Chapter – II

Constitutional and Legislative Framework
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CONSTITUTIONAL AND LEGISLATIVE FRAME WORK

Technological advancement and modernization, coupled with urban and industrial growth, create complex problems of non-availability of water for desired purposes and over exploitation of the resources as well. Due to green revolution in rural areas of the country irrational exploitation of ground water has severely affected the water table in many parts of the country. This overuse and misuse of groundwater results in bleak future.

All this is happening despite a clear constitutional mandate, which enjoins upon the state to protect and improve the environment and to safeguard the forest and wildlife.

To meet out such an alarming situation concerning groundwater in India, it demands immediate attention to the regulatory frame work. One of the basic issues in water laws is that what kind of rights do the people have or ought to have; and what are the rights of state? The whole edifice of water laws rests on the basic issue of rights. The whole issue of water rights needs to be redefined in relation to people's property, be it private or common. Since these situations have completely changed the priorities of water use and altered both users and availability of surface and ground water, therefore, the question of water right has become more important in modern times. So there has been much thinking and action regarding formulation and effectuaction of legal policies relating to groundwater management.

2. Article 48-A.
A. Water Policy – National Perspective

Traditional Concepts such as riparianism, appropriation, easement and property do not serve the purpose of using or distributing ground water in just way. Keeping these justifications in mind let us turn to note the specific policy, which contents of water law must necessarily reflect. It is difficult to say whether it was clear awareness of this that led to the establishment of National Water Resources Council in 1983. The functions of the National Water Resources Council as listed in the government resolution establishing it, no doubt included the formulation of National Water Policy in September 1987⁵. The National Water Policy of 1987 recognizes the fact that questions of prudent groundwater resource management and conservation as well as equitable distribution have to be tackled on the basis of common policies and strategies. The beginning of the planning are witnessed as an over emphasis on surface irrigation works⁶, water quality issues etc. It is a document of very general nature. The planners miserably failed in fulfilling this difficult target. The policy did not cover the issues like legal and institutional mechanism⁷ for newly arising problems of ground water exploitation. The policy document in its final form contains vague reference.

It must be conceded that the National Water Policy has only the force of consent. It was approved and adopted by National Water Resources Council, but the National Water Resources Council is only a body established by a

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resolution of Central Government, it lacks a statutory backing. It commands respect and serves as a body where a national consensus can be brought about.\(^8\)

The new National Water Policy 2002, again, lists out prescriptions most commonly found in any standard text of water management. Many sections of 1987 policy have repeated Verbatim with no mention of any developments that have taken place during the last fifteen years. But more or less this document also lacks the thrust to take urgent specific actions for meeting the increasing water crisis.\(^9\) The success of National Water Policy will depend entirely on evolving and maintaining a national consensus and commitment to its underlying principles and objectives. National Water Policy may be revised periodically as and when need arises.\(^10\)

Moreover, the National Water Policy was the first good step in the direction of evolving a national consensus, but it has largely remained unimplemented. Meanwhile several new issues and concerns like those relating to displacement and rehabilitation have emerged.\(^11\) During these fifteen years, ever since the first National Water Policy was declared with precious goal but little has been done to solve the legal imbroglios to enforce strict regulations on ground water mining and to develop realistic water pricing policies.\(^12\) The revised New National Water Policy has addressed these and other emerging issues with a nation perspective. However, one may advise that the policy

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8. Supra note 5.
should also be accompanied by a blue print for action.\textsuperscript{13} No doubt, in all these ventures equality in water distribution and use should be the basis.\textsuperscript{14}

The time is fast running out and the politicians and bureaucrats in India have not taken any strong initiative to address the urgent issue of ground water depletion. We may conclude by quoting from the Prime Minister’s Address to the National Water Resource Council “The Policy should recognize that the community is the rightful custodian of water. Exclusive control by the government machinery... can not help us to make paradigm shift to participative, essentially local management of water resources”.\textsuperscript{15} Furthermore, effective policies to protect water resources, particularly ground water resources, have to be launched.\textsuperscript{16}

Compatibility of the new water policy needs serious introspection. It appears that the present water policy needs certain vital aspect vis-a-vis the topography, climate condition, terrain features etc. to be reviewed. India is a land of varied cultures, agricultural practice and land holdings, which play a decisive role in policy making. Irrigation facilities are key to the success of green revolution, for which indiscriminate use of ground water seems to be a real cause for concern.

Furthermore, social fabrics of India while adopting any effective planning cannot be ignored. Rehabilitation of ‘ecological refugee’ is one of the

\textsuperscript{13} Supra note 11.
\textsuperscript{14} Leela Krishnan P.: Environmental Law in India, 2002, p. 70.
most pertinent question for implementing the policy as it needs the involvement of the people of a particular region.

Thus, for the sustainable use of the groundwater, a comprehensive outlook concerning socio-economic aspects, environmental feasibility, people's aspiration, etc will pave the way for the implementation of the new water policy effectively. This clearly shows that much more attention needs to be given to this sector.

B. Rights to Groundwater

Now we will take up the issue of rights to groundwater under the following heads:

1. Constitutional Rights

1. Constitutional Rights

It is a matter of great surprise that in spite of such a rich reverence shown to the earth and its environment, as depicted in the ancient Indian scriptures, the Constitution of India, as enacted and adopted in 1949, hardly averred to natural environment of earth and its vitality for human health. The makers of Constitution did not appear to be concerned in this regard so as to give a constitutional mandate for preservation and protection of natural environment. Following the UN Conference on Human Environment, held at Stockholm, Sweden, in 1972, the Constitution of India was amended by the 42nd Constitutional amendment and the subject of "ecology and environment"
was incorporated for the first time through Article 48A and 51-A(g)\(^\text{17}\). Another burning issue of environment protection and ecology is ground water resources. When we talk about ground water resources, it is appropriate to start with the special reference of the constitutional provisions. The specific question that is often raised is; whether water is a state subject? Under the federal set up of the Constitution the legislative competence for water and water based resources are divided between the Union and States, of which major part lies with the latter. All these arrangements can been seen in the three lists (i.e. Union List, State List and Concurrent Lists) of the Seventh Schedule of the Constitution\(^\text{18}\). The relevant provisions are Entry 17 in the State List, Entry 56 in the Union List and Article 262.\(^\text{19}\)

Entry 17 in the State List reads as follows: “Water” that is to say, water supply, irrigation and canals, drainage and embankments, water storage and water power subject to the state. Water is indeed in the State List but this is subject to the provisions of Entry 56 in the Union List. The Entry in the Union List runs as follows: “Regulation and development under the control of the Union is declared by Parliament by law to be expedient in the public interest.”\(^\text{20}\) Infact, the Constitution makes water a State Subject in express terms while only certain aspects are dealt with by the Union. The states, therefore, have exclusive power to regulate ground water”.

Water is not in the Concurrent List, but it is both in the Union and the State List. It can, therefore, be plausibly argued that even without any

\(^{18}\) Singh Chhatarapati, op.cit., p. 306.
\(^{19}\) Supra note 5, p. 733.
\(^{20}\) Schedule VII List II Entry 17.
constitutional amendments the Centre can do a great deal in public interest in relation to water. In fact, the Centre has not utilized the existing legal provisions adequately.

The use made for Entry 56 in the Union List has been limited. The only significant legislation under this Entry is the River Boards Act; and in fact no River Boards, even of an advisory kind have been set up under this Act.\(^{21}\)

For instance, a river which flows entirely in one state, it is conceivable that states intervention might produce environmental or social consequences in another state. Such interventions in intra state surface water may also have an impact on ground water aquifers cutting across state boundaries. This would seem to indicate a need for some kind of national co-ordination mechanism in relation to water resource in general and groundwater resources in particular. However, the Centre has not been given any such role in the Constitution.\(^{22}\) State identities have proved very strong.

In the light of the above analysis, the question arises, whether the present Constitutional position is satisfactory. It is possible to express some doubts in this regard. First, even the most general entry regarding water, namely, Entry 17 in the State List, quickly slips into specific uses of water such as water supply, irrigation etc. Secondly, while the word ‘water’ may doubtless be taken to include ground water, there is no specific reference to the latter, the Constitution makers seem to have been given a role only in relation to inter state rivers and river valleys. Some of these perceptions and concerns are of relatively recent origin, and perhaps the makers of the Constitution can not be

\(^{21}\) Supra note 5.
\(^{22}\) Ibid.
blamed for not having foreseen these developments. However, it is now crystal clear that if ever a subject needed planning and co-ordination on national basis, it is water resources management in general and groundwater management in particular that would look into the matter.

Looking into the present scenario and Constitutional provisions it is submitted that the Centre should be given upper hand in the management of the ground water management. The States should be made accountable for the mismanagement though it has almost exclusive power to manage the ground water resources.

2. Statutory Rights

Mainly, there are two enactments to regulate water related problems in India -

(i) The Water (Prevention And Control of Pollution) Act, 1974.
(ii) The Environment (Protection) Act, 1986

(i) The Water (Prevention and Control of Pollution) Act, 1974

With a view to implement the decisions taken at the Stockholm Conference, Parliament relied on the resolution under Article 252 passed by different states to enact water pollution law. Only then, this Act of 1974 was passed. This Act was designed generally to control water pollution whereas this precious resource has not got much attention. The subject of ground water protection is not exhaustively dealt with under this Act. Although the definition of streams, encompasses “subterranean water”, it is unlikely that it will be

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23 Id., p. 735.
24 Section 2(J) “Streams” has been defined to include (i) river (ii) water course (whether flowing for time being dry); inland water (whether natural or artificial) (iv) subterranean water (v) sea or
employed for efficient groundwater management and pollution. The language used in the Act betrays the effective enforcement and realization of its intention.

Though the Water Act is a comprehensive legislation, its loopholes and its shortcoming are glaring and evident of the fact that it defined the 'water pollution' but still groundwater and its control etc are kept outside the purview of this legislation.\(^2\) The Act is applicable to the water of the river, and other water resources. What is within the bound of water law is to be at least internally integral, that is to 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 countries treat groundwater as a separate entity (under different types of laws) thus allowing the use of groundwater which is totally unrelated and unconcerned with surface water. This leads to serious ecological imbalance.\(^2\) The Boards include mainly to educate people and lay down standards for a stream and well, but no minimum limit is provided to regulate the extraction of the use of ground water of any area. The problem of groundwater resources if handled, properly and effectively at the grass root level, it could go a long way to curb this evil at the national level. But the unfortunate part was and is that it has very weak and inactive machinery to curb the misuse of ground water. This phenomenon continues till today, inspite of repeated strictures and directions from the judiciary.\(^2\)

\(^2\) tidal waters to such an extent or as the case may to such point as the state government by notification in the official gazette specify in this behalf.

25 Dr. Musharraf (Editor): Legal Aspect of Environmental Pollution and its Management, 1992, p. 147.

26 Singh Chhatrapati: op.cit., p. 97.

27 Dr. Musharraf: op.cit., p. 135.
It may well be said that the boards are burdened with too many responsibilities and weakened by institutional pressures. Therefore, they are reluctant to act. Seldom do they look forward to interpreting the provision of the statute in such a liberal fashion as to assume powers at this level. Hence, it is desirable to look at the problem of ground water from a wider perspective.

Since 1974 we have enacted numerous legislations and have set-up a number of departments and institutions to oversee the implementation of these legislations. Despite these efforts current status of Indian Environment clearly shows that command and control mechanism of environment governance – enacting a law and then setting up bureaucracy to implement the laws – has failed miserably in India. What has gone wrong? It is probably late to ask this question. Control mechanism is a total failure under this act. There is inadequate linkage in handling the misuse of groundwater. This can be done only after definite and specific legislation with a comprehensive mechanism of control and management is to be enacted for sustainable use of groundwater.

(ii) The Environment (Protection) Act 1986

The rapid degradation of environmental quality, which has shaken the foundations of human survival, is a reality. We can no longer deny this fact. Increasing consciousness of the environmental threats to human survival led a considerable number of people throughout the world to conclude that unless we care for our planet earth and preserve it for our children, we will go down in history as the only species which watched its own destruction closely, but

28 The Hindustan Times, June 5, 2001, p.16.
never really bothered. Hence, protection of the environment has become our primary concern and an intensely debated issue of the present era.²⁹

But issues of environment have assumed high importance in course of time since the adverse signals sent by the ecosystems made man to understand that nature has limits to its tolerance and that he, as part of nature, must exercise restraint. As this awareness has grown, there has been a corresponding increase in the concern for the protection of the environment.³⁰ This warning made its impact on global as well as national scenario. The Stockholm Conference on Environment which was convened in 1972 was the result of this new awareness. There is the world wide move now to curb the menace of environmental degradation.³¹ Parliament under Article 253 read with Entry 13 List I of the Seventh Schedule of the Constitution, exercised its power to enact the Environmental Protection Act for implementing the decisions taken at the 1972 Stockholm Conference.³² The Directive Principles of State Policy³³ and Fundamental Duties³⁴ explicitly enunciate the national commitment to protect and improve the environment. These two provisions evidence the national sentiment on environment and environmental protection.³⁵

Earlier laws mainly consisted of claims made against tortuous action such as nuisance or negligence. These were based on the provisions of Criminal Procedure Code and Municipal Laws. The Environment Protection

³⁰ Id., p. 144.
³² Id., p. 279.
³³ Supra note 2.
³⁴ Article 51A(g) – “To protect and improve the natural environment including forests, lakes, rivers and wildlife and to have compassion for living creatures”.
Act, 1986, is the one which is now being implemented and relied upon in an effort to protect the environment.\textsuperscript{36}

The concept of ‘environment’ is very wide. The Section 2(a) defined “environment” to includes water, air and land and inter-relationship which exists among and between water, air and land, and human beings, and other living creatures, plants, micro-organism and property.”\textsuperscript{37}

Above section which deals with definition shows a total lack of understanding of the modern concept of arising situations. In the present time the major problem, which India is facing, is over use and misuse of groundwater. None of the section of this Act has mentioned the measure of the control to depleting ground water resource, neither indirectly nor directly. So the frontline challenge is not just to define the problem but to initiate a range of corrective mechanism. Presently it is perhaps inadequate beginning but a beginning nonetheless.\textsuperscript{38}

Above all, the term environment is crucial. It covers all factors affecting life-air, water sand, sound etc. Thus, it has become a pious duty of the states to protect environment from all activities that are hazardous\textsuperscript{39} to public at large. It is unfortunate that nothing was done by the enhancement machinery to check the misuse of ground water. But the government alone cannot achieve results unless people realize its use and misuse. Moreover, the preservation of the groundwater is closely linked with the existence of mankind. It is concern

\textsuperscript{37} The Environment (Protection) Act, 1986.
\textsuperscript{38} Leela Krishnan P.: Law and Environment, 1995.
of the entire mankind and vigorous efforts by all sections of the society are called for to solve the problem.

Like other issues, the judicial dynamism has gone one step further to protect the misuse and over exploitation of groundwater. The supreme Court of India took notice of the news under the caption “Falling Ground Water Level Threatens City” appearing in the Indian Express of March 18, 1996.\(^\text{40}\)

Concerning the level of Groundwater, the issue of regulating the indiscriminate boaring and withdrawal of groundwater in the country and the issue of necessary regulatory directions was subject matter of a decision in the case of \textit{M.C.Mehta v Union of India}.\(^\text{41}\) The Supreme Court has given following directions in this regard:

(i) to appoint a Central Ground Water Board as an authority under section 3(3) of the Environment (Protection) Act, 1986;

(ii) this authority was to take notice of the matters referred to in section 3(2) of the Environment (Protection) Act, 1986;

(iii) this authority was to apply its mind in respect of the urgent need for regulating the indiscriminate boring and drawl of underground water in the country and issue necessary regulations in this regard.

In pursuance of the above decision of the Supreme Court, the Ministry of Environment and Forest, Government of India was directed to formulate the Central Groundwater Board as an authority under section 3 sub section (3) of the Environment Protection Act, 1986 to control and regulate ground water

\(^{40}\) 1997 (ii) SCC 312

\(^{41}\) Ibid.
management and development. The need of hour is to control and manage the indiscriminate boring and withdrawal of underground water. It should be given urgent attention.

Existing laws generally focus on specific types of pollution on specific categories of hazardous substances. Some major areas of environmental hazards are not covered such as ground water resource. Because of a multiplicity of regulatory agencies, there is need for an authority which can assume leading role for studying, planning and implementing long term requirements of environment safety and to give direction and dithering punishment to those who endanger human environment.42

C. Ground Water Acts of Different States

Over exploitation of ground water resources is increasingly recognized as a major problem. How to address the problem, is, however, unclear.43 States have responded to the problem by using a variety of legal Acts for bringing in desirable changes. Several States have passed or are considering legislation designed to regulate ground water extraction whereas previously attempted, regulations are widely ignored. However, in spite of its abundance, it has not been possible to ensure its proper utilization, sustainable development and equitable distribution.

Keeping these facts in mind, it becomes imperative to regulate the use and development of the resources in an equitable and just manner. For this, other than the planning and policy making mechanisms, the legal mechanism is

important. However, legal regulation would be unsuccessful if the ecological and socio-economic framework on which the regulation is sought to be enforced is not kept in mind.

In India, we still do not have a comprehensive legislation to regulate the development of ground water. The legislative competence to enact laws on waters is primarily with the states under Entry 17 of the State List. Although the National Government would find it difficult to justify ground water legislation under the constitutional scheme but the first attempt dated back to 1970. More recent version of model bill includes the latest version of 1998, 2000, 2005. But states are still ignoring this vital resource due to political reasons. According to new survey, more than half of districts in India, i.e., 317 districts, ground water level has gone down to the dangerous level. This dangerous trend has impacted more influence on legislative activity and ground water regulation has become a priority in many states. Ground water Act of different states are given below:

The Andhra Pradesh Water, Land And Trees Act 2002

As the preamble states, it is an act to promote water conservation and tree cover and regulate the exploitation and use of ground and surface water for protection and conservation of water resources, land and environment. The act has following significant features. There shall be an authority. All the ground water resources in the state shall be regulated by authority and all wells and

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44 Alice Jacob; "Development of Ground Waters: Need For Legal Regulation" ILI, 1990, Vol. 32, No. 4, p. 542.
46 Hindustan, October 14, 2006.
47 Section 2(1)
48 Section 3
water bodies shall be registered with the authority. The Designated Officer, with the approval of the Authority may prohibit water pumping in such area which it may cause damage to the level of groundwater or environment for a period of not more than six months. No person shall sink any well in vicinity of a public drinking water resource within a distance of 25 metres in the area other than covered under section 9, and sub-section (1) of section 11. In over exploited area no well shall be sunk in such areas except wells sunk for public drinking purposes. Section 13 provides the distance and depth for sinking well in order to curb unhealthy competition to tap water from deeper layers of ground water. Groundwater pollution by chemical industrial or other uses by any person or body is prohibited.

The Act also provides for reasonable opportunity of being heard, provision for appeal and prescribes penalties for its contravention. The Authority has also been provided with powers of enquiry, investigation, calling for information, closing and sealing of unauthorized wells, seizures of equipments etc. Thus, the Act is comprehensive and unique as it provides for an integrated approach to water management.

The Goa Groundwater Regulation Act 2002

The Government shall constitute a groundwater cell. The State Government with consultation of the Cell may declare, by notification, any

49 Section 8
50 Sub-section (2) of Section 8
51 Section 9
52 Sub-sec. (3) of Section 11
53 Section 19
54 Section 35 & 38 etc.
55 Section 3.
area in the state as a schedule water scarcity and over exploited area.\footnote{Section 4.} One has, within the period of 60 days from the date of commencement of this Act, to apply before groundwater officer for registration of an existing well in the prescribed form.\footnote{Section 5(1).} No person shall sink the well unless he obtained the permission from ground water officer.\footnote{Sub-section 3 of Section 5.} In the violation of this Act or to obstruct the Ground Water Officers in performing their duties shall be punishable with imprisonment and fine.\footnote{Section 17(A) & (B)}

**Bombay Irrigation Act (Gujrat Amendment) Act 1976**

There is no separate ground water law. Some sections have been added to the Bombay Irrigation Act (Gujarat Amendment) Act, 1976. These sections were brought into force in 1988. Section 94 prohibits construction of tube wells beyond 45 M in depth. Beyond this depth special permission is required from the authorities. Section 99 of the same Act regulates wastage of ground water. Under section 100 if any person contravenes to any provisions of Act, he shall be punished with imprisonment for a term which may extend to six month or fine upto five hundred rupees or both.

**The Himachal Pradesh Ground Water (Regulation and Control of Development and Management) Act 2005**

The Himachal Pradesh Ground Water Act 2005 is one of the pioneering enactment by the Indian legislature towards the sustainable preservation of environment and ecological system of the beautiful planet of this universe i.e. ‘earth’.

\footnote{Section 4.} \footnote{Section 5(1).} \footnote{Sub-section 3 of Section 5.} \footnote{Section 17(A) & (B)}
This Act talks about the establishment of an Authority named as "Himachal Pradesh Ground Water Authority" under the overall control and supervision of the State Government, to regulate the extraction of ground water. The said authority shall advise the State Government if it feels necessary or expedient in the public interest to declare an area to be a notified area so that all the act pertaining to extraction of ground water shall be controlled and regulated accordingly. It is also provided that such declaration of notified area may be done by the State *suo moto* without receiving any advice from such authority. Such declaration shall be published in the Official Gazette, and the person affected or aggrieved may file an objection within thirty days and the authority may advise state Government to denotify to the effect of same later on.

Further, it provides that in such notified area a person desiring to extract ground water has to make an application to the Authority on payment of certain fees prescribed by the authority. Furthermore, every application shall contain such particulars as may be prescribed. The authority if satisfied may grant permission within sixty days from the date of receipt of such application giving priority for drinking water in preference to other needs. Such permission is not arbitrary rather the Authority shall have to regard various grounds as provided under sub-section (5) of Section 7. It further says that such permission shall not be refused without availing an opportunity of being heard to the applicant and such grant of permission or refusal to the effect should be

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60 The Himachal Pradesh Ground Water (Regulation and Control of Development and Management) Act, 2005, section 3.
61 Sub-section (2) of Section 5.
62 Sub-section (4) & (5) of Section 5.
63 Sub-section (1) of Section 7.
64 Sub-section (2) of Section 7.
intimated to the applicant within a period of thirty days from the date of such decision.\textsuperscript{65}

While on the other hand, the existing user of ground water in a notified area have to get it registered under the said Authority it established, within a period of sixty days on filing prescribed form and payment of certain fees as may be fixed by the authority. This period may be relaxed on certain reasonable ground. It is to be noted that during the pendency of such registration the user will continue to use the ground water in the same manner and quantify as he was entitled prior to the date of application.\textsuperscript{66}

One of the watermark provision in this Act is that of Section 15, which deals with rainwater harvesting for conservation and ground water recharge. It provides that the Authority may in order to improve ground water situation, identify the areas of ground water recharge and use guidelines for adoption of rainwater harvesting for ground water recharge in such area. In doing so the Authority may bring the concerned department of the State Government to do the required task. In urban areas the Authority may issue direction for construction of rain water harvesting structures in residential, commercial or other premises having plinth area of 100 sqm or above. At the same time the authority may issue direction to the concerned Municipal Corporation or other local Authority to impose conditions for providing roof top rain water harvesting structures in building plan with plinth area of 100 sqm or above.

\textsuperscript{65} Sub-section (3) of Section 5.
\textsuperscript{66} Sub-section (1) of Section 8.
The Karnataka Groundwater (Regulation for Protection of Drinking Water Source) Act 1999

This Act prohibits any person from sinking any well for the purpose of extraction of water within a distance of 500 metres from the public drinking water source. The appropriate authority can permit, by recording reasons in writing, any applicant to sink a well in the 500 m area on the basis of technical officer report and after considering public interest.

The appropriate authority may declare any area under its jurisdiction as water scarce area for a period not exceeding one year. During this period of scarcity, the appropriate authority can regulate or prohibit extraction of groundwater by any person from any well situated within 500 metre from the public drinking water source. Sinking of wells without permission of appropriate authority shall not be done by any person except on behalf of the government or the local authority and as a source of public drinking water. Keeping in mind the adverse impact of any well upon public drinking water resource in such over utilized area and after due hearing of the well owners, the appropriate authority may order for temporary or permanent closure or sealing of the well.

Where enforcement of regulation is concerned, the appropriate authority is also vested with powers to enquire, investigate, survey and test the water after issuing notice, he may order for closure or sealing of any well or

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67 Section 37.
68 Sub-section (2) & (3) of Section 3.
69 Section 4
70 Section 7
71 Section 9
disconnect the supply of electricity or seize equipments in case of violation of section 3,5,7,8 or 9 provisions. For appeal method of issuing notice, protection for acts done in good faith and imposition of penalties are also there.\textsuperscript{72} The drawbacks of the Act are several. It has a fragmentary approach of dealing only with drinking water without looking to the management and development of ground water as a whole. It excessively relies on bureaucratic control. Because of the 500 m radius rule and extensive application of public water supply schemes all over Karnataka, the coverage of the law is quite wide as distinct from its apparent look. The possibility of red-tapism, corruption and abuse of power is a by-product of permit-raj. There is no policy about conservation, rainwater harvesting and participative approach by involvement of water association or by the people at large. The effect of the Act is that the same old common law principle will continue to hold way.

The Kerala Groundwater (Control and Regulation) Act 2002

It provides the establishment of state Ground Water Authority.\textsuperscript{73} The authority is authorized in notifying areas for the control and regulation of ground water development.\textsuperscript{74} In notifying area, every user of ground water must apply for permit from the authority and registration of well in notified area within one hundred twenty days from the date of constitution of authority\textsuperscript{75}. All the users of groundwater shall apply for registration as users of the ground water in the state within one hundred twenty days from the date of application.

\textsuperscript{72} Supra note 4, p. 33.
\textsuperscript{73} Section 3
\textsuperscript{74} Section 6
\textsuperscript{75} Section 7
constitution of the authority.\textsuperscript{76} The authority is also empowered not to give permission for any purposes within thirty metres from any drinking water source from where water is pumped for public purposes.\textsuperscript{77} The Act criminalizes violation of the statutory provisions and prescribes penalties.\textsuperscript{78}

Its shortcomings lie on its exclusive reliance on the command and control model without providing for people’s participation, either directly or through panchayats or NGO. Non inclusion of the role of the electricity board and financial agencies in assisting the controlling functions of the authority which is clearly spelt out in the Karnataka Act is another shortcoming of this Act. There is complete absence of imaginative schemes for implementing rainwater harvesting which has great scope in Kerala. Moreover, there is lack of effective steps against water mining and sand mining, which have an adverse impact on groundwater.\textsuperscript{79}

\textbf{The Maharashtra Groundwater (Regulation for Drinking Water Purpose) Act 1993}

The scope of this Act is limited to protect the drinking water sources. The enforcement of this Act is done through district collector who is declared as the appropriate Authority for this purpose. The sinking of new well within a radius of 500 m from public drinking water source is prohibited.\textsuperscript{80} The District Collector on the report of the Technical Officer may declare any area as water scarcity area.\textsuperscript{81} In order to protect the public drinking water sources in scarcity

\begin{itemize}
\item\textsuperscript{76} Section 9
\item\textsuperscript{77} Section 10
\item\textsuperscript{78} Sub-section (1) & (2) of Section 21.
\item\textsuperscript{79} Supra note 4, p. 37.
\item\textsuperscript{80} Section 3
\item\textsuperscript{81} Section 4.
\end{itemize}
area, the appropriate authority will prohibit withdrawal of groundwater from the existing irrigation wells. No person shall without the permission of the Appropriate Authority will sink the well in over exploited watershed. The Appropriate Authority may prohibit the extraction of water from an existing well for certain period. Any existing well which is adversely affecting any public water source, the Appropriate Authority on the advice of Technical officer has power to close down the existing well. If any person who contravenes any provisions of the section 3,5,7,8 or 9 the authorized officer may enter upon that land and remove obstruction, if any, close pumping of water, disconnect the power supply, seize any material and seal off the well at the cost of owner.

The Punjab Tube Wells Act 1954

The Punjab Tube wells Act 1954, contains provisions relating to construction and maintenance of tube wells by the state and does not regulate the digging of well by individuals. Recently a significant step towards the preservation of ground water resources has been taken by the Punjab Government. The Government introduced ‘Punjab Preservation of Subsoil Water Ordinance 2008’, to prevent the early plantation of paddy in the state in view of depleting water table in the state. The authorities have ample powers

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82 Section 5.
83 Section 6
84 Section 7
85 Section 8
86 Section 9
87 Section 11
under the existing provisions of law to deal with these issues.\textsuperscript{89} This step should be appreciated at large and different State Government should also come forward for such timely needed legislation.

\textbf{The Tamil Nadu Ground Water (Development and Management) Act 2003}

Under this Act, the government shall have power to develop, control, regulate and administer the groundwater in the state and may exercise their power through the authority. The authority shall be constituted by the government through the notification. The authority has power to notify areas for development, control and regulation of groundwater. Those who violate the provisions of the Act shall be punishable for the first offence with fine which may extend to one thousand rupees, for the second and subsequent offences with fine which may extend to two thousand rupees. In respect of continuing offence, the offender shall be punishable with fine which may extend to five thousand rupees for every day.

\textbf{The West Bengal Ground Water Resources (Management, Control and Regulation) Act 2005}

The Act provides the establishment of state level authority.\textsuperscript{90} The Authority shall take every step to manage, control and regulate water resources including to issue certificate of registration or permit in accordance with the provisions of the Act.\textsuperscript{91} Every users must apply for permit before Appropriate Authority for extraction or use of groundwater.\textsuperscript{92} There is penal provisions for the violation of this Act.\textsuperscript{93}

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\textsuperscript{89} The Hindu, June 10, 2008.
\textsuperscript{90} Section 3.
\textsuperscript{91} Section 6.
\textsuperscript{92} Section 8
\textsuperscript{93} Section 16 (a) & (b)
\end{flushright}
So far as the groundwater levels of Delhi is concerned, it is falling drastically all over the city by four to ten metres during the last 10 years. There is talk of a groundwater recharge. Consultancy service being set-up in Faridabad. In the Nazafgarh and Mahrauli areas of Delhi, a ban has been imposed on construction of any new tube well. Any well drilled will be capped and the drilling company prosecuted.\textsuperscript{94}

On the basis of afore-mentioned details we can say that Acts of different states do not touch the issue of water rights. These Act merely try to regulate water harvesting and marketing by restricting of tubewells and introducing licensing procedure. None of acts contains any provision allowing the inclusion of local representatives in the management structure or the devolution of any management authority to local groups.\textsuperscript{95}

A glance at these state legislations will reveal at once the lack of coordinated effort on the part of the states regulating ground water abstraction. It would be ideal if comprehensive and central legislation with defined policy of conservation and management of groundwater is adopted in place of these adhoc and haphazardly modeled laws.\textsuperscript{96}

What is needed is a holistic approach to the problem, namely legislative regulation, economic incentives and social action, of course, a committed will to meet out the ground water crisis and thus, we can save the lives of the people of future generations.

\textsuperscript{94} The Hindu, June 4, 2000 (weekly magazine).
\textsuperscript{95} Supra note 43, p. A-10
\textsuperscript{96} Supra note 88, p. 82.
D. Ground Water – Legal Aspect

With the rise of new technologies, however, which allow large scale extraction and utilization of water, it becomes more important for the state to intervene and make sure that this does not result in a skewed or inequitable distribution amongst the people. The state should intervene to ensure equitable distribution. However, the basic question is what can be the basis for absolute right over ground water resource? The next question is: who has the right to use water? And, what kind of rights and corresponding duties are attached to it? Then the question of rights to resource will have to be settled. It has to be determined what the nature of rights are at present. Are they riparian or usufrutuary, public or private, positive or negative, individual or group rights etc? The object is not to go into a detailed rights discourse but to identify a practical workable proposition of the right to ground water so that the regulation can be made feasible.

Right to Groundwater in Common Law

Right to water is a right conferred on any person by law to take possession of water occurring in a natural source of water supply and to put it to beneficial use. In India, common law doctrine of land ownership is being followed in the sphere of groundwater.

The common law distinguishes between underground percolating water and an underground running stream. The percolating ground water does

97 Singh Chhatrapati: op.cit., p. 8.
98 Supra note 6, p. 632.
99 Supra note 88, p. 73.
not flow in a defined channel but the latter does. Under common law, any person who owns the (land) surface may dig therein and apply all that is there found to his own purposes. The owner of the land, accordingly, has, as incidental to such ownership, the right to collect, store, use and supply to others, the water that is percolating therein.

Right to Riparian Owner in Common Law

The English common law recognizes the doctrine of riparian rights to regulate proprietary rights in water. Each co-riparian has the right to have the water flow past his lands in the same quality and quantity. There is a duty cost upon the upper riparian to see to it that the lower one is denied this right. No such limitation is placed in respect of ground water running in undefined and unknown channels. The argument advanced for the acceptance of this rule was that the source and flow were so unknown that it is impossible to regulate any rules governing them.

In Perumal v. Ramaaswammy Chetty it was stated that the reason why underground water ‘not running in a defined stream’ is not subject of prescription is that there is no visible means of knowing to what extent, if any, at all the supply to the plaintiff’s tank would be affected by water percolating in and out of defendants land. These observations were quoted with approval in Kalanath V. Women Rao.

103 City of Los Angeles v. Hunter 156 Cal. 603 at p. 755 (1909)
104 Supra note 6, p.633.
105 Chaffield v. Wilson 28 Vt. 49 (1855)
106 11 Mad. 16, p. 2.
107 AIR 1937 Nag 310.
In view of the obvious difficulties involved in ascertaining whether water is flowing in a particular channel, common law does not prescribe any limits over the rights of land owner. Rather it allowed the land owner exclusively to appropriate the groundwater in his land for his own purpose at his free will and pleasure. It is according to this tradition that Indian Easement Act was designed.

Right to Groundwater in Indian Easement Act 1882

Where states have not enacted laws on groundwater management, it is the common law read with the Indian Easement Act 1882 (hereinafter Easement Act) which prevails due to Article 372, which mandates that the pre-constitutional laws shall continue in force until altered or repealed. This implies that the right to use groundwater is basically an individual negative right which can not be infringed or interfered with by any external agency.

The common law right of an individual land owner to exclusively appropriate percolating ground water is statutorily recognized in the Indian Easement Act. Illustration (g) to section 7 of the Act provides:

“Every owner of land has a right to collect and dispose within his own limits of all water under the land which does not pass in a defined channel”. The provisions suggest that a person by abstracting percolating groundwater may even drain water to such an extent that his neighbour may be left without any percolating groundwater, even though the latter was the prior user of such water. As laid down in English decisions like, Action V Blundell.
Chasemore V Richards,\textsuperscript{112} and Mayor of Bradford Corporation V. Pickles,\textsuperscript{113} that such inconvenience to neighbours can not become a ground for legal action.

In percolating ground water every landowner through whose land the water is percolating has an absolute right to such water. A landowner or landholder can extract as much percolating water as he likes leaving his neighbour's well dry. He has right to sink a bore-hole or well in his land to intercept water percolating underground through his land and prevent it from going to the other man's property.\textsuperscript{114}

Under section 2 of the Act, the individual's rights of water are subject to the states sovereign rights over waters both surface and underground, to regulate and control them in public interest No prescriptive rights of easement can be claimed against the government.\textsuperscript{115}

The prevailing law governing groundwater utilization was drafted at a time when groundwater was primarily utilized for domestic purposes. But in recent years unrestrained use inevitably result in complete exhaustion of the groundwater so that in the end the lands dependent thereon will revert to their desert state.\textsuperscript{116}

The common law doctrine of unrestricted easementary right of the landowner to use ground water is outdated and unacceptable in the light of

\textsuperscript{111} (1843) 12 Md W. 324, 41
\textsuperscript{112} (1859) 7 HLE 349
\textsuperscript{113} (1895) AC 587
\textsuperscript{114} Supra note 44, p. 540.
\textsuperscript{115} Ibid.
\textsuperscript{116} Supra note 88, p.75
disproportionate nature of ground water resources and the ever increasing social needs for use of water.\footnote{117}

**Group Rights**

Group rights of the village communities also form statutory provisions, specially panchayat Acts of different states. These Acts vest the village tank-ponds, streams and public well in the panchayat. The village under the Panchayat has a right to use the water resource. The Panchayats are supposed to regulate usufruct right of the village people. Since its inception, however, this arrangement of group rights has not been worked very well. Some analysts blame the Panchayat Raj system for this failure.\footnote{118}

The actual control over the natural resources has been moved away from village level to the external agencies. Some major amendment are made to the Panchayat Acts for the point of control over resources which has been described in Eleventh Schedule \[243G\] added by the Constitution (73\textsuperscript{rd} Amendment) Act, 1992.\footnote{119}

**Inchoate Rights**

There are also domain within Indian Law, where new rights or different types of rights have begun to appear, whose nature and extent is not clear. These have arisen due to two reasons (i) Conflicting interpretation of statutes (ii) new interpretation of the constitution.\footnote{120}

\footnotesize
\begin{itemize}
\item \textsuperscript{117} Supra note 14, p. 73
\item \textsuperscript{118} Singh Chhatrapati: op.cit., p. 20.
\item \textsuperscript{119} This Amendment has added a new part XI to the Constitution consisting 16 Articles and new Schedule “Schedule Eleven”. The Eleventh Schedule contains 29 subjects on which the Panchayats shall have administrative control. One of the such subject is minor irrigation, water management and watershed development.
\item \textsuperscript{120} Singh Chhatrapati: op.cit., p. 21.
\end{itemize}
The evolution of water laws has progressively strengthened the government's right over water. The rise of PIL has brought in the question of water rights. The Articles of the Constitution has been interpreted to mean right to environment and hence water. This interpretation of water right, is contrary to what it may mean in the statutory provisions. Right to life is a fundamental right. What the courts are in fact doing in the Public Interest Litigation (PIL) cases is to locate the duty bound agencies who will satisfy the fundamental rights to the people. The Supreme Court has put a major weight of law reform on Article 21 of the constitution.\(^\text{121}\)

**Ground Water Rights and Indian Scenario**

India being a welfare state undertakes or can undertake developmental work relating to ground water extraction of which the benefits go to the users. If groundwater is harnessed and augmented by construction of percolation tanks, check dams and so on, it cannot be said that the users enjoy a negative individualistic right over it.\(^\text{122}\)

India follows the common laws approach of landownership in the sphere of ground water rights, wherein ground water is recognized as a chattel attached to the land property with the rights therein belonging to the landowner based on ad-coleum principle.\(^\text{123}\) Rights in groundwater belong to the landowner, since they form part of the dominant heritage, and landownership is governed by the tenancy laws of the state. The Transfer of Property Act, necessitates that this right (to groundwater) can be given to anyone else only if

\(^{121}\) Id., p. 22.
\(^{122}\) Supra note 6, p. 633.
the dominant heritage (land) is transferred. Conversely, the Land Acquisition Act asserts that if someone is interested in getting rights over the easement (over groundwater in this case) he would have to have interest in land. There is no limitation on how much groundwater a particular land owner may draw.\textsuperscript{124}

The consequence of such a legal framework is that only the landowners can own groundwater in India. It leaves out all the land-less and tribal who may have group rights over land but not private ownership.\textsuperscript{125} It also implies that soon the upper caste landlords transform into water lords.\textsuperscript{126}

In the absence of legal regulatory mechanism for limiting withdrawals of groundwater led to a writ petition in the Kerala High Court under Article 21 of the constitution of Indian in \textit{Altakoya Thangal V. Union of India.}\textsuperscript{127} The petitioner contended that the excessive pumping of groundwater by the rich farmers was threatening the very availability of groundwater for all. The court upheld their claim. Such a decision once again, makes the right to water a natural or fundamental right under Article 21 i.e. right to life.

As a concluding remark, the whole legality of water right need to be considered differently. Primarily the right can not be thought of as absolute right against which no prescription can be obtained.\textsuperscript{128} Moreover, rights would include imposition of duties and obligations. So the related questions would be on whom lies duties? With the onward march of the society the emphasis has shifted from the individual to the society. Rights and Duties are co-related to

\textsuperscript{124} Singh Chhatrapati: op.cit., p. 39.
\textsuperscript{125} Ibid.
\textsuperscript{126} Supra note 123, p.115.
\textsuperscript{127} 1990(1) KLT 550
\textsuperscript{128} Tripathi B.N.: Jurisprudence and Legal Theory, 1993, p. 284.
each other in such a way that one can not be conceived of without other. In other words, the existence of one depends on the existence of the other. A right is always some one upon whom the co-relative duty vests. The right to use ground water is not absolute right, and there can be restriction on it in the interest of society. No doubt, it is natural right of man which all courts judgments and statutes must recognize. It is part of the right to life, and a basic need for survival. The nature of this right is one of usufruct right and not a property right. The role of the state in the recognition of this natural usufruct rights like all other fundamental rights should be that the state has to be a protector and a facilitator so that people can realize their right.

It has first of all, to protect the violation of this right i.e. it has to see that socially stronger or economically better off do not usurp the rights of the socially or economically under privileged people. The State has to make sure, through legal and administrative mechanism that the natural right of all is protected.

In India, all the citizens have right to use groundwater. This right is subject to property. This does not mean that the people may be deprived of the access to use water. The persons are to exercise this right in fair and reasonable manner and not so to impede others from doing the same. However, large number of landless and tribal people who have to use rights but not have been able to exercise it so far, must also be considered.129

Ground water should be declared as a common resource. However, the move has not gone down well in some quarters, which fears the move will

129 Singh Chhatrapati: op.cit. p. 59.
create an acute problem to the Political parties for their future prospective or vote bank. The Southern States have come out with novel idea in the form of Act to save and mange groundwater. The Cow belt states are far behind to frame the legislation on the pious work. The state of UP has its own water policy. The novelty introduced by the reforms, is that water rights are now created in favour of water users. Right to use ground water should be based on Rawl’s Theory of distributive justice which is enshrined in Art 39(2) of Indian Constitution.\textsuperscript{130}

However, no law or set of laws can be complete in the context of dynamic development. New problems are bound to arise with industrial and scientific progress necessitating updating of the existing laws.

\textsuperscript{130} Supra note 45, p. 208.