



International Environmental  
Law Research Centre

# WATER REGULATION AND PUBLIC PARTICIPATION IN THE INDIAN CONTEXT

Philippe Cullet

Published in: in Mara Tignino & Komlan Sangabana eds, *Public Participation and Water Resources Management – Where Do We Stand in International Law?* (Paris: UNESCO, 2015), p. 20-29.

*This paper can be downloaded in PDF format from IELRC's website at*  
<http://www.ielrc.org/content/a1501.pdf>



# Public Participation and Water Resources Management:

Where Do We Stand in  
International Law?

**MARA TIGNINO**

Senior Researcher and Coordinator of the  
Platform for International Water Law,  
Faculty of Law, University of Geneva, Switzerland

**KOMLAN SANGBANA**

Research and Teaching Assistant,  
Platform for International Water Law,  
Faculty of Law, University of Geneva, Switzerland

Published by the United Nations Educational, Scientific and Cultural Organization  
7, place de Fontenoy, 75352 Paris 07 SP, France

© UNESCO 2015  
All rights reserved

The designations employed and the presentation of material throughout this publication do not imply the expression of any opinion whatsoever on the part of UNESCO concerning the legal status of any country, territory, city or area or of its authorities, or concerning the delimitation of its frontiers or boundaries.

The author is responsible for the choice and the presentation of the facts contained in this book and for the opinions expressed therein, which are not necessarily those of UNESCO and do not commit the Organization.

Cover photo: Vintage picture – The waves of the river flow. © Shutterstock/Vitalii Bashkatov

Composed and printed in the workshops of UNESCO  
The printer is certified Imprim'Vert®, the French printing industry's environmental initiative.

*Printed in France.*



**Public Participation  
and Water Resources  
Management:**

Where Do We Stand in  
International Law?

INTERNATIONAL CONFERENCE • GENEVA, 13 DECEMBER 2013

**PROCEEDINGS**

**Edited by**  
Mara Tignino  
Komlan Sangbana

# WATER REGULATION AND PUBLIC PARTICIPATION IN THE INDIAN CONTEXT

**Philippe Cullet**

Professor, School of Oriental and African Studies (SOAS), University of  
London, United Kingdom

Senior Visiting Fellow, Centre for Policy Research, Delhi, India

## ABSTRACT

*Water regulation in India has traditionally been largely weak on public participation. Major changes have taken place in the past couple of decades from different perspectives. On the one hand, the international participatory agenda has been reflected in the adoption of a series of policies and laws emphasising the need for fostering the participation of water users. On the other hand, constitutionally-triggered decentralisation has led to democratically elected bodies of local governance being given broader water-related competencies. There have thus been significant changes in the discourse concerning public participation in the water sector. Yet, a lot more remains to be done to ensure that the change in discourse leads to an effective democratisation of the regulation of water. The two different forms of participation developing in parallel are different in their conceptual origin, the framework put in place for implementation and their results. While everybody agrees that participation in the water sector is necessary, its long-term success will be dependent on being framed in binding legal frameworks that reflect democratic principles.*

## RÉSUMÉ

*Le droit de l'eau en Inde n'a traditionnellement pas donné beaucoup de place à la participation du public. Au cours des deux dernières décennies, différentes innovations dans ce domaine sont devenues visibles. D'une part, l'agenda international pour des politiques participatives se trouve refléter dans des lois et politiques mettant en avant le besoin d'encourager la participation des utilisateurs d'eau. D'autre part, un processus de décentralisation déclenché par des réformes constitutionnelles a permis de donner, à des assemblées locales élues démocratiquement, des pouvoirs nettement plus étendus concernant l'eau. Les deux formes de participation qui se sont développées en parallèle diffèrent conceptuellement, en termes du cadre mis en place pour leur réalisation et de leurs résultats en pratique. Alors que chacun accepte aujourd'hui que la participation du public est nécessaire, son succès à long terme ne pourra être assuré que si ses bases se trouvent dans des instruments juridiques contraignants et basés sur des principes démocratiques.*

---

**Key words:** Water, public participation, India

---

**Mots clés :** Eau, participation du public, Inde

## I. INTRODUCTION

Water regulation in India has had a long history. In terms of modern water law, some of the earlier enactments are irrigation acts and rules regulating access to and control over groundwater. Most of the basic structure of current water law was, in fact, set out in judicial pronouncements and legislative enactments dating back at least a hundred years, if not more. This slow and progressive development of water law over time has led to a situation where water regulation is largely based on dated principles that do not reflect many of the advances that have taken place in recent decades, either in the field of human rights or environmental law. As a result, older water law is largely top-down and reflecting the priorities of the government.

If the core of water law in India is still based on old legal instruments or principles, there has been a significant push for change over the past couple of decades. Various new enactments have been adopted in a number of Indian states.<sup>1</sup> One of the major components of these new acts has been the focus on participation of water users. This is seen as a major shift from supply-led (top-down) to demand-led management, within which water users get a say in the management of water. This has been implemented particularly with regard to irrigation and drinking water supply.

There have also been developments in other areas of law that have an influence on the water sector. This is in particular the case of environmental law within which a number of new principles that also apply to water have developed, including mechanisms such as environmental impact assessment that foster some form of participation by project-affected people.<sup>2</sup>

While specific laws are noteworthy, some of the most significant recent developments have taken place at the level of the Constitution. This is, for instance, the case with constitutional amendments adopted in the 1990s that significantly strengthened local democratic governance, within which water has an important place. This is momentous because it confirms that participation cannot be dissociated from decentralisation and democratisation. It also clearly puts democratically-elected local institutions at the centre of the participation framework and confirms that participation is not limited to central/state government-organised participation.<sup>3</sup>

There are thus a number of important legal changes that have taken place over the past couple of decades in the legal framework that directly concern the participation of water users. While the role of the law has been important, some of the most significant changes that have taken place have not been the changes brought in through legislation or strictures of the higher judiciary but rather changes brought through policy development. In fact, one of the key markers of the reforms that have taken place over the past couple of decades in India is that in certain areas, such as drinking water supply, the framework has developed overwhelmingly through policy interventions.<sup>4</sup> This has significant consequences with regard to the kind of participation that is proposed and the mechanisms for enforcing the same.

This contribution examines the framework within which participation in the water sector is conceived in India. It then looks more specifically at two sectors where participation has been particularly emphasised, irrigation and drinking water supply. It concludes by analysing the lessons learnt over the past couple of decades of reforms in a context of ongoing reforms.

---

1 Water being a state subject in India, water laws are, in principle, adopted at the state level.

2 See e.g. S. Divan, 'The Contours of EIA in India', in R. Iyer (ed.), *Water and the Laws in India*, New Delhi, Sage, 2009, p.390.

3 See E. Mostert, 'The Challenge of Public Participation', *Water Policy*, vol. 5, 2003, p.179.

4 See e.g. P. Cullet, 'New Policy Framework for Rural Drinking Water Supply—The Swajaldhara Guidelines', *Economic & Political Weekly*, vol. 44/50, 2009, p. 47.

## II. FRAMEWORK FOR WATER REGULATION AND PUBLIC PARTICIPATION IN INDIA

Water law is a relatively old branch of law. As a result, it is a comparatively well-developed field but one where the introduction of new principles has been relatively more difficult than in relatively new areas of law like environmental law. This section introduces the basic water law framework and the way in which participation has progressively been strengthened. It also examines other participatory developments in other parts of the legal framework. Further, it considers the significant influence of policy instruments in recent decades over water policy and law generally and concerning participation specifically.

### A. WATER LAW AND PARTICIPATION

A part of existing water law finds its sources in the nineteenth century. This includes in particular irrigation acts adopted by the colonial power for whom agriculture, hence irrigation, was a central tenet in the economic development of the country. As a result, older legislation is geared towards giving the government the power to mobilise resources for fostering higher yields. These enactments give no particular space to farmers or other water users. In fact, the central issue is control over land. While colonial legislation is a historical remnant, the framework for irrigation legislation did not change much after independence, as confirmed by the 'Bihar Irrigation Act' of 1997 that is still based on a framework that gives the state overwhelming control and does not consider the needs and rights of farmers and water users directly. There are thus still a number of irrigation acts in force that are based on principles that are largely 'anti-participation'.

Another old part of water law are the rules concerning access to groundwater. English rules giving overwhelming control over groundwater to landowners were simply transposed in India. They still apply to date, as there has been no significant change to the basic legal framework concerning groundwater rights yet.<sup>5</sup> These rights are 'participatory' in the sense that they give landowners control over groundwater. However, in a broader sense, they give landowners a monopoly over groundwater while denying everyone else any say in the control, use and management of groundwater. This is particularly 'un-participatory' in a context where around 40% of the population does not own land and where groundwater is the main source of basic and drinking water for the overwhelming majority of the population in rural areas.

The lack of participation in irrigation and groundwater law is noteworthy because it constitutes two of the more developed areas of water law. In a context where there is no framework for water legislation,<sup>6</sup> an analysis of Indian water law must thus look at the main 'sectors' that have been covered in the legal framework. In this context, while participation in water law in general has not changed much over the past few decades, one sector has seen significant reform. Within irrigation regulation, the concept of 'participatory irrigation management' that has existed for a long time<sup>7</sup> has been much strengthened over the past couple of decades and is now enshrined in a number of state legislations.<sup>8</sup> This is taken up separately in the next section.

Beyond water law itself, a lot has happened with regard to participation in the past couple of decades. Firstly, at the constitutional level, two amendments adopted in the early 1990s have paved the way for strengthening local bodies of democratic governance in both urban and rural areas.<sup>9</sup> These constitutional provisions specifically refer to water and thus provide directly for a much more participatory form of water governance at the local level. Implementation of these provisions is uneven in the country, partly because implementation first depends

5 P. Cullet, 'Groundwater Law in India—Towards a Framework Ensuring Equitable Access and Aquifer Protection', *Journal of Environmental Law*, vol. 26/1, 2014, p.55.

6 Note however two separate initiatives in this regard, the first one, Planning Commission, National Water Framework Bill, 2011, available at: [http://www.planningcommission.nic.in/aboutus/committee/wrkgp12/wr/wg\\_wtr\\_frame.pdf](http://www.planningcommission.nic.in/aboutus/committee/wrkgp12/wr/wg_wtr_frame.pdf) and the second, the Draft National Water Framework Bill, 2013.

7 See e.g. N. Pant, 'Impact of Irrigation Management Transfer in Maharashtra—An Assessment', *Economic & Political Weekly* A-17, vol. 34/13, 1999.

8 R. Madhav, 'Law and Policy Reforms for Irrigation', in P. Cullet et al. (eds.), *Water Law for the Twenty-first Century: National and International Aspects of Water Law Reforms in India*, Routledge, Abingdon, 2010, p. 205.

9 Constitution of India, art. 243.G and Eleventh Schedule; and art 243.W and Twelfth Schedule.

on state legislation making this constitutional framework a reality in the legal framework.<sup>10</sup> In general, much more can be done with regard to effective control over water by local bodies of governance but participatory principles are now clearly in place.

Secondly, a number of participatory provisions have been introduced in environmental law. Since environmental law applies to water too, this is directly relevant in our context.<sup>11</sup> One of the instruments that specifically reflect the participatory imperative is environmental impact assessment. India has had a formal framework for this since 1994. While it has been subjected to severe criticism over time for being too weak,<sup>12</sup> it provides a starting point for some public participation which is not found anywhere in water law.

## **B. BEYOND WATER LAW: OTHER INFLUENCES ON PUBLIC PARTICIPATION**

The participatory framework highlighted in the previous section is framed at the level of binding norms, statutes or judicial fiat. While this is what usually interests lawyers, in the context of water, the enquiry must be pushed further because some of the most important developments having taken place over the past two decades have happened through instruments that are usually side-lined because they are not binding. The water sector has been a particularly important laboratory of this new kind of quasi-law making. Two different dimensions of this process can be identified, the national and international one. Interestingly, while there has been little international law influence on the development of water law in India over the past few decades, international policy instruments and international institutions have played an important role in the reforms that have been introduced, thus requiring reading them as a joint process.

While India does not yet have a framework for water legislation,<sup>13</sup> a national water policy has been adopted on three different occasions. The first dates back to 1987, the second to 2002 and the existing policy was adopted at the end of 2012.<sup>14</sup> In principle, a national water policy would have been understood as something paving the way for the adoption of legislation by Parliament. However, what has happened in practice is that the process has remained driven entirely by the executive, providing more flexibility in adaptation to new circumstances but bypassing the various safeguards that the constitutionally established process for the adoption of legislation provides.

From the point of view of public participation the national water policies are very important because they directly refer to participation, something that water laws usually fail to do. The first policy of 1987 emphasised farmers' participation in irrigation,<sup>15</sup> something that has been taken up subsequently in a number of states through the adoption of separate enactments. The second policy of 2002 moved towards a broader understanding of participation, including the 'participation of beneficiaries and other stakeholders' in project planning and private sector participation in the water sector.<sup>16</sup> The latest policy proposes participation as part of good governance and specifically highlights community participation in the management of water projects and services.<sup>17</sup>

There has thus been a steady emphasis on different forms of participation over the past couple of decades. This participation is, on the whole, completely different from the democratic participation proposed in the constitutional amendments devolving control over local water resources to local bodies of governance. Whereas the latter is framed in terms of a permanent framework, the former evolves in tune with the policy orientation of the executive over time, without creating any rights for people. Put differently, there is a major difference between the recognition of the fundamental right to water by the Supreme Court that implies 'participation' by rights holders and the 'participation' envisaged in the national water policy documents that have been increasingly built around the idea that water has an 'economic value' and must be allocated so as to foster its

10 For rural areas, see e.g. Rajasthan Panchayati Raj Act, 1994. For urban areas, see e.g. Rajasthan Municipalities Act, 2009.

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

12 See e.g. M. Menon & K. Kohli, 'From Impact Assessment to Clearance Manufacture', *Economic & Political Weekly*, vol.44/28, 2009, p.20.

13 Note that in a context where water is a state subject, it would in principle be state legislative assemblies that should adopt a framework for water legislation. Yet none has done so.

14 National Water Policy, 1987, available at [www.ielrc.org/content/e8701.pdf](http://www.ielrc.org/content/e8701.pdf); National Water Policy, 2002, available at [www.ielrc.org/content/e0210.pdf](http://www.ielrc.org/content/e0210.pdf); and National Water Policy, 2012, available at [www.ielrc.org/content/e1207.pdf](http://www.ielrc.org/content/e1207.pdf).

15 National Water Policy, 1987, s. 12.

16 National Water Policy, 2002, s. 6(8) and 13.

17 National Water Policy, 2012, s. 1(3) and 12(3).

'efficient use'.<sup>18</sup> This happens to mirror policy developments at the international level, in particular the Dublin Statement, a non-binding instrument that has been used as the basis for fostering an understanding of water as an economic good since the early 1990s.<sup>19</sup>

The promotion of participation by national water policies over time is thus both interesting and of concern. These policies and various other subsidiary administrative directions of the government constitute a framework for fostering public participation. At the same time, this is done in a context which takes little notice of developments happening elsewhere, such as the recognition of the fundamental right to water by the Supreme Court as early as 1991.<sup>20</sup> Further, this happens in a context where the sectoral development of water law has left major gaps in the legal framework. The most significant is the absence of any legislation providing the framework for translating the fundamental right to water into practice. In other words, the issue that is universally understood as being the most important priority by all branches of government suffers from not having any legislative basis that would make the fundamental human right to water a reality in legislative terms. In this context, while Supreme Court pronouncements carry significantly more weight than policy instruments, the reality that people experience on the ground, in particular in rural areas is that the real 'law' is what the executive implements on a daily basis. This ends up giving policy instruments much more importance than they should in principle have.

The ways in which participation has evolved in the legislative and policy framework over the past couple of decades is well exemplified by the example of participatory irrigation management and drinking water supply that give more concrete shape to the ideas conveyed through national water policies. This is taken up in the next section.

### III. PARTICIPATION IN DIFFERENT SECTORS: THE CASE OF DRINKING WATER AND IRRIGATION

Participation has progressively become entrenched in the water policy discourse over the past couple of decades at the international level as well as in India. Two key areas in the Indian water sector have been deeply influenced by this new vocabulary that finds its source both in evolving domestic and international policy making. The different underlying influences explain in part that 'participation' is understood and implemented in different ways in different contexts, though the overarching term used remains the same.

#### A. Participation and Surface Irrigation

As noted above, irrigation law is one of the oldest branches of modern statutory water law in India. It has thus logically been at the centre of calls for reforms for decades. The necessity to bring in change has become progressively more visible as decades of massive investments in surface irrigation schemes have failed to foster the kind of benefits expected in terms of irrigated zones. There had been calls for giving farmers more of a say in the management of irrigation schemes for a long time, which were based on the fact that there were strong historical precedents of local management before the colonial and independent governments started planning larger schemes under their control.

Calls for participation in irrigation management thus existed in India independently from the development at the international level of the model of Participatory Irrigation Management (PIM) that has come to dominate water policy since the 1980s.<sup>21</sup> It is thus striking to find that the model of participation in irrigation management that has been progressively implemented through projects and since the late 1990s through legislation is mostly a direct

18 *Ibid.*, ss. 1(2) & 1(3).

19 Dublin Statement on Water and Sustainable Development, International Conference on Water and the Environment, Dublin, 31 January 1992.

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

21 See e.g. S. Hodgson, *Legislation on Water Users, Organizations—A Comparative Analysis*, FAO Legislative Study 79, Rome, 2003.

application of the international PIM model. This raises questions as to the nature of participation in legal terms because the PIM model is a generic template that has not been tailored to the existing legal framework in India.

The PIM model now enshrined in law through legislation in a number of Indian states providing for the setting-up of water user associations (WUAs) is based partly on the realisation that the planning of massive irrigation schemes without farmer participation was not an appropriate starting point. It is also based on a broader policy shift away from entrusting the government with most developmental responsibilities in favour of a 'demand-led' model where water users are called on to participate.<sup>22</sup> The form of this participation is what matters and is analytically significant. Indeed, two different models coexist in India today.

On the one hand, there are now WUA acts that provide for the participation of farmers in the management of irrigation systems. This should not be confused with participation in policy-making in irrigation or participation in project design. The participation envisaged here is narrower and limited to certain specific tasks concerning the management of existing schemes. This is, for instance, the case in Maharashtra where the two main objects of WUAs are to ensure an equitable distribution of water among its members, to adequately maintain irrigation systems and to ensure efficient, economical and equitable distribution and utilization of water to optimize agricultural production.<sup>23</sup>

On the other hand, state legislation throughout the country has given democratically elected bodies of local governance control over water resources in pursuance of the constitutional mandate giving panchayats control over water at the local level, in particular minor irrigation, water management, watershed development and drinking water.<sup>24</sup>

There are thus two parallel bodies with competence over irrigation at the local level. This is unwelcome and inappropriate. Panchayats have been conceived as part of a comprehensive system of governance that understands the need for regulation of different natural resources, different activities and different uses of a given natural resource in a coordinated manner. In addition, panchayats are democratically elected and include reservation for both women and scheduled castes and scheduled tribes, a very important point to foster better representation of groups traditionally vastly under-represented.<sup>25</sup> In comparison, WUAs foster a type of participation that is narrowly conceived and based on regressive bases. Firstly, WUAs provide participation only for certain specific tasks rather than alongside the whole chain of activities from policy formulation to project management. They also fail to take into account the fact that in rural areas, it is artificial to consider irrigation separately from drinking water or other water uses since the same sources may be used. Secondly, their membership is skewed since it is only landowners that are members.<sup>26</sup> This is inappropriate participation in a context where water sources can often not be clearly distinguished by water use. In addition, apart from one exception,<sup>27</sup> WUA acts do not provide reservation, hence leading in practice to a logical dominance of higher caste males.

On the whole, the WUA framework, which appears at the outset as a welcome break from an over-centralised, government-driven regulatory scheme, is found to be lacking. This is mostly because WUAs were introduced in India alongside the model adopted at the international level without consideration of the existing legal framework and the specific conditions obtaining in Indian states. The limitations in terms of participation are made more evident by the fact that while different regions/states of India traditionally had different irrigation management arrangements, states in various corners of the country have adopted the same WUA model with little adaptation to local conditions. WUA acts also fail to act as a real reform of irrigation law since they only address a single issue within the sector rather than propose a comprehensive reform framework that is badly needed, in particular for laws adopted many decades ago.

---

22 See e.g. N. Pant, 'Some Issues in Participatory Irrigation Management', *Economic & Political Weekly*, vol. 48/1, 2008, p.30.

23 Maharashtra Management of Irrigation Systems by Farmers Act 2005, s 4(1), available at [www.ielrc.org/content/e0505.pdf](http://www.ielrc.org/content/e0505.pdf).

24 Constitution of India, Eleventh Schedule (art. 243.G), available at <http://indiacode.nic.in/coiweb/welcome.html>.

25 Constitution of India, art. 243.D, available at <http://indiacode.nic.in/coiweb/welcome.html>.

26 See e.g. Maharashtra Management of Irrigation Systems by Farmers Act 2005, s. 2.1(w), available at [www.ielrc.org/content/e0505.pdf](http://www.ielrc.org/content/e0505.pdf).

27 Chhattisgarh sinchai prabandhan me krishkon ki bhagidari adhiniyam 2006, s. 5, available at <http://www.ielrc.org/content/e0605.pdf>.

## B. PARTICIPATION AND BASIC WATER SUPPLY

Drinking water is today universally recognised as the key priority in the water sector. India is no exception and, in fact, the Supreme Court of India confirmed the existence of the fundamental right to water as a right linked to the right to life much before international bodies started taking a serious interest in the human right to water. It is thus surprising that there is no legislation setting down the basic principles and parameters governing drinking water supply. As a result, there are still no binding drinking water quality standards, even though reference standards have existed for quite some time.

The absence of legislation notwithstanding, drinking water became politically so important in the decades after independence that by the 1970s the Central Government started taking specific policy initiatives in this area, particularly with regard to rural drinking water supply in the context of the Accelerated Rural Water Supply Programme. There has been no looking back and since then the Central Government has kept giving policy direction in this sector through administrative instruments. In fact, since the mid-1990s, there has been an increasing array of interventions, making it a fast changing policy framework.

The relevance of this changing policy in the context of this chapter is that one of the key principles that has driven change in recent years is participation. As in the case of irrigation, the driving force behind change has been a perceived need to move away from government-led initiatives to water user-led initiatives, the so-called demand-led paradigm. The trigger for policy change was a World Bank pilot project that sought to bring in a completely new policy paradigm in the rural drinking water supply sector. This was based on making users take a more direct role in certain aspects of decision-making, making a financial contribution to the capital costs and taking on the financial and managerial responsibility for the operation and maintenance of the schemes.<sup>28</sup> This pilot project constituted an attempt to completely change the relationship between the government and water users and was centred around a concept of participation that would see local water users having more control over decisions made at the local level in return for their ‘participation’ in financing and operating the scheme. The pilot project was turned into national policy in the early 2000s through what came to be known as the Swajaldhara Guidelines.<sup>29</sup> Most of the key principles introduced during those years are now enshrined in the new overall policy framework that has been in place since 2009, the National Rural Drinking Water Programme (NRDWP).<sup>30</sup>

The participation envisaged under the Swajaldhara Guidelines was of an atypical nature. It included two dimensions. The first corresponded broadly with the mainstream understanding of participation whereby water users got more say in decisions affecting them directly. The second was in fact not ‘participation’ but the imposition of a duty to bear part of the costs of building the infrastructure and a duty to operate and maintain it. The capital cost proved to be particularly controversial because only people who contributed would be given access to the water provided by the scheme.<sup>31</sup> This thus excluded ab initio the poorest, who were already the people that had the least access to drinking water in their communities.

While the policy to make water users responsible for operation and maintenance has not been entirely abandoned, the capital cost contribution has been sidelined under the NRDWP because it had proved controversial and impractical in all the communities that could not afford the contribution. In the meantime, the emphasis is now both on participation by water users and private sector participation. Thus, the Strategic Plan 2011-2022 suggests at various points the need to strengthen the involvement of private actors in the delivery of rural drinking water supply.<sup>32</sup> In other words, there has been a shift from fostering public participation in all aspects of drinking water supply to suggesting a mix between public and private sector participation.

28 World Bank, Staff Appraisal Report—Uttar Pradesh Rural Water Supply and Environmental Sanitation Project (Report No 15516-IN, 1996).

29 Ministry of Rural Development, Guidelines on Swajaldhara 2002, available at [www.ielrc.org/content/e0212.pdf](http://www.ielrc.org/content/e0212.pdf).

30 Government of India, Department of Drinking Water Supply, National Rural Drinking Water Programme (2009/2013), available at [www.ielrc.org/content/e1308.pdf](http://www.ielrc.org/content/e1308.pdf).

31 See e.g. P. Sampat, “Swa”-jal-dhara or “Pay”-jal-dhara—Sector Reform and the Right to Drinking Water in Rajasthan and Maharashtra’, *Environment & Development Journal*, vol. 3/2, 2007, p. 101, available at <http://www.lead-journal.org/content/07101.pdf>.

32 Government of India, Department of Drinking Water and Sanitation, *Strategic Plan—2011-2022: Ensuring Drinking Water Security in Rural India*, available at [www.ielrc.org/content/e1104.pdf](http://www.ielrc.org/content/e1104.pdf).

## IV. PUBLIC PARTICIPATION IN THE WATER SECTOR IN INDIA – LESSONS LEARNT

India is a fascinating case study of the development of participation in water law and policy. It confirms that participation in the water sector is a much more complex issue than an international level analysis focusing on developments in international environmental law or human rights law indicates.

Firstly, the progressive development of participation has taken place both within water law and in other areas. The different pathways for participation proposed in water laws, the Constitution, environmental law and local laws indicate that there are unresolved tensions as to the nature of participation.

Secondly, participation is to an extent the antithesis of the framework on which many existing water laws are based. The government-centric framework of earlier decades leaves little place for effective participation by water users. In this context, initiatives like the adoption of WUA laws are an attempt to inject a participatory framework in the irrigation sector. However, since these WUA laws are usually not conceived as part of an overall participatory reform of irrigation law, they are unlikely to have broad-ranging impacts.

Thirdly, a large part of participatory frameworks that have been adopted over the past couple of decades are found in administrative instruments. This has the advantage of flexibility, but creates no binding rights and obligations. While the existing legal framework for accountability has not necessarily worked well, this replaces it with a non-system that is at least as problematic.

Fourthly, participation has increasingly been linked both with the participation of water users and private sector actors. The mainstream understanding of participation as bringing in more democratic processes and outcomes is thus no longer the only form that 'participation' takes in the water sector in India. This is unfortunate because it confuses completely different things in the name of bringing together different non-state actors on the same platform.

Fifthly, participation has been influenced equally by domestic and international factors. This is per se unremarkable since law and policy making is often subject to various influences. In this case, it brings up the problem of different participatory frameworks being placed side by side without ensuring that the whole constitutes a coherent framework. Thus, the participatory framework proposed in the WUA model is one that sees participation as detached from existing bodies of democratic governance and linked to specific interest groups, such as landed irrigators. This is largely separate, if not opposed, to the participatory framework envisaged in the Constitution that provides for permanent structures where participation is based on universal participation and the recognition of the need for reservation of disadvantaged groups.

On the whole, developments in India over the past couple of decades concerning participation reflect a dichotomy between two understandings of participation. The first one that is based on the current international water policy consensus that sees water as an economic good and that promotes demand-led water management. This version has permeated all documents adopted by the executive, ranging from national water policies to administrative directions and projects implemented by the government. The second understanding of participation is the one that sees participation as a facet of decentralisation. It also identifies the overbearing power of the central/state governments as a problem that needs to be addressed. The answer given is, however, radically different since it is enshrined in legislation, is based on universal participation, and specifically seeks to address existing inequalities within local communities.

The existence of two different understandings of public participation for something as important and contested as water is hardly surprising. This nevertheless raises questions from a legal perspective. Indeed, in the existing framework that puts the Constitution and fundamental rights at the top of the pyramid, we would expect to find that participation is driven by the fundamental human right to water and by the decentralisation framework provided in the Constitution. In practice, however, the influence of non-binding policy instruments has been such that it is often the case at local levels that the only thing that 'really' matters are the administrative directions of the government. These may not run counter to the legal framework but since, for all practical purposes, they

supersede what are theoretically hierarchically superior norms, the issue calls for further probing. In the context of a fast-evolving law and policy context in the water sector, we will certainly witness a lot more debate on these issues in the coming years. This is in fact what the Planning Commission tried to initiate during the development of the 12th Five Year Plan with the introduction of a new 'paradigm shift',<sup>33</sup> and the drafting of some new laws, including a proposed national water framework act.

---

## FURTHER READING

Cullet, P., *Water Law, Poverty and Development: Water Law Reforms in India*, Oxford University Press, Oxford, 2009.

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

---

33 M. Shah, 'Water: Towards a Paradigm Shift in the Twelfth Plan', *Economic & Political Weekly*, vol. 48/3, 2013, p.40.