

Governing Water to Foster Equity and Conservation Need for New Legal Instruments

PHILIPPE CULLET

The water sector in India and vested interests in it have always been averse to change. We have now reached a point where difficult decisions must be taken if we are to avoid an increasing number of water-related conflicts. The states must not only adopt legislation based on the central government's groundwater model law but also make sure to adapt it to their local circumstances. The union government also has a framework legislation that attempts to highlight the importance of water, which all states would do well to replicate.

Water has been a central policy issue for decades. A combination of factors has made water an even more important priority in recent years, something that will not change in the foreseeable future. The first reason for this is that water is a source of life and it is necessary for survival. Water is also central to most human activities, from domestic use and livelihoods to industrial growth. At the same time, protecting water and ensuring its conservation in the long term has become increasingly important over the past few decades. However, while conservation has become a significant agenda item, it is often seen as an "environmental" subject, or one that need not be addressed from within the water sector.

The increasing importance of water in policy terms can be ascribed to various factors. The main problem usually highlighted is increasing water scarcity (Mekonnen and Hoekstra 2016). Decreasing per capita water availability is a concern. This is caused by a variety of factors, including changing rainfall patterns caused by climate change, drought, its increasing use, and population growth. Yet, water scarcity is only one of the problems that should concern policymakers and guide attempts to rethink water regulation. Indeed, while overall water availability will be a growing concern in the future, people are now often affected by difficulties in accessing the available water. The barriers to access tend to be economic, but are sometimes social, as confirmed by cases of drinking water being denied to certain communities (Sathish 2015).

In addition, scarcity is not the only concern; certain parts of the country are just as concerned by floods. The availability of drinking water is, in a way, a diminishing problem, thanks to decades of

state investment in handpumps and other ways to access water. But this is counterbalanced by the rapidly increasing number of water sources whose quality is not acceptable as drinking water.

Overall, the water scenario has been changing fast over the past few decades. This has stretched the existing legal and institutional framework, which is largely based on premises that are not valid anymore, to the limit.

Evolving Water Law and Policy

Changes in the global climate, in water availability and distribution, in water use, and an evolving understanding of water, such as the necessity to foreground its conservation, are all factors that explain the need for change in the regulatory framework governing water. At the same time, the evolution of the legal framework itself calls for changes that are yet to be effected. These include constitutional amendments and strictures of the higher judiciary.

To start with, the Supreme Court of India has recognised the fundamental right to water for more than two decades (*Subhash Kumar v State of Bihar and Ors* 1991). Yet, none of the water laws specifically acknowledge its existence, thus leaving a gap between aspirations at the broadest level and implementation at the local level. The Supreme Court has also repeatedly ruled that water must be understood as a public trust (*M C Mehta v Kamal Nath and Ors* 1996). This implies that there can be no appropriation of water because it is a substance far too important to each and every one of us. In principle, this also bars the privatisation of water, though this principle has not been applied strictly by the courts (*Mrs Susetha v State of Tamil Nadu and Ors* 2006).

There has been no statutory recognition of the changed legal status of water and some water laws still assert full state ownership (the Jammu and Kashmir Water Resources [Regulation and Management] Act, 2010, Section 3). Another major reform adopted more than two decades ago was the constitutional mandate for decentralisation to local bodies. The functions devolved through amendments in state-level laws have included various

Philippe Cullet (pcullet@gmail.com) is with the Centre for Policy Research, Delhi and the SOAS University of London.

water-related elements (the Uttar Pradesh Panchayat Raj Act, 1947, Section 15).

Over the past couple of decades, various reforms have been introduced but they do not necessarily all pull in the same direction. In reality, water laws and policy changes have been influenced in a large part by a set of principles known as “water sector reforms” that emphasise the need to consider water as an economic good and to foster its demand management and efficiency of use (Dublin Statement on Water and Sustainable Development 1992). The water sector reforms and the laws that have been introduced in their light give little space to the right to water, the concept of public trust, the central role of the environment in water regulation, and the need to foster a form of participation that is at least in part parallel but separate from the constitutionally sanctioned form of participation.¹

There are thus at least two different strands of reforms in water policy and law. It is imperative to ensure that a modern water law reflects the principles set up at the apex level and is in consonance with higher-level norms. This is one of the central tasks that state governments and the central government need to address.

Need for Reform

Water law is a patchwork of many state laws adopted over decades and some central legislation. This complexity is made worse by the fact that there are many sectors to water law and neither the lawmakers nor the institutions implementing them necessarily see the different sectors as part of a whole. This is nowhere better reflected than in the separate treatment of surface and groundwater, governed by different legal principles and addressed by different institutions that act independently, and (surface) irrigation departments denying having anything to do with groundwater, though it is now the main source of irrigation in the country.

The inappropriateness of existing arrangements calls for new legal and institutional arrangements. One of the first things is to ensure that the overall framework within which all actors operate is linear. This involves, for instance, ensuring

that the same principles apply to the conservation, access, and control of surface and groundwater, something that is not the case today. This also involves operationalising constitutional reforms in letter and spirit.

The decentralisation mandate thus requires not only giving out small parcels of control to local bodies but rethinking the role and place of all state actors, from the panchayat/ward level to the state and central government levels. The Model Groundwater (Sustainable Management) Act, 2016 appropriately proposes that in keeping with the recognition of water, especially groundwater, as a local resource, it is local institutions that should have the primary rights and duties to do with it.

New Laws and Institutions

The central government has undertaken repeated lawmaking initiatives to address what seems like an unending logjam. Two among them are notable. First, in a context where groundwater is the main source of water for most water users and where existing legal arrangements are outdated, the Ministry of Water Resources, River Development and Ganga Rejuvenation (MoWRDGR) has come up with the Model Groundwater (Sustainable Management) Act, 2016, which updates a version drafted by the Planning Commission in 2011 (see Planning Commission of India 2011a).

Second, in a context where there is no set of principles applicable to water in general, the MoWRDGR has come up with the Draft National Water Framework Bill, 2016 that builds on a version prepared by the Planning Commission and a version prepared earlier by the ministry (Planning Commission of India 2011b; Ministry of Water Resources 2013). This needs to be seen alongside the proposals from another MoWRDGR committee for rethinking the institutional architecture of the water sector at the union level (Committee on Restructuring the cwc and cgwb 2016).

The proposed groundwater legislation builds on the realisation that it is not enough to seek to regulate access to groundwater at the level of individual landowners, as has been done until now.

A much broader framework is needed that goes beyond a limited focus on use to encompass conservation, and beyond individual regulation to aquifer-wide regulation and conservation. The Model Groundwater (Sustainable Management) Act, 2016 brings together this broader understanding of groundwater regulation based on the understanding that groundwater is the most local source of water. So the proposed framework calls on local bodies to take the lead in developing groundwater security plans, which are meant to bring together the demands of various users with the need for long-term conservation at an aquifer level and maintain its quality.

The proposed legislation seeks to perform the difficult task of providing an overall context for regulation of water without infringing on the legislative mandate of states. It provides a set of general principles largely derived from existing Supreme Court judgments and legislation, for instance, in the environmental field. A key contribution is that it provides a single set of principles for all water, whether surface or groundwater. Beyond this, it seeks to address some of the challenges that arise at the national level and require interstate coordination, such as interstate river basin regulation and conflicts, and data sharing. It also seeks to promote a new outlook on water by emphasising the need for its security plans.

The two new bills are linked to the proposed institutional reform at the union level so that they can more effectively address some of the key and mounting challenges in the water sector in an integrated manner. The proposed changes are momentous in a sector that has generally been averse to change and their implementation will take time and determination.

In the case of groundwater, the conceptual framework informing the bill and the institutional reforms is very similar. They are both premised on the need for participation in the regulation, conservation, and use of groundwater, and the unitary nature of water. The measures they propose are different because their point of entry is different. The institutional reforms envisaged are at the national level and thus concern the limited functions

that a national-level institution can play in the groundwater sector. They rightly provide for a single institution, the National Water Commission (nwc), to address both surface and groundwater. The proposed functions related to groundwater include, for instance, leading the national aquifer mapping and the groundwater management programme.

This ties in very well with the institutional framework proposed by the Model Groundwater (Sustainable Management) Act, 2016, which, in recognition of the local nature of groundwater, puts forth an institutional framework centred on local bodies of governance. Since the necessary technical expertise is usually not available at the local level, the nwc will be able to fill in such gaps. At the same time, it is appropriate that the Model Groundwater (Sustainable Management) Act, 2016 does not directly refer to the nwc since it only plays a subsidiary role and the lead role must be taken by state-level institutions.

In the case of the framework legislation, there is a direct link between the nwc and the proposed regulatory framework because they both operate at the national level. They are again both premised on the idea of the unitary nature of water and thus complement each other in terms of taking the water sector forward with their broader understanding of water and its regulation. At the same time, the lack of effective integration needs to be addressed to ensure that the nwc is effectively set up to serve the purposes and aims of the framework legislation.

The nwc needs to be the institution that will implement the provisions of the framework legislation. It needs to be the institution that contributes at the national level to the realisation of the principles of water regulation found in the framework legislation. This is necessary to ensure that the nwc effectively works in coordination with other ministries and departments that have a stake in water. Additionally, establishing the nwc in the framework legislation will ensure that its mandate is clearly linked to the mandate that the union has over water without interfering with the main mandate that states have over it.

The nwc should thus be conceived in terms of the principle of subsidiarity, which recognises the primacy of local regulation of water without losing sight of the fact that water must be regulated, conserved, and used at all levels at the same time. Such safeguards need to be written down in the legislative framework to ensure that states and the union have a harmonious relationship over water in the coming decades, which will undoubtedly witness increasing conflicts over sharing and allocation of water from the local to the national levels.

Beyond the Proposed Draft Laws

The union government has taken noteworthy initiatives to ensure that the water sector, in its legal, policy, and institutional dimensions, is better able to address the multiple challenges that have arisen and will arise in the future. The first task is to ensure that some of these initiatives take a concrete form soon because this is not the first time proposals for reform have been mooted. The increasing severity and multiplicity of water crises affecting the country should ensure that action will indeed be taken and the proposed initiatives implemented.

Change is, however, not necessarily welcome. It is particularly so in the water sector where vested interests get established over a period of time. While this may explain insufficient action over the past couple of decades, we have now reached a point where difficult decisions must be taken before the crisis worsens. Not doing so will lead, for instance, to a rapidly increasing number of water-related conflicts. These will not just be interstate conflicts such as the Cauvery dispute (Janakarajan 2016), but a multitude of conflicts at the local level over access to available water and, in many cases, over allocation between different sectors (Cullet et al 2015).

The steps taken at the union level are extremely important in forcing all actors to acknowledge the need for change. At the union level, there is some competence in the water sector and significant influence over what happens on the ground, especially through the funds it provides to states. It is the states that have the primary constitutional mandate over

water and given the multiplicity of climatic conditions, socio-economic conditions, and differing patterns of water use in the country, it is imperative not to upset the existing constitutional arrangement.

In the context of the current initiatives, this implies that two things are necessary. As far as the groundwater model legislation is concerned, states must not only adopt legislation based on its principles but also make sure to adapt it to their local circumstances, something that has not been effectively done earlier. As far as the framework legislation is concerned, the union initiative is a worthwhile attempt to highlight that water must be given additional visibility at all levels. The most important step is for each state to adopt a framework legislation because no state has any such legislation in place. The need for this has been felt and some states, such as Meghalaya and Rajasthan, have proposed draft legislations. The union initiatives should act as a wake-up call to all the states to display a new drive and dynamism.

NOTE

- 1 This is the case for water user associations set up as separate institutions from panchayats, even though panchayats are usually given control over minor irrigation, such as in the case of the Uttar Pradesh Panchayat Raj Act, 1947, Section 15(iii).

REFERENCES

- Committee on Restructuring the CWC and CGWB (2016): "A 21st Century Institutional Architecture for India's Water Reforms."
- Cullet, Philippe, Lovleen Bhullar and Sujith Koonan (2015): "Inter-sectoral Water Allocation and Conflicts: Perspectives from Rajasthan," *Economic & Political Weekly*, Vol 50, No 34, pp 61–69.
- Janakarajan, S (2016): "The Cauvery Water Dispute: Need for a Rethink," *Economic & Political Weekly*, Vol 51, No 41, pp 10–15.
- M C Mehta v Kamal Nath and Ors* (1996): Supreme Court of India (1997), 1 SCC 388.
- Mekonnen, Mesfin M and Arjen Y Hoekstra (2016): "Four Billion People Facing Severe Water Scarcity," *Science Advances*, Vol 2, No 2, pp 1–6.
- Ministry of Water Resources (2013): "National Water Framework Bill."
- Mrs Susetha v State of Tamil Nadu and Ors* (2006): Supreme Court of India AIR 2006 SC 2893.
- Planning Commission of India (2011a): "Model Bill for the Conservation, Protection and Regulation of Groundwater."
- (2011b): "Draft National Water Framework Act."
- Sathish, G T (2015): "Pond Water Here Is Still 'Untouchable,'" *Hindu*, 18 July, <http://www.thehindu.com/news/national/karnataka/pond-water-here-is-still-untouchable/article7436114.ece>.
- Subhash Kumar v State of Bihar and Ors* (1991): Supreme Court of India AIR, SC 420.