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WATER LAWS, POLICIES AND REFORMS – WHERE ARE THESE LEADING?

Philippe Cullet

INTRODUCTION

Water has never seemed so important. This is reflected in the fact that water and sanitation have been chosen as two of the main focus areas for large-scale social interventions by the Government of India in recent years. While the Swachh Bharat Mission (SBM) was one of the central policy initiatives during the 14th Lok Sabha, the Jal Jeevan Mission (JJM) is the current point of emphasis.(Ministry of Drinking Water and Sanitation, 2018; Ministry of Jal Shakti, 2019)

Interventions like SBM and JJM may seem relatively insignificant as legal instruments because they come in the form of administrative directions that create no rights and obligations. Yet, they are crucial because they constitute a central vehicle for channelling investment. At the same time, the legal framework concerning water is found elsewhere. It includes all the sectoral laws adopted by states over decades, union legislation adopted in sectors where the Union has constitutional competence or where states delegate such competence, and crucially decisions of the higher judiciary setting down the principles governing protection and use of water. The latter is of the highest importance because no water legislation defines the basic principles governing water protection and use.

The result is that the water sector is replete with sectoral legislations, which do not necessarily conform with the strictures of the Supreme Court. Further, water laws have remained largely focused on use and the protection dimension, to the extent that it is addressed and found in environmental laws that are often seen as a separate domain. This is further complicated by the use of administrative directions, which like in the case of SBM and JJM, are not linked to any legislation since there is no specific legislation in the concerned field.

DEVELOPMENT OF WATER LAW SINCE 2000

There has been significant legislative activity in the water sector since the beginning of the century. This is in part a response to multiple crises in the water sector, often perceived in policy terms as being centred on the increasing scarcity of water. (Ministry of Water Resources, 2002) Water law reforms in the 2000s were linked to a broader push at the international level to push for so-called water sector reforms centred on the need to manage water efficiently as an economic good and on the need for the inefficient state to take a back seat in water

management.(International Conference on Water and the Environment, 1992)

Water sector reforms were thus part of a broader push for privatisation and user participation. In other parts of the world, IFI-led privatisation had led to some spectacular failures in the 1990s. At that point, water sector reforms were often linked to specific projects, such as in the case of water privatisation in Cochabamba, Bolivia where the project failed after significant protests during which hundreds were injured.[1] In the wake of these challenges to proposed reforms, a new articulation of their delivery was proposed. This envisaged delinking the promoters of the reforms from the actual reforms by getting laws democratically adopted that would enshrine the reform principles in law and let elected governments implement them directly.

In India, this included a series of sectoral laws generally focused on the management of water. Some focused on existing infrastructure and ways to ensure better use of the same by involving users more directly in their management. A series of water user association laws reflect this trend.[2] Another broader and more controversial strand consisted of laws setting up so-called independent economic regulators. These new statutory bodies were meant to depoliticise decision-making in the water sector by delinking allocation decisions from the political process, based on the template used earlier for electricity despite the fact that water is completely different. (Koonan & Bhullar, 2012)

In the mid-2000s, the process seemed to unfold relatively easily, even if this was linked in certain cases to direct IFI conditionality.[3] The star regulator was the Maharashtra Water Resources Regulatory Authority (MWRRA), which was supposed to act as a model for other states. A number of other acts were adopted, partly linked to prodding from the Union (including financial conditionality),(Government of India, 2009) but besides the MWRRA, other regulators have been slow to start functioning. The MWRRA itself has not managed to fulfil the promises its promoters had envisaged in the first place. In addition, it constitutes an interesting example of the great difficulties encountered in seeking to de-politicise water. In this case, the state government repatriated some key water allocation functions given to the MWRRA after a little more than half a decade.[4]

Legislation adopted since the beginning of the century has generally been unspecific with regard to the issue of privatisation. At the same time, some legislations have been quite direct in pushing for the withdrawal of the state from certain functions because of its perceived inefficiency. The introduction of independent water regulators is the key intervention in this regard since it seeks to offer an alternative to state regulation. In practice, this was done only to a limited extent given that regulators like the MWRRA are headed by a retired senior bureaucrat or judge.[5] The second trend has been towards fostering user participation, particularly in the context of irrigation, which is meant to ensure better management by the beneficiaries themselves.

1 For example, see Gómez & Terhorst, (2005)

2 For example, see Madhav (2010)

3 For example, see (World Bank, 2004) 10 directing the state to 'prepare and submit for consideration for adoption' an appropriate draft enabling legislation for the establishment of a State Water Tariff Regulatory Commission.

4 Maharashtra Water Resources Regulatory Authority (Amendment and Continuance) Act of 2011.

5 Section 4 of the act as amended by the Maharashtra Water Resources Regulatory Authority (Amendment) Act, 2016.

THE 2010s: ATTEMPTED CONSOLIDATION AND CENTRALISATION

The 2010s were in part a period of consolidation. This was linked to the realisation that the types of sectoral interventions introduced largely a top-down manner in the 1990s and 2000s were not necessarily able by themselves to engineer the kind of change required. This is hardly surprising to the extent that water uses cannot be easily segmented, in part because many water sources are used for multiple uses and many water uses are linked to each other. This does not even take into account questions related to the protection of water, which is at best peripheral in existing laws that all focus in one way or another on use(s) of water.

Some new initiatives in law and policy have emerged in recent years. Some build on what policy-makers tried to do earlier. This is, for instance, the case with the push for adopting a fourth National Water Policy, (Ministry of Jal Shakti, 2020) and the adoption of the Dam Safety Act, 2021. This was first proposed in 2010 and its final adoption took time, in part because of opposition by some states to what they saw as undue interference in their sphere of competence. Some build on developments that have taken place in other forums and have not been integrated in existing statutes. This is, for instance, the case of the several attempts at drafting framework water legislation bringing together the basic principles governing water protection and use under one roof. Several states have started a drafting process but none has completed it yet and the Union has commissioned three different drafts over the past decade.[6] One of the underlying rationales for adopting framework legislation is the need to give statutory backing to a number of significant judicial pronouncements over the past few decades that have, in principle, completely changed the nature of water law. However, since the various decisions have not been incorporated in water legislation, there is, in practice, a significant disconnect between what can be seen as grand principles and their non-implementation on the ground. The recognition of water as falling under the public trust doctrine by the Supreme Court as early as 1996 is one such case. Not only have laws asserting state control over water not been amended but also some subsequent laws still assert full state control over water.[7]

Other new initiatives have built on the general trend of focusing on water use and management in preference to focusing on its protection. This is, for instance, the case of the National Waterways Act, 2016. This act seeks to promote the use of rivers for navigation and thus focuses entirely on an instrumental use of rivers. It opens up vast new avenues for large-scale investments that are directly targeted at fostering commerce and thus economic growth. Another impact of the act is that by declaring a significant number of rivers as national waterways, it reduces the authority that individual states have over rivers and contributes to a trend towards centralisation of control over water. Overall, its main concerns are centred around investment and infrastructure, and it fails to acknowledge potential impacts on the realisation of the fundamental right to water, on fisher people, on riverbed farming and various other traditional uses of water. In addition, the very significant ecological impacts of the massive infrastructure development that may be called for here are not mentioned.

6 The latest is the Draft National Water Framework Bill, 2016.(*Draft National Water Framework Bill*, 2016)

7 eg Bihar Irrigation Act, 1997, s 3; Gujarat Irrigation and Drainage Act, 2013, s 4.

RENEWED FOCUS ON DRINKING WATER

Drinking water is not the object of any specific legislation that would, for instance, reflect the recognition of the fundamental right to water, lay down binding quality standards and set out accountability standards for any provider. This gap has been filled in part through multiple administrative directions that have taken on different names over time. In the case of rural areas, these different schemes have been the vehicles for massive investments in infrastructure for accessing drinking water, from the crores of handpumps to multi-village piped water supply systems.

The latest avatar, the Jal Jeevan Mission (JJM) has as its central mission to provide every rural household a functional household tap connection. (Ministry of Jal Shakti, 2019, para 3.3) This presupposes further massive investments and infrastructure to deliver on this promise. This massive state-led enterprise is at the same time infused with a language that denotes a focus on the viability of the investment at least as much as the social goals pursued. Thus, in keeping with previous administrative directions concerning drinking water supply in rural areas, there is no mention of the fundamental right to water anywhere. There is thus a disconnect between the oft-repeated recognition of the right by the higher judiciary and its invisibility in policy frameworks that contribute to its realisation. At the same time, the JJM specifically mentions that water should be 'affordable' (as opposed to free),(Ministry of Jal Shakti, 2019) and calls on states to explore public-private partnerships to achieve the objectives of the mission, (Ministry of Jal Shakti, 2019, para 7.17) thus clearly placing drinking water supply in the list of resources that are commodified. In addition, as was the case already in the 2000s, there is a promotion of community ownership, which is linked to a contribution to capital costs (5 to 10%) of every household.(Ministry of Jal Shakti, 2019, para 6.12)

The JJM is not particularly novel since the push for including non-state actors in drinking water supply in rural areas has been a feature of reforms since the mid-1990s. It also does not go as far as pushing for privatisation of water supply services as has been done in some urban areas. As a result, more telling examples of the direction that drinking water policy is taking may be gleaned by looking beyond formal policy frameworks. One of the salient examples of new developments is that of water ATMs.

Water ATMs are particularly interesting because the very name signifies that they are associated with a push towards commodification of water. Indeed, there could be no better way to 'teach' water users that water is a commodity than by equating its access to that of bank notes. At this juncture, the term water ATM is often eschewed for the more neutral term of 'water vending machine' but the underlying idea remains the same.

The introduction of water ATMs was first linked to corporate efforts to spend their CSR funds. This was sometimes done through the setting up of social enterprises. Progressively, water ATMs have been taken up by a range of actors, from civil society to businesses and the state. These facilities have a social function. Yet, what the public discourse often misses is that each facility requires land (sometimes obtained free) and is thus a way to get a foothold in places where land may not be easily available. From a water perspective, the crucial element of these land allotments is that they are used to pump unlimited amounts of water, as the current legal framework governing groundwater allows. Since drinking water is recognised as the first priority for water use, it would be virtually

impossible to challenge such use, once it has been established.

Water ATMs are also directly associated with the push for bottled water advertised as an alternative to unsafe drinking water. Indeed, while water ATMs do not provide bottled water whose quality standards are higher than tapped water, the water is usually provided in unsealed bottles. Even in rural areas, 20-litre plastic bottles become the container of choice, not necessarily because they are more convenient than matkas, but because the machine dispenses water in 20 litre instalments.

Overall, a lot of investment is going to drinking water supply in both rural and urban areas. These interventions are partly guided by administrative directions; they are only guided to a limited extent by statutory frameworks since there is no single law directly applicable to drinking water supply in general; and they are not based on the understanding of drinking water as a fundamental right. At the same time, there is an increasing focus on the fact that water is expensive for the user, not only because it is scarce but also because it increasingly often needs to be treated before supply. There is thus a broad push towards ensuring that everyone understands that water is not free and that there is always a price to be paid, regardless of whether it is water used for survival, basic needs, the realisation of fundamental rights linked to water, such as the rights to sanitation, health and food, or whether it is water used for commercial or recreational activities.

CONCLUSION

Ongoing reforms since the beginning of the century have pulled in different directions. On the one hand, the recognition by the higher judiciary of the fundamental right to water and the recognition that water falls under the public trust doctrine reflect a completely new understanding of water that breaks with the old understanding of water as a resource whose main relevance is as an input for productive activities. There has thus been in principle a shift from the idea that water can be used (if not 'owned') by landowners to the idea that water is a public substance that no one can own.

On the other hand, the many laws that have been adopted over the past couple of decades have tended to reinforce the focus of water law on the use of water and ways to manage water infrastructure more efficiently. This has taken place in a broader context of distrust of the state as manager of water, of a push for commodification of water and need to bring in private sector actors to manage water more efficiently (rather than equitably), and of a progressive push for further centralisation of water management at the Union level. The fact that these different trends do not all pull in the same direction have unsurprisingly led to a situation where it is not possible to have a single reading of what is happening in the water sector. This is confirmed by the fact that while laws adopted to-date do not reflect the new thinking, several states and the Union have at least started the process of drafting water laws that would take water governance towards a less utilitarian framework and emphasise much more the social and environmental dimensions of water regulation.

In all this, the situation for individuals, in particular the majority of the poor is far from being as bright as it should be after decades of massive investments in drinking water supply. The difficulties cannot be attributed to a single cause but there is no doubt that the absence of a regulatory framework clearly setting out the rights of individuals and the responsibilities of water providers is a serious gap that urgently needs to be rectified, together with the need to re-orient water regulation towards giving water protection the priority it deserves.

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