



... to the inaugural issue of the *International Journal of Rural Law and Policy*. This first edition is focused on the topic 'Water Law: Through the Lens of Conflict'.

Allow me to explain why this topic, and why this journal.

There are many excellent journals that deal with legal doctrine and practice, policy and institutions, and with themes relevant to rural people and the rural context. However there is a relative lack of concentrated attention upon the unique issues and features of rural law and policy. We believe that rural issues are sufficiently distinctive and important to justify a specialist focus.

Rural people encounter many of the same law and policy issues that challenge their urban counterparts: crime, the struggle for social justice, property and commercial transactions, and the pursuit of sustainability. However, more than urban dwellers, rural people face these challenges from within environments that affect the character of the challenges themselves as well as the feasible responses to them. 'Rurality', by its nature, brings with it the challenges of distance in various forms: distance between people translates into difficulties of transport and communication, can result in unique challenges in interpersonal relationships and a sense of isolation, and generates economic cost and complexities in all forms of transacting; and distance from services and resources can translate into inadequate support in areas as basic as health care, education, or commerce, and in turn often results in adverse socio-economic outcomes. It is for these reasons not surprising the rural populations often demonstrate demographic characteristics of disadvantage, including relatively lower levels of wealth and education, and higher incidence of syndromes such as domestic violence.

Rurality also connotes unique relationships with 'landscape' and 'waters'. Typically rural communities, including Indigenous communities living outside of urban areas, which are often in remote locations, are closely dependent on nature for their wealth and welfare. Changes to seasons or the depletion of the environment are of more than theoretical interest to a farmer, fisher and those remote Indigenous communities who maintain a semblance of their traditional lifestyles, which depend so much on interactions with nature. Volatility in seasons and the sometimes-inexorable diminishment of the productivity of natural resources, and the impacts of the economic dynamics of commodity cycles are important underpinnings of the welfare of rural communities.

Out of such features arise many law and policy issues that are vital to rural people but which may be of marginal interest to the majority population clustered in cities or close to cities. Natural resources law and policy, indigenous social justice, and equity of access to services and transport are illustrative of such issues. There are also many issues that may not be uniquely rural preoccupations but which take on a particular character in a rural setting, including sexual freedom, personal reputation or professional ethics in a small community, and the challenges of creating viable enterprise networks when distant from urban centres where most consumers reside.

These special considerations for rural law and policy are relevant around the world. Whilst a tribal communities in South Africa, India or Tajikistan operates in a different way to a small town in the United States or the United Kingdom, they share the challenge of relative isolation and of greater dependence on natural resources: all struggle to overcome relative disadvantage



in accessing resources, even though the differences in their absolute disadvantage is likely to be great. There is an opportunity to learn how to design better governance systems, innovative laws, and improved policies from each other. We offer the medium of this journal as a platform to explore and share the learning.

Rural life is not without its many joys. Communities that are close and close to nature can be wonderful places to live. Often they operate in an environment that is characterised by constant innovation, where interaction between people from different socio-economic groups is richer and more frequent than in the city. Typically the pace of interactions allows for a more human face to everyday relationships. We hope that this 'richness' of relationships with the land and its people will also emerge from the writings for this journal, with its attention to the unique and valuable social features of living away from the too frequently dehumanising intensity of the cities.

We have adopted an open access policy for this journal with the intention of replicating some of the features of the modern community to benefit both readers and authors. We are taking advantage of the flexibility that modern technology provides, by publishing:

- ✓ Editions, which comprise papers on a theme. The theme in the Special Edition is on the topic of 'Water Law: Through the Lens of Conflict'. Papers in the edition are based on a colloquium held in January 2011 at the University of New England, Australia.
- ✓ Regular publications of unsolicited, relevant papers on an ad hoc basis. Scholars and practitioners are invited to submit papers for peer review and inclusion.
- ✓ Commentary. We invite comment (see the comment link to each paper) upon all papers published in the journal. On a periodic basis, the comments will be reviewed and a 'commentary' published.

We hope that by these means the *International Journal of Rural Law and Policy* will generate a lively community of scholars of rural law and policy, as well as contributing innovative and useful ideas to the field.

Challenges for water governance

We have selected the topic 'Water Law: Through the Lens of Conflict' for the first journal edition because it brings together issues of natural resources, social dynamics and complex policy challenges: and because the specific issues and the ways in which they are being addressed vary so greatly around the world. Whilst water law varies in response to the unique legal, social and ecological challenges of each jurisdiction, there are over-arching challenges to the effective use of the law. Water governance and legal scholarship can provide new insights into ways to address these universal challenges.

In recent years, the concept of Integrated Water Resource Management (IWRM) has increasingly informed the way in which water is managed. Along with this has come a strong emphasis upon hydrology and economics as essential lenses through which to view water management issues and to propose water law reforms. Often this has come with an emphasis upon optimising or balancing economic and ecological interests, and in some cases with a predisposition to the use of the market as a principle tool of management. These approaches offer many benefits but, as this papers in this special edition, suggest, they are far from a panacea; they offer an incomplete and somewhat distorted view of the complexity of the issues. As a result they risk being the source of proposals that are less than optimal and which may create perverse outcomes and ineffective interventions alongside the positive results.

Water, by its nature, is of fundamental importance to people for a variety of reasons. The valued attributes of water include: its physical necessity for sustenance and hygiene, its economic value in food and fibre production, the importance of cultural and recreational uses, and its intrinsic value as an element of natural systems. Because of water's centrality to society, it

ought not be surprising that in every jurisdiction we have explored in this edition of the IJRLP there is a history of conflict over water. In most cases, this conflict has resulted in a body of laws and norms that reflect complex and evolving community values. The papers in this edition suggest that this diversity of values is incompletely reflected in the 'mainstream' water policy paradigm.

In these papers the authors discuss the legal and institutional arrangements to address value-laden and technically complex issues such as competition for water between agricultural users, between agricultural and urban users, and between these users and the environment. Such patterns of water conflict could be expected to feature in almost any global discussion of water law and policy. The papers also discuss many other dimensions of conflict over water that do not fit along the conventional economic/ecological axes suggested by most IWRM approaches. These include: political and constitutional conflict in which water issues are involved but where water itself may not be the core of the contest; management of and funding for control of the residual damage to waters from derelict mines; social conflicts over water quality and quantity where the issues are ethical and philosophical as much as they are hydrological; matters associated with the political and legal authority of different levels of government; issues of equity for less advantaged groups where water is but one dimension; and issues of nationalism in hydro-energy production. This array of issues strongly suggests that water governance needs to be more pluralist and socially oriented than the standard approaches to IWRM might indicate. Environment, hydrology and economics are very important aspects of water in society, but so too are issues of culture and politics, and questions of social justice. Too narrow a lens through which to explore water policy may result in losing sight of these less-discussed aspects of water in society.

The papers also suggest that the institutional and normative aspects of water law and governance are under-considered in conventional thinking about water policy. They play a large role in determining what happens in practice and what is acceptable politically or at a community level; importantly they often over-ride considerations of efficiency. The papers demonstrate the significance of community norms such as attitudes to social justice. In particular (indeed in every case) the role of the national constitution in reflecting collective beliefs about ownership and control of water is pivotal to understanding the dynamics of water governance. Thus, in South Africa the *Constitution of the Republic of South Africa 1996*, positions water policy in the setting of social justice, whereas in Australia and the United States the constitutional arrangements are principally focused on coordination of policies. In China the constitutional arrangements reflect a focus somewhat similar to that of South Africa, but places an emphasis on the efficient coordination of a federalist structure. In Iceland the constitutional arrangements for water reflect very long established common law traditions of property intersecting with more recent demands of electricity generation. In each case, it is not possible to understand what is possible or likely with water law without paying a great deal attention to the national constitution and to the mechanisms for conflict 'framing' and management that these foundational documents establish.

Finally, the role of history emerges as more important than one might expect given modernist narratives about water policy. The distinct ways in which water laws have emerged in the drier parts of the United States and Australia, where there are many characteristics in common, suggests that the historical dynamic is an important factor in determining how modern water conflicts will be resolved. Some authors, referring particularly to Iceland and the United States, suggest that history has become restrictive, with property right arrangements now limiting society's capacity to adapt to changed water demands and new contexts. Of the jurisdictions explored in this edition of the journal, the two which seem to have had the greatest freedom to innovate to take into account broader interests are China and South Africa, both of which have constitutional arrangements that to some degree subordinate ownership to the public good (though in both cases the gap between the legal principle and established practice is large, in no small degree due to insufficient economic capacity to implement what is legally proposed).



This special edition does, in total, suggest that modernist narratives about how water policy is, or ought be, shaped, are to some degree deficient. By emphasising economic and ecological issues as the key goals, and social dynamics as being more related to means, approaches like IWRM pay insufficient attention to the richer dynamic that these papers have uncovered. Conflict is a complex social process; the dynamic of conflict and its outcomes are often driven by more than the issues being overtly contested. History, institutional settings, norms, complex values and the processes used to understand and respond to the issues are all significant and need to be given due attention if the outcomes are to approximate optimality (to the extent that one can talk of optimality in the context of pluralist values and asymmetrical interests and knowledge).

This edition of the journal indicates that further innovation in law and policy research and practice is needed to ensure that social justice, the rule of law and the dominant role of Parliament in protecting the interests of all are respected. It is essential that those who have such concerns – and who have the expertise to provide useful information about them – be heard alongside the hydrologists, ecologists and economists whose work is also vitally important to ensure efficient and equitable water governance outcomes.

This poses some challenges:

1. Shaping the water policy ‘problem’ so that the sorts of issues that have been highlighted by these journal papers are given sufficient weight (along with issues of science and economics);
2. Developing new methods and learning the skills needed to create effective multi-disciplinary teams and projects which can cope with such a complex mix of issues; and
3. Developing robust research and policy-design proposals to ensure that legal/institutional and social justice aspects of water policy are equally well developed alongside other aspects of water governance.

Whilst the papers provide valuable insights into such matters, they also pose serious challenges for the scholarship and practice of water law and institutional design. The following list of these challenges arose from the ‘Water Law through the Lens of Conflict’ Colloquium.

Research Challenges for water law

Change and improvement

- How can water law facilitate, rather than impede, change in response to changing conditions and values?
- What water law designs will best allow response to discontinuous change (for example climate, economic) and the primacy of the citizen in democracy?
- How can we create compensation/adjustment mechanisms that can be financed without undue strain on the public purse?
- How can we create water markets/interests that support adjustment of water uses and conservation of water, rather than entrenching particular uses?
- What can be done to manage the problems that arise as water users come to see/depend upon a mere license as if it were an item of property?
- How can water law be used to accelerate desirable change, rather than entrenching impediments to social change?

Sovereignty and the public interest

- How ought water sovereignty of nations be addressed within a system of private interests and international conventions to facilitate trade regardless of national boundaries and interests?
- What means might there be to align national visions and interests with water management efficiency (for example alignment with national concepts of water sovereignty)?



- Is there a system for water sovereignty that will create effective cooperation between states (for example a states riparian theory)?
- How can we ensure that broad statements about public ownership of water are reflected in the substantive provisions of water laws to ensure practical implementation of the broad principles?
- How can water law help to manage the power of large corporates and their relationship with government agencies, including meaningful penalties for breaches and problems of ‘agency capture’ in setting and implementing policy?
- What can be done to protect the public interest in ‘negotiated’ *inter-partes* resolution (for example where the direct parties have private interests that do not encompass all public interests)?
- How can the public interest be made a more tangible/potent concept in water law?

Fairness and social justice

- How ought water law balance the interests of property right indefeasibility with protecting the public interest and ensuring equitable benefit sharing?
- Can the public trust doctrine be made an effective instrument in water governance?
- What legal mechanisms ought be in place to ensure sufficient public access to information?
- Can we create mechanisms of public interest/right that bring social justice agencies (for example EPA, Indigenous welfare) to the table in administering water?

Participation, transparency and governance

- How can the law ensure that there is adequate ‘space’ for participative democracy over water?
- What legal principles will ensure full disclosure and access to information to support community debate and accountability?
- How can we ensure that there is broader public participation in shaping water governance beyond the conventional ‘club’?
- Can we determine the most efficient/effective/fair mechanisms that ought be applied to different types of water disputes, or for water law formation (for example processes for consultation, ADR, negotiation, administration, conflicts and litigation)?
- How can the law ensure effective and comprehensive (triple bottom line) impact evaluation of proposed water institutions and investments?
- What participative mechanisms will best enable both efficiency and social justice (including mechanisms for transparent governance of public/private partnerships for water)?

Ownership

- How can the principles of ownership be reshaped to better suit the unique issues of water?
- What mechanisms can be used to build responsibility to society into ownership of water resources?
- What ‘principled’ arrangements for payment or compensation when adjusting water interests will be equitable and feasible for the public purse?
- How can we better understand and deal with the implications of the use of property rights and markets (which import the panopoly of rules about competition, trade and commercial interests), particularly as these can markedly shift power and legal relationships over water and the legal arenas in which these are dealt with?
- How can accountability and equitable sharing be protected alongside the privileges of water right ownership?
- Would it be more effective/efficient/fair for water entitlements to be time-bounded or conditional, rather than permanent and unattenuated?



Creating synergy through law

- Can water law be used to create effective frameworks for cooperation and the pursuit of mutual gain (not just individual or national gain)?
- What water law provisions would best ensure that public good requirements of water management are sufficiently funded?
- Are there better ways for the law to promote multiple opportunities and synergies in the value achieved from water (for example, multiple eco-system services as well as production uses)?
- What can be done through water law to create a more synergistic/unified approach to maximising all values (allocation for production, conservation for sustainability and social/economic justice)?
- Would it be more optimal for treaty arrangements to encompass rivers, riverine systems or total water cycles? What would create the best basis for effective cooperation?

Institutional effectiveness

- What methods ought be created so that, in the process of water law design, we do ensure that key elements are feasible in practice (for example funding of necessary studies, capacity development etc)?
- What can be done to improve the timeliness of water pollution controls such as prosecutions, particularly given time delays in obtaining science-evidence and speedy intervention to minimise harms?
- How can standing rules be improved to create more effective water pollution laws?
- What innovations in the management of risk associated with water can be created through law (for example compensatory payments, risk insurance and stronger tort liability)?
- What are the innovations that might be used to improve legal instruments for managing water and water issues?
- In federal systems, what coordination mechanisms work best for water law?

Legal processes

- What legal arrangements and methods for the management of conflict and negotiation of interests ought be built into water laws?
- Are there common principles for the management of water conflict that can be applied, regardless of jurisdictional variations in water issues and legal arrangements?
- What processes can maximise cooperation between states, including the management of non-cooperation with agreements?

Science and law

- How can we create more effective sharing and governance arrangements for unobservable resources (for example groundwater) and complex system interactions (for example ecological systems)?
- How can we ensure that the cumulative effects of small changes to water law and administration do not result in water governance that is out of alignment with community interests?
- How can robust and 'certain' legal arrangements be created against the background of uncertainties in the science?

Legal role and capacity

- Is the mental model of the purpose of water law and water policy the right one, does it contribute to pursuit of the wrong goals, or does it over-privilege some approaches and exclude others that could be important?

- What can be done to strengthen the role, and the capacity to carry out the role of lawyers in relation to water policy and disputes?
- How can we create a proper learning paradigm for legal scholarship from the diffuse experiences with water law and policy?
- Are we in danger of 'sacrificing the good in pursuit of the perfect' in water scholarship?

Conclusion

In conjunction with my colleagues, I trust that this new journal will be useful and informative to our fellow scholars and practitioners who are involved in issues of rural law and policy. This first edition sets the tone we hope to maintain:

- ✓ High quality scholarship from leaders in their field from around the world,
- ✓ Addressing issues of great importance to rural people.

We look forward to an ongoing relationship and dialogue with our fellows.



Paul Martin
Chief Editor

