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The Farmer-Managed Irrigation Systems Network

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General Articles

State and Customary Laws: Legal Pluralism and Water Rights

For the past decade it has become increasingly clear that renewed studies of water rights are an indispensable part of the efforts to enhance socio-economic development, social security and equity, as well as the sustainable management of natural resources in rural areas throughout the world. Many authors on the subject of irrigation development and other issues involving water use and water management have made that point (Chhatrapati Singh 1991; Ambler 1990; Vermillion 1986).

Still, studies on water rights, other than from the conventional legal science perspective, have remained very scarce. Conventional legal science approaches, operating from an essentially normative conception of law and society, cannot offer the appropriate tools when it comes to understanding water rights and their actual significance in social practice.

Sociology, on the other hand, as well as anthropology and the various agro-economic and political sciences, or whichever other disciplines connected with studying water resources management, seem to have long nurtured a blind spot for the legal and paralegal dimensions of their objects of study. Generally, matters involving law, legislation, or rights, were seen either as irrelevant or as exclusively belonging to the domain of legal science.

Quite contrary to what one would expect, social science conceptualizations of social institutions, social rules and human behavior, common goods and private rights, conflict and of conflict management, have long been dominated by the bias of normative (basically legal) definitions. These biases in social science conceptualizations are at the background of the impressive record of failure, or unintended consequences, shown by development programs and efforts at socio-legal engineering around the world.

Demystifying Both State Law and Customary Law

In the course of the last ten or fifteen years, it has become one of the main objectives of legal anthropology to demystify and to reconstruct the legal-thinking- and ethnocentric-dominated categories in which both social and legal scientists conceptualized their objects of study and tools of analysis. This calling for deconstruction and reconstruction of the analytical tools for socio-legal research did not come about accidentally.

From its very origin, for instance, legal anthropology has been strongly oriented toward problems of comparison. In the wake of colonial domination over nonwestern peoples, anthropology of law started out trying to identify indigenous social rules and institutions which could qualify as representing indigenous peoples' legal system. It may not be too surprising that the comparative basis of these efforts was predominantly grounded in western legal bias and doctrinal assumptions.

In addition to a weak comparative basis, most of the earlier studies suffered from a profound bias re-

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News on Changes at IIMI

For the past six years, the FMIS Newsletter has been published by the Local Management Program at IIMI with support from two projects funded by the Federal Ministry for Economic Cooperation of the Federal Republic of Germany and the International Fund for Agricultural Development. Since the fall of 1994 the last of these projects has ended. However, under a new project, Support Systems for Locally Managed Irrigation, funded by the Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ) GmbH, the Government of the Federal Republic of Germany, the Local Management Program at IIMI will be able to continue to produce the Newsletter at least once a year.

As this project has a specific focus on support systems for locally managed irrigation, including legal, institutional, technical, economic and social systems, the Newsletter will have a broader focus than it has had in the past. A particular interest is to examine the unique support system requirements needed to ensure that systems transferred from public to local management are technically, economically, institutionally and environmentally sustainable. In addition, as IIMI is expanding its program into Mexico and Latin America efforts will be made to increase the contributions to the Newsletter beyond its traditional Asia base. During 1995, the Newsletter will be published in both English and Spanish to improve access to the material to our non-English speaking audience as well as to broaden exposure to local management activities in the various regions of the world.

We would like to inform our readers that this is the last FMIS Newsletter to be edited by Dr. Ujjwal Pradhan and we wish to thank him for his capable efforts over the last two years. Dr. Pradhan left IIMI to take up a position at the Ford Foundation, New Delhi Office in India. He can be reached there at 55, Lodi Estate, New Delhi 110 003, India. (Tel: 91 11 4619441; Fax: 91 11 4627147 and Tlx: 3161008 FORD IN).

As of September 1995 Newsletter contributions from Asia and Africa can be sent to Dr. Douglas Vermillion at P.O. Box 2075, Colombo, Sri Lanka. Contributions from Latin America can be sent to Dr. Sam H. Johnson III at IIMI, C/o. CIMMYT, Lisboa 27, Colonia Juarez, Apdo. Postal 6-641, 06600 Mexico, D.F., Mexico.

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garding the interrelationships between society's legal lexicons or normative repertoires and peoples' behavior. These relationships were mainly seen in terms of one-dimensional causalities in which the 'living' norms could simply be decided from behavior and vice versa. It should be stressed, however, that it is not only legal anthropology that has suffered from these conceptual weaknesses but the mainstreams of anthropology and sociology, imprisoned as they were in structuralist modes of focusing on social structures and institutions while envisioning actual social practices and relationships mainly in terms of compliance or deviance. This is a rather myopic and lopsided way of looking at what is happening on the ground.

With an eye especially to contemporary trends which tend to refocus on indigenous, customary or traditional values, rules and practices regarding water management, there is another important characteristic of colonial and also, at least in some respects, post-colonial legal anthropology which should be mentioned. What I am referring to is the persistent phenomena of conceptualizing customary law and practices in isolation from the wider socio-legal environment, as well as the kind of conceptual rigidity which prevents the perception of, and accounting for the processes of change within the customary systems themselves.

Such misconceptions, on the one hand, have often resulted in mystification and romanticizing of the "ancient, ingrained rules and practices of indigenous communities, based on stable, equitable, conservation-minded local knowledge," while, on the other hand, customary laws and practices have often been vilified and accused of obstructing socioeconomic change. Thus adherence to tradition became backwardness; the (falsely) perceived equitability of common property regimes became the "tragedy of the commons;" lineage and extended family claims on property became

an obstacle to rational (i.e., individualized) exploitation of productive resources, and so on.

These, and many other misconceptions of customary law and practices can be traced, to a large extent, to colonial and even post-colonial policy which created a separation of socioeconomic and legal spheres between indigenous peoples and the others. But they can also be traced to the abovementioned flaws in conceptualizing customary legal systems and property regimes. They can be traced, moreover, to the biased ideas about how legal frameworks and social practices would relate.

Contemporary Legal Anthropology

From the 1970s onward, after having learned the hard lessons of scores of abortive efforts at socio-legal engineering, legal anthropology began to develop a quite different outlook on the issues of law and society. The comparative study of law in society, the conventional dichotomies of state law versus customary law, the issues of legal rules versus non-legal rules, and the old ethnocentric, legal-science-dominated frameworks of analysis became increasingly questioned. Let me just give you in a nutshell some of the most important characteristics of what (our) contemporary version of legal anthropology is about.

1. From descriptions of normative repertoires with an eye mainly to identifying their legal character, the main focus of our work has shifted to trying to understand the actual significance of such repertoires in social practice. In order to be able to do this we have moved away from the legal disciplines' boast that law should be conceptualized as representing the ultimate or ever the main source of order in society. To us law is only part of a multiplicity of institutional arrangements and normative repertoires in society. Among these we find law in the sense of state (or lawyers' law), as well as forms of law which are known as religious law and customary law. But we racognize that there is no scientifically sound reason to stop there, and leave out of our conceptual framework all those instances in which other law-like forms of normative repertoires are generated and maintained amongst people, which can be called unofficial law or self-regulation.

2. We assume that in most domains of social life more than just one of the above legal or law-like systems will be relevant. We call this legal pluralism. Legal pluralism means that in many life situations, farmers, water users, village-headmen, bureaucrats and officials can make use of more than only one normative repertoire to rationalize and legitimize their decisions or their behavior. Toward which specific repertoire and which specific case people will orient themselves, will mostly be a matter of expediency, of local knowledge, perceived context of interaction and power relations.

3. The paradigm of legal pluralism or legal complexity has important consequences for our conceptualization of the relationship between norms and behavior. Discrepancies between rules (belonging to whichever sphere of society's structural and institutional frameworks) and peoples' behavior no longer need to be seen in terms of such one-dimensional categories as deviance or noncompliance, but have to be explained in terms of peoples' options. The same counts for rule-conform behavior. In view of a complex, multilayered legal universe from which people can be imagined picking their choice, it becomes especially clear that specific practices and customary law, for instance, should not be analytically conflated. The same goes for the impact of state law. State law and state officials taking decisions should not be conflated either. They too live in a complex legal universe in which there may be many reasons and many ways to let decisions be motivated by other legal repertoires than the official law.

4. In short, our perspective of legal pluralism means that peoples' actions and peoples' rationalizations in terms of cognitive and normative repertoires should be carefully distinguished. Therefore, one of the key notions of our approach is the word "locality." It means that we start out from the assumption that the relationship between rules and behavior can fruitfully be studied only by looking into real-life situations. Instead of the paradigmatical top-down analyses of law and behavior in terms of effectivity, compliance and implementation we prefer a grass-roots approach by trying to look at the surrounding legal complexity from the actor perspective, and to do so in different time and space locales.

It seems about time to focus on what this short contribution is supposed to be about: the utility of legal anthropology for the study of water rights. It may be clear that, by taking a broader and more grass-roots perspective than conventional legal science, our version of legal anthropology has certainly not turned away from law as the focus and the object of our study. Law is our business, but in order to grasp its social significance we had to leave the trodden paths of ideological and doctrinaire lawyers' as well as citizens' folk beliefs concerning law and society. We had to conceptualize law in terms of sets of more basic assumptions which enable us to pursue a more systematical analysis and comparison. This also counts for the issue of rights: water rights, land rights and human rights.

It cannot be very surprising that our approach to issues of rights would be very similar to the general approach to law as sketched above. So, we would start out by, in the first instance at least, ignoring the legal lexicons and the legal definitions of types of rights—such as private rights versus public rights. In the case of water rights, the first things to look at would rather be how water and the value of water have been conceptualized in the society (community) studied. We would want to know which types of interests in water (which automatically also involves land) would be involved, and which types of social relationships would be connected with these interests. Next, we would want to know which social institutions and which normative frameworks would be involved. Automatically, this would bring us to instances of legal pluralism, if only because any legal repertoire (even customary law) tends to become transformed as well as to develop contradictory versions in specific interaction situations in time and space.

So, our first point of departure would be the assumption that people, and their natural and social resources are interconnected through complex sets of cultural and normative schemes of meaning. Through these people construe concepts and different categories of natural resources, and institutionalized relationships and social practices through which they try to control, exploit and preserve them. Since natural resources such as land, water and crops are of existential importance for human life and organization, the conceptualizations of types of resources and of rights to control them form key elements in any legal system.

A second point of departure would be the assumption that law consists not only of rules, concepts, principles and procedures which are external to social practices and institutions but that it is also embodied in social practices and resources. Carrying within itself the assertion of legitimate authority and use of social power, law provides normative structures and constraints for peoples' activities, and can be a source of motivation and orientation. But, as was indicated above, law cannot be seen as a determinant of social practices if only for the fact that in any society there actually is more than one body of normative concepts, rules, principles and procedures that relate to social organization.

Exploring the relationships among complex legal orders, various conceptualizations of water and land as natural resources, types of interest and social relationships and practices involved, is an essential precondition for any effort to understand, and certainly to improve natural resources management. This is true whether one focuses on creating property regimes for groundwater control by the state, on bolstering customary law regimes for canal irrigation management, or on the possible types and forms of conflict management.

A legal anthropological approach to water rights issues also means being aware that both within the various government organizations and in peoples' economic and social life, the legal systems or sub-systems are by no means well-integrated wholes. Policies and legal regulations for property regimes intersect with other concerns such as sustaining law and order, or with politicians' or bureaucrats' private and class interests. Local forms of customary and folk legal regulations are also far from being unambiguous. There are usually different, and often contradictory versions of such local legal orders. They have usually different, and often conflictive bases of political authority, substantive regulations, and procedural modes to solve problems and contain conflict.

In local processes of social ordering, the various sets of normative systems tend to become intertwined and they are characteristic of the various social, economic and political conditions of the rural areas. They are the daily experience of farmers, bureaucrats and development agents. Legal anthropology teaches researchers in the field of natural resources natural resources management and property regimes, not to start out from the

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water (drainage boards, districts or areas, farmers' drainage cooperatives, flood control boards, associations or cooperatives) or any other form of association of water users. Policy decisions are required for their formation, dissolution, organization, functions and eventual participation in the government water administration. They represent the best means of combining into one single group many users at the final stage of water distribution. Their organization provides a solution to conflicting customary and traditional water rights. The relevant policy decisions could be implemented in a basic water code or in special legislation.

In the case of international basins, proper institutions either exist or should be established in the form of river boards or joint commissions, for the purpose of (a) exchanging hydrologic data and submission of projects affecting another basin state; (b) establishing joint technical cooperation; (c) preventing and settling disputes; and (d) pooling efforts to secure international financing and assistance.

Water legislation is an important element to enforce policy decisions. The water law should consider availability of water in the country, basin or region, knowledge of existing uses and amount utilized, by whom and for what purpose, cost of different sources of water, as well as present and future water requirements in the country or region. This may be achieved by bringing past, existing and future uses of water under unified, coordinated or centralized administrative control.

Basic legal provisions could include the ownership status of water resources, the right to use waters, water conservation provisions, the organization of the administration of the rights to use water, the different procedures for granting permits for the use of water and for its discharge, provisions on underground water with licensing of drillers, the organization of water users' association and their legal status, provisions for the payment of water rates and procedures for their collection, relationship with other water-development agencies (for land reform, for hydropower generation, for municipal water supply and sewerage, etc.), for the control of hydraulic structures, for the establishment of protected zones or areas with special measures for their protection, and, finally, for the implementation and enforcement of the water law.

In the case of irrigated areas, it is obvious that, in the allocation of water, priority will be given to agricultural uses of water, after water is supplied for domestic purposes. In addition, economic, financial and institutional incentives should be taken into consideration.

Because of their critical role in the country's development plans, there is ample justification for subsidizing some types of investment. For instance, agriculture may be so predominant in a country's welfare that subsidized irrigation and drainage costs are fully justified.

The establishment of water rates, charges and methods of collection deserves special consideration and policy decisions by the government.

Many factors influence the returns from a farmer's operations. Some of these may be beyond his control, such as decreased yields due to unfavorable weather or decreased income because of low prices for farm products. In the case of irrigation, it seems justified to set water charges, possibly in accordance with the farmers' ability to pay, either on a variable in accordance with market and weather conditions, or on a volumetric basis, according to the amount of water utilized. Consideration could be given to requiring a fixed minimum payment at least sufficient to pay annual operation and maintenance costs, as a deterrent for misuse and to promote financial awareness. Often, a water resources project, particularly for

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oratory of the legal profession, nor from the recitals of local traditional law, but from the peoples' daily experience regarding their normative environment, with all its ambiguity, variation and contradiction. It offers some theoretical and methodological tools to do just that.

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[H.L.J. Spiertz, Professor, Department of Agrarian Law, Wageningen Agricultural University.]