pre-dated by the common law and Roman law tradition. Of course, the manner in which the doctrine has been used in the Audubon case, to specifically realize the emerging environmental values, gives a totally new dimension to the public trust doctrine. In American law three early and frequently cited cases examine this trust obligation. In *Arnold* v. *Mundy*[8], the New Jersey Supreme Court ruled that the state could not deed away title to oyster beds underlying navigable water ways because the state held these beds in trust for the common benefit of the public. Similarly, in the U.S. Supreme Court decision, in *Martin* v. *Waddell*[9], it was held that "the shores, and rivers, and bays, and arms of the sea, and the land under them were held as a public trust for the benefit of the whole community".[10] However, the notion that the action of the state legislature should allocate resources to benefit the public trust was first clearly articulated and established way back in 1892 in *Illinois Central Railroad* v. *Illinois*.[11] Many jurists have held this judgment in this case to be a "Lodestar in American Public Trust Law."[12]

The historical roots of public trust doctrine can be traced back to the Roman Law, but it is also to be found in many other ancient legal systems. References to "public values in water" are to be found in the Chinese water law of 249-207 B.C., in ancient and traditional customs of the people of Nigeria, in islamic water law, in the laws of medieval Spain and France, in the Mexican laws and institutions present in the New World, and in the values and traditions of many Native American Indians.[13] In the *Manusmriti,* Kautilya's *Arthasastra*

and other *dharmasastra* texts in India, there are notions ranging from the fact that under *rajniti* the king is the trustee of his whole kingdom, to specific notions of public trusts in particular forests, waters and natural wildlife habitats.

Having noted the water rights issues within a liberal legal framework, where right to property is a pivotal legal concept, it may be interesting to compare this with some socialist legal frameworks, where no basic right to private property is recognized.

China, to begin with, has recently enacted a comprehensive 'Water Law of the People's Republic of China', in 1988, which completely centralizes water resources administration. The law stipulates that the State exercises a system of unified administration on water resources, in association with administration at various levels and with various other government departments.The Ministry of Water Resources is incharge of the unified administration and protection of water resources throughout the country. All natural waters, both surface and ground, vests in the State. Under the law, the State can exercise a water-drawing permit system for drawing water directly from ground aquifers, rivers and lakes. The department of water administration under the State Council shall be incharge of implementing the water drawing permit system. For domestic, poultry and livestock purposes the permit is not required. Under this central law, the state is also permitted to levy water-fee from all those who are provided water from water supply projects. The fee is also to be charged to those who draw water directly from ground aquifers or rivers or lakes.[14]

In contrast to China's highly centralized administration of water resources, the Eastern Block countries present a comparative picture in which the administration, although centralized and state controlled, allows for some independent lower level planning and regulation. The Czechoslovak Water law, for example, (The Water Act, Act No. 138/1973) provides that the national water economy and use plan will be the responsibility of the Ministry of Forests, Water Management and Woodworking Industries, in collaboration with other relevant ministries. The actual monitoring and implementation of the plan is, however, left to the local government authorities. Private investor organizations are permitted to take on lease water sources, from the government, on payment of certain fees. But these leases are governed by strict rules concerning use, amount, pollution, etc. There are penalties for misuse in these various matters. The Czech Water Act covers both surface and ground water.The interesting feature of the Act is that it allows for the declaration of some natural water accumulations as 'protected areas'. In these regions the activities which might endanger the water economy conditions are subject to a special regime or are forbidden. The Act also allows for declaration of certain natural water courses as 'protection zones', in which the existing use of immovable property or activities threatening the yield are forbidden or restricted.[15]

The Hungarian water law and administration is somewhat similar to that of Czechoslovak. Although water laws in Hungary go back to 1885, radical changes in the administration began only in 1948 when all water management activities were taken over by the State. The central authority of water management right now is the Ministry for Environment and Water Management. Local and regional water management tasks are performed by the District Authorities of Environment Protection and Water Management, and by organizations of local councils. All these function under the supervision

of the Ministry. At present there are 12 district Environment Protection and Water Management Authorities in Hungary. The basic law governing water management is the Water Rights Act, 1964 (Act. No:IV, of 1964), but this Act incorporates not only some features of the XXIII Act of 1885, but, in so far as procedures, institutional systems, permits and supervision are involved, also features of the Austrian, Spanish and Italian laws which were adopted by Hungary over the course of the century. The district authorities, established under the law, issue water right permits for installation and operational purposes. The water rights permits can be amended, suspended or even cancelled on the beneficiary's request or in the interest of national economy. The Water Act stipulates the conditions under which the cancellation or amendment of permits is possible or compulsory. These conditions specify that water use under the permit fit into the system of water management provided by law and that they do not harm any interest concerning the protection of quality or quantity of the water resources. The water management authority may also establish water servitudes. The interested partners can themselves establish such servitudes by the conclusion of a contract. But in case of a water facility bound by water right permits, to validate a servitude contract the approval of the water management authority is necessary.[16]

A comparison of the Eastern Bloc countries, and other socialist or communist countries such as China, with liberal countries, such as U.S.A., may make one think that political economies dictate legal strategies in a straight forward way. Whereas in the former the resources are totally governed by the state, in the latter there is a free play of private interests. This simplistic picture is far from the truth. The water rights situation is actually a great deal more complex, dependent as much on availability of water and on socio-historical conditions as on the political structures. We have already noted how Spain, which although not enthused with totalitarian ideologies, has declared all surface and groundwater to be state property regulated by a central authority, mainly for utilisation reasons. This reason is more pressing in the water scarce areas of the Middle-East and other desert areas. However, the criterion of efficient utility alone does not seem to be the basis for centralisation. There is also a certain understanding about efficient management which presumes that decentralization can lead to multi-faceted plans and utilities which are not compatible together, and which will, hence, bring about inefficiency in productivity and use of water. Such an assumption does not address itself to questions about power and control over resources which can lead to inequities or dis-empowerment of the earlier people in control of the resources. An obvious example of such a centralizing tendency is the Indian legislations, but we find legislation in Philippines show a similar and more centralizing tendency. The hierarchy of legislations in Philippines begin with the Constitution which provides that all water is owned by the state. Water use is governed by the Philippine Water Code, 1976, which requires that, except for domestic use, all individuals and also institutions using or supplying water (including to the municipality) must obtain a water permit from the National Water Resources Board. The Board can also demand that individuals register themselves with the Board even if they are using water for domestic purposes. The water permits create only usufruct rights on water.

In contrast to the Philippines or Spain situation the English law becomes extremely interesting because it leads totally to the other direction— to

privatization and decentralization. The type of unification of water resources control being now sought in Spain and other socialist countries, was regarded as very progressive in 1974 in Britain, a period which saw new legislations which brought about single regional agencies with superior regulatory powers to control water quality and use. Over the last 15 years, however, the government of Mrs.Thatcher has had a policy of progressively returning businesses which had come into public ownership to private ownership and control. In transferring key assets to private hands, the government, thereby, placed a great dependence, and probably strain, on regulatory processes to secure the public interest and prevent abuses, specially where quality of water and other environmental resources are concerned. This changing political economy has driven the British Government and Parliament to recently legislate a long and complex new Water Act for England and Wales. The main thrust of this Water Act, 1989, is to transfer the utility services of water supply, sewerage and sewage disposal from the public sector into commercial companies in private ownership. The Act also provides for a regime of price and level-of-service regulation to which the new companies will be subject in respect of their water services as extreme monopolies. Significantly, however, the Act also creates a new public agency, the National Rivers Authority, which, while being politically accountable through being answerable to Ministers, will deal with permits to discharge effluents and withdraw water, and with operational river basin functions. This total reversal of legislative strategy does not, of course, alter the prevalent water right doctrines for individuals, such as the riparian doctrine.

Traditional societies, such as India, which have not gone through a revolutionary legislative change, such as U.S.S.R., China or the Eastern Bloc countries, present a different picture. In their legal systems they represent a continuity from the past systems, which means a whole range of customary and social rules from the earlier legal regimes are carried through into the modern legal system, althogh the modern system may have had a new constitutional beginning. The situation in this respect is more comparable with the African nations, Australia and New Zealand, than with U.S.A. or U.K. What makes the Indian legal system different is also the fact that it is a multi-cultural system – having elements of Hindu, Islamic and the English common law, within it. The situation, once again, is more comparable with some African nations, such as Nigeria, which has the English common law super-imposed on the traditional Islamic and customary law, than with legal systems as of U.S.A.

Since the important feature of Indian law is the transition from the customary to statutory law, it will be useful to have a closer look at this phenomenon in terms of the basic issues of state formation, equity and power. These details need to be outlined separately.

NOTES

1. *U.S.* v. *Gerlach Livestock Co.* 339 U.S. 725, 744-745, 94 L.Ed. 1231, 70 Sup. ct. 955, 20 A.L.R. 2d. 633 (1950).
2. *Coffin* v. *Left Hand Ditch Co.* 6 Colo. 433, 1882.
3. Constitution of Colorado. Art. XVI. Section 5.
4. *Brighton Ditch Co.* v. *City of Englewood*, 124 Colo. 366, 237 p. 2d 116, 120 (1951).
5. *Woods* v. *Sargent*, 43 Colo. 268, 95 Pac. 932.
6. Sections 37-45-118, (b) IV, C.R.S. 1983. See also : "Area Origin Statutes – the California Experience", Robie and Keetzing, 15 Idaho L. Rev. 419.
7. *National Audubon Society* v. *Superior Court of Alpine County*, 33. Cal.3d 419, 447, 189, Cal. Rptr. 346, 365, 658 p.2d 709, 729 (1983), cert. denied, 464 U.S. 977, 104 S.Ct. 413 (1983).
8. *Arnold* v. *Mundy* 6 N.J.L. 1 (1821)
9. *Martin* v. *Waddell*. 41 U.S. (16 Pet.) 367 (1842).
10. Id., at 413.
11. *Illinois Central Railroad* v. *Illinois*. 146 U.S. 387 (1892).
12. See, for example, Sax, "The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention," 68 *Mich. L. Rev* 471 (1970), at 489.
13. Wilkinson, "The Headwaters of the Public Trust: Some Thoughts on the source and the Scope of the Traditional Doctrine", 19 *Envtl. L.* 425 (1989), at 429-430.
14. For the details about the administrative set up under this law, see: Ke Lidan "Water Resources Administration in China" in Proceedings of the III World Conference in Water Law Administration. 1989 (SPAIN) International Water Law Association.
15. For details on the Czechoslovak water law see: 2 denek Madar, "Basic Principles of the Czechoslovak Water Law", as in supra n. 14.
16. See for details : Gyula Egerszegi, "Water Management and Water Law in Hungary", as in supra n. 14.