CHAPTER FIVE

# FROM CUSTOMS TO STATUTES

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There seems to be a common belief amongst jurists and resource planners that the management of water under customary law was piece-meal, *ad hoc* or arbitrary, and that the modern 'developed' state laws present a more rational or efficient regime. Surprisingly however, if we take the Bruntland Commission's report on sustainable development to be a guide indicating modern rationality,[1] we find that many of the crucial insights in this report are more easily perceived in customary laws than in the modern 'developed' legal systems. The notions of inter-generational equity, communal title, inalienability, trusteeship, unity of mankind and nature, balance between personal desires and communal obligations, which the Bruntland Commission report speaks of emphatically, are more ubiquitious in the customary laws than in modern laws. In fact the prescriptions of the Commission's report will demand of the developed legal system to urgently limit and redefine the attributes of property. This is not to say that the customary laws were ideal or perfect systems, far from it, they had numerous shortcomings of their own, but only to point out that to simply assume that the statutes are more rational because they are 'modern' or positive law is to lose sight of a whole tradition of mankind's learning embodied in customs. The whole transformation from customs to statutes needs to be more critically understood if we are to grasp the reasons for the tensions between these two types of laws. The tensions arise primarily due to different notions of private and public domain, and different notions of ownership and its attributes. These notions need to be unpacked and examined to unveil the reasons for the tensions.

In India both the Hindu and the Muhamadan customary law recognized various types of water rights of the people. These were recognized way back in 1869, even by the English court in *Begram* v. *Khettranath*,[2] and subsequently in the Easement Act of 1882 (Sections 2(6), 13, 15, 18). Prior to this the riparian rights, which had its roots in the customary laws of England, were also recognized in the Limitation Act of 1859. The customary laws varied from state to state in India, but they had some common features, such as the fact that most customary systems recognized communal, rather than individual, rights over water, such rights often transcended mere values of convenience or practice, they were based on formal or informal religious beliefs or spiritual values. There are other differences which are important to notice, which, on the face of it, one may find disconcerting from the point of view of the modern legal system, but which is not necessarily so from the point of view of long-term developmental goals. Customary law has been dynamic, more in tune with the needs of the people than dogmatic about certain fixed notions of territoriality or ownership right. Secondly, the limits of customary rights have often been imprecise in spatial and qualitative terms. Third, under many customary systems, even where notions of trade or barter exists between clans or castes, there has been no notion of transmissible or alienable title to land and its water resources. Social changes under customary law, therefore, have not been

obstructed by problems concerning compensation. Finally, because of the dynamic character and uncertain scope of the customary rights, recognition of their existence has necessarily depended on assertion of long use, rather than some technical proof of title or deed. For modern lawyers used to objective standards of 'textual' or documentary proof, the lack of such corroborative indicia is sometimes deeply unsettling. The lawyer is not willing to undertake any sociological or historical research which the verification of customary rights necessarily demand. We notice how in India under the forest laws the customary *nistar* or *dafayti* rights of the people over forest resources are very reluctantly recognized as 'concessions' under the Forest Acts, because some documentary (historical) evidence exists for this. Neither the Forest Departments, nor the lawyers have ever bothered to establish such rights on the basis of actual sociological or historical research.[3]

In terms of modern principles of water management, a basic criticism that can be raised against customary law and the values which underlie them is that they seem to acknowledge no 'national' obligation superior to internal obligations between clans or castes. It becomes possible, hence for one caste to dominate the various productive uses of water and either to exclude others or admit them only at a price. Whether this inherent possibility of inequality or exploitativeness is an aspect of customary laws or the larger social structure needs to be considered carefully. To do this one must take a closer look at the characteristic of modern statutory laws and compare them with those of the customary ones.

If we compare the modern statutory law, specially the common law presently operative in India, we find that the modern legislations are faced with precisely the same difficulties of which they complain. First, these laws limit the enjoyment of water to a narrow clan (under the riparian doctrine) of rich farmers; second, they acknowledge correlative rights and duties only between members of such clans; third, under doctines of federalism, the laws acknowledge no supervening interest in the 'national' community, on the contrary, they make possible wasteful use of water by the urban rich and the industries. It thus becomes possible for one class to dominate the various productive uses of water and to admit others only at a much higher price. The modern law, therefore, has not been able to overcome the shortcomings of the customary law, it has only redefined water use, priority and the class of beneficiaries. On the other hand, it has lost the various advantages of customary law, such as dynamism and sustained yield use.

In India the statutory law is an imposition of a colonial law over the traditional practices. A brief review of this colonization process in other countries will be helpful in putting the Indian situation in a relief. The precise relationship between local customary law and the imported law of a colonial power has been and still is, a matter of considerable judicial controversy. An outline of some of the common features in this controversy is nonetheless possible.

In United States, Canada, New Zealand, the doctrine of "discovery", as laid down by Justice Marshal in *Johnson* v. *M'Intosh*, [4] has prevailed. [5] In this view, "discovery" of a new land by the colonial power gave it ultimate dominion, its sovereignty, however, was limited by indigenous rights of occupancy. These were legal rights that could not be transferred by the indigenous people except

to the colonial power which alone had the power to extinguish native titles. The most blatant deviation from this principle has been in Australia. There the orthodox view has been that the Australian colonies were *terra nullius* and occupied by settlement and not conquest, with the implication that there were no local inhabitants and hence no local law. As recently as in 1971 Blackburn J., in *Millirrpum* v. *Nabalco*[6], could not overcome that presumption. He did concede that the aboriginal clans did have a legal system, but that did not create any property rights for them under the Australian law. He based his arguments on the authority of *Cooper* v. *Stuart* (1889)[7] and other Indian and African cases.[8] Blackburn's doctrine again received some support in 1979 in *Coe* v. *The Commonwealth.*[9]

In extending the British common law to India, the colonial powers did not employ the Marshal's "discovery" principle or Blackburn's "conquest" principle, nor the recognition of the "prior appropriation" principle, as applied in United States. Instead, they manufactured a new "act of the state" jurisprudence, such as first explicitly evidenced in *Vajssingi Joravarsinhi* v. *Secretary of the State of India*,[10] which, simply stated, asserts that when sovereignty changes within a nation the state can act to simply abolish all rights and titles to communal property, by decree or fiat. In the British and the liberal view at that time land was a commodity which could be pledged as a security or transferred to a more highly-valued use. Anything which would reduce delays and transactions costs would be encouraged. This ideology, of viewing land primarily as an economic asset, was not only engrafted on to all customary or traditional legal systems in colonial countries, including India, but has also become the dominant ideology in the post-colonial era. Land settlement and consolidation programmes have, hence, often been paternalistic means of enforcing this ideology on the local people. It is true that increase in agricultural productivity is often enhanced by laying out lands, irrigation, transport and other community services, but this in itself does not require individualisation of previous communal titles. Privatization has been necessitated by various other economic and political reasons, such as the fact that market operations with registered owners is far easier than operating with amorphous castes, clans or tribes; money lending transactions for raising funds for agricultural machinery, fertilizers, livestock, demand certainty of the borrower's title; it is easier for the sovereign to take land tax or rents from registered individuals than from vaguely defined groups, and so on.

In retrospect, the consequences of an ideology which treats land as a commodity and attaches water as an attribute to land, has been manifest. Individualisation of titles (of rights to own land and water without any duty towards it) has certainly empowered a whole range of people to deal with it as a marketable commodity, but it has displaced a greater number of people from having access to land and its resources. Land and water have moved into the hands of landed classes and irrevocably away from traditional users. It has led to the collapse of traditional structures of authority and community resource management systems, hastened the drift of the traditional people to the new urban areas, and substituted the tragedy of the humanly degrading urban poverty for the simple but balanced traditional subsistence communities. The physical consequences of this development ethic has been equally devastating. In a situation in which individuals have legal rights but no duties to preserve the environment for the future generations, land degradation, soil erosion,

desertification, accumulating dry land salinity and diminishing forests, are inevitable.

In contrast with the Indian situation, where the English law and the notion of private property have taken deep roots, the African nations offer a comparatively more flexible situation, where the conflicts between customary and modern laws stand out in stark transparency, and where a concentrated effort can still salvage some of the basic prudence of customary law. In Nigeria, for example, the customary indigenous law is sandwiched between the imposed Islamic and English law. Courts adjudicate differently for natives and non-natives, applying customary or Islamic law in the former case and English law in the latter. The customary law treats water as communal property of a tribal, the Islamic law, based on Koran or Hadith, treats water as a matter of common ownership, giving limited usufruct rights to individuals but not personal ownership on occupancy rights. The English law, on the other hand, treats water as a private property of the land owner. All three laws apply at the same time, with different jurisdictions and on different people. In case of conflicts the English law takes the upper hand.[11] In essence, the nature of the major conflicts or tensions between customary laws and modern statutory laws in Africa is very similar to what one may find in the Asian or the American continent, the difference lies in the fact that in terms of existence and legitimacy customary law in Africa is still more prominent. The African struggles brings one thing out explicitly to the forefront, namely that the assertion of customary law over natural resources is simultaneously also the assertion of power over control of resources, right to self-determination of tribes or clans, and a matter of self-identity for nations or peoples. This is also the underlying theme in the struggle of the aboriginals of Australia or New Zealand. The conflict between customary law and statutes is, therefore, not merely a matter of efficient management of water resources, but more significantly an expression for the realization of certain human rights, such as right to self-determination, dignity and the right to have access to unpolluted environment for the sake of people's livelihood.

The worries of legal theorists that the compensation issue under the customary law, specially where riparian rights are involved, may become an obstacle in development, [12] almost in the same way as the right to (land) property had, does not look at the total social aspect of who in fact are the people who suffer most from the loss of right to compensation. In India more than 3000 large and small dams have been built on various rivers, most of these in forest areas where the tribals or the poor rural people have lived. It is these people who have been displaced, by and large, due to land submergence. The number of people who have been displaced is over thirty million, at the lower estimate.[13] Assuming all these people had riparian rights, in accordance with the Indian laws, the greatest loss of compensation has been to all these displaced tribal and rural people.

The remedial compensation jurisprudence that developed after the *Kameshwar Singh*,[14] *Golak Nath*[15] cases and the Twenty Fourth Amendment to the Constitution in India, took into account only the claims of compensation of the rich landlords, it did not notice that in abolishing their claim it also at the same time abolished the claims of the vast majority of the poor tribals and other rural people.[16] It is true that if the riparian rights or water rights are strongly

asserted as a property right, the first most likely benefeciaries of this will be the rich waterlords and landlords. These people are already benefiting from the existing water rights. Any attempt to abolish such rights, must not, however, look merely at the waterlords. The large number of poor rural and tribal people who have these rights but have not been able to exercise it so far, must also be considered. The use of the rights discourse in favour of the poor needs as much legal acumen and striving as those against the rich who over-exploit their rights. A water law or a water resources management scheme which merely abolishes all rights of the people or groups (rights in water or rights to compensation), and vests absolute rights or powers in the state, or conversely, a water law which asserts water rights as property rights of individuals and reduces the state's role to insignificance, is simply incapable of handling the complex human rights, equity and poverty issues which is involved in the use and distribution of water resource.

## NOTES

1. Report of the World Commission on Environment and Development, Our Common Future (1987).
2. *Begam* v. *Khettranath* (1869) 3 Pang. L.R. (O.C.J.), 18, 37.
3. For details on the rights of the forest dwellers see : Singh, Chhatrapati, *Common Property and Common Poverty*, Oxford University Press Delhi, 1985.
4. *Johnson* v. *M'Intosh* 21 U.S. 543 (1823).
5. For the Canadian position see : *Calder* v. *Attorney General of British Colombia* (1973) S.C.R. 313; *Guerin* v. *The Queen* (1984) 2 S.C.R. 385. For New Zealand see : *R.* v. *Symonds* (1847) N.Z.P.C.C. 387; *Nireaha Tamaki* v. *Baker* (1902). N.Z.P.C.C. 371.
6. *Millirrpum* v. *Nabalco Pvt Ltd.* (1971) 17 F.L.RE
7. *Cooper* v. *Stuart* (1889) 14.A.C.
8. For the implication of the *Millirrpum* case on Indian law see supra note pp. 27ff.
9. *Coe* v. *The Commonwealth* (1979) 53 ALJR.
10. *Vajasingi Jorvarsingi* v. *Secretary of State of India.* (1924) I..R. 51, Ind. App. 357.
11. For details on the Nigerian water law see : Coponera, D.A., Water Law in Selected African Countries. (1979) Legislation Branch Legal Office, F.A.O., Rome, (Legislative Study No. : 17).
12. See : Sandford D Clark : "Reconciling Customary Law and Modern Law Principles in Water Management", in Proceedings of the III World Conference on Water Law and Administration 1989., of the International Association for Water Law.
13. See : Walter Fernandes, J.C. Das and Sam Rao : "Displacement and Rehabilitation : An Estimate of Extent and Prospects," in Walter Fernandes and Enakshi Ganguly Thukral ed. Development Displacement and Rehabilitation, Indian Social Institute, Delhi 1989. pp. 62.
14. *Kameshwar Singh* v. *State of Bihar.* A.I.R. 1952.S.C. 152.
15. *Golak Nath* v. *State of Punjab* (1967) 54.A.I.R. (1643).
16. For a more detailed analysis of this argument see: Chhatrapati Singh: "Rehabilitation and the Right to Property" in Fernandes, Thukral, ed: Development Displacement and Rehabilitation, Indian Social Institute, Delhi, 1989. pp.91., Also : "The Jurisprudence of Remedial Justice", in *Lokayan* Bulletin. 6 : 1/2. 1988.