

# **SUSTAINABLE GROUNDWATER LEGISLATION**

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# INTRODUCTION

- NRM Policies and practices [including that of groundwater] – decades of wide ranging debate.
- However, GW management has not witnessed the same extent of successful experimentation and innovation as have surface waters / forest resources.
- Sustainable and equitable NRM in India – sectoral approach persists.
- INRM – still at the level of experimentation, though slowly consolidating.

# INTRODUCTION

- Current problems associated with groundwater in India - failure in integrated approach to NR Use and Management.
- Obsession for large-scale irrigation projects in the country since 1951 prevents scientific and ecologically viable methods of water management
  - river diversions,
  - reduction of run-off losses
  - conservation of ground water resources.

# INTRODUCTION

- Current legal framework on natural resources – reflects the same inappropriate approach.
- No legal reform anywhere in India in furtherance of Policy approaches for integrated NRM that have been experimented upon for the last two decades
- separate land , forest, and water laws, with no organic relationship between and among them.

# INTRODUCTION

- Groundwater law in the country as it prevails today is firmly located in the same unsustainable natural resource legal frameworks.
- Law for sustainable NRM through integrated approach can ensure sustainable groundwater management as well.

# INTRODUCTION

- Agricultural production in India - the mainstay of the 65 % of the country's population
- entirely dependent on the monsoon rainfall pattern.
- entirely different from middle latitude countries of Europe, from where most of our modern technologies and developmental models have been borrowed.
- Significance of the monsoon rainfall - most of the country receives rain for about 100 hours each year, half of which is received in only 20 hours.
- Very little precipitation in India is in the form of snow

# INTRODUCTION

- Criticality of Rain Water Harvesting, watershed development
- Degraded Watershed – i.e Faulty land management – results in
  - excess water runoff,
  - soil erosion,
  - crop destruction,
  - water pollution,
  - sedimentation,
  - flash floods or bigger floods,
  - ground water depletion,
  - waterlogging,
  - salinity.

# INTRODUCTION

Requirement – integrated, decentralized NRM

Sustainable groundwater management – if:

- it provided for an equitable rights framework,
- it ensures an institutional and regulatory mechanism that is part of a decentralized form of governance of natural resources as a whole.

# Problems related to Groundwater Use .

Three problems dominate groundwater use

- *depletion* due to overdraft;
- *waterlogging* and *salinization* due mostly to inadequate drainage and insufficient conjunctive use;
- and *pollution* due to agricultural, industrial and other human activities

Most common symptom : secular decline in water tables.

# Problems related to Groundwater Use .

- All these problems point to incorrect or In appropriate land management policies.
- Differing types of groundwater problems across the country as per specific geo-hydrological conditions.

# Problems related to Groundwater Use .

*Impacts:* Adverse social, economic and political impacts.

- Groundwater – an important opportunity for productive life for poor farmers with no access to irrigation commands.
- The different regions' capacity to feed its growing population is impaired According to experts, a quarter of India's harvest may well be at risk from groundwater depletion.

# Problems related to Groundwater Use .

- Health problems arising out of groundwater contamination through pollution or over-draft, particularly in the case of populations who are users of groundwater only for drinking and domestic needs.
- Groundwater use – a contributor to inter-sectoral conflicts – industry, agriculture, domestic and drinking, rural and urban.

# Solutions to Groundwater Problems

- A clear definition of rights to satisfy the requirements of sustainability as well as equity.
- Suitable institutional frameworks that give representation to all stakeholders to adequately protect rights by regulation.
- Appropriate institutions and processes for effective and speedy dispute resolution and conflict management

# Purpose of Groundwater Law.

- To provide the framework of rights, institutions, mechanisms and processes to enable a management paradigm based on the above parameters.

# Present Law on Groundwater

Current groundwater law :

- A quantum leap - conceptually, structurally and functionally - is required for sustainability and equity.
- Source of Groundwater Law:
  1. Statutory: the Constitution, Central and State laws.
  2. Common Law

# Current Groundwater Law

- Constitutional Provisions : Two kinds:
- Broad principles
- Specific Provisions

## Broad Principles

- Provisions regarding sustainable and equitable use of resources for common good and fundamental duties of the State and citizens in relation to the environment are contained in Part IV [Directive Principles of State Policy] and Part IV A [Fundamental Duties].

# Current Groundwater Law

- The Directive Principles:
- Art. 38(1), Art. 39(b)(c) - social, political and economic justice and equity.
- Art. 48(a) and 51 A (g) – Environmental duties

# Current Groundwater Law

- Judging by prevailing environmental problems, these principles have *not* animated natural resource governance practices by the State, either at the Centre or the States.
- In occasional, individual cases, the courts have had to step in to enforce the duty of the State to observe these directives.

# Current Groundwater Law

## Specific Provisions:

- Vesting of legislative powers
- Fundamental Rights.

## Legislative Powers:

- List II of Seventh Schedule. Legislative powers of States on water

# Current Groundwater Law

- Article 252 --- Parliament is given the power to legislate for two or more States on matters falling under the State list, if the States so desire, and resolutions are passed to that effect by all the legislatures of the requesting States.

# Current Groundwater Law

Articles 14 and 21 - Fundamental rights to equality, life and personal liberty

Courts have recognized that:

- the right to clean and safe water is an aspect of the right to life
- This right can be affected by actions that adversely affect the availability of groundwater supplies.

However, judgements of the Courts do not reflect the day to-day practice in the exercise of rights, but constitute a final recourse to protect or uphold rights, through specific litigious action, case by case.

# Current Groundwater Law

## *Role of Panchayats and Municipalities under the Constitution*

- Panchayat Raj Institutions have been accorded a Constitutional status through the 73rd and 74th Amendments;
- List of subjects has been provided in the Eleventh and Twelfth Schedules.
- If the States so desire, they *may* transfer powers and responsibilities to PRIs to “*implement schemes*” in relation to these subjects [Art.243 G and 243 W].

# Current Groundwater Law

- These subjects include, not groundwater specifically, but minor irrigation, water management, watershed development [Panchayats] and water supply for domestic, industrial and commercial purposes [Municipalities].
- These provisions make it clear that the devolution of powers is not mandatory, but at the discretion of the States,

# Current Groundwater Law

## Statutory Law:

Two main central statutes are involved.

- Indian Easements Act, 1882
- Transfer of Property Act, 1882.

# Rights in Groundwater

- The Indian Easements Act, 1882, right to groundwater is described, *not as an easement* as is incorrectly generally interpreted, *but as a right attached to land which may be restricted by easements.*

# Rights in Groundwater

## Easements?

- Rights which the owner or occupier of certain land possess, as such, for the beneficial enjoyment of that land, to do and continue to do something, or to prevent and continue to prevent something being done, in or upon, or in respect of, *certain other land not his own.*  
[section 4]

# Rights in Groundwater

*By definition:* Two types of land:

- Dominant heritage - The land for the beneficial enjoyment of which the right exists
- Servient heritage - the land on which the liability is imposed.

Two parties:

- Dominant owner - the owner or occupier of dominant heritage.
- Servient owner - the owner or occupier of servient heritage.

# Rights in Groundwater

## Examples of easements

- Right of Way,
- Right to Light and Air,
- Right to standing or flowing water not on one's own land,
- easementary rights to support, etc.

# Rights in Groundwater

Thus

- The existence of two heritages or tenements [dominant and servient] belonging to different owners is absolutely essential to establish an easement.
- Ownership and easement are inconsistent and cannot co-exist in the same person.
- By this definition, the right in groundwater can by no means be defined as an easement, as in the exercise of this right, no servient heritage is required.
- It is a natural incidence to land which a landowner may enjoy, but *which may be restricted by other easements.*

# Rights in Groundwater

Sec. Easements Act occurs in Section 7, which deals with rights which are restricted by easements.

“: Easements are restrictions of one or other of the following rights (namely):-

- **Exclusive right to enjoy.**

(a) The exclusive right of every owner of immovable property (subject to any law for the time being in force) to enjoy and dispose of the same and all products thereof and accessions thereto.

# Rights in Groundwater

Rights to advantages arising from situation.

(b) The right of every owner of immovable property (subject to any law for the time being in force) to enjoy without disturbance by another the natural advantages arising from its situation.

Illustration (g) refers to the right to ground and surface water thus.

- “The right of every owner of land to collect and dispose within his own limits of all water under the land which does not pass in a defined channel and all water on its surface which does not pass in a defined channel”

# Rights in Groundwater

- The right to groundwater is thus not an *easementary* right, attached to a 'dominant heritage' but a right attached to land.
- The Easements Act does not define the nature of the right, whether ownership or usufructuary, but merely describes it as a right “ *to collect and dispose*”.

# Rights in Groundwater

## Transfer of Property Act, 1882.

- Section 6 of the Transfer of Property Act states that property of any kind may be transferred, subject to the provisions of that Act and other laws in force.
- Section 6(c) states that an easement cannot be transferred apart from a dominant heritage.
- Based on the erroneous interpretation of groundwater right as an easementary right, the provisions of the TP Act have been relied on by many to conclude that groundwater right cannot be transferred apart from land.

# Rights in Groundwater

- While in practice, this may be true, it is based on the right to land and its products and not as an easement.
- Treating groundwater as an easement would give rise to innumerable legal actions for remedy whenever the act of any person in digging or otherwise doing any thing on his or her land results in diminution of water in the well of an adjacent owner.
- We know from experience that such legal remedies are not being sought even though such diminution takes place on a widespread scale.

# Rights in Groundwater

- Courts would have been flooded by cases, and the issue of groundwater rights would have been dealt with again and again by the courts.
- However, we know from fact that this is not so.

## Statutory Law

- From statutory law, we can conclude that groundwater right is a property right attached to land, and not an easement.

# Rights in Groundwater

## Common Law:

- The general rights structure related to groundwater extraction derives from English Common law and is applicable in India as well.
- The cases of *Acton v. Blundell* and *Chasemore v. Richards* have settled the law in regard to natural rights to underground water.

# Rights in Groundwater

*Acton v. Blundel*: Question before the Court:

- Whether the right to the enjoyment of an underground spring, or a well supplied by such underground spring, is governed by the same rule of law as that which applies to, and regulates, a watercourse flowing on the surface.

# Rights in Groundwater

With surface water, the law is well established.

Such proprietor of the land has a right

- to the advantage of the stream flowing in its actual course over his land,
- to use the same as he pleases for any purposes of his own, not inconsistent with a similar right in the proprietors of the land above or below.
- Neither can any proprietor above diminish the quantity or injure the quality of the water which would otherwise naturally descend, nor can any proprietor below throw back the water without the license or the grant of the proprietor above.

# Rights in Groundwater

Marked and substantial difference between the two cases [i.e Surface water and groundwater] and that they are not to be governed by the same rule of law.

Various circumstances under which groundwater is used, distinguishes it from surface water.

# Rights in Groundwater

- The concealment of the course and channels in which underground water may flow;
- The possibility of its percolations in numberless unascertained directions
- The impossibility of telling what changes in the underground sources make take place from time to time
- The ignorance of the landowner as to how much water he receives and how much is taken away from him by adjoining landowners

# Rights in Groundwater

- The difficulty or impossibility consequent upon all these circumstances, of any interruption on the part of the proprietor against whom the right might be claimed.

These conditions prevent the acquisition of an easement in the flow of underground water, the sources and direction of which are hidden and unknown”.

# Rights in Groundwater

Consequently Held:

- that groundwater was not to be covered by the law which applies to rivers and flowing streams.
- By principle, the owner of the soil has property in all that lies beneath its surface.
- That the land immediately below is his property, whether it be solid rock, or porous ground, or venous earth, or part soil, part water;

# Rights in Groundwater

- That the party who owns the surface may dig therein and apply all that is there found to his own purposes at his free will and pleasure;
- If, in the exercise of such right, he intercepts or drains off the water collected from underground springs in his neighbours' well, this inconvenience to his neighbour falls within the description of *damum absque injuria*, [damage without injury] which cannot become the ground of an action

# Rights in Groundwater

The principle laid down in *Acton v. Blundell* was established by the House of Lords in *Chasemore v. Richards* as follows.

“ The law respecting the right to water flowing in definite visible channels is inapplicable to the case of subterranean water not flowing in any definite channel .... But percolating or oozing through the soil, more or less according to the quantity of rain that may chance to fall”.

# Rights in Groundwater

- The result of this case was to establish beyond all doubt that the principles regulating the rights of landowners in water flowing in known and defined channels whether upon or below the surface of the ground, do not apply to underground water which percolates through the strata in unknown channels.

# Rights in Groundwater

## State Law, Customary Law

- The right to groundwater as an inalienable part of the right to land is supported both by custom as well as state law in India.
- In customary practice, landowners generally regard wells as 'theirs' and view others as having no rights to restrict or otherwise control their rights to extract water
- Statutes that declare State sovereignty over all water sources by vesting their ownership in the State - such as Land Acts and Irrigation Acts – exclude groundwater by omitting mention of it.



# Rights in Groundwater

- Existing Irrigation Acts - no definition of ownership of sub-surface or groundwater.
- Land Acts refer to all water sources except groundwater.
- These Acts list all sources in which the Government's right of property exists, excluding when they are the private property of persons. Ground water is not explicitly mentioned.

# Rights in Groundwater

- Case of Orissa – amendment of Irrigation Act 1993 to include subsoil water in “Government Water Source” under challenge in courts.
- Summary: State-level land and water legislation do not define rights to groundwater, thereby leaving it in the realm of common law doctrine.
- Rights in groundwater are absolute, protected implicitly by irrigation and land laws in the country.

# Rights in Groundwater

## Implication:

- Right to Property can be restricted in the interest of the public.
- Easements cannot be interfered with generally. [Government's right to collect, retain and distribute water prevails over easements however, only in specific situations, where there is a government project for instance, easements can be suspended. ]
- Groundwater is a property right, not an easement. It can be generally controlled by legislation, in the interest of sustainability and equity.
- However, this has not been done.

# Current Groundwater Law

## Attempts at Groundwater Legislation

- Central Model Groundwater Bill - more than two decades ago.
- Very few states adopted the Bill.
- Those which did, failed to implement it.
- A primary reason for this failure can be stated to be the neglect in addressing the issue of rights in groundwater in the context of current management problems.
- Also, the attempt to enforce a centralized regulatory regime on countless millions of private well owners results in unmanageable complexities.

# Current Groundwater Law

## Comparison of Central / State Groundwater Legislation

- Model Bill to Regulate and Control the Development of Groundwater, Ministry of Water Resources, Government of India.
- The Madhya Pradesh Peya Jal Parirakshan Adhiniyam, 1986 [Act 3 of 1987]
- The Tamil Nadu Ground Water (Control and Regulation) Bill, 1977
- Control and Regulation of Groundwater in Pondicherry and Karaikal Regions, G.O.Ms. No. 39/Ag dated 21/9/88
- Maharashtra Groundwater (Regulation for Drinking Water Purposes) Act, 1993. [Act No.XXVIII of 1993].
- The Bombay Irrigation (Gujarat Amendment) Act, 1976.[Act 45 of 1976].
- The Kerala Ground Water (Control and Regulation) Act, 2002