BLUE GOLD: THE CONFLICT OF MARKETS AND BUSINESS EFFICIENCY WITH RIGHTS

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ABSTRACT

In response, analysis of International conventions, global & Indian jurisprudence, empirical and theoretical evidence on the fickleness of economic valuation and the myth of the tragedy of the commons, all leads us to a rights based water resource framework. This answer necessitates a shift of focus from the resource to its use. Water when used for drinking and sanitation is a Right, through water used in industry may not. Most International Conventions and Human Right covenants reflect this principle. Prof. Salzman raised and eventually answered a fundamental question, in the context of water wars in Bolivia, "who should have access to drinking water and why"?[1] Technology, regulation and economics may change but environment-resource management should be anchored in the permanent principle of 'who & why'. Thus even as inputs change, entitlements and access of the human right to water, especially for the vulnerable, remains non-negotiable.

Keywords: Drinking Water, jurisprudence, fickleness, drinking water, entitlements.

I. INTRODUCTION

Water is frozen in the binary of an economic or a public good. Globally, the liberalization trend has led an increased focus on ascribing an economic value to water, in all its functionality. This trend reached its' apogee at the Dublin conference[2] where it was resolved that 'water is to be treated as a private or economic good in all its competing uses'. The first Earth summit at Rio[3] reiterated that 'water is a finite resource with an economic value'. Soon enough the Economist blamed governments for not adequately pricing this valuable resource and thus misgoverning the resource. [4]The United Nation, in 2006, joined the bandwagon equating pricing of water with improved service delivery, conservation of resource. Nearer home, the World Bank blamed the lack of evaluating water financially for poor operation and maintenance and poorer supply of water.[5]

India was soon to pursue this conventional wisdom. The National Water Policy 2012 declared that "pricing of water would ensure its efficient use & encourage conservation".[6] The National policy further lays down that for sustainable & efficient use of water; it should be allocated and priced on economic principles. Elaborating on the desired institutional arrangement it further posited that for this purpose private sector participation and cost cum market based tariffs should be the norm.[7]

[1] James Salzman. (2006) Thirst: A Short History of Water, 18 (6),Yale Jnl.of Law & Hum. 94.
[2] International Conference on Water and Environment, Dublin, (1992).
[3] UNCED Rio June 1992.
[4] Economist, A soluble problem, Economist, 23 March.(2000).
[5] State of Water in India, World Bank, (2005).
[6] Section 7.4 of National Water Policy, (2012).
[7] Section 12

II. METHODOLOGY

The Neo-liberal National policy formulation

Blinkered by globalization, Indian policy makers insist that water right is not justiciable and that water is an economic good, best provided to the people if it is priced. Further, the resource is sustained if it is allocated on economic efficiency criterion to the most efficient user, and not left to the vagaries of the commons.

The thrust underlying their argument is premised on three important assumptions.

i. Water right is *not a justiciable right*.
ii. Without individual property rights, water resource suffers from the *tragedy of the commons.*
iii. Water is an *Economic Good* and *pricing of water* ensures its efficient utilization and improved service quality.

2.1 Aims and Objectives

The purpose of this paper is to examine the legality of a Member State's voluntary or forced exit from the EU and European Monetary Union (EMU), in the context of the tensions and varied assertions made by the proponents and opponents of an 'ever increasing Europe'. The focus is to uncover the text and the substantive import of the law in first, its application for voluntary withdrawal by member states and second, in the legal issues arising from a member state's unilateral withdrawal or expulsion. This paper argues that a unilateral withdrawal from the EU and EMU can be conceived as legitimate under provisions of both EU and International Law, though subject to immense complexities. However, this paper would conclude that it is legal and practically inconceivable to forcibly expel a member state.

2.2 Scope and Limitations

The legality of withdrawal or expulsion from the EU and EMU is examined from an assessment of the legal right either on the basis of 'the law as it prevails' (de lege lata) or on the conceptual frame of an assumption of what the 'law should be' *(de lege ferrenda).* The EU legal order is also examined in its patriarchal conceptualization, water boarding Monist view of integrating jurisprudence, over increasingly restive members. Moreover, the explicit provision of withdrawal may not have existed in the treaty till Lisbon, but that doesn't preclude its unilateral assertion by a member state, even then.

This paper will however not examine the financial and economic issues behind the current EU crisis nor the issues out of secessionist demands within member states. This paper also restricts its analysis of the politics of withdrawal under public international law.

2.3 Research Questions

Through this paper, I attempt to examine the legality of Unilateral or a Negotiated Withdrawal from the EU and EMU by member states of the Union, especially Greece, in the context of the present calls for GREXIT. In this context, there are three possible scenarios worth examining, the first, unilateral withdrawal of a member state, the second, negotiated withdrawal of the member state and third expulsion by other member states.

2.4 Research Question/Counter Hypothesis

This paper explores the justiciability of the right to water, in the context of the global conventions on human rights and seeks to uncover the positivist judicial pronouncements of Indian courts, while constructing a constitutional right to water and establishing it as a public and social good. The paper further counters that the tragedy of the commons is mythical and

that the policy of commoditization & water pricing is the antithesis of justice, equity and even empirical evidence on economic efficiency.

III. GLOBAL HUMAN RIGHT TO WATER

The global discourse is littered, with both direct and indirect references to a construction of right to water. From time to time the discourse has permeated into public international law and international covenants, making it binding upon signatory states to uphold a human right to water. Water right is indeed justiciable.

3.1 Global Legal Foundations

Starting as early as 1977, the United Nations General Assembly in the M.D Action plan declared that "all peoples have a right to drinking water of appropriate quantity and quality". This was echoed in the subsequent UN population conference in 1994 which enunciated a satisfactory standard of life, and which also integrated access to water. Concurrently, the right to water is also specifically recognized, by a number of global legal covenants, like on Child Rights and Anti–discrimination .

In a landmark the United Nations Economic and Social Committee issued a General Comment on the Right to Water[8]. General Comments have the considerable weight of the Covenant. It established a comprehensive *right to sufficient standard of living*, encompassing food, clothing and shelter.[9] Water is an intrinsic element of this right, as it is vital not just for standard of living but for human sustenance itself. Even earlier, in its 1995 resolution the committee had held the water is an essential element of the recognized right to health (Art 12) and right to food (Art 11).

Analyzed from the view point of an international bill of Human Rights with it is primary focus on human dignity, would automatically provide for a water right. Similarly, a convention of political rights (Art 6) can be constructed to provide this right as a sub text of right to life.

3.2. Paradigm Shift and recent UN Consensus

Recently, after a protracted global debate, scientific evaluation and theoretical examination the UN General Assembly mandated the '*Human Right to Water and Sanitation* (henceforth HRtWS). The right was further reiterated in the UN HRC.[10] The resolution recognized "the right to safe drinking water as a humanitarian right indispensable to satisfaction of life as well as array of other rights".[11] With respect to water praxis, the resolution further advocated adoption of human rights principles of university, inalienability, and indivisibility. By linking it with human rights principles and showing interdependence with the *right of full enjoyment of life*, as enshrined, in the Vienna Declaration, the UNHRC expanded remit of the human right to water to more normative aspects.

In a paradigm shift, the HRtWS sub assumes certain normative content based on five criteria: availability, accessibility, quality, affordability and acceptability. This normative content stands juxtaposed on humanitarian principles of universality, indivisibility and inalienability expressed through equality, non-discrimination & citizen participation. The two dimensions together construe the holistic right.

[8] General Comment No. 15; 29th Session, 2002, U.N. Doc. E/C.12/2002/11 (2003).
[9] Article 11, paragraph 1
[10] UN Human Rights Council Resol. 15/9, (2010).
[11] UNGB resolution 64/292 of (2010).

Therefore, the holistic right to water is integrated with other human rights. First, in assisting realization of rights to health, living standards and clean environment and second, in encouraging a freedom in determining the national rights to water. In the broader global discourse, the human rights based language of various covenants and UN resolutions, through adherence to the human rights principles and normative criteria collectively disagree with the neo-liberal justification of commoditization of common resources, and signal a strong pro-poor paradigm shift. Despite contentious interpretations by the neoliberals, the UN mandated HRtWS, of which India is a signatory, does lay the foundation for a globally justiciable right to water.

IV. MULTI NATIONAL JURISPRUDENCE

4.1 Global Constitutional Development

Supranational legal institutions have also acknowledged the water right. The International Disputes Repository (ICSID) has in *Azurix Corp v. Argentina*[12] and *Biwater Gauff v. Tanzania*[13] decreed that 'water cannot be exploited for rampant profiteering and that public interest is paramount'.

Nationally, constitutional provisions work as catalysts in three critical ways; formulation of legislation, judicial action, and in policy-political debate. In this context firstly, most constitutional provisions obligate the state to provide water while also expressing citizen entitlements. Secondly, in absence of specific constitutional provisions courts have proactively interpreted various other legislations (Water Service Acts or Municipal Acts), to uphold the right to water. Thirdly, with the inclusion of directive principles (as in India), courts have enough scope to direct proactive state action like in cases of pollution and droughts etc.

4.1.1. Constitutional Mandates

Many African countries, born out of anti-oppression and discrimination struggles, have provided an explicit right to water. Uniquely, Ecuador provides for a state guaranteed access to water in Article 48, Kenya goes a step further to qualify an adequacy requirement with the right in Article 65. South Africa legislated further with the Water Service Act & the National Water Act.

In Latin America, the heart of the water struggles, Venezuela has led by a referendum on water and a constitutional provision (Art 304) which not only mandates water rights but also declares water as a common property resource, forbidding any private ownership. Uruguay under Article 47, derives a fundamental right to water as a sub clause of protection of Environment. Argentina is less explicit and enumerates it only as a state duty to protect health under Article 42. Bolivia and Colombian constitutions enshrine the human right as constitutional mandated policy. It directs state ownership of all natural resources, to ensure an availability of all critical services like drinking water.

4.1.2. Judicial Interpretation

In many countries, absence of explicit right in the constitution doesn't deter courts to creatively interpret right to life. India, Pakistan & Costa Rica fall in this category. Argentinean courts also have taken recourse to rights to health, to derive a progressive right to water and sanitation. Similarly, Brazilian courts also have utilized the Consumer Defense

[12] International Centre of Disputes Settlement; Azurix Corp v. Argentina ,ICSID Case No. ARB/01/12
[13] Biwater Gauff v. Tanzania ,ICSID Case No. ARB/05/22

Code to clamp down on water disconnections for non-payment, as violation of basic service right.

4.2. Normative Content and Special National Laws

Constitutional provisions require legislation to enforce policy praxis. These laws need to provide standards, obligations, actions and regulations. Without these legislations constitutional provisions are left to the executive directions of the judiciary. Therefore, ideal legislation or right frameworks exhibit the normative dimensions of the right comprising both freedoms & entitlements. Freedoms include *protection against discrimination, contamination* and *dis-connection*, while Entitlements assure q*uantity, quality, access and affordability.*

4.2.1 Entitlement of quantity

The UNGA General Comment be prescribes a minimum quantity for each person which is personal regular and adequate. WHO prescribes 50–100 lpcd.[14] An Argentinean court in the Paynemil community case[15] directed state to provide 250 lpcd for a tribal settlement whose water resources suffered because of contamination by an oil firm. Similarly, the Belgian arbitration court , relying on the constitutional guarantees, directed that every person was entitled to 15 cum m of free water.[16] Further, some national acts like Costa Rica Water Law, Kirgizstan Water Code or South African National Water Act also provide similar entitlements.

4.2.2. Quality

The General comment 15 reflects WHO guidelines that the water so supplied be safe of chemical & micro biological load. Further, it must be of standard colour, odor and taste. The EU adopted the European water framework Directive to specify EU state obligations on the quality of water. Most nations, including India, have landmark tort judgments prescribing massive damages for pollution of drinking water sources.

4.2.3. Allocation & Accessibility

Global domestic consumption is less than 10% of the total water footprint. Therefore, it deserves to be prioritized over Industrial, Agriculture and Commercial use. In many countries service, benchmarks are prescribed like in the South Africa Water Service Act, which defines preference to domestic obligations. This issue of allocation becomes critical in drought years wherein markets and economic efficiency criterion fail. Therefore, sharing of distress can be successfully designed only in the rights based regime. This was exemplified in *Grootboom v. S. Africa* [17]wherein the Constitutional Court underlined the obligation of the state to be non-discriminatory and address first the needs of the vulnerable.

On similar lines, Indonesia, Lithuania, South Africa and Georgia all advocate sustainable availability of water resource to ensure domestic access. Even the Indian National Standards have prescribed a 500m distance, as a notion of accessibility of water.

[14] LPCD – litre per capita per day
[15] Neuquen, Sala II, Cámara de Apelaciones en lo Civil: Menores Comunidad Paynemil, Acción de Amparo (Expte. No. 311- CA-1997, 19 May 1997), cited in Juan Miguel Picolotti The Right to Water in Argentina (2003), available at www.righttowater.info/pdf/argentina ,(April 5,2017,12:30 pm).
[16] Commune de Wemmel v. Moniter Belge, Arret No 36/98, April 1998.
[17] Republic of South Africa and Others v Grootboom and Others , 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC) .

4.2.4. Affordability

Is an important corollary to non-discrimination on all grounds including economic. The paradigm states that the total cost of acquiring water should not detract from a family's capacity to acquire other essentials. For the vulnerable, it implies free service. Even the reviled World Leaders on Sustainable Development (2002) while upholding cost-recovery, cautioned against prices forcing poor out of the service ambit. Many progressive nations, as part of their national policy, have addressed water service pricing and subsidies. Chilean & Venezuelan laws provide for special affordability funds for marginalized or poor families.

Amongst the developed, Australian Utilities Act prescribes 'fairness' of tariffs on all water contracts. The UK Water Industry Act authorizes the Secretary to issue grants to the deserving. Finland permits subsidizing using community funds, for ensuring equity. French courts in *Avignon v. Eaux*[18] held that 'disconnections constitute deprivation of essential elements of life'. Disconnections are also frowned upon in New Zealand Local Government Act, South Africa, UK, Finland Service Acts and the Indonesia water Regulation.

The highest Court of South Africa in *Pretoria v. Walku (1998)*[19] upheld the local council's decision to fix lower water rates for Black Township than for white neighborhoods, on the ground of supporting a poor community by cross – subsidization. Even in the US, the California[20] & Pennsylvania Constitutions include affordability as a fundamental guarantee to water. In the landmark *Diane Pilchen v. City of Auburn, NY*[21]case, the court 'dismissed the contention that since bottled water is available, public water is not a constitutional right'. It further held that 'suo-moto disconnection violated a petitioner's constitutional rights'.

4.3. The Guarantee in South Africa

South Africa is in the forefront of providing an unambiguous right to water under Article 27 of its constitution. The constitution states that "Everyone has a right to water" and that "the state is duty bound to take all measures to progressively achieve this right." In a nuanced articulation, the constitutional duty placed on the government is tempered by the condition of availability of resources. This nuanced formulation could answer the apprehension of courts and governments in India, about the financial ramifications of explicitly providing this right.

The South African courts have been active in expanding the definition of the right. In the landmark *Mangele v. Durban Metropolitan council*[22] and subsequently *Bon Vista Mansions v. S. Metro Council* [23]cases the court opined that disconnection of water connections was contrary to the constitutional (implied) guarantee of availability of water. So interpreted, the right obligates the state to respect existing access, and for any disconnection to be valid it requires a counter constitutional justification. The court also explicitly laid down the principle that a water service connection cannot be disconnected, for inability to pay for economic reasons. In response to these and other similar judgments the South African parliament has legislated to assure a lifeline level of water supply, free to every household.

[18] Francois X and the Union Federale des Consomateurs d' Avignon v. Societe Avignonaise des Eaux,Tribunal de Grande , Order No. 1492/95, May 1995.
[19] Pretoria v Walker (CCT8/97) [1998] ZACC 1; 1998 (2) SA 363; 1998 (3) BCLR 257 (17, February 1998)
[20] California Public Utilities Code, Sec. 739 (1993).
[21] Diane Pilchen v. City of Auburn , NY, 728 F. Supp. 2d 192 (2010)
[22] Mangele v. Durban Metropolitan council (6) SA 423 (D) (2002)
[23] Bon Vista Mansions v. S. Metro Council (6) BCLR 625, (2002).

These judgments and legislation are significant for Indian policy and jurisprudence. Indian courts have constructed a similar right as in South Africa. Therefore the 'public good' and 'positive Social Right' conceptualisation of the South African courts can also apply to the Indian context. Indian legislature could also learn from the South African parliament and not shy away from an explicit right.

V. POSITIVIST FORMULATION OF THE RIGHT IN INDIA

The Right of Water is not explicitly mentioned in the Indian Constitution. However, the right has been steadfastly constructed by the jurisprudence of the Supreme Court and various other courts of India.

5.1. Justisciability of Right to Water

The numerous UN resolutions, International covenants, cross-country legislations and increasing burden of case law all point to the undeniable global affirmation of the *Right to Water*. In India, in the absence of an explicit constitutional provision, the positivist journey started in the context of pollution of water to protect a negative right – Right not to have water polluted. In *Gautham Uzir & Anr. v. Guwahati Municipal Corporation*[24], a case relating to supply of polluted water by Guwahati Municipality, the court observed that "*clean water is fundamental to life itself and therefore it attracts Art 21 of the Indian constitution*". The Court was deriving a right not to have water polluted from its articulation of '*right to healthy environment'* enunciated for the first time *in Bandhu Mukti Morcha v. Union of India*[25]. The court elucidated that the principles of common law provided remedial measures including tortuous action in water pollution cases. In the *Vellore CWF v. Union of India case* [26] on tannery effluents, the court enunciated the principle that "though the constitution and various statutory provisions protect the right to clean water, however, it is derived from the common law right to clean environment". The Supreme Court further reiterated the pollution prevention doctrine in the case of pollution of Osman Sagar Lake in *AP PCB v. M.V. Nayudu*[27]. However, on this occasion the court choose to take recourse to construe a right to pollution free (clean) water under Art 21.

Justice Kirpal very ably reconciled these two differing contentions into a single principle, in *Narmada Bachao Andolan v. Union of India*[28]. He wrote that " water as a basic need for human survival is included in the right to life as encoded in Art 21…. further, the rights to healthy environment are also implicit fundamental rights inherent in the right to life".

The court was echoing the Supreme Court's earlier twin observations in *Chameli singh v. State of Uttar Pradesh*[29]. First, the right to life incorporates right to food & Water as part of the construct of Basic Human Rights essential to any civilized society. Second, other fundamental human rights promised under the Indian Constitution can only be enjoyed if the Basic Human Rights are ensured. Thus the court established the inviolable right to water derived from basic human rights.

The same year the Supreme Court further underlined the priority to drinking water by establishing a hierarchy of uses. The court observed that drinking is the paramount, usufruct

[24] Gautham Uzir & Anr. v. Guwahati Municipal Corporation 1999 (3) GLT-100
[25] Bandhu Mukti Morcha v. Union of India AIR 1984 SC 802
[26] Vellore CWF v. Union of India case (1996) 5 SCC 647 at pg 661
[27] AP PCB v. M.V. Nayudu (2001) 2SC 62
[28] Narmada Bachao Andolan v. Union of India (2000) 10 SCC 664, para 248
[29] Chameli singh v. State of Uttar Pradesh ,(1996) 2 SCC 549: AIR 1996, SC 1051

of water and it would prevail over its alternate uses.[30] The trend was maintained by the Allahabad High court while directing adequate water supply to Allahabad, reiterating the fundamental right to drinking water in *S.K. Garg v. State of Uttar Pradesh*[31]. Similarly, the Andhra Pradesh HC in *Wasim Ahmed Khan v. Govt of Andhra Pradesh* went a very rare step further by positing that right to water is fundamental & therefore can't be denied on grounds of paucity of funds.[32]

The Kerala High court in *VKKSS v. State of Kerala*[33] on a PIL by people of Cochin held that inability to provide safe drinking water of adequate quality is fundamental to enjoying rights under Art 21.

The above juristic journey is also supported by the Article 39 (b) of the Directive Principles, which directs the state towards securing ownership & control of critical common resources, like water, to best serve the common good.

5.2. Guaranteeing a positive Right

The Supreme Court has refused to accept the myth of economic efficiency of individual property resource rights. Instead, it has established the *public trust doctrine* based on English common law. The court in *M.C. Mehta v. Kamal Nath*[34] laid the following principles:

i. *Water is a community resource.*
ii. *In view of inter generational equity it has to be preserved by the state in public trust.*
iii. *Thus the state is legally bound to protect and prevent its conversion to private ownership* [35]

The Kerala High court succinctly threaded together the global doctrine and M.C Mehta *in Perumapatty Gram panchayat v. Coca cola Ltd.*[36] *I*t held that first 'the government is the public trust for all common pool resources. Second, natural resources are social goods performing a communal function and not individual profit. Third, the state was duty bound to protect these resources (ground water in this case). Any state failure to do this 'would be a denial of the fundamental rights under Article 21, as right to clean water is a subpart of these rights'. To articulate this canon the judges referred to the UNGA resolution and principle 2 of the Stockholm Declaration[37] which states that 'natural resources must be safe guarded for present and future generations'.

In the sum the courts have traversed from a perspective focused on the protecting a restrictive right i.e. preventing pollution, to enforcement of a positive right i.e duty to protect & provide adequate safe drinking water. Further, the latest trend is to emphasize the obligation of the state to provide citizens, unhindered assurance of safe water.

[30] DWSD undertaking v. State of Haryana, (1996), 2SCC 572: AIR 1996 SC 2992
[31] S.K. Garg v. State of Uttar Pradesh 1999 ALL. L.J. 332
[32] Wasim Ahmed Khan v. Govt of Andhra Pradesh 2002 (5) ALT 526
[33] VKKSS v. State of Kerala 2006 (1) KLT 919
[34] M.C. Mehta v. Kamal Nath (1997) 1SCC 388
[35] S. Muralidhar,The Right to Water: A Legal Overview (2006) , available at http://wwww.ierlc.org
[36] Perumapatty Gram panchayat v. Coca cola Ltd, 2004 (1) KLT 731
[37] United Nations Conference on the Human Environment , Stockholm, Sweden , June 1972.

5.3. Meaning of this justiciable Right to Water:

So what is this justifiable right to water? Does it encompass; quality, accesses, quantity? Learning from South Africa, the right can be defined as with two intertwined obligations of the state.[38]

i. The right creates Entitlements to ensure unhindered access for all, especially the disadvantaged & marginalized. The access needs to be physical, qualitative and economic.
ii. The right contains freedoms to protect the access from undue infringement by policy, practice or violation.

5.4. Incorporating the Right under the Constitution

This judicially evolved fundamental right now needs to be explicitly enshrined in the constitution. The law commission in its report of 2002 had suggested an insertion of an independent Art 30D thus: 'all Citizens have a right to adequate quality drinking water'. The state could learn from the consensus built around Right to Education introduced in Art 21-A. Since, an explicitly defined right in the Constitution will obviate ambiguous judgments of the courts, like in the Andhra Pradesh High Court pollution case, wherein the court declared for a clean water right, yet shied away from granting a remedy.

Internationally, the UN has recognized that the rights regime needs to specify basic core obligations, for successful progressive achievement. In this case it can translate to the WHO norms of 40 lpcd. Such a prescription will, satisfy the three requirements of an effective right: *fundamental*, *universal* and *specifiable*. Thus only will India eliminate its jurisprudential and policy ambivalence.

VI. PROPERTY RIGHT & MYTH OF THE COMMONS

6.1. Common Property Resource Management

In 1968, ecologist Hardin propounded the theory of 'The Tragedy of the commons ".[39] Invoking the example of British pastures, he theorized that individuals will maximize personal benefit by over grazing cattle, unmindful of the collective cost of permanent loss of pasture. This thesis has found favor with many neo-liberal behavioral economists and some law makers. This group strongly canvassed that for environmental resources, bestowing individual or group property rights was the remedy to the problem of the commons. They make two critical assumptions, *first*, that there is a tragedy of commons exactly as defined by Hardin and *second*, individual property rights and markets with economic efficiency norms can successfully solve the problem of the commons.

On the first assumption, subsequent research proved that Hardin's assumption that enclosed grazing grounds are more sustainable and efficient than open ones was historically and empirically erroneous.[40] Even at a conceptual level, many differed with Hardin's individual property right based interpretation of the commons. Instead Crowe redefined 'commons' as a 'social institution' or 'a natural resources unit like water', which can never be parceled out or exclusively appropriated by a single individual or an exclusionary group.[41]

[38] J. Visser, E. Cottle, The Free Basic Water Supply Policy, V3,1,ESR Review (2002).
[39] Garret Hardin, The Tragedy of the Commons, 162 Science, 1243, (1968).
[40] Susan J. Buck, No Tragedy of the Commons, 7(1) Envtl. Ethics ,49, (1985).
[41] Berley Crowe, The Tragedy of the Commons Revisited, Science, 166 (3909), 1103, (1969).

6.2. Markets and the Commons

Despite contrary evidence Hardin's myth persists. Multilateral financial institutions have encouraged governments to create property rights over water, with the assumption that private property rights will promote owners to value and manage resource for its life cycle benefits. Law makers often take recourse to markets when confronted with the central question in environmental law, of *how much?* How to sustain? How much the resource should be exploited? And, how much pollution should be permitted in the tradeoff with development?

Conventional wisdom has posited two solutions: i. Regulation and ii. Commoditization or private property solution.

In the second solution the market provides the answer to "how much". In fact it combines two approaches. First, dividing and allocating common property into privately owned defined units (individual property right on the resource) so as to isolate externalities or spillover effects between units. This is assumed to solve the commons problem by individualizing all costs and benefits. Second, the market is assumed to minimize transaction or opportunity loss of the resource, by optimizing the allocation of the resource to the highest economic bidder.[42]

6.3. Games & Common Pool Resources

In response nobel laureate Ostrom[43], through extensive field study, disproved Hardin's thesis on the tragedy of the commons and the mythical market driven panacea. Her findings were true for Water Resource Management issues, specifically ground water. Ostrom[44]prescribed three key characteristics of successfully managed common property resource:

i. Boundary rule – there is a limit on the number of users.
ii. Resources are stationary.
iii. Resources can be stored.

Water satisfies all these three constrains. First, at a given point in time there are only a fixed and finite number of users in the community. Second, the resource as ground water or as stored in large overhead tanks for city supply, are stationary. Third, evidently the resource can be stored and is not a time dependent self destructing opportunity like migratory fish. Therefore, the stability of the resource makes it possible for the community to design boundary rules and methods of allocation & use.[45]

Other researchers have also concluded that excellent management of common property resources doesn't require an individual right based market regime but can be achieved by a well defined user group able to develop internal communication, thus delinking success from the type of property law regime. [46]

[42] Amy Sinden, Commons & the Myth of Private Property Solution, 78 U. Colo. L. Rev. 533, (2007).
[43] Elinor Ostrom et al., Rules, Games and Common Property Resources ,at 302 (2nd ed.1994)
[44] E. Ostrom& E. Schlager, Property Rights Regimes and Natural Resources: A conceptual Analysis, 68 (3) Land Econ. 249 (1992)
[45] Fred. P. Bossehnan, Replaying the Tragedy of the Commons, 13 Yale J.on Reg. 391,(1996)
[46] Robert. D. Cooter, Structural Adjudication and the New Law Merchant: A Model of Decentralised Law, 14 Intl. Rev. L & Econ. 215, (1994).

VII. COMMODITISATION AND THE ECONOMIC ARGUMENT

Water Pricing

Institutional arrangements for water efficiency and efficient water utilization are touted as the sine qua non of water security and water pricing is posited as the silver bullet to achieve both these aims. The economic premise seeks to internalize both the resource and service cost, thus pushing up the price. It is assumed that as more the price increases, the more the consumption drops, as would any price – elastic economic good. [47]The underlying assumption is that increasing prices will reduce demand and control consumption.

However, many scholars like solanes have held that water is a unique natural resource not amenable to demand – supply economics. Refer trans boundary water wars, loss of life on local water disputes and thriving black water economy, in many developing countries. Interestingly this dichotomy prevails even in developed country policy; while England prices domestic water, Scotland & Ireland don't.

7.1. Economic Efficiency and Privatisation

Economic efficiency is an oft repeated argument in the commoditization of water and treating it as an economic good. However, there has been very little detailed investigation of the claimed positive impacts of tariff on value of water provision, satisfaction levels and Levels income generation. A randomised contra-factual study[48] in India found that the links between externally-prescriptive user charges and service performance or resource conservation were very tenuous. Rather, the study discovered that a right based approach, focused on community decision making, yielded nearly double the conservation effort. Similar are the findings in the systematic study of Irrigation projects. Therein too, external incentives and risk appetite of farmers seem to have a much higher impact on water consumption than increasing water tariffs.[49]

The key expectation of the thrust of the Dublin Principles, commoditizing water, was that it will open the flood gates of private investment. Led by the World Bank and the IMF, policy prescriptions (volumetric pricing, privatisation, independent tariff fixation etc) favouring the return of investment for the private sector, were globally enforced. However, the results have been disappointing. The IMF is on record to acknowledge that service performance is not determined by the form of ownership, public or private, but rather by the extent of competition.[50] The World Bank also grudgingly acknowledged that the private sector, despite liberalisation, has failed to invest more than ten percent of required amounts in critical continents like Africa.[51]

7.2. Community not Financial Management

The James study highlights that "there is little justification to price water and impose tariffs to generate revenue to meet all operation and maintenance costs, as is the practice in many donor-assisted programmes currently and in the National water policy. This approach is myopic, as for short term financial gains, citizen rights are sacrificed. Further, the policy doesn't prove its anecdotal claim of ensuring sustainable of the resource. Even on community

[47] Simone Bach, Perspectives from European Water Management Law, 5 (3)(4) JEEPL . 341, (2008).
[48] A James & V. Nayar, Policy insights on User Charges and Rural Water Supply Delivery: A Counter-Intuitive View, 26, Intl Jnl of Water Res Dev. 403,(2010).
[49] I.Ray, Get the price right: water prices and irrigation efficiency, 13 Economic and Political Weekly, 3659,(2007).
[50] A. Estache & M.A. Rossi, How Different is the Efficiency of Public and Private Water Companies in Asia, 16 (1), World Bank Review,139, (2002).
[51] David Hall & E. Lobina, Pipe Dreams: The Failure of Private Sector to Invest in Water Services in Developing Countries, Public Service International, available at http://www.psi-wdm.org/investment/pdf.

involvement, economic pricing is to socially divisive a method to achieve these ends foregoing its rights.

The key suggestion from the study is to not approach water management and conservation as a financial challenge. Since, pricing water fails in achieving either financial sustainability, equity or resource conservation. Instead, a rights based approach would lead to a focus on equity, non – discrimination and accountability. Once the community understands the finiteness of the resource it will provide indigenous solutions which go beyond the rubric of market economics.

7.3. Economic Valuation

The study demolishes the assumption underlying the National Water Policy the tariffs will be judicious and will reduce demand. The study found that individual behaviour looks to subvert externally mandated tariffs. In fact village without any economic imposition found more innovative ways to ensure & meet their operation and management costs. Further, extensive evidence from the health sector[52] also indicates that tariffs are exclusionary, rather than improvements in service delivery and asset outreach. The World Bank has also started recommending a normative value of five percent of household expenditure towards water, as affordable. This prescription again suffers from one size fit all attempt at defining poverty. There are obvious definitional issues in the World Bank's normalisation of poverty, poverty line and affordability. Sen's theory[53] of capability traps would suggest a more nuanced approach. In fact, many point to the self selection inherent in the water service delivery regime. Household water supply is usually charged whereas taps in the streets and hand pumps are not. It is obvious that only the needy would deploy the manpower and time to fetch from the street hand pump. Therefore the subsidy is automatically targeted, despite being universal.

With its basic assumptions weakened the National Water Policy should reconsider plumping for economic efficiency criterion based on individual property rights, for such common pool resources like water.

7.4. The Overarching Critique

Olstroms extensive research and James study sufficiently show up the fallacy in the National Policy push toward private property rights (privatization) as a panacea for the failure of the commons. Scholars like Derrick Jensen[54] accuse economists of using Hardin to push the propaganda of private ownership. Private property rights are premised on the assumption of inefficiency of public sector in contrast to the markets which are epitome of economic efficiency. However, the failure of the market is not uncommon.[55] Further, firms are known to adopt any means to secure profits. In natural monopolies like water, there is an absence of choice and competition. Therefore, state failure in all likelihood, will be replaced by market failure.

More crucially, unlike Hardin's pasture conceptualization, water is not an open access commons. Historically most resources (tanks, rivers) have their traditional rules – rights and

[52] A.L Creese, User Charges For Health Care: A Review Of Recent Experience, 6(4), Health Policy And Planning, 309, (1991).
[53] Amartya Sen. 1989. Development as Capability Expansion, 19 *Jnl.l of Dev. Plng* 41, (1989).
[54] Derrick Jensen, End Game: The Problem of Civilisation,1, 210 (2007).
[55] Michal. S. Gal, the Ecology of Anti Trust Pre conditions for Competition Law, Working Paper 10, N.Y. University of Law,22,(2004).

duties which self regulate the permissible levels of exploitation. This also hints to Harden's second misconception. Unlike the pastures, water commons have traditional management institutions. This is something which was also confirmed empirically.[56] Natural resources have been well served and preserved by these informal institutions for centuries, rather better than the markets.

Another approach could be to examine the commons from modern experiences. It seems that the neo liberals erroneously box human beings as homo economicus (individual benefit driven) and then use it to prescribe all courses of law and public policy. Both Evolutionary sciences and the web world provide evidence to the contrary. Internet, open – source software and increasingly hardware are all recognition of the vast potential as well as successful achievement of collaboration.[57] In contrast to individual property rights attempting to maximize profits, the Modern Network Economy (Wikipedia, the Internet, hackathons, Red hat) thrives on a model of collective commons based peer production. Interestingly, this collaborative approach towards the commons erases long held binaries of public/private, group/individual, Cost/benefit and Resource/property. In fact by mandating more interaction amongst users (commoners) of the commons, modern networked society would help rebuild the human link with nature & the inert resource. This point was also alluded to by James, referred earlier, in proposing resource management best practices.

VIII. CONCLUSION

Cutting through the clutter of the binary of public – private good or human right, is the existential question. Don't we have a right on certain resources, irrespective of our ability to turn the resource into a property, we can ill-afford to retain?[58]

In response, analysis of International conventions, global & Indian jurisprudence, empirical and theoretical evidence on the fickleness of economic valuation and the myth of the tragedy of the commons, all leads us to a rights based water resource framework. This answer necessitates a shift of focus from the resource to its use. Water when used for drinking and sanitation is a Right, through water used in industry may not. Most International Conventions and Human Right covenants reflect this principle. Prof. Salzman raised and eventually answered a fundamental question, in the context of water wars in Bolivia, "who should have access to drinking water and why"?[59] Technology, regulation and economics may change but environment-resource management should be anchored in the permanent principle of 'who & why'. Thus even as inputs change, entitlements and access of the human right to water, especially for the vulnerable, remains non-negotiable. Moreover, this is not new, the right to certain resources & freedom from pollution is already historically present in common law. Therefore, the Indian state is better off rewriting its National Water Policy and explicitly its law. Since, poorly defined rights don't benefit either citizens or society.[60]

[56] Fred. P. Bosselman, Limitation Inherent in the Title to Wetlands at Common law, 247 (15) Stan. Entl. J.L, 283(1996).
[57] Yochai Benkler, The Wealth of Networks: How Social Production Transforms Markets and Freedom, at 133 (2006)
[58] Victor Flatt, Let us Drink our Fill, 18 (3),Yale Jnl of Law & Hum. 199 (2006).
[59] James Salzman, Thirst: A Short History of Water, 18 (6),Yale Jnl.of Law & Hum. 94 (2006).
[60] Jim Salzman, Creating Markets for Ecosystems Services, 80 N.Y.U.L.Rev. 870 (2005)