

# Water – Law, Policy and Governance

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# Water – Local to global dimensions

- Water in terms of use is generally a local concern (partly because it can't be transported over long distances easily)
- Yet, water cannot be dissociated from state and inter-state dimensions, inter-country dimensions, eg in terms of shared watercourses
- Further, water availability at the local level is directly linked to the global water cycle, namely rainfall
  - This dimension is completely ignored in both national and international water governance
  - Existing water law, policy and governance thus misses out entirely on probably the most important issue arising (see also link with climate change)

# Bases for water policy

- **Physical water scarcity:** main basis for policy for decades around the world (2012 National Water Policy's starting point is '1.1 A scarce natural resource...') – surprisingly also in Meghalaya (see s 17.2 State Water Policy, 2019) [hereafter MLSWP]
  - **Protection** (environmental aspects) is thus a central concern
- Water as a **commons:** Recognition as a 'public trust' (Supreme Court of India)
- Water as a **fundamental right:** recognition of the right to water derived from the right to life (since 1991)
- Water as an **individual right: use** rights (no ownership) linked to **land** rights

# Issues arising

- The **commons** perspective and **appropriation** framing (land rights) are not reconciled – each pulls in a different direction
- The **use** emphasis overshadows the **protection** (environmental) dimension [despite ‘scarcity’ being at the fore]
- **Scarcity** is not the reality on which to base policy (see eg **floods**)
- All this remains focused on water as a **natural resource** (rather than **social**, fundamental **rights** aspects)
  - eg MLSWP, ‘Water is a prime natural resource’ (preamble)

# Issues arising (ctd)

- More specific than ‘natural resource’, an **economic** perspective to water management dominates. Reflected in the MLSWP (itself very similar to policies around the country and the world – issue of lack of **localisation** of water policy/governance)
- ‘Low public consciousness about **judicious use** of water and its **economic value** also results in its **wastage** and **inefficient use**’ (preamble).
- Elements arising:
  - Focus on use (not conservation)
  - Value: limited or focus on ‘economic’
  - ‘Efficiency’ is what is opposed to ‘equity’
  - Wastage: the ‘public’ is the cause (the remedy is behaviour change but of the ‘public’, not government, private sector etc)

# Concerns to address (domestic water focus)

- Ensuring the full realisation of the **fundamental right to water** for all. Issues arising:
  1. **Economic scarcity** (water not free and/or unaffordable)
    - Addressed eg through free water policies (see Delhi, Hyderabad etc)
  2. **Social** discrimination in access
  3. Missing **infrastructure** to ensure sufficient quantity (eg areas in cities unserved by piped network)
    - Issue of **universality** of fundamental right and concerns arising, eg with court decisions indicating the right can be realised differently for different people (Pani Haq Abhiyan, Bombay High Court, 2014)
  4. **Quality** concerns: as quantity increasingly satisfied out of increasingly dirty water, quality issues come to the fore

# Water law

- Framing of water governance starts with water law. First element, the rules, norms and principles are framed at different levels (leading to complexity):
  1. **State-level legislation:** first point of entry given constitutional mandate
  2. **Central-level legislation:** subsidiary point of entry for matters concerning more than one state – also significant water content in non-water laws (eg environment)
  3. **Judicial interventions:** some of the most basic features of water law have been developed by the judiciary (from ‘old’ rules concerning rights of access to water to the recognition of the fundamental right to water)

# Water 'law' – Other elements

- Water law actually encompasses other instruments that lawyers may not understand as 'law'
  - The distinction is crucial because the instruments below **do not create** any rights or obligations
- **Policies** have been and remain crucial in the absence of 'framework legislation' in any state. At the national level, the fourth National Water Policy is being considered by the government) – At the state level, water policies since the late 1990s (Meghalaya in 2019)
- **Administrative directions** have played a crucial role in filling the gaps, in particular concerning drinking water supply in the absence of comprehensive legislation (with the additional twist of the Union taking a lead since the 1970s)

# Structure of water governance

- The water 'sector' is usually understood as covering a **limited** number of issues, such as irrigation and drainage, drinking water, navigation or fishing ['use' focus]
- Norms concerning 'protection' are often addressed in '**environmental law**' (important distinction since the latter has been framed at the national level since the 1970s)
- Some of the fundamental rules affecting access to and use of water, in particular land/property rights are often seen as part of **property** rights
- Other water-related concerns are addressed in a variety of sectors that are seen as distinct: energy for hydropower, labour for MNREGA, land for land acquisition etc

# Challenges in practice

- Addressing water in practice requires making the links between different sectors
- The 'silos' need to be broken in terms of addressing different laws and regulations together, as well as making the links between different administrative departments
- As a starting point, 'water' does not stop at the department of water resources. It 'obviously' also include PHE department but just as much environment, labour etc.
- At the block level, the different schemes often come together but this is less and less the case higher up

# Example 1: drinking water

- Basis: fundamental right to water
- Operationalisation: No legislation (beyond local laws focusing on infrastructure, management)
- Additional elements: all water policies give drinking water priority
- Actual guidance in the form of administrative directions, mostly from the Union, mostly focusing on rural areas: ARWSP, NRDWP, now Jal Jeewan Mission
  - In practice, this is what administrators ‘see’ as the norms concerning drinking water

# Example 1: drinking water (ctd)

- Limitations of this scheme: no certainty of the framework, rights holders are seen as ‘beneficiaries’, top-down framing
  - More specifically whether it is water policies (including MLSWP s 2.2) or administrative directions of the Gol, there is no reference to the fundamental right to water, hence governance disconnected
- Institutional dimensions: As drinking water is a concern from the individual/community level to Union level, every level of governance is involved
  - This raises issues in terms of participation of rights holders in governance and links between different tiers (such as say shnongs, municipality and PHE in Shillong)

## Example 2: dams

- Water infrastructure traditionally seen as central dimension of water sector
- The State/Union take a lot of interest in these, leaving relatively little space for others to influence the process
- Complex projects, such as say the Umngot dam are not actually 'water' but really at the intersection of various sectors [note: need for convergence recognised in MLSWP s 2.2]
  - Land (for land acquisition)
  - Forest (for forest diversion)
  - Environment (for environmental impact assessment)
  - Energy (where hydropower)
  - State/inter-state/international dimensions [here transboundary]
  - Water sub-sectors (as relevant): drinking water, irrigation, quality/pollution

# Summarising

- The water 'sector' needs to be understood from a multi-sectoral perspective and a multi-level perspective
- This complexity is what policymakers do not like and therefore the attempt is usually to simplify and compartmentalise
- For water it does not work because it is the same finite amount of water used for all water uses (as well reflected in terms of pollution when an upstream city without effective sewage treatment pollutes downstream watercourses – true as much in Delhi as in Shillong; or where a non-water based activity, say mining pollutes downstream communities, states (say Assam) and countries (say Bangladesh here))
- Primary task of administrators of the system is thus to make sense of the complexity without reductionism

For more further details:

P. Cullet & S. Koonan eds,  
*Water Law in India – An  
Introduction to Legal  
Instruments* (Oxford  
University Press, 2nd ed,  
2017).

<https://india.oup.com/product/water-law-in-india-9780199472475>

