

FOREWORD

I

Indian legal education and research have been in a state of ferment for the past decade. Empirical legal research is no longer a mere *programschrift*, the viability and desirability of which is interrogated at the bar of Blackletter law or doctrinal research.¹ Socially relevant curricular inputs are no longer points of polite conversation amongst senior law academics; innovative action, though not widespread, has indeed emerged.² A decade or more of construction of optional courses such as law and poverty³ has expanded awareness of jurisprudence of human rights as well as of human needs. Similarly, the emergent concern with environmental law has illustrated to even the nineteenth century survivals in the Bench, Bar and the academia of the critical importance of law as social technology. This concern has been amply triggered by advises of judges, lawyers and scholars through that manifestation of struggle which has come to be known as "social action litigation."⁴

The Indian Law Institute's research agenda began to revise itself in this milieu. During the period 1985-1988 when I was privileged to be its Honorary Research Director, it occurred to us to develop a programme of social research in law, policy and administration concerning natural resources even the most minimalist conception of jurisprudence of natural resources, land, water and air form an integral trinity. The unity of jural problems was constantly emphasized, as also the focus on land and forests in early in-house discussion (notably by Dr. Chhatrapati Singh); but I remained persuaded that we should look primarily at one domain: namely, water. I developed a tentative research programme (Appendix A) which was then discussed with Mr. R. Sudarsan, Assistant Representative of the Ford Foundation, New Delhi, Dr. Chhatrapati Singh and Dr. Alice Jacob. The programme was later endorsed by the Water Law Research Project Advisory Committee (Appendix B). I must here acknowledge in plenitude our great appreciation of the excitement and enthusiasm with which the Ford Foundation received our project formulation and proceeded to generously support it. We also remain grateful to the Government of India for having so readily sanctioned the Ford grant.

The project conceptualizes *water as a resource and water - based resources*: it seeks to explore dimensions of *access, use and productivity* of water as a resource and of water-based resources. In particular, we set before ourselves the daunting task of assessing the historical role of legal order, including legal administration, in the evolution of access, use and productivity of water as a resource and water based resources; further, we also sought to assess the *potential* of legal order in the development of a *just* regime of access to and use and productivity of water resources.

None of us (Appendix C) had ever addressed ourselves to this kind of agenda in any significant way during learning and teaching of law; we quickly found ourselves in deep waters! The four year life of the Project is now about to end; without further lease of life to the Project our agenda will attract the description "little done, vast undone." But this volume — and five or six volumes to follow — do give us the satisfaction of having begun to scratch the surface of aquatic law and jurisprudence.

II

This simply written work for the project addresses both the learned professions and an audience of social/human rights activists. Dr. Chhatrapati Singh begins to explore the basic jurisprudential issues of water rights and principles of water management. The difficulty in this *genre* of writing is formidable: to the *cognoscenti* many assertions seem elementary or trite, to the novice the discourse may appear, at first sight, somewhat complex. The author himself combines both aspects: a legal philosopher by training, explication of theories about rights flows with felicity from his pen; but as one tackling the minutiae of technical legal doctrines and rules, he finds himself occasionally overcome by legal complexity. The vicissitudes of the author are also those of his varied readership. The monograph offers a variety of conversations which should, put together, help understanding to move forward. In this sense, the work in your hands is a truly pioneering adventure.

III

There is no denying that the Project is animated by a whole set of cardinal assumptions. *First*, we believe that regimes of rights in water originated in civil society rather than state; any discourse on water rights must bear the marks of the origin. *Second*, the colonial and post-colonial state emergences has been a saga of appropriation and misappropriation of "people's rights." Dr. Singh makes this point acutely when he says:

"The truth of the matter is that there have been gross violations of people's water rights in this country, of those in the immediate past and those existing, leave alone the future generations" (p.16).

Third, the mode of appropriation reflects diverse processes and practices of State formation, both in terms of what Dr. Singh calls "rights of the State" (pp. 40-66; perhaps a more apt expression would have been the *powers* of the State) and in terms of the principle of distribution (pp. 67-94). *Fourth*, we believe that the mutations of regimes of water rights marks the projections of various theologies of "development" and "progress." *Fifth*, it is clear to us that state-bureaucratic appropriation of water as a resource and water-based resources is the source of much of contemporary crises and the bleak future ahead. *Sixth*, we affirm the need for an alternate socio-legal theorization and practice in the arena of water law where state hegemony (in the Gramscian senses) is truly *ethical* in the double sense that it takes organic knowledges of water resources management as seriously as scientific knowledges and that it takes people's struggles for water rights seriously even from the limited horizon of legitimation of power. *Seventh*, perhaps not unconventionally enough, we assert that "the pursuit of water rights is, ... simultaneously, the pursuit of human rights" (p.14). *Eighth*, state formative practices and processes remain deeply affected by ways of appropriation, of water resources and of struggle against it.

Not all of these eight ideological assumptions may be explicitly shared by Dr. Singh's work or other works to follow. But these have been the animating implicit assumptions of the Project, at any rate as conceived by me. All this, I am confident, will abundantly become clear with publication of accompanying works which deal even more concretely with the dimensions of access, use and productivity of water as a resource and water-based resources.

IV

Dr. Singh, felicitously, draws attention (though not as explicitly as formulated here) to the *basic need of converting needs into rights*. In a sense, this is "a paradigmatic strategy" of the doctrines of "natural rights" entitlements which have to be affirmed if we are to respect not so much discursive entities called "human rights" as the rights to *be and to remain human*.⁵

Dr. Singh offers an account of various approaches to water rights in Chapter 2. He wrestles bravely with the range of entitlements comprehended in the compendious term "water rights." But in this Chapter his main focus are *access* and *use* rights. No matter which prism one uses, Dr. Singh enables us to see that the naturalness of natural rights to access and use of water as a resource rests on a *belief* that "all people because they are people, whatever be their moral, legal, social or civil status, have a natural right to water" (p. 23), since water as a resource is another way of describing the right to life. An interesting achievement of Dr. Singh's analysis is the rehabilitation of the notion of group rights (pp 24-25); what is striking about this analysis is the return of a concept made deeply problematic in the modern theories about rights. Dr. Singh, in a short compass, *normalizes* the notion of group rights, an insightful authentic operation which resonates beyond the regime of water rights.

Of equal resonance is the dexterous treatment of 'positive' and 'negative' rights (pp. 25-27). The distinction is deeply problematic. "Positive" rights entail a duty "on others to do something"; "negative" rights entail a duty from refraining doing something." Dr. Singh deciphers a tendency in the "progressive development of the rights of the government" the steady emergence of the question: "has the acquisition of such power and rights by the government changed water rights into a positive right?" (p.27). He believes that this is not the case, although pointedly leaving open the possibility of an alternate reading. While Dr. Singh welcomes, guardedly, the emergence of activist judicial concern seeking to convert 'negative' into 'positive' water rights, he also counsels that "rectification of existing statutory law" will provide "a more lasting solution" (pp. 38-39). This optimism of legislative initiative sits rather strangely with the author's overall account of expropriation of people's water right by the state (pp. 40-42).

V

I will not burden the reader with further elaboration of the text which speaks, eloquently, for itself. But I must draw attention to Dr. Singh's observation concerning state sovereignty or *imperium* over water rights, with which I wholly agree:

"Given the ontological status of water, that is, its special legal status, any claim to property or absolute rights over it can at best remain *de jure*, that is an unrealizable and unimplementable legal fiction, *de facto*, that is in reality, the only kind of rights that can become operative for anyone are usufructory rights, that is right to use of water. The real question, therefore, is who has what kind of right to use water, and what corresponding duties attach to it. Claims of sovereign rights in terms of absolute or ownership rights hence, can at best be exploitative claims to power for

monopolizing the use of water. The question of jurisdiction or territoriality can be handled in other ways." (p.90).

It is these "exploitative" claims which human rights movements in India have to combat. Dr. Chhatrapati Singh's fine work gives a clarion call for this struggle. And the strategy for reversal of state sovereignty is boldly outlined in Chapter 7 (pp 95-97) which provides axiomatic principles for people's struggles, not just in India. With this work, then, our Water Resources Law Project brings home the basic truth about emerging socially relevant legal research where acts of scholarships are in themselves acts of solidarity with people's struggle for a just order of state and society.

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References

1. See U. Baxi, "Socio-Legal Research: A Programschrift" in S.N. Jain ed. *Legal Research and Methodology* 24 – *Journal of the Indian Law Institute* pp. 416-449 (1982).
2. U. Baxi, *Towards Socially Relevant Legal Education in India* (1976; Delhi, UGC); *Report of UGC Curricular Development Centre in Law* (1990: U. Baxi. ed.; see materials there cited on innovation in legal education.)
3. See U. Baxi (ed.) *Law and Poverty: Critical Essays* (1988.)
4. U. Baxi, "Taking Suffering Seriously", in *Law and Poverty*, *supra* note 3, 387-440.
5. U. Baxi, "From Human Rights to Rights to be Human" in *The Right to be Human*, 201 (1987 Delhi; U. Baxi ed.)