

THE LEGAL-TERRITORIAL PERSPECTIVE IN THE NEW MODELS OF WATER GOVERNANCE: THE SPANISH REGULATIONS

MARIA F. ZARAGOZA-MARTÍ
Institute of Geography, University of Alicante, Spain.*

ABSTRACT

Access and water supply in today's world remains a universal problem. The Objectives of Sustainable Development (OSD) advocate a change in governance that allows for greater effectiveness in the management and use of water resources, in such a way as to ensure universal and non-discriminatory access, since this essential resource should not only to meet the direct needs of its users, but its proper management is capital to guarantee the sustainability of the Planet. In Spain, traditionally, the services of water supply have been offered by the municipalities, as entities territorially close to the citizenship, which allows them to know better the necessities of this group and, therefore, to respond to the same ones of effective and efficient way. But the European commitments made on climate change, as well as the growing concern for the environment in general and the crisis of management on water resources, in particular, oblige to revise the actions and the norms that regulate this sector. Consequently, combining the legal methodology with the DAFO analysis, the objective of this study is focused on knowing the legal norms that have been configuring the historical governance of water resources. In view of the results and despite international demands for the recognition of the human nature of the right to water, these investigations have not been reached on a legal level, as the legislation analysed deals with water as a resource not as a right. It is therefore necessary to implement a different way of governing, in which the participation of multiple actors in the formulation and execution of the political actions in water matters, to ensure adequate access and water supply to communities and citizens, as a safeguard of human dignity.

Keywords: Governance, Human Right, Legal-Territorial Perspective, Objectives of Sustainable Development, Regulatory Regulation of Water.

1 INTRODUCTION

'The shining water that moves in the streams and rivers is not just water, but the blood of our ancestors (...). The water's murmur is the voice of my father's father (...). You must teach your children that the rivers are our brothers, and that they are yours too, and that you should treat them as such'. These are some of the extraordinary words that the Indian chief Nohad Seattle used to reply to the president of the United States, Franklin Pierce, in 1855, when he was attempting to buy the land of the Suwanish tribe. It stands as the first manifesto on the protection of the environment, understood as a comprehensive cycle that includes all the natural resources that are necessary for the survival of nature and of the human species.

Closer in time, Arrojo Agudo [1] tells us that if we think that the forest is not a simple repository of wood, then our rivers, aquifers, wetlands and lakes are much more than simple repositories of water. After all, water is the soul of our mostly aqueous planet, whose natural cycle is necessary both for the survival of the Earth and for the continuity of the human species. From ancient times, water has been considered sacred, the source of life, especially important for communities that settled on the banks of rivers, which supplied them with everything they needed to survive. It is the emotional and cultural heritage of human nature and the terrestrial biosphere, a common and universal asset that must be treated and

* ORCID: <https://orcid.org/0000-0003-3912-0395>

protected, because without water there can be no life. We can survive for several weeks without eating, but not without water, which is essential for the basic development of Humanity. Hence the importance of putting water back into the original position it once had as a basic and necessary resource for life and the adequate development of the personality, given that it is a transversal element which, together with human dignity, constitutes the safeguard of the respect, protection and development of people's fundamental rights.

In these present times, we live immersed in so-called 'water crises', brought on not only by the oft-times presaged climate change, in its natural or anthropogenic dimension, but also by urban growth and the exponential development of the population, which has generated a sense of responsibility in civil society, which fervently clamours that their rights should be respected, of which one of the most basic and necessary is having access to water resources, guaranteeing universal and equal access to water and to the necessary sanitation systems, as let us not forget that water is present in different sectors of society (culture, leisure, industry, health, etc.), and is today an element of great geopolitical value.

Water has been traditionally valued as an economic element that is recorded in market-based policies, ignoring its cultural and natural value. As it should be recognised as a universal heritage, we must recover the symbolism that water once had as the source of life in Greco-Roman cultures. It is true that water, its management and supply, generates costs, but life should not be one of them, since, as the European Environment Agency points out [2], human beings exploit 50% of renewable and accessible fresh water, while thousands of millions of people still do not have access to this basic service.

In fact, many parts of the world do not have access to water sources, nor to sanitation systems, nor to the water resources which should by their very nature belong to them, as they are in the hands of partisan and private interests, which makes both the survival of populations and the stability of nations difficult, since what there is in these places is not a water crisis, but a water war. This is why an entire universal social movement has emerged to call for the recognition of the right to water and sanitation as a human right, endorsed by the work of the United Nations, which recognises the human character that water should have as a basic and vehicular right for the rest of the fundamental rights of mankind, thus putting an end to the eternal discussion about rights between the generations, since water and dignity alike, are the essential substrates that give character and validity to the rest of the rights, without which they would have no meaning.

In Spain, this situation is aggravated by the huge differences that exist between the territories that make up the peninsula, since water is scarce in Spain and its accessibility is characterised by two basic hydrological circumstances: its irregularity in terms of time and its imbalance in terms of its distribution, not to mention the fact that there are historical deficits of a structural nature and in the management of water resources which significantly affect the integrated and rational management of water [3]. In addition to this, there is also an enormous diversity of regulations in this area between the different levels of government that make up the Spanish state, despite the country having been a pioneer in the regulation of water resources when, in 1926, Hydrological Confederations were set up as entities responsible for regulating water catchment areas. Although it is true that the European Union has established a framework regulation for water, through the Water Framework Directive, it is also true that this directive, even though it follows the Spanish model, does not take into account the diversification of the areas and the special complexity of the southeast Mediterranean region, given that little attention has been paid to the problems of flooding, droughts and water scarcity that this area suffers from, and the fact that it forgets other fundamental issues such as unconventional sources, rights and the system of use, the participation of users, etc. [4].

Consequently, in this context of natural water scarcity and intensified demand, tensions between users regarding access to the highest quality resources are evident [5], making Spain one of the countries where this problem is most apparent [6].

Hence the importance of listening to the clamour for a new water culture, which advocates a paradigm shift in how water is regulated, through adequate water governance, in which all affected sectors intervene, in a homogeneous way, for the common good.

2 THE TERRITORIAL NATURE OF THE LEGAL AND REGULATORY REGULATION OF WATER RESOURCES

Water is an asset that acquires strategic value in regions where its availability is insufficient to meet the different consumptive demands, thus conditioning the options of and the alternatives for territorial development; therefore, in addition to this traditional dimension as a factor of socioeconomic development, over the last decade, there has been growing concern for environmental values and the conservation of the resource within the concept of sustainable development [5].

This situation is no longer only found, albeit to a greater extent, in those corners of the Planet that endure extreme circumstances, it is also replicated both within and outside cities, in developing and in developed countries, albeit with different consequences. That is why we can identify social actions, such as the Right2Water Initiative, by means of which the public, in this case the European public, is crying out for water not to be a commercial commodity, but rather a public asset, having an effect on European and, therefore, also national water legislation. Perhaps in this International Decade for ‘Action on Water for Sustainable Development’ (2018–2028) an integrated water resources management can finally be adopted in order to achieve the social, economic, human and environmental objectives at all levels, while safeguarding the objectives set out in the 2030 Agenda for Sustainable Development through adequate water governance. In Spain it seems that the long-awaited ‘Social Pact for Water’ is going to be achieved, as cities are being urged to ‘be brave in safeguarding water as a right and as a public service’, defending a democratic, participatory and public water management model, as will be outlined in the next Green Paper.

Water is no longer a purely financial issue, rather one that concerns all of us, and it is necessary to adapt the legal corpus that applies to it in order to guarantee and ensure the availability of this resource, in quantity and in quality, for all humanity on an equal footing, thus avoiding having to remember the scandalous figures issued by the United Nations, reflected in its last report for 2018 [7]: 2.1 billion people do not have access to safe drinking water, 4.5 billion people lack safe sanitation, water scarcity affects 40% of the inhabitants of the Planet, 80% of wastewater returns to ecosystems without having been treated and 90% of natural disasters are water-related.

2.1 The legal and regulatory regulation of water resources in Spain: a brief historical overview

As we have already mentioned, Spain has been revolutionary and pioneering insofar as the regulation of water flows is concerned, especially if we consider that the first manifestations thereof appeared in the first Spanish Law of Waters in 1866, effectively the first attempt to regulate Spanish territorial waters. This Law included among its basic principles the public domain of all natural streams, watercourses and riverbanks [8], given that previously, although 19th century liberalism had tried to create a legal framework defining water as a public asset, it was a rather imprecise framework that maintained the privatising nature of the previous

governments of the Enlightenment [9]. Hence, the Law of 1866, together with that of 1879, marked a milestone in the legislative history of water in Spain, as they unified and homogenised the somewhat disperse previous regulation and were responsible for declaring the public nature of all surface water, although for the public dominion of all water to be recognised (now including groundwater which had been excluded in the past) it was necessary to wait for the great Water Law of 1985 [10]. It could be said that this 19th century legislation regulates, in a certain way and with the instruments of the time, the right to water in a way that protects water by understanding that its exploitation and use corresponds to all citizens equally, it being their right and the duty of the State to protect it. In spite of this, the turbulent crises and revolutions of the time hindered the effective implementation of this legal corpus, which was extended by a number of laws (the Gasset Law, the National Plan of Public Works, Prieto's Agrarian Reform, the Law on Colonisation, etc.) and was being replaced, a little later, by the current law.

The explanatory memorandum of the National Framework Law (that of 1985 and its subsequent amendments) already reflected the spirit of the European Charter of 1968, by mentioning that 'water is a scarce natural resource, indispensable for life and for the pursuit of the vast majority of economic activities; it is irreplaceable, not expandable by the mere will of man, irregular in the way it presents itself in time and space, easily vulnerable and susceptible to successive uses'. It does, however, also outline and depict the typical orography of Spain, with its important time-space differences of major droughts and abundant rains that occur uncontrollably in the different territories that make up the State in a totally irregular manner and that have given rise to the cliché of the Dry Spain and the Wet Spain and of which one also senses, in certain way, the hydraulic policy of public works that was developed during the 19th century, with the objective of correcting the existing imbalances between the 'two Spains'.

This new regulation marked a turning point in the Spanish regulations of water, given that its primary objective was to ensure the availability of water in sufficient quantity and quality to meet the demands of social dynamics, as a result of which the unity of the hydrological cycle, the declaration of the public hydraulic domain and hydrological planning were introduced as action principles in water-related matters. It was actually quite an advanced policy, because we can calmly affirm that these same approaches to water were later extended to the whole of Europe under the Water Framework Directive, which also unified and streamlined all the prior regulations. As they mention, Valenzuela Montes and Rigosi [11] developed plans for integrated management at the water catchment level on hydro-geological rather than purely administrative bases, placing the emphasis on an eco-systematic conception and considering water as an eco-social asset.

Seen in this way, the way water was treated in this Law may erroneously lead one to think that it was calling for a recognition of the human right to water, especially when it talks about a common use thereof for all citizens. But nothing could be farther from reality, given that it only allows access to surface waters, as long as they flow naturally and their quality and flow are not altered, although it must be acknowledged that it does make up for the shortcomings of previous laws. Nevertheless, and in view of the growing social demands for a more respectful treatment of the environment, fuelled by social development and economic growth, it proved necessary to adapt and improve this law. This was done by Law 46/1999, of 13 December, on the modernisation and reform of the Water Law, and by Royal Legislative Decree 1/2001, of 20 July, which includes the Revised Text of the Water Law.

In line with certain currents that have specific achievements in other countries such as the US, China or Australia, the former of the two introduces a regulation that descriptively comes

to be known as 'water markets' [12], since it meant a change in water exploitation systems, replacing the national conception of the hydraulic policy with a new configuration of the water policy, understood as the set of actions of public administrations at different levels and in different areas that affect the development, allocation, conservation and management of water resources. That is to say, the objective of the hydraulic policy can no longer be to merely ensure the exploitation of water at a low cost, rather it must also include the efficient use of the resource in terms of economic optimisation, requiring a reallocation of resources governed by guidelines consistent with the demand model: the control and limitation of flows and, in any case, the permitting of uses based on the most efficient technologies, as well as the future flexibility of resource redistribution [13].

For its part, the Royal Legislative Decree places the emphasis on maintaining the quality of the aquatic environment and on protecting the public hydraulic domain, given that the only effective way to rationally ensure that water can continue to fulfil its vital mission on Earth [14] consists of: preventing the deterioration of its ecological condition; eradicating any form of water pollution or degradation in order to achieve a good condition; recovering aquatic systems associated with the public hydraulic domain; ensuring the progressive reduction of groundwater pollution; mitigating the effects of floods and droughts; achieving the objectives set out in international treaties and avoiding any accumulation of toxic compounds in the subsoil.

Consequently, one can discern a new orientation of water policy towards a form of planning that guarantees the rational and adequate use of the resource for the sake of the environmental and ecological protection of water, but without going so far as to afford a human recognition of water or its treatment as such in relation to the integral water cycle. In other words, European and international environmental requirements are being incorporated, legislation after legislation, in such a way that the water resource is no longer understood merely as an economic asset for commercial use, rather its ecological and social nature is beginning to be understood as is the need, as mentioned in the White Paper on Water, to reorient the traditional policies of the hydraulic phenomenon towards others of greater social utility and future sustainability, although this has yet to be achieved.

2.2 Territoriality in the regulation of water resources

The social evolution and development, both of the institutions and the States of which they form part, promote changes and adaptations to the new times, responding to demands made by society itself. These new approaches, as Arrojo Agudo tells us [15], will require an in-depth administrative reform, in which above and beyond any organisational aspects, it will be necessary to change the mentalities, scales of values and attitudes of the Public Administration. As a result, the State and the Constitution have lost their exclusivity in the regulation and management of fundamental rights, given that other normative levels and even other supra- and infra-national entities intervene.

The interventionism of the public administrations is detected in the growing protagonism of town councils and their legislative eagerness to assume roles that until then had been highly fragmented among various institutions, given that particularly municipal councils began to be given greater powers in areas such as charity, primary education, town planning or health services and very specifically at the health level, as hygienists and engineers were aware of the enormous difficulties vis-à-vis privatisation that had to be addressed to solve urban planning and sanitary problems [9].

Consequently, the evolution and development of rights cannot be ignored by the cities themselves, since no other entity is so close to the citizen and no other organism is capable of

attending to the needs of the people who live in them. For this reason and to a large extent, municipalities have been the driving force behind the construction of the social State in Spain [16], especially, as we have mentioned, due to the proximity factor that enables them to offer policies appropriate to the needs of the population living on their territory. Without a doubt, local authorities contribute to guaranteeing those rights on which the citizenry has deposited its ultimate effectiveness, which are none other than the basic rights to life and personal development.

Historically, in Spain, we can find an incipient and profuse local and sectoral regulation in this area. Thus, as far back as 1813, the Instruction for the economic-political government of the provinces included among the obligations of town councils, *that of ensuring that public fountains are well preserved that there is a suitable abundance of good water, for both men and animals* (Art.V). These obligations were maintained in subsequent instructions, which also defined and included water supply and sanitation as basic municipal obligations [17], and even several various City Council laws (1846, 1866, 1870, 1877, etc.) progressively included among their powers the supply of water, as well as the maintenance of communal exploitations, the conservation and repair of fountains, pipelines, irrigation ditches, channels and common water tanks, the creation of municipal sewerage and water supply services, etc., all of this as an obligatory public service in the municipalities.

Subsequently, in the 20th century, we can find various sectorial laws, directly applicable to the territory, which regulate the water issue in a clear and actionable manner by linking it to basic fundamental rights, such as the right to health, to housing or to the development of life. So, for example, the technical-sanitary instructions for small towns in 1923 mentions that it is of utmost hygienic importance that all houses be supplied with water for drinking and cleaning. It was with the Royal Decree-law of 12 April 1924 that the supply of water was declared a public service, as that Municipal Statute reiterated the power of City Councils *over the supply of water, the disposal of waste water, and the disposition of washing places, troughs, spas and similar services, as well as sewage, sanitation and hygiene services* (art.150).

We can even find large municipalities with their own regulations that complement and develop the local regulation in detail and in relation to their territory and specific population. Together with Seville, Barcelona is one of the municipalities that by 1950 had already issued decrees on the supply of water, quantifying the amount needed as 250 litres, one hundred litres more than the per capita and per day amount established by the Municipal Sanitation Regulation of 1925. That same year, it was when the Local Regime Law of 1950 entrusted local administration authorities with the cleanliness and hygiene of drinking water and that of other sources for human use and consumption.

Finally, the current basic local regime law recognised the right of residents to demand compliance with the legally established obligations for municipalities, in such a way that they must guarantee the adequate provision of obligatory municipal services, including, without a doubt, the domestic supply of drinking water.

Already in this 21st century, we could cite the European Charter of 2000 as the starting point for the safeguarding of the rights of cities, with that renewing air fostered by the current social movements, more committed to the territory in which they live and to the resources it offers, although it is true that the regulatory cycle is closed with the different by-laws that are promulgated at the municipal level according to the present and future needs of each municipality, since not all of them have the same needs, nor the same resources with which to face the challenges they face. Let us put aside here the peculiar autonomous regulation that characterises the Spanish State, as we understand that it does not contain anything about the

governance of water or the human nature of water as a vital resource for everyone (despite the fact that certain statutes have included it in the catalogue of rights of their citizens), as the statutes are more in favour of a jurisdictional and territorial regulation of water resources according to the land on which they flow, as well as their economic treatment.

3 THE GOVERNANCE OF WATER AS A NEW PARADIGM IN THE INTEGRAL REGULATION OF WATER RESOURCES

Currently, we find thousands of institutional and social examples that cry out for a change in the management and cataloguing of water. At the European level, we can assert that already in 1968, the European Water Charter recognised that water resources constituted a common heritage and a precious and indispensable asset for human activities. That is to say, as Morote Seguido reminds us [5], already at that time we were being warned that fresh water resources were not inexhaustible, hence the need to increase their availability and preserve their quality, in accordance with standards established for each one, advocating for a commitment to the management of water within the framework of the natural water basins, overcoming administrative and political borders in order to promote effective actions to manage the resource through cooperation.

Initially, it was the New Water Culture that developed social movements advocating a change in the treatment of water, focused on recognising the human nature of water, in spite of not having a regulation that was legally binding on the great declarations of rights, simply because of an oversight by the legislators of the time. These demands, together with the paradigm of environmental sustainability set out by the WFD have led to the need to consider another vision of the planning and management of water, one that is integral in nature. In other words, integrated water management constitutes the theoretical basis for sustainable water management, and it is necessary to achieve a genuine integration between hydrological planning and territorial planning, as an authentic physical projection of environmental sustainability, since there is no water management without territorial management [18]. And this is extremely important if we are to be able to implement adequate water governance, which must necessarily imply the coordination, cooperation and democratisation of all the agents, levels and bodies that are involved in the management and planning of water in Spain, guaranteeing a more social knowledge and participation; it is said that democratic water management necessarily involves truthful, continuous and thorough information and the active participation of agents and subjects linked to the protection and sustainable management of the resource [18].

Accordingly, we find both European Territorial Strategies and Social Development Strategies at the national level (also the AGUA Programme) and various actions at the global level (UN) whose recent concern for the quality and quantity of available water has led to the urgent need to move towards a different approach in which there is a more exhaustive knowledge [5] of nature, of the elements that make it up and of its territorial and temporal dimensions, the local level being the basic area in which to examine the particularities of water and the factors that influence it. The objective is to advance towards a model of social, cultural, economic, environmental and personal development that recognises and guarantees the principles of equity, efficiency, saving and conservation of water resources. Undoubtedly, for this new governance, the local level is essential, since these issues are related to the supply and sanitation of population hubs, as well as to the floodability and conservation of the hydrological environment, as issues that must be integrated into local action policies to improve the welfare and quality of citizens' lives [19].

As the OECD tells us in several of its analyses, governance responses must be adapted to territorial particularities, as there is no single solution to water challenges, rather diverse

situations in several countries and even a degree of variability within the same State, as is the case in Spain. For this reason, it is necessary to recognise the link between governance policies and the geographical context in which they are applied, in order to be able to produce an entire set of options based on the different legal, administrative and organisational systems of the countries in order to create Water Governance Policies, or as the OECD calls them, Principles of Water Governance, based on legitimacy, transparency, accountability, human rights, the rule of law and the inclusive nature of the different levels of government, civil society, companies and the other stakeholders, to help regulate the resource in question.

In this way, the ethical-hydrological perspective advocated by Community regulations is included, as is the more holistic vision demanded by the new social currents, in a more efficient, effective and sustainable hydrological policy, where governance guarantees the participation of all the sectors involved, so that solutions can be found for real and immediate problems that the abundance or absence of water causes, especially in territories with major climate changes, taking into account the different situations that occur in each territory, since, according to Saurí and Cantó [20], the integration of territorial and sectorial policies are emerging as the class factor in the new governance of water.

4 CONCLUSION

The Spanish experience in terms of the legislation of the water resource is particularly interesting, since its complex legal-regulatory configuration grants powers, in the field of the environmental conservation and preservation of water, both to the central government, and to regional and local authorities, in addition to the introduction of community and international regulations on the matter. This situation has generated a lengthy 'water war', which is nothing other than a war between different bodies with powers over the resource, with the sole aim of converting the water that flows through their territories into a proprietary and economic asset that they can have at their exclusive disposal to the detriment of the rest of the users.

This has generated the promulgation of various hydrological policies that have only served to degrade the natural cycle that includes water, violating the basic rights of users, with a partial view as to the supply and demand of this resource and, especially, leaving society to one side. Hence, the new water governance policies advocate a participatory and consensual policy, with equal importance, for both the demand and the supply of water, including non-conventional resources and other more social-environmental ways of managing water, its use and sanitation.

We must once again be pioneers in the regulation of water, as we were in the past, and implement an eco-systematic and sustainable water regulation, taking into account the environmental cycle of which water forms a part, but also its particular needs, especially in territories as diverse as those of Spain, precisely the characteristic that has made our legislation an example in the regulation of hydrological flows. And all this, within an adequate governance of water, in which the social and human value of water predominates for people, societies and the environment, based on a combination of the supply and demand of water, in such a way that we combine a multilevel system that responds not only to economic needs, many of them necessary, but also includes the 'other values of water', protecting its use, exploitation and management, so that it is equitably accessible to all, now and in the future.

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