TRANSFORMING WATER POLICY AND LAW

A Water Manifesto for the Government of India

Ramaswamy R. Iyer

I. Preliminary

This paper will first provide a synoptic account of the problems relating to water; from that diagnostic statement it will proceed to an adumbration of the responses needed and the changes in water policy that they call for; and it will then outline the water law reform that this requires.

The structure of this paper entails references to the same themes under four different heads (problems, answers, policies and laws). This may give an impression of repetitiveness, but the writer hopes that the readers will find it to be more apparent than real.

This paper is offered not as an academic work but as a practical contribution recommending actions and policies - a Water Manifesto - for adoption[1].

The essence of this paper will be found in the enumeration of goals and objectives in section III, the tabular presentation of proposed policy transformations in section IV and the tabulated summary of recommended legal changes in part D of section V.

1 The author has written about the reform of water policy and law earlier (see Towards Water Wisdom: Limits, Justice, Harmony, Sage, 2007; Water and the Laws in India, Sage, 2009; and a Paper on 'Water: Centre-State and Inter-State Relations' written for Task Force No. 6 of the Commission on Centre-State Relations), but this paper represents a fresh attempt at thinking and formulation.

II. The Problems: A Synoptic View

It is clear enough that the finite freshwater resources of the world are likely to come under increasing pressure. While this can be partly attributed to the growth of population, it is this writer's view that the water crisis (if there is going to be one[2]) is largely one of our own creation through the gross mismanagement of our (i.e., India's) water resources; and that better and wiser use of water may reduce the severity of the crisis, if not avert it.

That we have indeed grossly mismanaged our water resources will be clear from the following (brief, compressed, illustrative) enumeration of problems:

(i) limited, intermittent, unreliable, unsafe urban water supply;

(ii) the enormous generation of waste of all kinds – domestic, municipal, industrial - in urban areas, and the very partial treatment of such waste;

(iii) rivers reduced to sewers (e.g., the Yamuna), or turned into poison (e.g., the Palar in Tamil Nadu); problems of fluoride and arsenic content in groundwater in some places; contamination of aquifers by industrial effluents and agricultural residues;

(iv) failure to ensure the fundamental right of safe drinking water to all; in particular, an inadequate coverage of the poor by the public system; (the related fact of the absence of sanitation facilities for large numbers of people);

(v) in rural areas, the persistence of the problem of `uncovered villages' (i.e., villages without a nearby source of safe drinking water), despite the repeated 'achievement' of targets for

2 Predictions of a crisis arise from estimates of availability of water and projections of demand for various uses. The former have recently been called into question, and the latter need to be gone into very carefully. This paper will not go into these matters. Whether there is going to be a crisis or not, we are certainly going to face a very difficult situation. Taking that for granted, the paper proceeds to enumerate the problems that we undoubtedly face.

coverage; the continuing burden on women and girl children of having to bring water from distant sources;

(vi) major and medium irrigation systems in disarray, rendering poor and unreliable service, and characterized by inequities of various kinds;

(vii) the vicious circle of low irrigation charges, inadequate allocations for operation and maintenance, poor service, and the consequent resistance to any increase in charges for irrigation water;

(viii) the very limited success of `reforms' such as the Participatory Irrigation Management (PIM) or Irrigation Management Transfer (IMT);

(ix) low efficiency of water use in irrigated agriculture, low yields, and the emergence of water-logging and salinity over the years;

(x) the availability of canal water from major/medium projects leading to the adoption of water-intensive cropping patterns, creating unmanageable demands for ever more water;

(xi) the misguided extension of that kind of irrigation to areas such as Rajasthan;

(xii) inadequate attention to the improvement of productivity in `rainfed' agriculture;

(xiii) the persistence and intractability of inter-State river-water disputes, and the poor functioning of the adjudication system;

(xiv) inter-sectoral, inter-use, and inter-area conflicts over water (for instance between industry and agriculture, between irrigation and drinking water, between urban and rural areas, and so on);

(xv) the absence of a nationally agreed statement of principles of water-sharing (between riparian States, between uses, between sectors and between areas), and of institutional arrangements for allocations, priorities, and the prevention and/or settlement

of disputes (except for the adjudication provision for inter-State river-water disputes);

(xvi) the enormous difficulty of institutionalising any kind of holistic overview or coordination at the river basin level because of strong resistance by the State Governments to what is perceived as a central imposition;

(xvii) the environmental / ecological impacts of big water-resource projects, and the unsatisfactory nature of EIAs;

(xviii) the displacement of people by such projects and the general failure to resettle and rehabilitate project-affected persons;

(xix) the unplanned explosion of groundwater exploitation from the 1980s onwards, leading to aquifers getting depleted and/or contaminated, and the absence of any regulation;

(xx) the indifference or hostility often faced by non-governmental initiatives for local water-harvesting and micro-watershed management;

(xxi) the tardy progress of devolution of local water management to PRIs; and

(xxii) questionable approaches to 'flood-control', and mounting flood-related damages and expenditures on relief, with hardly any disaster-preparedness.

That is a comprehensive indictment of what we have done or failed to do in relation to water. It may appear to be 'negative', but regrettably, it cannot easily be contested.

(On top of that bleak picture, we have now to superimpose the complexities introduced by climate change. While the IPCC Working Group report of June 2008 tells us that there will be increase in precipitation in some areas, increased incidence of drought in some other areas, and increased variability in precipitation, we do not know exactly what will happen, when, and where. This needs to be studied and

responses formulated. This paper will make no further reference to climate change.)

III. Responses: An Outline

An Agenda for Action

What should we do in response to the problems identified in the preceding section? Quite simply, we have to reverse each of those negatives into a corresponding positive statement. In that spirit, the following goals and objectives (tersely stated and not in the same sequence as the previous section) are put forward as an agenda for action, for the consideration of all concerned:

(i) make the theoretical concept of the right to water (as life-support) a practical reality;

(ii) in all other uses of water, restrain the growth of demand with reference to availability;

(iii) promote efficiency and economy in water-use (including multiple use of the same water) and resource-conservation; foster a consciousness of a scarce and precious resource;

(iv) establish principles and institutional arrangements for a system of equitable, socially just and functionally appropriate water entitlements for all uses;

(v) lay down principles, priorities, processes and machinery for the obviation or quick resolution of conflicts between uses, sectors, areas, States, etc (providing for all routes such as negotiation, mediation, conciliation, arbitration and adjudication);

(vi) improve the existing adjudication process for inter-State river-water disputes by speeding it up, changing the present adversarial, court-like procedures to a constructive, collaborative style, recognizing the *locus standi* of actual water-

users, and ensuring the acceptance of the results of adjudication by all parties;

(vii) revive and restore dying rivers, and protect other rivers from decline;

(viii) promote rainwater-harvesting and micro-watershed development throughout the country to the maximum extent technically feasible without adverse effects, and in harmony with the overall basin hydrology;

(ix) build basin-level holistic overview and coordination mechanisms from the village watershed committee upwards through a series of nested, participatory institutions, ensuring the consent and representation of water-users at every level, PRIs, and State Governments;

(x) formulate a series of area-specific answers for the needs of arid, drought-prone or water-scarce areas, the stress being on local solutions, recourse to external water being exceptional, and avoiding `development' of the water-intensive kind in such areas;

(xi) arrest as quickly as possible the present disastrous over-exploitation of groundwater;

(xii) put large projects (where these are found necessary as a last recourse) through a stringent evaluation procedure (making EIAs truly independent, professional and rigorous; going beyond the conventional Cost-Benefit Analysis into qualitative assessments; adopting the criteria of minimum displacement and least environmental impact; and fully involving, right from the earliest stages, those who are likely to be affected);

(xiii) revise the National Rehabilitation Policy to make it more just and humane, and to give the affected people the first claim on the benefits of the project or activity in question;

(xiv) help and strengthen the capabilities of people to be fully prepared in advance for floods when they occur (as they will), to cope with them, to derive benefits from them and to minimise damage;

(xv) arrest and reverse the loss of good water to pollution and contamination; minimize the generation of waste, and treat and recover as much of waste water as possible for acceptable uses;

(xvi) establish a constructive working relationship between the state and civil society at all levels, and in particular between Water-Users' Associations and Irrigation Departments, and between watershed committees and Panchayati Raj Institutions; and

(xvii) ensure a voice for women in water-management and a proper place for them in water-governance institutions.

Some Explanatory Notes

Each of those brief and perhaps cryptic items on the agenda needs to be extensively elaborated. That is not feasible in this paper, but short annotations on some of the recommendations are offered below.

(a) Making the right to water real would require among other things the imposition of an obligation on water supply agencies (State Government agencies or PRIs or city municipal corporations or parastatals or private entities) to ensure that right; and the acceptance of a final last-resort obligation by the State Government.

(b) Restraining the growth of demand for water would entail the following:

- bringing about substantial improvements in the agricultural use of water over present low levels of efficiency (35 to 40% as estimated by the National Commission on Integrated Water Resource Development Plan), and in yields from irrigated agriculture (beyond

the Commission's modest projection of 4 tonnes per hectare by 2050);

- ensuring that government policies do not encourage water-intensive crops everywhere, and that irrigated agriculture is not extended to wrong areas;
- insisting on the multiple use of the same water by industry, and moving towards the long-term goal of zero effluents (or 90% recycled water with only 10% fresh make-up water);
- setting more modest norms for urban water supply (no more than 100 lpcd), ensuring the more equitable distribution of the supplied water, severely discouraging profligate use by some through steep tariffs and penalties and perhaps a denial of service above a certain limit;
- substantially reducing the use of freshwater for transporting human waste;
- minimizing, if not eliminating, waste in all uses of water (agricultural, industrial, commercial, institutional, municipal, domestic, recreational), and in the operation of water-supply and canal systems; and
- mounting a national campaign to promote an awareness of water as a scarce and precious resource to be economically used, protected and conserved, and enlisting social sanctions against wasteful use.

(c) The working out of principles and institutional arrangements for allocations, priorities, dispute-resolution, etc, will be an arduous exercise to be undertaken perhaps at the State Government level, but preferably working upwards in a nested and federating manner from villages or micro-watersheds to sub-basins or basins. (Where basins or sub-basins cross State boundaries, inter-State arrangements will be necessary.) We can look at best practices elsewhere in the world (say, France, Holland,

South Africa, Australia; also the European Water Framework Directive). (As we shall see later, the Maharashtra Water Resources Regulatory Authority is not a good model to follow.)

(d) Improving the functioning of the existing adjudication system under the Inter-State Water Disputes Act 1956 (as amended in 2002) would entail some additional amendments to the ISWD Act. This will be dealt with in the section relating to legal reforms.

(e) The protection of rivers and the revival of dying ones will call for a transformation of attitudes towards rivers[3].

(f) The large number of tubewells (some 20 million), mostly privately owned and operated essentially for 'self-supply', makes the regulation of groundwater use extremely difficult. However, the task cannot be given up as hopeless. Apart from indirect control through the electricity tariff, perhaps the best course would be to move towards community management, but this requires the delineation of aquifers and the mobilisation of the users (farmers and others) into associations for the sustainable management of aquifers. The idea has been mooted, but has not been seriously pursued so far. This is no doubt fraught with difficulty but it needs to be tried.

The other recommendations will not be elaborated here. The point is that many of them will call for administrative, governance and institutional reforms and for the designing of new institutional arrangements where none exist.

Exploring a Deeper Understanding

3 If legislation is to be attempted for the protection / conservation of rivers, as is often advocated, certain basic propositions about rivers will need to be kept in mind: for instance, *a river must flow*, if it is to cleanse and purify itself; *a river needs space* for accommodating floods when they come, as they will, and the floodplain must be recognized as an integral part of the river; *a river is part of a larger ecological system*, and therefore the protection of a river entails the protection of the ecological system; and so on.

However, going beyond administrative, governance, and institutional reforms, there is need for a deeper understanding of what has gone wrong. The following is an attempt to encapsulate this.

(i) There is a failure to understand the uniqueness, complexity and multi-dimensionality of water[4].

(ii) There is a tendency to think of water as just another commodity and apply the economist's language of 'demand' and 'supply' to water. The market philosophy teaches us to think that if we 'demand' water, a supply response will follow. It is this which leads to an ever-growing, competitive unsustainable demand for water in all uses. We are asking for water that does not exist. It is necessary to reverse the usual practice of proceeding from projections of demand to supply responses, and start with an acceptance of finite availability and proceed to limit demand. (The reference here is to economic demand and not basic life need.)

(iii) Unfortunately, the 'demand' for water is part of an overall demand for goods and services celebrated by a conception of 'development' or 'growth' that entails an unsustainable and destructive onslaught on natural resources and on Planet Earth. Changing the approach to water implies changing the approach to 'development'.

(iv) Underlying that conception of development is a sick relationship between humanity and nature based on technological hubris and a Promethean approach of 'conquest' or 'subjugation' of nature, the catastrophic consequences of which are now becoming evident.

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4 Cf the following extract from the writer's *Water and the Laws in India*, Sage Publications, 2009 (p.568): "Water is clearly an essential life-support substance, needed for drinking, cooking and cleansing (one's person, clothes, habitat). It is also a requirement for economic activities, such as agriculture (irrigation) and industry; for navigation; and for municipal uses such as sanitation or firefighting or for institutions such as hospitals. It has (partly) a fearsome aspect in the form of floods. It is an inextricable part of our society, culture and history; and it is also regarded in many cultures as a sacred resource or as a divinity in itself. Water sustains not merely human life, but also the lives of animals and birds; and it sustains and is sustained by the ecological system of which it is an integral part. It plays a crucial role on Planet Earth." For a fuller account, see the Preamble to *Towards Water Wisdom: Limits, Justice, Harmony*, Sage 2007.

(v) The pursuit of 'development' so conceived, the religion of 'growth' and the worship of the Market, are accompanied by an unconcern for justice and equity, an indifference to the sufferings of the poor, the marginalised and the disadvantaged, and the disappearance of compassion.

(vi) The dominance of engineering and economics (separate or combined) has meant that we are offered a choice of state or market. The State Governments (in particular their engineers) want and assert state control over water resources so that they can build big projects and "push rivers around" (to quote a famous remark of an American water manager[5]). The economists (or some of them) want water to be left to market forces, and recommend private investment in water projects, the privatization of water services, economic pricing based on 'full cost recovery' and so on. However, there is a third possibility, namely, that water is a Common Pool Resource to be managed by the community or held in public trust by the state for the community. The advocacy of this view is being heard increasingly, but it has not yet made much headway.

IV. Towards a New National Water Policy

Needed: A Transformation

It is clear that over and above governance and institutional reform, a major transformation is called for. The present writer tried to capture this through a triad of terms (limits, justice, harmony) leading to a fourth (water wisdom) in his book *Towards Water Wisdom: Limits, Justice, Harmony* (Sage Publications, 2007). This was explained in the preface to that book: "Its plea is encapsulated in the three terms of the title: Limits, Justice, Harmony. Each of these has multiple meanings and all three are inter-related. `Limits' on water-use are necessary for ensuring equitable

5 Quoted by Ken Conca in Governing Water, MIT Press, 2005.

sharing (`justice') and for avoiding conflicts with others and with nature (`harmony'); `justice' means justice to other users of the resource, to those whose lives and livelihoods are likely to be disrupted by our plans, to other forms of life, and to future generations (that harks back to `limits' and forward to `harmony'); and `harmony' means harmony with fellow human beings within and beyond political borders and with nature (that refers us back to `limits' and `justice'). Everything is connected with everything else; and the water crisis is merely a part of a larger crisis of `development'."

However, that is too large a subject for this paper. In the context of the present paper, the important point is that in addition to administrative and governance reform, policy changes are needed. The existing National Water Policy 2002 needs to be replaced by a new National Water Policy.

Elements of a New National Water Policy

This paper cannot provide a draft of a new National Water Policy, but it can put forward some suggestions as to its orientation and principal elements.

Orientation:

Central to the Policy Statement should be the holistic and wise use of water (which is a better, if less catchy, formulation than the currently fashionable term 'Integrated Water Resource Management'), with due concern for social justice, equity, compassion and ecological sustainability. In other words, the Policy Statement should be governed by the framework of 'limits, justice, harmony, leading to wisdom' referred to earlier.

*Principal element*s:

Many of the action points and changes listed in section III above involve major departures from past policies and approaches. These will

need to be explicitly stated in the Policy Statement. They will include the following shifts of primacies or approaches among others:

FROM	**TO**
Promethean approach of conquest of nature	Learning to live in harmony with nature (being guided by the Precautionary Principle in interventions, adopting a Bhagiratha-like prayerful spirit towards nature)
"Pushing rivers around"	Respecting rivers (see footnote 3 above).
Dominance of economics / engineering	Subordination of economics and engineering to ecology and equity
Demand projections leading to supply-side responses	Recognition of finite supply leading to restraining the growth of demand
Adversarial adjudication of river-water disputes; claims and counter-claims	Constructive resolution; equitable sharing
An absence of specific provisions relating to inter-use, inter-area or inter-sectoral conflicts	Principles and institutional arrangements; equitable sharing
Large centralised techno-centric 'water resource development' projects	Extensive local decentralised small-scale people-centred water-harvesting initiatives
Large projects as first choice	Large projects as last choice
Top-down project planning and implementation, poor EIAs, forced displacement, poor rehabilitation	Fully participatory planning and implementation, minimum environmental impact and least displacement as project-selection

	criteria, strengthening EIAs, no forced displacement, 'free informed prior consent', effective rehabilitation, statutory right to benefits
Discrete projects, schemes or activities	Holistic, coordinated overview at the basin or sub-basin level (in a participatory, consultative, representative manner)
Private ownership of groundwater and uncontrolled extraction	Groundwater as CPR, community management of aquifers, regulated use
Water as economic good, predominance of irrigation	Water as life-support first, livelihoods next, everything else afterwards
"Define property rights in water, make them tradable"	No property rights, only use rights in water, very limited tradability
Generalised advocacy of water rights	Fundamental 'right to water' (including right of access to water sources) to be distinguished from and privileged over economic 'water rights'
Corporatisation, privatisation of water services	Improved public provision (water supply prime responsibility of state, particularly PRIs)
Supremacy of markets; acceptance of outcomes of market forces as having implicit validation	Wariness towards water markets, recognition of inherent flaws and injustices in their outcomes, regulation of markets
Sovereign powers or 'eminent	Public Trust doctrine (state as

domain' of the state	holding natural resources in trust for the community)
State control	Community management
Women as fetchers and carriers, household drudges	Voice to women in water management at every level
Dominance of Central and State Governments	Effective devolution to local level, 'subsidiarity principle', i.e., decisions at a level no higher than necessary

That is an illustrative and not an exhaustive table. Besides, there will be other elements in the policy statement which cannot be put into that table, for instance, providing a policy framework for a system of allocations or entitlements, including institutional arrangements to make it operational.

It will be clear that the proposed new national water policy will be vastly different from the NWP 2002.

If a reasonably good national water policy can be drafted and adopted, then that Policy can be made into a National Water Act. However, why do we need a National Water Act? We shall return to that question.

V. Water Law Reform

Threefold Transformation

The governance and institutional reforms and policy changes outlined in the earlier sections of this paper will run into difficulties with the present legal dispensation in many ways. It follows that a transformation of law will have to accompany and support the intended transformation of water policy.

The transformation that this writer has in mind is threefold. First, a full understanding of the nature of water in all its complexity and multi-dimensionality (see footnote 4 above) must be the bedrock on which the entire structure of laws relating to water from the Constitution downwards rests; that is not the case at present. Secondly, while water can and must be dealt with at the State and local levels, it seems desirable that there should be a minimal commonality of positions on certain basics relating to water across the States and at the Central level. Thirdly, there must be changes in the existing laws or new laws to support the proposed policy changes.

That threefold prescription translates as (i) declarations relating to water in the Constitution; (ii) a National Water Act; and (iii) changes in particular laws or new laws. We shall deal with the last item, i.e., specific legal changes, first, and then proceed to the others.

A. Specific Legal Changes

(i) Right to Water, Water Rights

In India, the right to water[6] has been treated by judicial interpretation as part of the right to life. However, it seems desirable that there must be an *explicit* constitutional recognition of the right to water, as there is in some countries[7]. Once this is done, it would follow that the state has a responsibility to ensure that this right is not denied to any citizen or group of citizens, but it might be useful to make that responsibility also *explicit*.

When we talk about fundamental rights, we must include not merely the right of all to safe drinking water, but also the rights of access

6 The reference is to water as essential to life, i.e,, the basic water requirement for drinking, cooking and washing, and not water for economic uses..

7 See Upendra Baxi's chapter on the human right to water (Chapter 7) in Water and the Laws in India, ed. Ramaswamy R. Iyer, Sage 2009.

of certain tribal and other communities to forests, mountains, rivers, etc, i.e., the natural resource base on which they have for centuries depended for sustenance. This is partly recognized by the Provisions of the Panchayats (Extension to Scheduled Areas) Act 1996 – popularly known as PESA, but the recognition needs to be more general and explicit.

There can be no fundamental right to irrigation water or water for industrial use: these are (economic) *use rights.* The term 'water rights' usually refers to these rights. Between a fundamental right (life-right) and a non-fundamental use-right, the former must clearly take precedence over the latter; and the economic rights of some must never be allowed to endanger the fundamental rights of others. It seems desirable to give these propositions formal legal expression.

(ii) Legal Support for Civil Society Initiatives

There is a potential for conflict between the unqualified assertion of the state's sovereign powers (or what is often loosely referred to as 'eminent domain') and the encouragement of civil society initiatives, which is now part of accepted official policy. If it is indeed the policy of the state to promote such initiatives, then legal changes must be made to enable and facilitate the role of civil society. We must return to this subject, but at this juncture it is necessary to refer briefly to the question of ownership of water.

Who owns water? Is water state property, or private property, or a common property resource? State Governments tend to regard rivers, streams and lakes as belonging to them; this is even stated in some State laws. The view that water is an 'economic good' is generally accompanied by the related view that it is private property. Social activists and

mobilizers and NGOs campaigning for the empowerment of the 'people' are likely to hold the view that water is a common property resource[8].

This is a major and complex issue; it is not proposed to enter into an elaborate discussion of that subject here, because the crucial question here is not whether the state's claim of ownership of natural resources is valid, but whether the assertion of state *control* over water in India (in colonial times and later) is compatible with the empowerment of civil society. If indeed we believe in such empowerment, then the people or civil society or community must be *enabled* to play their role. It follows that the sovereign power which hinders this needs to be moderated.

However, the state too has important roles to play in relation to water and must be enabled to play them (constructively, and in cooperation with civil society). How then can we empower the state and the people at the same time? The answer to that conundrum lies in the public trust doctrine.

(iii) Public Trust Doctrine

Under this doctrine, the state is perceived of, not as owning the water resources of the country, but as holding them in trust for the people (including future generations). As a trustee, the state will of course have to be empowered to legislate, regulate, allocate, manage, and so on, and all this must involve a degree of control. However, the role of sovereign as trustee, unlike that of a sovereign *simpliciter*, is not inherently confrontational, and may permit a constructive relationship between the state and civil society.

8 The law in India recognizes 'private property' in the case of groundwater, where the ownership of land carries with it the ownership of the water that lies under the land. This creates serious difficulties for the regulation of groundwater. Besides, this difference in law between surface water and groundwater (private property being recognized in the latter case but not in the former)) is a legacy of the past which is no longer tenable.

It would appear that after *M.C.Mehta v. Kamal Nath and Others*[9] the public trust doctrine is indeed part of Indian law, but the position is not entirely clear. In the Coca Cola (Plachimada) case, the first judgment (single judge) invoked the public trust doctrine and went in favour of the panchayat, but on an appeal by the Company the Division Bench overturned the first judgment and allowed the Company to extract a certain quantity of water; the implications of this for the public trust doctrine are not clear. The case is now before the Supreme Court and one wonders whether the judgment, when it comes, will have something to say on the applicability of the public trust doctrine or will decide the case on other grounds. Meanwhile, recent reports say that in another case (Pudussery, Pepsi Cola) the Supreme Court has upheld the High Court's Order allowing the Company to extract water on certain grounds (industrial area, government licence, etc). We need not go into the details of that case - there are differences between that case and the Plachimada case - but the point is that it is by no means clear that 'public trust' is firmly a part of Indian law. One can only hope that this will be strongly re-affirmed by the Supreme Court in the Plachimada case.

Incidentally, it seems to this writer that the public trust doctrine must apply not merely between the state and civil society, but also between present and future generations, between humanity and other forms of life, and between humanity and Nature in general. The doctrine needs to be widened and given an ecological / philosophical underpinning.

(iv) Inter-State River Water Disputes

There is general dissatisfaction with the prevailing adjudication process under the ISWD Act, on three grounds: delays at every stage;

9 "These resources meant for public use cannot be converted into private ownership. Thus the public trust doctrine is a part of the law of the land." (1997) I SCC P-388/389)

adversarial proceedings; and uncertainty of compliance with the final decision and therefore the absence of finality. (The objection to adjudication itself as a means of settling a dispute need not be discussed at length. Article 262 and the ISWD Act do not force adjudication on the disputing parties, nor do they preclude recourse to negotiation, conciliation or mediation; but when all these efforts fail, disputes still have to be resolved, and a last-resort mechanism is needed for the purpose. That is what Article 262 and the ISWD Act provide.)

(a) Delays at every stage certainly presented a serious problem in the past, but the Amendments of 2002 have substantially taken care of this problem by prescribing time-limits at various stages. However, there are two loopholes that need to be plugged through further amendments: one, an open-ended availability of time for the Tribunal's supplementary or clarificatory report in response to a reference back to it after its Award; and two, the absence of any time-limit for the notification by the Central Government of the (Interim or Final or Supplementary) Orders of the Tribunal. For the former, there is a limit of one year but that year can be extended indefinitely; a limit (of say, six months) needs to be prescribed for such extension. As for the latter, it may seem trivial, but the possibility of delays in notification cannot be ruled out. A time-limit (of ten days or two weeks) should be laid down for this.

(b) Adversarial proceedings characterise all litigation in the courts, and as ISWD Tribunals function like courts, their proceedings too are subject to this malaise. However, the Tribunals are not *obliged* to adopt the court style of functioning. Instead, they can adopt a consultative, inter-active, fact-finding, solution-exploring Committee-style procedure, while retaining the ultimate responsibility for giving a judicial decision. In fact the Tribunals can go further and become forums for conciliation as well as for adjudication. The Tribunals can presumably modify their

own procedures and style, but if necessary, they can be specifically empowered to do this by an amendment to the ISWD Act.

Incidentally, the disputing parties under the ISWD Act are the State Governments concerned and not the people. The Tribunal does not hear the farmers and other water-users in the basin. It seems very desirable that any reform of the present system of resolution of inter-State river-water disputes should bring the people in as interested parties. 'People' in this context should encompass different categories of water-users, as also those who are likely to be affected by the projects that the Tribunal takes note of.

(c) The problem of non-compliance is indeed a serious one. Though the Award of an ISWD tribunal is said to be final and binding, there are no means of enforcing compliance with it. If a State Government refuses to obey the Order of such a Tribunal, there are not many courses open to the other parties to the dispute or even to the Central Government. The Centre can give directions, but if these too are not complied with, what sanctions are available? Article 356 (Central rule) is an extreme measure that cannot be lightly used, and in any case, what will happen when a popular government returns? The Sarkaria Commission had recommended that the words "final and binding" in the Act should be buttressed by conferring upon the Tribunal's Order the status of an Order or Decree of the Supreme Court, and this has been done through the 2002 amendment. However, this seems to have had no perceptible effect. (Perhaps the Supreme Court will make a pronouncement in this regard when it delivers judgment on the Special Leave Petitions in the Cauvery case.)

(d) The general dissatisfaction with the functioning of the adjudication system, and in particular, the absence of finality, had led to the recommendation by some that that the ISWD Act should be repealed and inter-State river-water disputes brought within the original

jurisdiction of the Supreme Court. Such a suggestion had been made by the National Commission to Review the Working of the Constitution, and more recently, the eminent lawyer Fali Nariman, has also advocated this[10]. This arises largely from a sense of exasperation with the manner in which adjudication under the ISWD Act has been functioning. The suggestion is based on the system prevailing in the USA. However, in such cases the US Supreme Court appoints a Special Master who goes into the dispute in detail, hears the parties, and gives his findings which then go back to the Supreme Court for a final decision. In other words, the Special Master in the US does what the tribunal does in India. There seems to be no particular advantage in replacing tribunals by a Master. However, it is certainly desirable to bring in the Supreme Court – not in original but in appellate jurisdiction. This is explained below.

The most important deficiency in our system is that the Tribunal's decision is a single, non-appealable verdict. If one or more parties are left with a sense of grievance or injustice, the aggrieved party has no remedy apart from a reference back to the same Tribunal within three months. With a view to providing a better remedy, and at the same time improving the prospects of better compliance with the final decision, this writer has been proposing (for several years, though without attracting any attention) that in partial modification of the bar of jurisdiction of the courts, the ISWD Act should be amended to provide for an appeal to the Supreme Court against an ISWD Tribunal's Order.

This suggestion is likely to be objected to on the ground that every case will go to the Supreme Court, resulting in further delays. The answer is that every case does go to the Supreme Court even now, on some issue or the other, and the Supreme Court rarely ever says: "We do not have jurisdiction; go back to the Tribunal", nor does it carefully refrain from entering into water-sharing issues. In other words, the bar

10 See Nariman's chapter 'Inter-State Water Disputes; A Nightmare' (Chapter 3) in Water and the Laws in India, ed. Ramaswamy R. Iyer, Sage, 2009, and the discussion by the editor on pp 576 et seq.

on the jurisdiction of the courts has been ignored by the Supreme Court itself.

It is clear that the parties do wish to go the highest Court in the land, and it seems better to accommodate that wish by providing for an appeal to that forum. This will at least remove the ground for a sense of grievance.

(e) Finally, there is the point, often made, that there is no nationally approved statement of water-sharing principles to guide the tribunals. The Ministry of Water Resources did attempt a draft statement of water-sharing principles at one stage and the draft went up to the National Water Resources Council more than once, but the wide divergence of views among the States made it a non-starter; it remains in limbo. There seems to be little likelihood of an agreed statement emerging in the foreseeable future. Meanwhile disputes have to be dealt with, and successive Tribunals have referred to the Helsinki Rules, case-law in India and elsewhere, reports of earlier Tribunals, and so on. By and large, the principle adopted by the Tribunals is that of equitable apportionment. Even if a national statement on water-sharing had been agreed upon, it could hardly have laid down any principle other than that of equitable apportionment or sharing, and it would necessarily have been a very general statement needing to be elaborated in detail in each case. However, this is not an argument *against* such a declaration of principles, if that is found feasible.

(v) Basin-level Overview/ Coordination

There is a need for a holistic ecological/ hydrological overview and harmonization at the river-basin or sub-basin level, but at present there are no institutional arrangements for this. The Central Government has not made much use of Entry 56 in the Union List, and the River Boards

Act 1956 enacted under that Entry has been a dead letter, largely because of negative perceptions by the States. This is a political and not a legal or constitutional problem. The possibility of making greater use of Entry 56 and of re-activating the River Boards Act needs to be explored. However, the RBA as it stands is an inadequate instrument for the kind of holistic overview that is needed. It is interesting that recently, when the need was felt for that kind of institutional arrangement in relation to the Ganga, action was taken under the Environment Protection Act. That is not a wholly satisfactory solution. Ways and means must be found for the proper use of Entry 56, and of revamping the RBA.

(vi) Should Water be moved to the Concurrent List?

A linked question is whether water should be put into the Concurrent List by a constitutional amendment. The short answer, on logical grounds, is 'Yes, certainly', but politically, this is a very difficult thing to do. Please see Annexe I for a fuller discussion.

(vii) Water-Use: Allocations, Regulation, Principles, Priorities, Dispute-Settlement

At present, only inter-State river water disputes are explicitly dealt with by law, and there too, only adjudication is provided for. We need principles and institutional arrangements for dealing with allocations, priorities, dispute settlement, and so on, covering all uses of water, and inter-use, inter-area and inter-sector conflicts. This has already been referred to in earlier sections. On the legal side, what is called for is a new law or a set of inter-related laws in each State, enshrining the principles and providing the basis for the institutional structure. In this context, three things need to be kept in mind: broad conformity to the national policies and laws, while reflecting and responding to local

specificities; inter-State coordination/integration at the basin level; and accommodating and supporting local self-governance in accordance with the 73rd and 74th constitutional amendments and the devolution as envisaged in Schedules 11 and 12. As already indicated, the Maharashtra Water Resources Regulatory Authority Act is not a good model[11]. The nested, federated cooperative structure in the dairy sector, with suitable changes to incorporate the basin idea, might be a better model.

(viii) Regulating Groundwater Use

The existing difference in law as between surface water and groundwater is a relic of history which must be discarded. The recognition of private property in groundwater based on land-ownership, deriving from British common law, must be abandoned[12]. If the public trust doctrine is sound in relation to surface waters, it is equally sound in relation to groundwater, and must be so extended. In other words, groundwater, like surface water, must be regarded as a community resource held in public trust by the state. (This will call for new national legislation.)

It does not follow that groundwater must be managed by the state. We must move towards the community management of CPRs, subject to the role of the state in laying down principles, providing institutional mechanisms for the resolution of disputes, etc. As mentioned earlier, aquifers will have to be delineated, and aquifer-users' associations built up. They will have to be given legal backing, as in the case of Water Users' Associations under the PIM Programme. This will have to be State-level legislation, with arrangements for inter-State coordination where

11 See relevant paragraph in Annexe III.

12 If the linking of ownership of groundwater to the ownership of land derives from common law, then the de-linking may not require amendments to existing laws such as the Indian Easements Act 1822 or The Transfer of Property Act 1822. A new law stating that groundwater is CPR and asserting the public trust principle may be needed.

the aquifer cuts across State boundaries. Regulation of use will then be through a combination of legal restrictions and social sanctions.

(ix) Restoring Tanks and other Traditional Systems

The continuing importance of tanks and other traditional water-management systems in the rural economy and way of life and the imperative of restoring them to their old position to the extent possible is an issue of policy with economic, social, political and cultural dimensions. This will call for action primarily at the local level on the part of PRIs and civil society institutions, with strong support at the State level. It is not clear that this requires any major legal reform. However, a review of the laws relating to local and small-scale water management in each State may be called for. (For instance, there is the Tamil Nadu Protection of Tanks and Eviction of Encroachments Act 2007. There may be need for some legislation of this kind in each State, but what is needed will vary from State to State.) The Central Government has of course a responsibility for the preservation of the water resources of the country, but here again, the role it will need to play will depend on local circumstances.

(x) Big Water Resource Projects

A Statutory Clearance for Dams? The suggestion already made, that large 'water resource development' (WRD) projects should be the last choice and not the first, is a policy change; this may not require a new law, though the desirability of a statutory clearance for large dams or barrages or other structural interventions in a river (apart from clearances under the Environment Protection Act 1986 or EPA and the Forest Conservation Act 1980 or FCA) needs to be considered. This will seem to run counter to the prevailing climate of opinion in favour of 'liberalisation' and to display an 'old mindset'. Shades of licence raj,

permit raj! (If we do wish to revive dying rivers and protect rivers in good health from declining, as is often stated, then we cannot keep diverting waters from them and destroying the river regime downstream: a dam virtually kills a river. Please see footnote 3 above.) It may be pointed out that in the USA a licence is needed for a dam. This idea is merely flagged for attention and will not be pursued further here. However, it is very important that the two statutory clearances that do exist (under the EPA and the FCA) are made really effective, and a new clearance instituted for the displacement of people.

Improving the clearances under the EPA and FCA: The instrument used for clearances under the EPA is an Environmental Impact Assessment (EIA). The entire system in this country in this regard is notoriously unsatisfactory. Many changes are needed, including (a) a statutory backing for the regime; (b) sector-wide impact assessments prior to the planning of individual projects; (c) choice of the (environmental, social) least-cost option; (d) regional/basin carrying-capacity assessments; (e) coordination of environmental, forest and wildlife-related clearances; (f) serious action on violations; and (g) stringent post-clearance monitoring. One hopes that some or all of these changes will take place following the two new initiatives recently proposed by the Minister for Environment and Forests, namely, a National Environment Protection Authority and a Green Tribunal.

However, even more important than all this is the need to make EIAs truly professional, objective and independent. On the analogy of the medical and accountancy professions, EIA should also become a profession with its own statutory charter, professional council and disbarment procedures. It should be truly independent of the proposers and approvers of projects. The nomination of the EIA consultant for a project and the payment to that consultant should be divorced from the project authorities; the Appraisal Committee should reflect relevant expertise and experience, represent a diversity of concerns and interests,

and be constituted by an independent authority, say the proposed NEPA; and so on. All this applies equally to clearances under the FCA.

Making clearances under the EPA and FCA more rigorous and stringent would be criticised by many as 'negative', anti-development', 'impediments in the way of projects' and so on. The short answer to that is that major interventions in nature with serious impacts and consequences *ought not* to have an easy passage to approval; that a degree of 'delay' and 'difficulty' is necessary and salutary; and that a clearance procedure that stands reduced to a formality and fails to stall or reject a bad project is a mockery of the EPA.

Displacement and Rehabilitation: Apart from environmental impacts, the other major problem with big water projects is that they displace people. A debate on this subject has been going on for several decades, and there have been many writings calling for a national rehabilitation policy and setting forth the principles that should be enshrined in such a document[13]. We are past that stage now. We no longer have to call for a Policy or an Act. There is now a Policy in force: in October 2007 the Government of India notified the National Resettlement and Rehabilitation Policy 2007. They followed it up with the introduction into the Lok Sabha of two Bills: the Rehabilitation and Resettlement Bill 2007, and related to that, the Land Acquisition (Amendment) Bill 2007. These have lapsed and have to be reintroduced in the new Lok Sabha. There have been several critiques of these pointing out serious deficiencies. The Bills need substantial revisions[14].

(xi) Coping with Floods

(xii) Pollution Control

13 See this writer's article 'Towards a Just Displacement and Rehabilitation Policy', *Economic and Political Weekly*, 28 July 2007.

14 See this writer's article 'A Slow but Sure Step Forward' in *The Hindu*, 7 August 2009, reproduced in Annexe II.

In respect of these two matters, policy changes, governance reforms and more effective enforcement may be called for (as indicated in earlier sections), but no major legal reforms seem to be indicated.

(xiii) Restraint, Economy, Conservation

Restraining the growth of demand for water and preventing it from getting out of hand, promoting economy in water-use, avoiding waste in all uses, getting the maximum benefit out of each unit of water, ensuring the careful conservation of the resource: all these are matters for advocacy, education, promotion of awareness, and a transformation of thinking and attitudes, and not necessarily for legal reforms. (To an extent, systems of entitlements, allocations and priorities, institutional mechanisms such as River Basin Organizations and regulatory authorities, and of course pricing, can play a role in bringing about the needed transformation. Perhaps the prescription of a Fundamental Duty in this regard in the Constitution, as proposed later in this paper, will be of some help.)

(xiv) Empowering Women in Relation to Water

Here again, what is called for is a transformation of thinking and attitudes. It is not clear that legislation is needed or will be useful.

B. A National Water Act

Going beyond specific changes, this paper proposes a National Water Act. The suggestion is generally received with scepticism or even strong disagreement. The objections arise from a reluctance to add more laws to the statute book; the feeling that this is a typical bureaucratic suggestion; the cynical suspicion that this will be one more law that will not be obeyed; and the apprehension that a National Water Act would be a centralising move. Short answers to those objections are the following. (1) We cannot go by a general reluctance to add more laws; we have to

consider in each case whether the proposed new law is necessary and desirable. (2) The origin of the suggestion is not the bureaucratic past of the writer, but a study of international experience. (3) Failures of enforcement do need to be dealt with, but the answer to the problem of enforcement of laws is not an absence of laws. (4) The fear of centralisation arises from a misunderstanding of the nature of the proposed national water law. However, this needs to be gone into more elaborately.

At the outset, the fear of centralisation needs to be laid to rest. The intention is not to shift water management to the Centre. Water will continue to be managed at the level of the State Governments, subject to the devolution of local water management to panchayats and nagar-palikas under Schedules 11 and 12, and subject further to the increasing participation of civil society institutions in water management at every level. The proposed national water law will not be a managerial or command-and-control law but a *framework* law. It will provide a framework within which decisions and actions will be taken by various levels of governance in exercise of their own powers.

The question may still be asked: why do we need a national framework law? Many countries in the world have national water laws or codes, and some of them (for instance, the South African National Water Act of 1998) are widely regarded as very enlightened. There is also the well-known European Water Framework Directive of 2000. The considerations behind those national or supra-national documents are relevant to India as well. However, let us leave that argument aside[15] and confine ourselves to the national context. Consider the following points.

- We already have a number of national laws on important subjects such as the environment, forests, wildlife, biological diversity, etc. Water is as basic as (if not more basic than) these subjects. Is it so

[15] See Annexe III for a fuller discussion.

very strange to propose a National Water Act? (We are concerned here only with the nature of the subject, and not with the Centre's legislative power; we shall return to the latter point.)

- Several States are enacting laws on water and related issues. These can be quite divergent in their perceptions of water. For instance, one State may see water as CPR to be held by the state in public trust; another State may regard water as a commodity to be left to market forces; a third State may consider water to be the property of the state. Is such divergence desirable or manageable?
- Under a number of Projects and Programmes different States are obtaining World Bank or ADB funds for `reforms' in the `water sector'. As a part of this they are required to formulate State Water Policies, and we have the Orissa Water Policy, the Tamil Nadu Water Policy, and so on. Here again, significant divergences are possible. Conformity to the National Water Policy is not a binding requirement.
- Different State Governments tend to adopt different positions on riparian rights in the context of inter-State river-water disputes. The upper riparians tend to favour the Harmon doctrine, whereas the lower riparians tend to assert prescriptive rights, prior appropriation, etc. If each State were to enact a law reflecting its own position, there would be utter confusion, and inter-State river-water disputes would become even more intractable than they are now. Some kind of a national position on the principles that should govern such cases seems desirable, though a consensus might be very difficult to achieve. Tribunals have generally been adopting the principle of equitable sharing for beneficial uses, but there might be some advantage in embodying some such statement in a law. Such a law can only be a Central law.

- It was a recognition of the need for a minimal national consensus on certain basic perceptions, concepts and principles that led to the adoption of the National Water Policy of 1987 and the new NWP of 2002. What is being suggested is merely that the NWP be revised substantially (or redrafted) and given a statutory status.
- The tabular statement in section IV above proposes a number of policy changes. If they (or some of them) are accepted, several of them will call for legislation. The issues are not State-specific. A series of State-level laws will not serve the purpose. National legislation will be necessary.

What the proposed National Water Act will do is to state or lay down or embody (as the case may be) the following, among other things:

- a perception of the complexity and multi-dimensionality of water;
- a consensus position on the harmonisation of the different roles of water (life-support, economic good, etc) and the primacy of water as life-support;
- the relationship between the fundamental right to water and the economic water rights to various uses;
- the nationally accepted understanding (if there is one) of the respective roles of the state, civil society or community, and the market, in relation to water;
- the public trust doctrine (if that be the national consensus);
- the bringing of rivers, lakes, ponds, groundwater, and other forms of water on to one common legal basis;
- principles to govern water-allocations to and water-sharing between different uses, areas, sectors, States;
- principles to govern the pricing of water in various uses; and so on.

These matters have been discussed or referred to in earlier sections. It will be seen that none of this will entail the issue of permits or licences or clearances by the Central government. What is intended is a kind of umbrella legislation under which laws will be enacted, policies framed, rules and orders issued, and executive decisions and actions taken, at different levels. Those laws, policies, actions, etc, will have to conform to the provisions of the umbrella legislation, and the National Water Act will of course be justiciable.

The case for an umbrella or framework law on water at the national level seems self-evident. However, given the structure of entries relating to water in the Constitution, can such a law be enacted by Parliament? There are two ways in which this can be done. One is to shift water to the Concurrent List first. This is discussed in Annexe I. The other way is to follow the route through which other Central legislation on subjects that are within the State domain has been enacted. An example is the Water (Prevention and Control of Pollution) Act 1974. If the necessity for a national water law is acknowledged, then ways and means of enacting it can be found with the assistance of experts.

C. Constitutional Declarations on Water

Assuming that the case for a National Water Act is accepted, why is it necessary to incorporate declarations about water in the Constitution?

When the Constitution was being drafted, there was no serious worry about an impending water scarcity; ecological concerns lay in the distant future; water essentially meant rivers; canal irrigation loomed large; it was looked at through the eyes of engineers; and the principal concern was about inter-State river-water disputes. That limited perspective is reflected in the entries relating to water in the Constitution (Entry 17 in the State List, Entry 56 in the Union List, and Article 262). Perceptions of water as essential life-support or a basic right; as multi-

dimensional, having social, cultural and other aspects; and as an integral part of the ecological system; were perhaps not widespread at the time. The situation is vastly different today. Water is now considered extremely important, and its multi-dimensionality has become part of conventional wisdom. The perception of the importance of water, growing steadily over the last two decades, has now acquired an additional urgency because of the phenomenon of climate change which can no longer be ignored. It is a crucial resource; it is going to be under increasing pressure; conflicts over water are likely to increase; and the economical use, protection and conservation of water are matters of the greatest national and global importance. It seems self-evident that there should be a declaratory statement regarding water in the Constitution.

It must be noted that the Constitution does refer to forests, wildlife and the environment. If it does not contain a similar statement regarding water, it can be only because the fundamental importance of water was not adequately realised earlier. Attention is invited to the significant statements about water in the preamble to the EU Water Framework Directive of 2000, the South African Constitution of 1996 and National Water Act of 1998 and the Venezuelan Constitution, cited in Annexe III. There is no comparable statement in the Indian Constitution. Given the fundamental importance of water, and the urgency of economising on its use and conserving the resource, it seems clear beyond question that in both the Directive Principles and the Fundamental Duties sections of the Constitution, there should be carefully drafted statements about water.

The statement or declaration in the Directive Principles section will be about the complex and multi-dimensional nature of water; its crucial importance to life and livelihoods; its role in the ecological system and on Planet Earth; its finiteness in nature and the growing pressure on it; its roles in society, culture, history and religion; and the responsibility of the state in protecting and preserving it and ensuring harmony in its use

(harmony between groups, areas, uses, countries, species and generations, and between humanity and Nature).

The statement in the Fundamental Duties section will cast a responsibility on the citizens for economical use, avoidance of waste, resource-conservation, protection from pollution and contamination, and a spirit of harmonious sharing rather than conflict and contestation.

These cannot of course be detailed discourses; they will have to be brief, compressed entries, which could then be elaborated elsewhere.

D. How Should We Proceed?

If a transformation of water law on the lines recommended above is accepted in principle, how should we proceed? The following is a tabulated summary of the changes recommended in this section, and an indication of the steps and processes that would be needed:

Recommendation	**Steps/Processes**	**Remarks**
1. Putting water into the Concurrent List	Constitutional amendment	Logically right, but politically difficult.
2. Statements about water in the Directive Principles of State Policy and in the Fundamental Duties parts of the Constitution	Draft the Statements, get a national consensus, make amendments to the Constitution	Putting water in the Concurrent List is not a necessary pre-condition for this.
3. A National Water Act setting forth certain basic	Get general agreement on the idea of a	This might be easier if water were in the

propositions regarding water and providing a framework for legislation, policy-making and executive action at various levels.	National Water Act; decide on what should go into it; draft the Bill; get resolutions by State Legislatures, if necessary; get the Bill enacted by Parliament.	Concurrent List, but that is not a necessary precondition. The procedure appropriate for Central legislation on a subject that is in the State List will have to be followed.
4. Explicit declaration of the right to water (including the right of access to water sources), and privileging it over economic use rights.	Constitutional amendment; alternatively, include in the National Water Act	
5. Empowering civil society to play its role in water management, and moderating the sovereign power of the state for this purpose.	Include in the National Water Act	State Acts asserting ownership of water resources or sovereign power (eminent domain) over water may have to be over-

		ridden. Consult Law Ministry.
6. Water (in all its forms) to be regarded as a common pool resource; the state to hold water and other natural resources in public trust for the community.	See 5 above.	See 5 above. See also 12 below.
7. Further amendments to the Inter-State Water Disputes Act (a) to lay down time-limits for the tribunal's supplementary or clarificatory report, and for the notification of the tribunal's orders by the Government of India, (b) empowering the tribunals to change their style	Self-evident	

of functioning, and (c) partially modifying the bar on the jurisdiction of the Courts and providing for an appeal to the Supreme Court against the tribunal's Award.		
8. A declaration of water-sharing principles.	Include in the National Water Act	
9. The Centre to make better use of Entry 56 in the Union List, and re-activate the River Boards Act 1956.	Self-evident	Political action
10. A legal basis for institutional arrangements for holistic coordination at the river-basin level.	Draft legislation. Work out design of nested set of institutions federating upwards from the micro-	Political: persuade State Governments to go along.

	watershed to the river basin. Action under Entry 56 of the Union List for each major inter-State river, or alternatively, under the River Boards Act 1956.	
11. State-level legislation for principles and institutional arrangements for entitlements, priorities, regulation, dispute-resolution, etc.	Self-evident. Centre can provide a standard draft.	
12. Moving away from land-linked private property in groundwater towards (a) treating groundwater as a community resource held in	(a) Include in the National Water Act. (b) Delineate aquifers. Promote aquifer associations.	For (a), the need for amending the Indian Easement Act and the Transfer of Property Act may have to be considered.

trust by the state and (b) a system of community management of aquifers.		For (b), action by each State Government; legislation on the analogy of the PIM Acts; overall advice and coordination by the CGWA.
13. Legal support for the restoration and re-activation of tanks and other traditional water management systems.	Action by the State Governments concerned.	Overall advice and coordination by the Ministries of Water Resources and Rural Development?
14. Considering a statutory clearance for dams.	Ministries of WR and E&F to consider in consultation with the Law Ministry.	
15. Making EIAs more objective, rigorous and professional; providing them with a statutory	Action by MoEF. Under EPA? Or Include in the proposed legislation for a National	

basis; making them independent of project planners, approvers and managers; making Environmental and Forest Appraisal Committees truly independent and professional.	Environment Protection Authority? Or a separate legislation for EIAs?	
16. Enacting the Rehabilitation and Land Acquisition Amendment Bills after rectifying deficiencies, and bringing them into force.	Self-evident. Action by M/RD.	

Annexe I. A Note on the question of shifting water to the Concurrent List

Note: This note draws upon a paper submitted by this writer to the second Commission on Centre-state Relations.

Broadly speaking, having regard to Entry 17 in the State List and Entry 56 in the Union List, it could be said that water is primarily a State subject in the Indian Constitution, but that the Constitution gives a potential role to the Central Government in relation to inter-State rivers to the extent that Parliament legislates for the purpose. The question is whether this is a sound division. The Sarkaria Commission thought so. The National Commission on Integrated Water Resource Development Plan, in its Report (1999) expressed some doubts but did not recommend any change. The Report of the National Commission to Review the Working of the Constitution (NCRWC) is silent on this issue. Now the question is before the second Commission on Centre-State Relations.

There is a view that the structure of entries relating to water in the Constitution is not appropriate; that it limits the role that the Centre can play; and that water should be shifted to the Concurrent List. The Union Ministry of Water Resources has held this view for a long time. The present writer has in the past argued against that view on two grounds: (a) that it would be politically very difficult if not impossible to enact a constitutional amendment to put water in the Concurrent List at this stage, though it might have made sense to do so at the time of the drafting of the Constitution; and (b) that it is not really necessary to do so because that would only enable the Centre to legislate on water, which the Centre can do even now under Entry 56 in the Union List relating to inter-State rivers. He still holds those views, but it must be noted that the argument is practical rather than legal. If one asks what the right course would be, i.e., what the right structure of entries would be if we were writing the Constitution now, the obvious answer is that water should be in the Concurrent List. There are two main reasons for saying so.

First, if we are thinking primarily of river waters and of irrigation, as the Constitution-makers seem to have been doing, it might appear appropriate to assign the primary role to the States, and provide a specific role for the Centre in relation to inter-State rivers. However, even from that limited perspective, most of our important rivers are in fact inter-State, and inter-State (or inter-provincial) river water disputes were an old and vexed problem even at the time of the drafting the Constitution: a primary rather than a secondary or exceptional role for the Centre might well have been warranted. Further, even in single-State rivers, interventions might have consequences beyond the boundaries of the State in question.

Secondly, Entry 56 in the Union List is only about inter-State rivers and does not enable the Centre to legislate on water *per se*. Water is larger than rivers; ponds and lakes, springs, groundwater aquifers, glaciers, soil and atmospheric moisture, and so on, are all forms of water and constitute a hydrological unity; and there is more to water than irrigation. If the environmental, ecological, social/human, and rights concerns relating to water had been as sharply present to the makers of the Constitution as they are to us, it seems very probable that the entries in the Constitution would have been different. Besides, many laws and rules not directly about water have a bearing on water.

The theoretical case for water being in the Concurrent List is very strong indeed. Of all the subjects that are or ought to be in the Concurrent List, water ranks higher than any other. The practical and political difficulties of shifting it there remain, but these would need to be overcome.

However, if a constitutional amendment to put water into the Concurrent List seems politically impossible, then we have to settle for the second best course of greater use by the Centre of the legislative powers relating to inter-State rivers provided for in Entry 56 in the Union

List, and of re-activating the dormant River Boards Act 1956. Even this 'second best' course, however, would still entail considerable political effort.

Annexe II. Copy of Article published in The Hindu, 7 August 2009, under the title 'A Slow but Sure Step Forward'

THE REHABILITATION AND LAND ACQUISITION AMENDMENT BILLS

Ramaswamy R. Iyer

The debate about the displacement of people caused by various developmental projects has been going on for over two decades. Without going into that history in detail, we may note that the Government of India finally notified the National Rehabilitation and Resettlement Policy 2007 in October 2007, and followed that up with the Rehabilitation and Resettlement Bill 2007 and the Land Acquisition (Amendment) Bill 2007. Those Bills have lapsed and have now to be introduced afresh in the new Lok Sabha. There have been reports that the Railway Minister Mamata Banerjee is unhappy with the Bills. There have also been protests against the Bills by many NGOs.

Superficially, the Bills seem to include a number of good elements. There was a demand for a Rehabilitation Act and here is a Bill; the much-criticised Land Acquisition Act is being amended; 'public purpose' is being re-defined; governmental acquisition of land for private parties is being reduced; 'minimum displacement', 'non-displacing alternatives', consultations with the people likely to be affected, and so on, find a place in the Rehabilitation Bill; a Social Impact Assessment is provided for; an Ombudsman is being provided for the redress of grievances; and a National Rehabilitation Commission is envisaged. Why then are the Bills not being welcomed?

Let us consider the Land Acquisition Amendment Bill first. At first sight, the deletion of all references to companies gives us the impression that acquisition by the state for private parties is being eliminated, but that is not the case. The original Act had the wording "for a public

purpose or for a company"; the words "or for a company" are now being omitted; but the definition of "public purpose' itself is being changed to include a (supplementary) acquisition for "a person" (including a company). If the private party purchases 70% of the required land through negotiation, the balance 30% can still be acquired by the Government for that party. This means that sovereign compulsion will be brought to bear on those who are not inclined to sell their land, and also that state patronage for industrial houses can continue. Incidentally, it will be seen that the definition of 'public purpose', instead of being made stringent and narrow as many had recommended, is being widened.

Moreover, it was necessary not merely to rule out (or limit) the acquisition of land for private parties under the Land Acquisition Act, but also to ensure that rural communities are not taken advantage of by corporate bodies in unequal negotiations. There is no such provision in the Bill.

Judging by its name, The Land Acquisition Compensation Disputes Settlement Authority will apparently deal only with compensation issues. A longstanding criticism of the Land Acquisition Act has been that the 'public purpose' for which land is being acquired is not open to contestation. There seems to be no change in that position.

One wonders whether the bar on the jurisdiction of the civil courts and the establishment of a Dispute Settlement Authority instead is in fact a good thing to do. There is room for misgivings here.

Turning now to the Rehabilitation Bill, the provision for a Social Impact Assessment seems very good, but the impacts are rather narrowly confined to physical assets (buildings, temples), institutions, facilities, etc. Social impacts must be more broadly understood to include the loss of identity; the disappearance of a whole way of life; the dispersal of close-knit communities; the loss of a centuries-old relationship with nature; the loss of roots; and so on. It is good that the SIA will be *reviewed* by an independent multi-disciplinary expert body, but it should

first be *prepared* by a similar body. The provision for a Social Impact Assessment *clearance* is good, but not enough: it should be part of an overall *clearance for displacement*. If the felling of trees and interference with wildlife and nature in general require statutory clearances, should not the displacement of people be subject to a similar requirement? Such a clearance must come from an independent statutory authority and not from the bureaucracy. The clearance must of course be subject to certain conditions and must be revocable in the event of non-compliance or lapses; and the revocation clause should be actually used.

The terms 'minimum displacement' and 'non-displacing alternative' are music to the ears, but the application of this criterion is left to a late stage when the consideration of options may no longer be possible, and the decision is left to the Administrator for R&R. In other words, this crucial decision is entrusted to the bureaucracy.

An impressive structure of institutions has been specified, but their responsibilities and powers have not been spelt out. Administrator, Commissioner, project-level and district-level R&R Committees, Ombudsman, Monitoring and Oversight Committees, National R&R Commission: what each will do, how they will be inter-related, what decision-making powers each will have and in relation to what aspects, and so on, are far from clear. Everything is covered by the phrase "as may be prescribed".

Words such as "wherever possible", or other similar phrases are scattered throughout the Bill. For instance, group settlement is laid down, but qualified by the phrase "wherever possible"; training is to be provided "wherever necessary"; there are also qualifications such as "if government land is available", "preferably", and so on. They seem innocuous, but all of them involve *decisions*. Such hedged-in requirements can hardly be mandatory: they are likely to become discretionary, with the discretion vesting in the bureaucracy.

The Ombudsman provision is a good one, but 'grievance' has been narrowly defined to cover only the case of "not being offered the benefits admissible". Grievances could relate to many other things: non-participatory project decision, failures of consultation, non-compliance with the minimum displacement condition, non-inclusion of a person in the 'affected' category, and so on. How the Ombudsman will be appointed, how the Ombudsman will function, etc, are left to be 'prescribed'.

Taking the preceding points together, it appears that the precise manner in which this seemingly benign and enlightened legislation will actually work in practice will be entirely determined by the delegated / subordinate legislation, i.e., the rules that are made under it.

The National Monitoring Committee seems totally bureaucratic, except for the non-mandatory association of some experts (the operative word is "may"). No civil society or NGO participation seems envisaged.

In the case of the Sardar Sarovar Project the basic principle in force (though it may not always be complied with) is: rehabilitation must precede submergence. The present Bill retreats from that position and requires only "adequate progress in rehabilitation" prior to displacement. This is a retrograde step. Besides, who will decide the adequacy of the progress?

The elements of the rehabilitation 'package' seem inferior to the policies already adopted in projects such as Sardar Sarovar and Tehri. Moreover, cash in lieu of land is envisaged in several places. This is fraught with danger. Eventually, cash may well become the main form of compensation.

In the event of deliberate or inadvertent lapses or non-compliance or deviations, what consequences will follow? The Bill is silent on this. Without such sanctions, how can the provisions be enforced? Far from sanctions for non-compliance, there is a sweeping indemnity provision!

In addition to those primary points, there are many others, some of them quite important, that need consideration. They cannot be set forth in detail here for want of space.

The conclusion that emerges from this quick examination of the two Bills is that there are many weaknesses and questionable features in these Bills which need to be rectified. Opposition to the Bills is therefore warranted. However, the very fact that the Government is thinking of a rehabilitation law and of amending the Land Acquisition Act is an achievement for public opinion. It has taken more than two decades for the debate to reach this stage. Opposition to the Bills should be carefully modulated so that we can proceed further from here and not lose what has been gained.

Annexe III. South African, Venezuelan and European Union Examples, and a Comment on MWRRA

South African Water Law

In drafting its new constitution the post-apartheid regime in South Africa wanted to remove the inequities and injustices of the past. In relation to water this meant the removal of the private ownership of water as well as of inequities in access to it. This led to two features in South African law, namely, the recognition of the right to water, and the adoption of the public trust doctrine (i.e., the doctrine that the state is the custodian of water and other natural resources for the community and holds them in public trust). The first is enshrined in the South African Constitution of 1996 (articles 24 and 27), and the second in the South African National Water Act of 1998[16].

As the adoption of the public trust doctrine meant the discontinuance of the old rights (private, riparian, etc), new water use rights had to be introduced and these had to ensure equity. This was sought to be done through a system of entitlements. All users were required to reapply for their water use entitlements, and a fairer allocation of water between competing users and sectors was sought to be ensured through a process. However, as the poor and the disadvantaged were not able to participate in the process and apply for entitlements, a system of General Authorisations was adopted as a way of addressing these concerns by setting water aside for specific categories of users.

16 Article 24 of the South African Constitution of 1996 says that "everyone has the right..... to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that .....secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development". Article 27 lays down that "everyone has the right to have access to....sufficient food and water". Section 3 of the South African National Water Act of 1998 declares the National Government to be "the public trustee of the nation's water resources".

It is rather curious that despite the adoption of the public trust doctrine and the declaration of a right to water, South Africa was influenced by prevalent economic thinking into undertaking the privatization of water services, accompanied by water-pricing on the 'full cost recovery' principle. As the very poor could not pay the new rates, many of them were disconnected from the service for non-payment, and the consequent recourse to unsafe water sources led to an outbreak of cholera. It was in response to this that President Thabo Mbeki announced a Free Basic Water Policy in 2001. Under this policy, on the basis of 25 litres per capita per day and 8 persons per family, the provision of 6000 litres per month to a household free of charge was envisaged.

Venezuela

Article 127 of the Venezuelan constitution runs as follows:

"Article 127: It is the right and duty of each generation to protect and maintain the environment for its own benefit and that of the world of the future..... It is a fundamental duty of the State, with the active participation of society, to ensure that the populace develops in a pollution-free environment in which air, water, soil, coasts, climate, the ozone layer and living species receive special protection, in accordance with law."

European Water Framework Directive 2000

This is a comprehensive document addressed to member States of the EU containing detailed provisions on a wide range of matters such as quantitative and qualitative status, ecological status, economic analysis, transboundary issues, and so on, with the ultimate objective of achieving "good water status" (for all forms of water) within 15 years. For our present purpose, we need to take note of two points.

The first is the important statement in the preamble to the Directive that "water is not a commercial product like any other but, rather, a heritage which must be protected, defended and treated as such." This runs counter to the prevailing economic orthodoxy, and may even be regarded as modifying the fourth of the Dublin principles ('Water has an economic value in all its competing uses and should be recognized as an economic good').

The second is that the Directive envisages the river basin as central to all the actions that it requires member States to take[17]. As the

17 Article 3
Coordination of administrative arrangements within river basin districts
1. Member States shall identify the individual river basins lying within their national territory and, for the purposes of this Directive, shall assign them to individual river basin districts. Small river basins may be combined with larger river basins or joined with neighbouring small basins to form individual river basin districts where appropriate. Where groundwaters do not fully follow a particular river basin, they shall be identified and assigned to the nearest or most appropriate river basin district. Coastal waters shall be identified and assigned to the nearest or most appropriate river basin district or districts.
2. Member States shall ensure the appropriate administrative arrangements, including the identification of the appropriate competent authority, for the application of the rules of this Directive within each river basin district lying within their territory.
3. Member States shall ensure that a river basin covering the territory of more than one Member State is assigned to an international river basin district. At the request of the Member States involved, the Commission shall act to facilitate the assigning to such international river basin districts.
Each Member State shall ensure the appropriate administrative arrangements, including the identification of the appropriate competent authority, for the application of the rules of this Directive within the portion of any international river basin district lying within its territory.
4. Member States shall ensure that the requirements of this Directive for the achievement of the environmental objectives

laws and institutional arrangements in several member States are based on administrative and not hydrological divisions, adjustments will need to be made over a period to conform to the basin as the unit for planning and management.

Relevance to India

From these examples a few points arise for consideration.

The first is that on the analogy of (but not necessarily reproducing) the statements in the European Water Framework Directive and the South African Constitution, it would be useful to make a formal and

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established under Article 4, and in particular all programmes of measures are coordinated for the whole of the river basin district. For international river basin districts the Member States concerned shall together ensure this coordination and may, for this purpose, use existing structures stemming from international agreements. At the request of the Member States involved, the Commission shall act to facilitate the establishment of the programmes of measures.

5. Where a river basin district extends beyond the territory of the Community, the Member State or Member States concerned shall endeavour to establish appropriate coordination with the relevant non-Member States, with the aim of achieving the objectives of this Directive throughout the river basin district. Member States shall ensure the application of the rules of this Directive within their territory.

6. Member States may identify an existing national or international body as competent authority for the purposes of this Directive.

7. Member States shall identify the competent authority by the date mentioned in Article 24.

8. Member States shall provide the Commission with a list of their competent authorities and of the competent authorities of all the international bodies in which they participate at the latest six months after the date mentioned in Article 24. For each competent authority the information set out in Annex I shall be provided.

9. Member States shall inform the Commission of any changes to the information provided according to paragraph 8 within three months of the change coming into effect.

clear statement regarding the nature and importance of water in the Constitution of India. Such a statement would provide a basis for all future water policy and planning.

Secondly, the explicit declaration of the right to water in the South African Constitution seems worthy of emulation. The Free Basic Water Policy of South Africa also seems a good example to follow.

Thirdly, the South African system of entitlements or authorisations is interesting as a means of ensuring both equity and sustainability, but it is not clear whether it would be possible to adopt it without running the risk of centralisation and bureaucratisation and increasing state control. It is necessary to explore modalities of regulation of water use that would depend less on command and control by the state and more on community regulation and social sanctions.

Fourthly, the stress on planning and management within a framework of river basins in the European Water Framework Directive is in consonance with similar statements in some of our own policy documents. Unfortunately, the idea has made little headway in India. It is necessary to persuade our politicians to accept the essential soundness of this approach.

The Maharashtra Water Resources Regulatory Authority (MWRRA)

Two important features mentioned above, namely, the idea of entitlements or authorisations and that of the river basin as the basis for management, are present in the MWRRA scheme. However, that is a superficial similarity. The MWRRA draws its inspiration not from the South African or European model but from the World Bank's ideas of 'water sector reform'. It is based on a view of water as a commodity, and behind its idea of entitlements (water rights) lies that of tradability. It is much concerned with water tariffs, and adopts the principle of 'full cost recovery'. More than anything else, what causes concern is that it reinforces state control. The appearance of an independent Authority

distanced from the state is misleading because the MWRRA is dominated by bureaucrats. The regulation that it envisages seems no different from old-style control, though it may be exercised by an Authority and not by a Government Department. Its system of entitlements may well become a newer version of the 'permit-licence raj', and it seems likely to proceed in the direction of centralisation and bureaucratisation rather than in that of 'people's participation' or a greater role for the community. It is also not clear how a State-level statutory Authority on water will function in harmony with the idea of democratic decentralisation and the devolution of water management to PRIs.
