

**CHAPTER SEVEN**

**LEGAL POLICY AND  
PRINCIPLES**

## LEGAL POLICY AND PRINCIPLES

A policy document is a guideline for a possible law. It must lay down the necessary principles with which a law must necessarily be informed. The presentation of the legal policy here attempts to outline precisely those very elements which need to be expressed in the legal language for an appropriate water law.

These policy recommendations and principles emerge from all the foregoing discussions undertaken in this work. The attempt in this last chapter, therefore, is not to merely summarize the important issues discussed, but to systematize and bring together the salient points so that they can cumulatively outline the format for an appropriate water law.

The justification for a new policy statement need hardly be emphasized. To begin with, there is an urgent need for law reform, specially in countries such as India. This is so for three basic reasons. First, the existing water laws have made possible massive degradation and pollution of the environment, leading to a point of ecological crisis which may soon become irreversible. Second, the existing water laws are often inconsistent with charters or bills of human rights or natural and fundamental rights expressed in the constitutions. In the Indian context, these laws are not only violative of some fundamental rights but also of the directive principles of the Constitution. Moreover, Article 13 clearly mandates law reform when such a situation obtains. Third, the existing water laws were enacted without any reflection or concern about the land or forest laws. The purposes and implementation of these laws are, therefore, often mutually conflicting. The aims of the forest law, for example, is not supported by the aims of the water law, although it does not require much understanding of ecology to know that no afforestation work can be done without ensuring the availability of water. Modern ecological knowledge has made it amply clear that natural resources, such as forests, land and water, can be conserved, protected or utilized on a sustained yield basis only if one uses and executes plans for them in an integrated way. Fourth, and lastly, there is an urgent need to modernise natural resources law from the point of view of legal conceptions. As we have seen, traditional concepts such as of riparianism, appropriation, easement and property do not serve the purposes of using or distributing water in a just way. Keeping these justifications in mind let us turn to note the specific policy and principles which the contents of a water law must necessarily reflect. For the sake of brevity the principles can be presented as specific points which are logically connected and which lead to each other.

1. The law must recognize the natural right to water of all people and living beings.
2. If the right is already affirmed by the Constitution or a Charter or Bill of Rights the preamble to the law must state that the enactment intends to realize or seeks the fulfillment of this right.

3. The law must prioritize the use of water, making the right to drinking water the first priority. This would imply that any use, plan or project which deprives living beings of drinking water would be illegal and hence non-executable. Violation of fundamental natural right would entail sanctions.
4. The law must give the state the power to acquire water resources for public purposes. But it must explicitly state that all such acquisitions must be done only to hold the resource in common trust (and not own it) for the sake of realizing the natural rights of all living beings and for common development. Acquisition of the resource would not mean cessation or suspension of natural rights, but the taking up of a correlated duty by the state for which it can be held legally accountable.
5. The law must explicitly define what it means by public purpose. Public must certainly include the local original users of water, and it must not exclude the other living beings in the original locality.
6. Where compensation needs to be given for public purpose use the law must necessitate dispensation in a manner which is proportional to the real loss of economic options and livelihood of a person, such that those who lose the most receive the most.
7. Where water needs to be distributed, the law must require that the resource must be apportioned equitably such that optimum utilization occurs for all concerned, and no one who is least advantaged in the former scheme becomes more disadvantaged in the new scheme. In seeking optimum utilization for all concerned, all relevant factors must necessarily be taken into consideration, and the most relevant factor is need, specifically the need for drinking water.
8. The need for all concerned includes the needs of all living beings, and evidently, it would be very difficult to compensate the needs of all living beings if their rights are violated. The law must, therefore, make it obligatory that before any plan or project is to be executed a detailed ecological impact analysis must be carried out, such that only if the analysis shows that the advantages gained by the violation of the natural rights of all living beings, including of the future generations, is greater for all than the disadvantages, the plan, project or new use must be permitted. Where the violation of rights can be compensated the law must necessitate rehabilitation of all mobile living beings and the creation of a similar ecological habitat elsewhere for the flora, in so far as physically possible.
9. Since the creation of an equivalent ecological habitat is a difficult task the law must mandate that for every project all the available alternative technologies must be first presented and the preferred one shown to be the best or the only one through which the desired goal can be achieved.

10. A water law that concerns itself with the whole ecological habitat cannot ignore the cognate forest and land issues. It cannot, of course, cover the whole of the subject matter of forest or land laws, but in so far as those aspects which are directly relevant to the conservation, protection or use of water, the law must relate itself to these aspects, it must take an integrated approach. For example, it must take under its purview the whole watershed, catchment, delta or river basins and not confine itself to merely regulating the river or the stream. Protection or conservation of a river or a lake, for example, cannot be done without the protection of the whole watershed or catchment areas. Ideally, the water law must be in harmony with the forest and the land laws, but that is a consequence of the whole natural resources legal policy and not within the bounds of a legal policy for water law alone.
11. What is within the bound of water law is to be at least internally integral, that is, treat surface water and groundwater in one holistic framework. The existence and flow of groundwater is not independent of the surface vegetation. Water laws in India and in many other countries treat ground water as a separate entity (under different type of laws) thus allowing a use of groundwater which is totally unrelated and unconcerned with surface water. This leads to serious ecological imbalances.

These then are the summary outlines for the contents of a water law principle. Each of the points summarized here have been discussed in detail in the earlier chapters, one may hence refer to them if a deeper understanding is required at any point for the drafting of a law. This outline, evidently does not touch upon the important question of legislation --- as to how a law of this kind can be brought into effect. The legislative issues for each country are different. In India, for example, water is a state subject. Each state would, therefore, have to legislate the law separately. But then there are known solutions to such a problem --- the central government could promulgate a model Bill which the states could adopt, the states can frame their law independently, if they so wish. Alternatively the Constitution could be amended to bring water to the concurrent list so that the Centre may also be able to legislate on the matter; or else water could be brought to the union list by a constitutional amendment so that the central government may promulgate an all encompassing federal law. These legislative problems are left to the drafters, the central concern of this work has been to show what should go into such a draft, by whatever method and at whatever level it is drafted.

As a concluding remark, there is one anxiety that remains to be shared. On the face of it, the legal policy advocated in this work may seem utopian, but then we have to ask ourselves: what do we want to leave behind for our children and their progenies, utopia or hell? We may never attain utopia, but in the meantime we can at least strive for the best. To do that we must first know what the best looks like, and have a good reason to strive. It is hoped that this outline and the rest of the work at least gives one a glimpse into that best, which is not only ecologically sustainable and beautiful but also just.