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Proposed Union Water Laws: Need to Rethink the Premises

Philippe Cullet

[55] The Union Government has circulated two proposed new water laws, the Draft National Water Framework Bill, 2013 and the Draft River Basin Management Bill, 2012.¹ These two bills reflect in some way new thinking about water regulation which includes, for instance, the need for having a set of principles governing all water uses and all water bodies. In this sense, the two bills are premised on ideas that would take water laws forward, something that is seriously needed given that many water laws are now outdated. Yet, as this article discusses, while both bills start from premises with which most people may agree, the way in which they are conceived make them inappropriate starting points for new legislation in 2013.²

NEED FOR A WATER LAW FRAMEWORK

There have been increasing calls over the past decade for the adoption of a framework water law.³ Indeed, no modern water legislation has ever set down a set of basic principles which apply to the entire the water sector. There are various substantive reasons why a framework is needed. Firstly, the water sector is governed by two different sets of principles depending on whether the issue at stake is surface water or groundwater. Legal principles governing the use of these two bodies of water have not been updated for about a century and a half.⁴ As a result, they are still based on the idea that surface water and groundwater are different while we now clearly know that this is not the case.⁵ A framework legislation that provides a central point guiding all water uses would ensure, for instance, that panchayat, district or state administration have clear guidance in situations where a given source of water needs to be allocated to domestic use, irrigation, livelihoods and industrial uses. For the time being, this is largely left to administrative and political considerations, giving the state machinery ample flexibility, often at the cost of social and environmental considerations. This has the potential to give rise to conflicts that are unnecessarily adjudicated by the courts, as in the case of a dispute over the use of the Rajsamand Lake in south-west Rajasthan where the dispute between the farmers and town dwellers went all the way to the Supreme Court.⁶ Secondly, a framework is also needed to reflect the recognition of the fundamental right to water by the courts since the early 1990s.⁷ Indeed, there is no legislation that puts this right into a framework that is directly applicable and thus [56] contributes to the realisation of this right for every individual. Thirdly, a framework is needed to reflect the fact that water law is part of a broader corpus of laws that are concerned with water. This includes, in particular, environmental law. The need for making the link between the two is particularly crucial in a context where environmental law includes key water-related legislation, such as the Water (Prevention and Control of Pollution) Act, 1974.

¹ Respectively available at <http://wrmin.nic.in/writereaddata/linkimages/nwfl1268291020.pdf> and <http://mowr.gov.in/writereaddata/Reports/Doabia-Committee-Report-2012.pdf>.

² This article focuses on basic structural issues arising in both bills and does not provide an exhaustive commentary of each bill.

³ Ramaswamy Iyer ed., *Water and the Laws in India* (New Delhi: Sage, 2009).

⁴ Rules for groundwater allocation were settled in English cases, such as *George Chasemore v Henry Richards* (1859) VII House of Lords Cases 349 (House of Lords, 27 July 1859).

⁵ M Sophocleus, 'Interactions Between Groundwater and Surface Water: The State of the Science', (2002) 10/1 *Hydrogeology Journal* 52.

⁶ *N.A.A. Upbhokta Sanrakshan Sansthan v State of Rajasthan* (Supreme Court of India, Order of 28 September 2012).

⁷ *Subhash Kumar v State of Bihar* AIR 1991 SC 420 (Supreme Court of India, 1991).

The debate over a framework for water law has been dominated by a debate between those arguing in favour of a framework legislation and those arguing that there should be no such framework because it will unnecessarily contribute to unwanted centralisation in the water sector.⁸ The debate should, however, take a different direction, as the opposition is not between having and not having a framework legislation. It should rather be about whether the framework should be at the state or union level. In terms of the constitutional scheme, water is primarily a state prerogative. It is thus primarily at the state level that a framework should be introduced. In the absence of state legislation, it has not been uncommon for the Centre to take the initiative. Such initiatives can take the form of legislation adopted on the basis of Article 252 of the Constitution or can be framed in terms of a model legislation to be adopted in a state-specific format by state legislative assemblies.

In the present context, another distinction can be made. The Draft National Water Framework Bill, 2013 proposes legislation based on Article 252 of the Constitution. This is not actually a novel proposition since the Planning Commission had earlier set up in 2011 a committee that had drafted the National Water Framework Bill, 2011.⁹ What matters more is the intent and content of the proposed framework. While the Planning Commission bill focused on a coordination framework, the 2013 draft goes in a completely different direction that is tilted towards strengthening the power of the Central Government in the water sector at the expense of the States.

Beyond the issue of whether a framework should be adopted, there is the more important question of the framework that needs to be given to water in the context of the pervasive nature of water and its links with so many other sectors. This is, for instance, the case in respect of the link between water and the environment. Environmental law has been overwhelmingly developed at the union level and has included a framework legislation since 1986 whose definition of the environment includes water.¹⁰ The real issue is thus not just one of coordination of water within the water sector but of coordination of the different sectors within which water is a key dimension. The Draft National Water Framework Bill, 2013 recognises indirectly that environmental law is a key dimension of modern water law,¹¹ but fails to actually make the link between the two. This is probably not unexpected, since the committee that drafted the bill did not include anyone from the Ministry of Environment and Forests.

⁸ For opposition to a national framework, eg Gargi Parsai, "National legal framework will compromise our rights", *The Hindu*, 29 December 2012, available at <http://www.thehindu.com/news/national/national-legal-framework-will-compromise-our-rights/article4249863.ece>.

⁹ Planning Commission, National Water Framework Bill, 2011, available at http://www.planningcommission.nic.in/aboutus/committee/wrkgrp12/wr/wg_wtr_frame.pdf.

¹⁰ Environment (Protection) Act, 1986, s 2(a).

¹¹ For instance, through the insertion of the precautionary principle, see Draft National Water Framework Bill, 2013, s 2(xx).

[57] PUSH TOWARDS CENTRALISATION

A joint reading of the two drafts bills under consideration brings out a number of important issues concerning water law in general. Firstly, both are conceived as central acts, but the proposed justification is different since the Draft National Water Framework Bill, 2013 is seen as encroaching on the prerogatives of states and hence requiring the use of Article 252 of the Constitution whereas the Draft River Basin Management Bill, 2012 conceived as a set of amendment to the River Boards Act, 1956 is justified by its focus on inter-state issues that fall directly into the mandate of the Central Government.

The different justification notwithstanding, the understanding has been until now (and since the Government of India Act, 1935) that states are the primary actors in water regulation. This implies that the competence of the union is residual and concerns only issues, which cannot be effectively addressed at the state level. This constitutes a limited application of the principle of subsidiarity between the federal units and the centre in recognition of the variety of issues arising in the water sectors of the various states of the country covering a multiplicity of hydrological and climatic situations.

The two new bills seem to be informed by a completely different perspective that is premised on strengthening the role and powers of the Central Government at the expense of the states and a fortiori districts, blocks, municipalities, panchayats, ward sabhas and gram sabhas. In the case of the Draft National Water Framework Bill, 2013, an interesting statement is made to the effect that water is a 'common pool resource of the community',¹² something that seems to indicate decentralisation to the most local level. Yet, the next paragraph indicates that 'the state holds water in public trust'.¹³ In principle, the idea that the state is a 'trustee' is a step forward compared to the previous situation where the state exercised its power of eminent domain over water.¹⁴ Yet, in a context where community level is not prioritised and where the powers of the trustee are not defined, it is more than likely that in practice the 'trustee' will be able to carry on acting in more or less the same way as the 'sovereign' state today. In fact, while the principle of 'subsidiarity' is mentioned,¹⁵ it is strictly limited to groundwater and does not apply generally in the Framework Bill.

Other provisions of the Framework Bill confirm this reading. In general terms, there is little to confirm a decentralisation focus. Indeed, the only other mention of decentralisation is found in a provision dealing with 'local rainwater-harvesting and micro-watershed development'.¹⁶ There is also a section entitled 'Participatory Water Management'. This seems to provide a framework for decentralisation but does not actually fulfil its stated aim. The Bill starts by suggesting the setting up of 'water user associations' that are not defined but are specifically conceived as being set up

¹² Draft National Water Framework Bill, 2013, s 3(4).

¹³ Draft National Water Framework Bill, 2013, s. 3(5).

¹⁴ On eminent domain, eg U Ramanathan, 'A Word on Eminent Domain', in Lyla Mehta ed., *Displaced by Development – Confronting Marginalisation and Gender Injustice* (New Delhi: Sage, 2009) 133.

¹⁵ Draft National Water Framework Bill, 2013, s 12(2).

¹⁶ Draft National Water Framework Bill, 2013, s 3(16).

outside of the panchayat and municipalities, thus necessarily restricting the powers of [58] democratically elected bodies of local governance over water.¹⁷ Further, the only paragraph that gives some further hints as to the powers given to water user associations focuses on their powers to collect water charges. These associations are thus conceived within the narrow confines of the push for the commercialisation of water supply services. On the whole, the Framework Bill seems to be mostly concerned about a twin agenda of centralisation and commercialisation. This is confirmed by the proposal for the introduction of a Water Regulatory Authority whose sole mandate is the 'fixation of water pricing'.¹⁸ This new governance structure with a focused mandate would also impact the work of the proposed water user associations since they cannot function independently but would work under the guidance of the Authority.¹⁹

The Draft River Basin Management Bill, 2012 goes even further than the Framework Bill in proposing a strengthening of the powers of the Central Government. It starts by asserting that the 'regulation and development' of inter-state rivers and river valleys should be taken under the control of the Central Government.²⁰ This concerns twelve of the main river basins of the country including the Cauvery, Ganga, Indus, Krishna and Narmada basins.²¹ The strong assertion that there is a public interest in taking over inter-state rivers and river valleys is a direct reproduction of the same provision found in the original River Boards Act, 1956.²²

The novel assertion of power at the union level is found in the operative parts of the Bill. Under the 1956 legislation, a board is to be established 'on a request received in this behalf from a State Government'.²³ The Draft River Basin Management Bill, 2012 completely overturns this and simply declares that the Central Government shall establish river basin authorities.²⁴ The shift from an act that intended to a large extent to foster coordination between states to an instrument that seeks to give the Centre strong over-riding powers is highlighted in the operative parts of the Act and Bill. In the River Boards Act, 1956, the first function of a board is to 'advise' governments.²⁵ In the Draft River Basin Management Bill, 2012, the functions of the Governing Council of a river basin authority include the power to approve a river basin master plan, to allocate the costs of executing schemes among governments and to accord clearance to water resources projects.²⁶ The river basin authorities envisaged under the Bill are thus much more powerful than in their earlier avatar.

This new stronger and more centralised avatar of river boards needs to be seen in historical perspective since the Draft River Basin Management Bill, 2012 advertises itself as bringing a set of amendments to the River Boards Act, 1956. It is generally understood that the latter legislation has on the whole been a failure to the extent that boards have not been set up.²⁷

¹⁷ Draft National Water Framework Bill, 2013, s 15(4).

¹⁸ Draft National Water Framework Bill, 2013, s 6.

¹⁹ Draft National Water Framework Bill, 2013, s 15(2).

²⁰ Draft River Basin Management Bill, 2012 s 1(3).

²¹ Draft River Basin Management Bill, 2012, Schedule I for the full list.

²² River Boards Act, 1956, s 1(2).

²³ River Boards Act, 1956, s 4.

²⁴ Draft River Basin Management Bill, 2012, s 11(1).

²⁵ River Boards Act, 1956, s 13(a).

²⁶ Draft River Basin Management Bill, 2012, s 17.

²⁷ Ramaswamy R. Iyer, 'Towards a Re-ordering of Water Law in India', 1 Indian Juridical Rev. 18 (2004).

[59] It is difficult to provide a detailed analysis of the shortcomings of the 1956 legislation since it has not been the subject of much interest in scholarly debates. However, what is certain is that the lack of response by states to this legislation cannot become the basis for moving to a framework that drastically centralises decision-making power in this area without a full policy debate that does not appear to have taken place. Indeed, while there may be river basins like the Ganga basin that can possibly not be appropriately regulated without union coordination given the number of states involved, the case of the Narmada basin that lies essentially within MP is a case where a number of basin issues will be local issues that may not be best addressed by the Union. The need for circumspection is also linked to the fact that the constitutional scheme provides in effect for the Union to have a secondary role in water regulation and only intervene where states cannot address certain issues alone. In such a situation, the lack of implementation of the River Boards Act, 1956 is not sufficient to justify in itself a complete change of perspective on the matter.

A top-down centralising perspective also generally informs the Draft River Basin Management Bill, 2012. It also includes a statement that water is a common pool resource. However, the relevant section is a contradiction in terms. It states that water is a 'common pool community resource held, by the state'.²⁸ While this section qualifies 'held' by stating that it is held under the public trust doctrine, the problem is the same as highlighted in the case of the Draft National Water Framework Bill, 2013. Simply stating that water is held under public trust does not necessarily restrict the state's power of control in practice. Similarly, such a statement does not imply that the state is conceived as starting at the panchayat/municipality level and in fact there does not appear to be any decentralisation focus in this provision. This absence of a perspective that conceives of governance starting at the most local level is confirmed by section 4 of the Bill that specifically provides that cooperation among basin states is 'for the mutual benefit of the basin States and the Indian Union'. There is no mention anywhere of other actors or beneficiaries, besides the Union and the basin states.

LACK OF CONTRIBUTION TO MODERNISING WATER LAW

At this juncture, there are strong substantive reasons for introducing new water laws or reforming existing water laws. This is due to the fact that many laws are completely outdated, such as in the case of irrigation acts drafted decades ago when groundwater was not a significant source of irrigation.²⁹ Similarly, the allocation framework that distinguishes surface water and groundwater is based on a dated and incorrect understanding of the links between the two.³⁰ Further, water laws do not include an environmental or protection dimension and what exists in the legal framework is mostly found in environmental laws.

²⁸ Draft River Basin Management Bill, 2012, s 8.

²⁹ Madhya Pradesh Irrigation Act, 1931.

³⁰ P Cullet, 'The Groundwater Model Bill – Rethinking Regulation for the Primary Source of Water', 47/45 Economic & Political Weekly 40 (2012).

[60] From the point of view of modernising water law, the Draft River Basin Management Bill, 2012 is, for instance, informed by the need to move towards river basin planning. This is something that water practitioners have been requesting for a long time and that has been widely shared among countries for some time.³¹ In this sense, the Bill moves beyond the 1956 act that only considered rivers and river valleys to move towards basin management, including not only water but also related resources.³² Similarly, the Draft National Water Framework Bill, 2013 is informed by the need for setting out certain basic principles in legislation to ensure that the legal framework is not guided only by judicial statements or administrative directions.

While there is a need for modern water laws, the two draft bills fail in their present form to harness this potential. This is visible, for instance, in the fact that neither bill is built in a clear and unequivocal manner on the principle that all water needs to be governed by a single set of principles. The Draft River Basin Management Bill, 2012 recognises the issue and devotes a separate section to 'conjunctive management' but this is a limited framework since the provision only enjoins states 'make their best efforts' to manage water in a unified manner.³³ The Draft National Water Framework Bill, 2013 does not fare better. Interestingly, its first principle for water management focuses on integrated management with other resources.³⁴ At the same time, when it comes to water, it does not have a set of principles applying to all water. This is, for instance, the case of the precautionary principle that appears to apply only to groundwater.³⁵

The limited application of the precautionary principle in the Framework Bill is an important marker of the partial environmental perspective introduced here. The Draft River Basin Management Bill, 2012 has a similar vision of the relevance of environmental principles. For instance, it includes a section 5 entitled 'equitable and sustainable' use of water that seems to include the environmental perspective completely missing from the previous section that simply talks about cooperation between basin states being for their mutual benefits, without any qualification.³⁶ Yet, the paragraph of section 5 that specifies the meaning of equitable and sustainable starts by telling states to attain 'optimal and sustainable' use, only qualified later by the need for it to be 'consistent with adequate protection of quality of water'.³⁷ The rather convoluted treatment of environmental matters is further visible in the list of functions of river basin authorities. The general functions of the Governing Council focus on development, management and regulation of river basins.³⁸ Conservation is mentioned as part of these functions but it is clearly a subsidiary concern since the Governing Council is only to make recommendations for conservation in accordance with a pre-existing River Basin Master Plan.³⁹ River basin master plans are not devoid of environmental considerations. Yet, they are clearly defined as being plans for 'development, management and regulation' and do not include conservation or [61] protection as part of their core aims.⁴⁰ This is all the more surprising when it

³¹ Report of the International Law Commission on the work of its forty-sixth session, 2 May-22 July 1994, Official Records of the General Assembly, Forty-ninth session, Supplement No. 10, UN Doc. A/49/10, p. 93.

³² Draft River Basin Management Bill, 2012, ss 2(k) & 7(1).

³³ Draft River Basin Management Bill, 2012, s 6.

³⁴ Draft National Water Framework Bill, 2013, s 3(1).

³⁵ Draft National Water Framework Bill, 2013, s 12(1).

³⁶ Draft River Basin Management Bill, 2012, s 4.

³⁷ Draft River Basin Management Bill, 2012, s 5(2).

³⁸ Draft River Basin Management Bill, 2012, s 17.

³⁹ Draft River Basin Management Bill, 2012, s 17(e).

⁴⁰ The definition of river basin master plans is found at s 2(o), Draft River Basin Management Bill, 2012.

is compared with the River Boards Act, 1956 where the first power of the boards is to advise the states on 'conservation, control and optimum utilisation',⁴¹ conservation being the first of the three.

WAY FORWARD

There is an urgent need to revisit ageing water laws and old water law principles. This is made all the more urgent by increasing concerns over water quality, access to water and water availability in the context of global environmental change that may further threaten water supplies.

The reforms that are necessary must start by recognising that water is firstly a local issue and that water is not only a fundamental right in itself but also the source of the realisation of various other fundamental rights, such as the rights to health, sanitation and the environment. Beyond this, reforms must be built on the basis that water is also a primary input for livelihoods, agriculture in general and for industrial uses. The legal framework that is needed is one that puts fundamental rights squarely at the centre of the regime and provides the basis for ensuring that all the links between different water uses can be addressed in a principled manner.

At this juncture, the lack of a set of general set of principles concerning water in general, the lack of binding quality standards and the lack of an effective environmental dimension to water law ensure that powerful actors make use of the inherent flexibility that this non-system affords. This is neither equitable nor sustainable nor effective. This lack of framework has not provided appropriate results until now. In the future, with increasing water scarcity on the one hand and increasing over-abundance of water on the other hand, there will be an even stronger need for conserving, using and regulating water in a comprehensive, decentralised, equitable and environmentally sustainable manner.

This calls for a different kind of new water laws. Such laws must, for instance, avoid making references to a right to water and then limit the quantity associated with its minimum realisation to an unacceptably low 25 litres per capita per day (lpcd).⁴² This happens to go entirely against the policy goals at the national level that put the minimum level of sufficient access to drinking water at 40 lpcd already in the 1970s in the context of the Accelerated Rural Water Supply Programme (ARWSP). This has now been increased in the Strategic Plan of the Ministry of Drinking Water and Sanitation whose target for 2022 is 70 lpcd.⁴³ The problem goes beyond the specific issue of the content given to the right to water. Indeed, more generally, the Bill does not place itself within the context of [62] the fundamental right to water being a guiding framework for a framework legislation on water.

The two proposed bills confirm that while water law needs to be modernised, there is a danger in doing so without having a broad view of what needs to be achieved. The kinds of instruments

⁴¹ River Boards Act, 1956, s 13(a)i.

⁴² Draft National Water Framework Bill, 2013, 4(2).

⁴³ Strategic Plan – 2011-2022 Department of Drinking Water and Sanitation – Rural Drinking Water.

proposed seem more concerned about concentrating power at the centre than providing broad frameworks for a resource, which is primarily a local concern and must thus be managed on the basis of the principle of subsidiarity and of its ecological functions without which no human or economic development will take place.