

FOREWORD

The present work constitutes an exploration of "Water rights" and "Water law" in India. It is exploratory, and despite its size, does not address all aspects of "Water law" in India. This is ineluctable in a nascent effort which forms part of an on going, and somewhat ambitious, research project on water resources law and policy, in India. And I must at the outset congratulate all the contributors to this volume who conscientiously ferreted out statutory and judicial materials over a vast range of Indian time and space. Through a series of drafts through which the work moved, I have been harsh with my colleagues, insisting the need for appropriate conceptual frame works, but in their final form the contributions here reflect an imaginative reaching towards new domains of knowledge. This needs to be stated by way of celebration of the potential of juristic scholarship in India, especially in the currently synical climate about the role and value of legal research and self serving alibis for not venturing out of settled areas of research which have become badges of virtue even in our leading law schools. Despite all the difficulties, and the time taken to complete this work, each of the young contributors to this volume deserve the appreciation for commitment to innovative scholarship and research, and for their good natured tolerance of my often harsh criticisms.

"Water rights", an inchoate notion, extends not just to right to access to water as resource but to all water-based resources. And rights have their full being only in just regime of resources management, in terms, at least, of access, productivity and accountability in planning, administration and adjudication. We hope that the work in your hands will evoke sustained interest among the lawpersons, including the Bar and the Bench. It is hoped that with the availability of this, and related works in this series, the Indian law schools will be able to innovate curricula and research in this vital area. We also hope that policy makers and scientists, who have hitherto complained about access to legal information, will now begin to appreciate the centrality of legal order fashioning water related policies. The centrality consists in making power and policy fully accountable; in this area, as elsewhere, the prime civilizational task of the law is to discipline power and to constrain it to move towards the creation of a just society.

Most essays in this volume direct attention to legal complexity, which inevitably escalates asymmetry of power relations in society. This complexity has many dimensions. *First*, there exists a plethora of legislations, some truly of venerable antiquity. *Second*, administrative regulations expand the range of control by planned ambiguity. *Third*, the regime of sanctions is highly variable; and their efficient administration through prosecution, conviction and sentencing is waywardly feeble. *Fourth*, inherited bodies of common law principle, especially in tort law but not only their, have not proved adequate to promote equity, efficiency and productivity of water as a resource and water-based

resources. *Fifth*, dispute handling as regards water resources, under old enactments, is primarily administrative, indeed to the point that one might cognize the advent of tribunalization to an early phase of high colonial state. *Sixth*, as in other areas of law, but more poignantly in water law, adjudication remains captive to the interstice of the resourceful and dominant individuals and groups. *Seventh*, the Indian water regime is not comprehensively responsive to innovations in international law.

This cumulative features of the Indian water law emerged during a number of discussions I was privileged to initiate with each of the young authors. We searched for explanation of the profile of Indian water law. But we soon found that no monocausal approach will suffice. If colonialism was a major causative factor, and it was indeed such, one is hard put to explain why the law has changed so little in four decades of Independence. If history, pre-colonial as well as colonial, was our guide to understanding, the paucity of eco-history materials and perspectives made it a poor guide historiography in India does not seem to have attended, in any sustained manner, to the formation of water rights, law, policy and administration. If economy was to be regraded as among the decisive factors, we stood confronted with a similar state-of-art silence on water as a resource and water-based resources. Much the same absence affected our giving salience to technology as a prime causative force.

In the circumstance, we decided, *faute de mieux*, that it was better to present the profile of Indian water law as it emerged, rather than seek explanatory frameworks. Despite this general self-abnegation, you will find various contributors indicating their individual preferences for a causal approach, and even policy prescriptions for the immediate future. But this tendency is illustrative of committed, and at times anguished, concern at the state of law, and policy. I do hope that even when unsubstantiated by high theory such observations will have some resonance for the future shaping of water law in India.

In the doing of this book, we also realized, each in our way, increasingly, that the expression "water law" is a somewhat slippery one, even when conceptually moving within the axis of water as a resource and water-based resources. Other bodies of law were constantly engulfing water we named 'water rights' or 'water law', especially the law of property in all its technicity, metaphysics and ideology. We also found that we had to deal with diverse phenomena exceeding our competence as lawpersons: inland water transport, fisheries, pollution, hydro-electrical power, irrigation, for example. These diverse realms display their own 'logic' of law-policy development. The construction of a discursive entity and field named 'water rights' or 'water law' out of this diversity gave us many a panicky moment:

We have persevered. But we have also realized the metaphorical nature of 'water'. In a sense, 'water' is a metaphor for 'power'. This had led us

to a preliminary exploration of counter-power manifesting itself through contemporary people's struggles over 'water rights'. The repressive role of legal order eclipsed our early enthusiasm for its liberational potential. But not wholly; our endeavour is still animated by the expectation that people's struggle for a just social order, converting their basic *needs* progressively into *rights*, is a trajectory for the future of Indian development. To study counter-power in-the-making is as crucial as the effort to describe the historical power formations inscribed on the surface of Indian water law. If the present endeavour enables a glimpse of the dialectics of power in the area of water resources management for the sake of the India impoverished, our tasks would have well begun.

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