

Introduction

Freshwater is fundamental for life on earth and for human life specifically. Thus, access to sufficient water of appropriate quality is one of our most immediate and basic requirements. Its fulfilment is required on a daily basis as a matter of simple survival. This explains why water has always been at the centre of policy concerns for most societies throughout human history. In fact, water availability has been a precondition for the development of human settlements and natural or human-induced water stress has played an immense role in their decline.

The importance of water as a basic survival need, as a livelihood, as an input for agriculture and hence food sovereignty and as an input for economic development related activities have given it a central role in governance for a long time. Thus, whether it is aqueducts built during the Roman Empire, irrigation tanks in South India or the large dams of the twentieth and twenty-first century, the harnessing of water for drinking or other activities has been of central importance. The essential nature of water for human survival led most societies to give it a special status in law. One of the primary consequences of this special nature was the introduction of restrictions on the ownership over water per se.

In keeping with the central role of water, its regulation has been the object of significant attention for a long time. During colonial times, significant emphasis was put on the development of irrigation law. This has had lasting impacts because some of the basic principles deemed to govern water overall are only found in irrigation acts from the colonial period or acts inspired by the same ethos. Yet, in India, water law is comparatively underdeveloped. Thus, to-date there is no framework water legislation. Similarly, there is no drinking water legislation even though this is, in principle, a primary concern of the Union and all state governments.

Besides formal water legislation, a number of other water-related principles have emerged over time. These include, for instance, principles concerning the rights of landowners on neighbouring flowing water and groundwater. More recently, water pollution and more generally the environmental impacts of water use have been the object of increasing attention. While different uses of water have been separately regulated, there has been no comprehensive water legislation

addressing all needs and uses. This did not prove problematic as long as human-induced and natural water stress was not too prevalent. This is not the case any more and the existing legal framework is largely incapable of addressing the new challenges that have arisen over the past few decades.

Water law in India has been heavily influenced by early developments of water legislation that focused on the economic potential of water and the types of rights that landowners could claim over water found underneath or adjoining their plots. It thus remains straight jacketed in a conceptual framework, which is, by definition, incapable of taking on board the multiplicity of water uses and, in particular, the fact that it is a human right. A broader framework needs to be provided for water law. The premise must be that water is first of all essential for life, essential for the realization of a number of our most fundamental human rights, essential for all ecosystems and extremely important as a resource for a variety of activities ranging from food production to energy generation. This gives water law a prime role in poverty eradication and the realisation of a socially equitable and environmentally sustainable process of development. In other words, water law must be at the centre of any broadly conceived strategy of development.

The need for a broader framework is, in principle, a relatively innocuous assertion in an era that has seen international and national law move rapidly over the past decades to effectively include human rights, environmental conservation, equity and sustainability dimensions. Yet, it raises a number of questions in the context of water. Firstly, while the international law of sustainable development has rapidly developed over the past two decades, water is remarkably absent from the areas that have received most attention. In fact, international water law remains dramatically underdeveloped since states have neither moved beyond the traditional focus on international watercourses nor even managed to ratify the rather conservative convention adopted in 1997 after years of negotiations. Thus, a country like India cannot expect to get much effective guidance from international water law in the development of a modern national water law that addresses all the dimensions of water. Secondly, water, like biodiversity, can neither be comprehensively addressed only at the national level nor only at the international level. In this sense, it is typical of a new emerging pattern of transnational law which needs to be conceived, implemented and analysed from the local to the global level as if it were one single framework to ensure its coherence and effectiveness. Thirdly, while international water law is of comparatively little importance in ongoing water law reforms, these are strongly influenced by a policy consensus around water issues. A series of non-binding instruments not necessarily developed in UN frameworks or legislatures thus yields a disproportionate influence on ongoing changes in water law.

The need for changes to Indian water law stems from a variety of reasons. These include the narrow framework within which existing water law is conceived, outdated principles that do not reflect existing scientific knowledge, for instance, concerning groundwater and the new challenges that have surfaced over

the past few decades, such as the dramatic rise in groundwater consumption triggered by the introduction of mechanical pumping devices. All these are compelling reasons for introducing water law reforms. Yet, in practice, no broad-based movement towards water law reform has taken place. Rather, the process of water law reform that is ongoing has been conceived as part of what are known as water sector reforms and actual reforms introduced have been sectoral.

Water sector reforms are a set of measures proposed to ensure that the water sector can address the challenges of the twenty-first century. Water sector reforms are at the same time broadly conceived and based on a narrow understanding of the problems that need to be addressed. On the one hand, they suggest that water should be managed in an integrated manner, which includes, for instance, the need to address water issues at the basin level. On the other hand, water sector reforms tend to focus on issues of governance and management. Thus, even though water sector reforms suggest that the reform process aims at maximizing economic and social welfare, the real emphasis is on economic aspects. This includes, for instance, the call for turning water into an economic good, a fundamental change that will have immense repercussions for many years. Water sector reforms also specifically advocate private sector participation and the reduction of the role of the state in the water sector. On the whole, adopting water sector reforms implies significant changes because the principles proposed are different from existing principles governing the water sector.

Water sector reforms have been implemented in a variety of ways over the past couple of decades through specific projects or schemes. Little emphasis was put on the law even though certain proposals, like the introduction of water rights, have significant legal implications. This can be partly explained by the fact that some of the reforms could proceed without amending existing legal frameworks or without introducing new laws. Yet, this model was found to be partly unsuccessful, for instance, because of failed privatization schemes and partly lacking because it did not sufficiently entrench reforms beyond the specific contexts where they were introduced.¹ The perceived need to consolidate project-specific reforms and to introduce specific legal frameworks that incorporate the principles of water sector reforms was taken up as a way to ensure the permanence of reforms. This new strategy is particularly visible in India where the introduction of water law reforms has been taken up as a way to strengthen processes already started and to initiate new changes. As a result, water law reforms have emerged as a central component of the overall process of reform in the past decade. One of the peculiarities of these new laws is that their adoption is often linked to the implementation of a project spearheaded either by the World Bank or the Asian Development Bank. In certain cases, some of the conditions of the loan specifically include the adoption of certain laws while in other cases legal changes may be part of a broader set of

¹ eg World Bank, *Efficient, Sustainable Service for All? An OED Review of the World Bank's Assistance to Water Supply and Sanitation* (Report No. 26443, 2003) 21.

measures, such as in Maharashtra where two major new acts were adopted just before the signing of the agreement for a big World Bank water project.

The new focus on law reform in the context of water sector reforms has two main consequences for water law. Firstly, the pace of change has dramatically increased over the past decade with the swift adoption of a number of new laws. Secondly, water law has become a central component of the broader set of reforms in the water sector. Both factors indicate that water law should be given significant attention by all concerned actors, from all individuals concerned with the implementation of the human right to water to panchayats and municipalities, civil society organizations, state governments, state and national policy makers, academics, and national level institutions. In reality, while certain issues like the reform of patent law in the wake of the adoption of the Agreement on Trade-Related Aspects of Intellectual Property Rights have been the object of significant public debate throughout society for the past decade,² the same thing has not happened with water yet. This is unexpected given that the realization of the human right to water is something even more immediate than concerns over the right to health that surfaced in the context of the introduction of product patents in the health sector.³

The lack of broad public debate over water law reforms, the lack of academic literature and the limited involvement of civil society organizations in water law issues are even more surprising given the intense interest that water in general elicits. Thus, water sector reforms have been the object of numerous studies and books over the past couple of decades.⁴ Water law, however, has not been the object of much interest since the early 1990s and most of the existing literature focuses on inter-state aspects.⁵ The general lack of interest for water law has meant that few people were ready to pick up and analyse the developments ushered by the introduction of water law reforms. This is unfortunate because the reforms that are being introduced are momentous and will redefine water law in India for many years to come.

² eg R Dhavan & M Prachh, 'Patent Monopolies and Free Trade: Basic Contradiction in Dunkel Draft' (1995) 37 *J Indian L Institute* 194 and NS Gopalakrishnan, 'Protection of Traditional Knowledge—The Need for a *Sui Generis* Law in India' (2002) 5 *J World Intellectual Property* 725.

³ On the relationship between patents and health, S Chaudhuri, *The WTO and India's Pharmaceuticals Industry: Patent Protection, TRIPS and Developing Countries* (New Delhi: Oxford University Press, 2005).

⁴ eg A Gulati, R Meinzen-Dick & KV Raju, *Institutional Reforms in Indian Irrigation* (New Delhi: Sage, 2005), GN Kathpalia & R Kapoor, *Water Policy and Action Plan for India 2020: An Alternative* (Delhi: Alternative Futures, 2002), V Pangare, N Kulkarni & G Pangare, *An Assessment of Water Sector Reforms in the Indian Context: The Case of the State of Maharashtra* (Geneva: UNRISD, 2004), K Prasad (ed), *Water Resources and Sustainable Development—Challenges for the 21st Century* (New Delhi: Shipra, 2003) and M-H Zerah, *Water—Unreliable Supply in Delhi* (New Delhi: Manohar, 2000).

⁵ The landmark study of the early 1990s was C Singh, *Water Rights and Principles of Water Resources Management* (Bombay: Tripathi, 1991). On inter-state and international aspects, eg R D'Souza, *Interstate Disputes over Krishna Waters—Law, Science and Imperialism* (New Delhi: Orient Longman, 2006) and SP Subedi (ed), *International Watercourses Law for the 21st Century—The Case of the River Ganges Basin* (Aldershot: Ashgate, 2005).

This book focuses on India for several reasons. Firstly, the widespread process of water law reform that is currently under way requires much more attention than it has been given until now. Secondly, India is one of the first countries where so much emphasis has been put on law reform in the context of water sector reforms. Thirdly, the fact that water is a state subject means that most reforms are taken up at the state level. Given the diversity of hydrological, environmental and socio-economic conditions that mark the different states, the Indian experience is in principle full of lessons for other countries. Fourthly, India is not only one of the biggest countries in the South but also a country that is a microcosm of the broader world. While it has experienced fast economic growth for more than a decade, this growth has not trickled down and the overwhelming majority of the population still experiences severe poverty, as illustrated by the fact that 77 per cent of the population lives with less than Rs 20 a day.⁶ It thus exhibits traits of a rapidly developing economy as well as traits of a poverty-ridden country at the same time.

This book seeks to contribute to a better understanding of ongoing reforms, their rationale, their broader context and their likely impacts. The rapidity of the changes that are unfolding together with the lack of an ongoing body of scholarship focused specifically on water law reforms have not yet led to the development of sufficient literature on these new issues.⁷ In this context, the main question that arises is not whether water law reforms are necessary but what kinds of reforms should be introduced. There has, however, been no broad debate on the type of reforms that India needs. This work thus seeks to contribute to the critical analysis of ongoing water law reforms so as to ensure that the framework that informs the reforms and the consequences of the decisions taken are clear to all concerned. Additionally, it shows that there exist different options for water law reform. It is imperative that all these options be further examined, debated and critically analysed before more long-term decisions are taken.

This work examines the reforms that are taking place in India. Yet, by the very nature of the reforms being introduced, the analysis builds to a significant extent on the international policy framework that is influencing developments at the national level. This is, however, not a traditional study examining the ways in which international law is taken into account in the formulation of domestic law. In fact, existing international water law only addresses the issues that are at the centre of this study tangentially. The frameworks that are

⁶ National Commission for Enterprises in the Unorganised Sector, Report on Conditions of Work and Promotion of Livelihoods in the Unorganised Sector (New Delhi: Ministry of Small Scale Industries, Government of India, 2007).

⁷ Renewed interest in water law is highlighted, for instance, by the publication of R Iyer (ed), *Water and the Laws in India* (New Delhi: Sage, forthcoming 2009) and P Cullet, A Gowlland-Gualtieri, R Madhav & U Ramanathan (eds), *Water Law for the Twenty-first Century: National and International Aspects of Water Law Reforms in India* (Abingdon: Routledge, forthcoming 2009).

most relevant are either soft law instruments or the strategies and policies of development banks. The interactions between the national and the international levels are thus much more complex than the traditional framework of interaction between national and international law.

The analysis of ongoing reforms indicates that the conceptual framework that informs ongoing water law reforms is not sufficiently broad-based to reflect the multiplicity of water uses and its different functions, in particular its human right, social and environmental dimensions. This is, for instance, borne out by the analysis of law and policy reforms for drinking water that adopt the same economic model proposed for other water uses and fails to focus on the realisation of the human right to water for the poorest and most marginalised despite the general poverty eradication framework of water sector reforms. This points to the need for proposing alternative bases for water law reforms. Since water law reforms of one kind or another are imperative at this juncture, this book proposes a series of alternative bases for broad-based reforms starting from a human rights, equity, and sustainability perspective.

Proposed changes in water law suggested in this book focus on the national level. Similar proposals could be made at the international level where water law also needs to be further developed. Yet, at this juncture, it does not seem realistic to expect the prompt adoption of international water treaties focusing primarily on the social, human rights, and environmental aspects of water. It is rather incremental changes at the national level in various countries that may foster the progressive development of a body of water law that could constitute the basis for later developments at the international level.

The structure and organization of this book is influenced by the context within which it has been conceived. The relative lack of recent scholarship on water law and the absence of a body of work concerning ongoing water law reforms implies that a sizable part of the sources used are primary documents and literature in other disciplines. Additionally, since a number of the most important reforms are recent or unfolding, there is often little that can be said yet concerning their actual implementation. As a result, part of the analysis is limited to an analysis of the legal frameworks that have been adopted and the conceptual framework that informs them. Since a broader analysis of the changes that are taking place is needed, the impacts of policy changes in the specific context of drinking water are analysed with regard to policy frameworks as well as their implementation in a few selected places. Further work will be required in years to come to analyse, for instance, the actual impacts of the introduction of independent regulators in practice, something which cannot be undertaken yet.

Chapter 1 starts by providing a general background on the water situation, water uses and the policy background that informs water law. Chapter 2 moves on to examine water law as it has developed until the introduction of the current water law reforms. Chapter 3 then examines water sector reforms and, in particular, the conceptual framework that informs them. Chapter 4 analyses some of

the main law reforms currently proposed and implemented in different states in India. Chapter 5 carries on the enquiry by focusing on the specific situation of drinking water. Following the critical analysis of ongoing water law reforms, chapter 6 suggests a series of alternative bases for water law reforms. These are necessary to ensure that water law focuses primarily on the human right and social dimensions of water rather than its economic aspects.

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