



Protecting Water While Providing Water to All: Need for Enabling Legislations

PHILIPPE CULLET

India is facing an increasingly dire water situation. The NITI Aayog in 2018 warned that the country is facing the ‘worst water crisis in its history’.¹ This is a crisis of availability of water with various states facing increasingly frequent and/or acute water scarcity for at least some part of the year. With increasing water use and more erratic monsoons, per capita water availability in the country is progressively decreasing. An associated challenge is the country's dependence on groundwater. This is particularly significant because the overwhelming majority of the population depends on groundwater for its domestic water needs; for crores of people water is a source of constant worry in a context where water tables are rapidly falling and water quality rapidly diminishing. It is also a concern for irrigators since the bulk of irrigation today depends on groundwater. Juxtaposed

against this water scarcity challenge is a crisis of abundance reflected in the frequent floods that afflict several states on a regular basis.

However, the most critical challenge of all is that of governance of water. On the one hand, the governance of water is organized largely around laws and institutions tasked with allocating and regulating use of water among various claimants. On the other hand, water protection is seen as an environmental mandate that remains largely distinct from water governance, even though water is an integral part of environmental governance. This makes for poor outcomes since protecting water is necessary to ensure availability today and in the future and thus conditions water use. The failure to effectively protect water is an increasingly significant cause of conflicts among different water users.

The challenge of water governance primarily emerges from an inappropriate and insufficient legal framework. This challenge can be broken into different components.

- » The rules governing access to water are often drawn from old case laws that gave primary control over water to landowners.² This is problematic because there is no mechanism to coordinate the cumulative use of a river by all riparian landowners, leading to potential over-exploitation. It is also inappropriate because it gives only landowners rights over a resource that every person needs to use on a daily basis for drinking, food and domestic needs. In addition, it precludes any basin-wide or aquifer-wide protection measures since control over water is organized around the claims of individual landowners. This is particularly problematic for groundwater where each individual landowner has the right to take as much groundwater as they please, to the extent of depriving other users of the same aquifer and without considering the need to avoid use beyond replenishment.
- » One of the specific problems with the above scheme is that the rules for surface water and groundwater are not the same. It was determined in the nineteenth century when the connections between the two were not well understood. This has led to the very unfortunate situation where rules for surface water and groundwater are different. Moreover, most water laws centre around issues related to surface water, leaving groundwater unregulated, even though this is the critical issue today. The largest use of water, irrigation, is mostly governed by laws that consider irrigation to be sourced from surface water when in reality farmers rely overwhelmingly on groundwater for irrigation.
- » The responsibility for governing water is divided between different institutions, from panchayats/ municipalities to states and the Union. The

Constitution gives primary responsibility to states, while the local dimensions of water governance have been confirmed in the 72nd and 73rd constitutional amendments and the Union has some powers concerning matters that go beyond the state level. The recognition that water needs to be addressed at all levels is an excellent starting point. In practice, however, even though the Supreme Court has repeatedly stated that the state at each level is a 'public trustee',³ this is not yet reflected in legislation, leading to unnecessary governance conflicts.

- » The rules in place for drinking water supply are separate for urban and rural areas, with different supply norms for rural and urban residents.⁴ This fragmented governance is problematic since urban areas increasingly rely on water from beyond the municipal limits, thus making it imperative to address problems arising jointly.
- » As we have seen, the rules treat surface water and groundwater separately. They also view pollution as an environmental matter and usage as a water sector matter.

As this brief description highlights, there are vast gaps between regulation and practice, as well as gaps between the existing parts of the regulatory framework. These issues have been critical concerns in the water sector and policymakers at different levels have tried to address them. This has led to various law-making initiatives at the state and central levels. In keeping with the constitutional mandate, states have adopted a number of water laws over the past couple of decades. This is commendable since it reflects a recognition that a number of issues can only be effectively addressed if legislation is adopted. At the same time, states have generally not engaged independently in developing new water laws and have tended to react to policy priorities set elsewhere. The resultant patchwork of laws does not necessarily address the most critical issues.

The new government needs to focus, in particular, on two initiatives: a framework water legislation and a model groundwater law. Both of these have been in the making since the beginning of the decade, having been proposed and developed by the last two governments at the Centre. They need a much stronger push to ensure a strong legal framework for water that allows India to face the challenges of the 2020s.

Towards Framework Water Legislation

The medley of water laws that exist in most states is deficient in that these laws are not centred around any set of principles governing the water sector as a whole. Principles have been laid down by the higher judiciary over time but they have not been enshrined in legislation. This is a gap that impedes effective governance of water and prevents water conflicts from being resolved on bases that are clear for all users.

In the absence of framework legislation in any state, the Planning Commission of India took the initiative of drafting such a law in 2011.⁵ The underlying idea was to ensure that all institutions concerned with water could rely on a single frame of reference so that water governance becomes more transparent and accessible. The drafting of framework legislation was taken up again by the Ministry of Water Resources, River Development & Ganga Rejuvenation (MoWRRDGR) in 2015, leading to an updated draft known as the National Water Framework Bill, 2016.⁶

There is a strong need to ensure that all water and all water uses are governed by the same principles, and that protection and use principles are clearly linked. The new government must ensure that this draft is taken up and adopted so that the country is better prepared to face the increasing number of water crises that are likely to beset a number of states in the 2020s.

Need for Comprehensive Groundwater Legislation

Groundwater is and will remain the primary source of water for most water uses for many years. Existing groundwater regulation is extremely dated; the principles were laid out in the 19th century and have not been updated. Recent regulatory interventions focus on top-down attempts to control usage; they are failing because they neither consider the broader aquifer-level protection nor reflect the fact that groundwater use is, first, a local issue to be addressed at the local level. The rapidly deepening groundwater crisis calls for an entirely new perspective on groundwater protection and groundwater rights.

The central government has played an important role in providing models that states can use to develop their own legislations. A first generation of model legislation promoted between 1970 and 2005 focused essentially on introducing new control measures for groundwater use without addressing either the rights to groundwater or the need to protect, manage and regulate groundwater at aquifer level. In 2011, the Planning Commission of India took up the challenge of drafting a comprehensive groundwater model law addressing protection and use from the local level to the state level.⁷ In 2015, the MoWRRDGR decided to go back to the draft of the Planning Commission and requested an updated version. This was delivered in 2016, and submitted for comments to states and the NITI Aayog; a revised version incorporating comments was submitted in 2017.

The new government should ensure that the Model Groundwater (Sustainable Management) Bill, 2017, is taken forward at the earliest.⁸ Where it exists, state groundwater legislation based on the old model legislation is woefully incapable of addressing today's challenges; in any case most of these Acts exist mostly on paper. The Bill is an appropriate template that the central government must formally adopt and promote to address the rapidly worsening situation in terms of falling water tables and diminishing water quality besetting vast areas of the country.

Priorities for the New Legislature

The water sector has been the object of much attention from policymakers for several decades. Most regulatory interventions have, however, been largely piecemeal as reflected in the fact that most water laws are sectoral (for instance, irrigation-specific) and fail to address the unavoidable connections amongst different uses and between surface water and groundwater. Some of the most glaring gaps, such as a missing framework of principles governing the water sector, have been partly filled by the Supreme Court and the high courts. This is an appropriate start but does not affect the governance of water on a daily basis at the local level, which is determined by the laws in place. Further, the lack of comprehensive legislation to address groundwater leads to a situation where the most important aspect is not regulated by comprehensive regulation, contributing to the increasingly dire situation in many states.

The new government should immediately make use of the two existing drafts prepared in the previous legislature and take them forward:

- » The adoption of the model law for groundwater – the Model Groundwater (Sustainable Management) Bill, 2017 – is crucial to ensure the equitable and sustainable use and protection of groundwater.
- » The adoption of a framework legislation based on the National Water Framework Bill, 2016, will ensure that there is a set of overall principles for the entire water sector reflecting legal developments in recent decades. This will ensure that all actors in the sector have the same point of reference in their interventions.

END NOTES

1. NITI Aayog, Composite Water Management Index (2018), 27
2. For example, *Debi Pershad Singh v. Joynath Singh* (1897) L.R. 24 I.A. 60 (Privy Council, 7 April 1897) for surface water and *Acton v Blundell* (1843) 152 ER 1223 for groundwater.
3. *MC Mehta v. Kamal Nath* (1997) 1 SCC 388 (Supreme Court of India, 13 December 1996).
4. NITI Aayog, Composite Water Management Index, 46.
5. Draft National Water Framework Act, 2011, http://www.planningcommission.nic.in/aboutus/committee/wrkgrp12/wr/wg_wtr_frame.pdf.
6. The text is available at http://mowr.gov.in/sites/default/files/Water_Framework_18July_2016%281%29.pdf.
7. Model Bill for the Conservation, Protection and Regulation of Groundwater, 2011, in Planning Commission, *Report of the Steering Committee on Water Resources and Sanitation for Twelfth Five Year Plan* (New Delhi: Government of India, 2012).
8. An earlier draft is available at http://mowr.gov.in/sites/default/files/Model_Bill_Groundwater_May_2016_o.pdf.