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GROUNDWATER LAW IN INDIA:

PROBLEMS AND PROSPECTS

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Introduction:

India is one of the most blessed countries so far as its water resources wealth is concerned. The average annual precipitation in India is higher than that of any other continent in the world ~~precipitation of South America and Asia is twice like surface water~~

precipitation of the continent of Asia¹. Like surface water, groundwater too has its origin in rain water. Groundwater is a part of ^{the} over all hydrologic cycle and is defined as that part of precipitation which percolates deep down the earth to form underground water reservoir. The usable resource is taken through recharge from rainfall, canal seepage and other sources.¹

Since India is predominantly an agricultural country, ensuring supply of sufficient water for irrigation purposes is a matter of prime importance. The only two sources for irrigation available in India today is surface water and groundwater. Presently groundwater accounts for more than forty percent of the total irrigated area in the country. However, hardly thirty percent development of groundwater has yet been attained and the rest seventy percent of the available potential still remains to be developed for further utilisation.³ Since India is a country with pronounced ecological diversity, similar problems of groundwater utilisation may not be prevalent in all areas. In some areas with little recharge, there are problems of overexploitation of groundwater whereas in other water logged and saline areas there is need for more drainage. The (Cont..)

management of this resource has to be more region specific than many other natural resources like land or f o r e s t s .

The Need for Reflation:

- Given the fact that groundwater is a potential resource in India for domestic, industrial requirements, livestock consumption and mainly for irrigation and also that its mismanagement is threatening its sustainable development and equitable distribution, it is absolutely necessary that some kind of regulation is devised. The National Water Policy, 1987 states that questions of prudent resource management and conservation as well as equitable distribution of groundwater are questions which cannot be left to be dealt with in divergent ways in different parts of the country; they will have to be tackled on the basis of common policies and strategies.
- Law and its processes have to be understood as resources for such regulation. It is an effective resource because it can lay down certain equitable standards for the use of the resource and it also has the potential through sanctioning mechanisms to check deviance. Whether legal regulation is pragmatic as far as groundwater management goes; the problems and prospects in it will be examined in this paper. However, at this Juncture it can be said that a case for legal regulation has atleast to be considered.

The Existing Legal Framework :

- In the Constitution of India, water, that is to say, water supplies irrigation and canals, drainage and embankments, water storage and water power are items of List II of the Seventh Schedule of the Constitution i.e. the State List. Accordingly, if/any one of these matters there is need for a legislation, the States in India will be empowered to do so and not the Centre. Even though groundwater management is recognised as a national priority problem and institutions such as the Central Groundwater Board have been set up, yet when it comes to actual regulation the initiative has to come from the States. With natural resources of this kind, where regulation has to be region specific, such decentralisation is necessary. The problems of management of groundwater resources in every state would depend upon the nature of availability of the resource there. What the centre can do is only to provide certain guidelines for regulation but it is for the states to adopt them with whatever modifications necessary to suit their requirements.
- Accordingly in 1970, the Government of India mooted the Groundwater (Control and Regulation) Bill through the Ministry of Agriculture. This draft Bill was circulated to all states with an advice to enact the same into an Act with necessary incidental modifications. Till date, only the State of Gujarat has enacted the law in the shape of the Bombay Irrigation (Gujarat Amendment) Act 1976, which came into force on the 24 of March, 1988. However even this Act is applicable only to certain specific areas in Gujarat. The States of Tamil Nadu and Karnataka are also in the

process of making the law.

The Question of Rights :

If natural resources of any kind is to be developed in a sustainable manner and its equitable distribution ensured, then the nature of rights on it need to be defined and enforced. It is important to determine whether rights on groundwater are individual or group rights, positive or negative rights, private or public rights, usufructory or riparian rights and so on. The object of this paper is not to go into a detailed rights discourse, but to identify a practical workable proposition of the rights situation in groundwater so that the nature of regulation can be determined. As the situation exists in India, a land owner has the right to sink a bore hole or a well on his land to extract underground water and prevent it from going to the other mans property. According to the Easements Act of 1882, the owner of the land also owns the groundwater beneath it. This implies that right to groundwater is basically an individual negative right which cannot be infringed or interefered by any external agency, even the state. However, the situation is not as simplistic as it may appear to be. India is a welfare state and therefore major developmental works are undertaken by the state and the benefits go to the users. The benefits accruing from irrigation structures constructed with public money for e.g. in the case of groundwater if it 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. Similarly, if we see the English Common Law, it recognises the doctrine of riparian rights to regulate proprietary rights in water. Each co-riparian has the right to have the water flow pass his lands in the same quantity and quality. There is a duty cast upon the upper riparian owner to see to it that the lower riparians are not denied this right. There is also a difference between an underground stream where riparian right is applicable and groundwater wherein the private right is recognised in Common Law. The common law was followed in India, but with the changed socio-political scenario today, it would be unwise to only rely upon the doctrines laid down there. The discourse on rights over water resources and especially over groundwater resources is a very complex one but it would be enough to say that given the existing socio-economic-political situation today, it would be best to consider it a common property resource, which can be regulated by the state i.e. a resource on which individuals enjoy only a positive group right.

Regulation: Problems and Prospects:

- It is really a matter of surprise that even though the initiative to have a groundwater law was taken way back in 1970 by the Government of India, till date only one state has got a legislation on this. The reasons for this kind of situation could be many; it could either be that the problems in regulating groundwater are so complex that there is difficulty in making or accepting a legislation or because there is a distrust in effectiveness

of law of any kind or simply because of legislative lethargy, Whatever the reason may be, it would be worthwhile to examine the problems that could be visualised in the legal regulation of groundwater.

- As it has already been discussed, the very nature of rights over these resources make it difficult for the state to regulate it. Even if we agree upon the fact that groundwater belongs to the state as all water belongs to the state, there is still the difficulty of regulating that groundwater which is situated below the private land of individual. To tackle such a problem, the best strategy would be to devise a method of regulation which would promote self regulation.
- In law there are various strategies available for eg, the policing deterrent strategy) the regulatory strategy and the managerial strategy. The deterrent strategy involves criminal liability and depends for its success on effective policing like in the Environment Protection Act, 1986. The regulatory strategy involves delegated powers and depends for its success on the administrative powers to give licences or incentives, or deprivation of opportunities eg., Industries (Development and Regulation) Act, 1951. The managerial strategy involves setting up organisational infrastructure that facilitates the achievement of the desired ends. It depends for its success on the effectiveness of the organisation and the competence of the people in these organisations eg., the University Grants Commission Act, 1956. Unless the appropriate strategy for regulation of groundwater is identified, no law can be

successfully implemented. Law shares both 'liberational' and
⁵
'repressive' potential. A wrongly designed law can do more
harm than good. Many laws became ineffective not because they
are not implemented but more because they are made in such a
manner that they simply cannot be implemented.

- In the area of groundwater management, as has already been
stated, the strategy adopted for effective management should
be such as to promote self regulation. But before we begin
to discuss that, it is necessary to identify at the outset
the actions that need to be regulated in the use and misuse
of groundwater resources.

- In the areas of scanty water supply, the regulation has to be
aimed at preventing over exploitation of the resources. In areas
with groundwater and supporting infrastructure of surface irr-
igation systems, regulation should encourage conjunctive use.
One of the methods to prevent the receding groundwater table
is to regulate the spacing of wells. In the recently enacted
Bombay Irrigation (Amendment) Act, controls over licensing of
wells is one of the methods employed. However, the practicability
of this method has been questioned. It is impossible as such
to control the quantity of withdrawal by measurement and even
special norms, prescribed to control crowding and interference
amongst wells are difficult to enforce. Even whilst they are
enforced it should kept in mind that it does not discriminate
against small farmers. The criterion for licensing should be
designed with expert guidance from specialists of connected
disciplines.

- Over exploitation of groundwater is further increased due to subsidised electricity and horse power linked power tariff in many states, whereas in some areas the supply of electricity is erratic and irregular. Due to the heavy subsidies, consumption is more. Legal regulation of this kind of problem can be possible only if the policies relating to electricity supply and the relevant statutes relating to it^{are} looked into. In India, statutes like the Electricity Supply Act have to be looked into for the purpose. Before these Acts are perused, it has to be seen firstly how much of electricity is actually being utilised for groundwater extraction. Secondly, it has also to be determined how the usage of tubewells and dugwells can be minimised by the control over supply of electricity. Options could be regulation in the peak periods, encouraging prorata metered tariff rather than flat rates and so on.
- Another major problem relating to groundwater regulation is that of maintaining equity in its distribution. Innumerable studies done in India point to the fact that it is generally the small and marginal farmers who are most affected in the over exploitation of groundwater. For example, in a study conducted by the Administrative Staff College, it was found that depletion of groundwater table had inequitable repercussions on the small and marginal farmers of the eastern part of the Indo-Gangetic belt who in 1983 numbered about 200 million.⁶ This is mainly due to the fact that a rich farmer is in a position to invest more for extraction as he cannot be prevented in law from going as deep as he wants. The possible answer to

this would be to encourage community tubewells or public tubewells. Encouraging such tubewells can be through licensing procedures in law i.e., the regulatory strategy. ^{made public}

The inequitable, uneven and fragmentary distribution of land is a major difficulty in promoting community schemes. The defective land laws and over-hauling of all these in India is indeed a Herculean task and would mean no less than a revolution. What is important is to see how best the situation can be salvaged within the existing legal framework. It is at this juncture that the role played by NGOs becomes pertinent. For example, in India the emergence of organisations like the Pani Panchayat in some pockets in Maharashtra promoting community actions is a welcome sign. Some basic principles of Pani Panchayat are as follows :

- 1) Only group schemes are undertaken and not schemes for individuals.
- 2) The sharing of water would be on the basis of number of members in the family and not in proportion to land holdings .
The principle of equity is thus incorporated.
- 3) Crops such as sugarcane, requiring more frequent watering and more quantity of water are not cultivated.
- 4) The landless can also share water so that they gain full employment.

The Gram Gaurav Parishad, through its experiments in certain areas in Maharashtra has shown that it is possible to harness groundwater resources in low rainfall areas.⁷ But, since the related costs are beyond the means of farmers, State aid becomes a must. With state support, such organisations can go a long way

in involving the community to look after the common property resources. The statutes promoting co-operative movements like the Co-operative Societies Act, Societies Registration Acts, etc., have to be made technically more simplistic to encourage community action along with more generous funding. If this is done, even the landless farmers who are beneficiaries of ^a community well, can utilise their right to use a share of the water as a bargaining power to acquire even land ownership rights.

However, it has to be borne in mind that it is only when there is inequity in the distribution of water due to mismanagement that alternative management institutions come to the picture.

If it is possible for the state to strengthen the already existing grassroot democratic structures to manage the resource, such institutions would become redundant. The recently proposed sixty fourth and sixty fifth amendments to the Constitution which sought to rejuvenate the panchayati raj institutions in India was a big step towards decentralisation. It is a known fact that participatory endeavours at the local level of the village has yielded very good results in India.

In the proposed amendments Article 243 E provides that the state may endow by law the panchayats with such powers and authority with respect to the preparation of plans for economic development and social justice and implementation of schemes for the same, including for Matters listed in the eleventh schedule. The eleventh Schedule includes minor irrigation, water management and water shed management. Financially too, these bodies were

and NGOs can play an effective role here. However, if the dispute cannot be sorted out through mediation, specialised courts to handle environmental disputes, which has been a matter being actively contemplated, could be instituted.

- Till now, the discussion was on how to regulate private use of groundwater in the irrigation sector. The discussion has brought forth the fact that it is the regulatory and managerial strategies that have to be adopted to achieve sustainable development and equitable distribution to whatever extent possible. In the domestic and industrial sectors that groundwater is used, regulation is no doubt necessary but is not imminent. In the industrial sector, legislations like the Industries (Development and Regulation) Act and the Factories Act can be amended to incorporate incentives and disincentives for regulating groundwater use by industries. The punitive, deterrent policing strategy may not be of much relevance here because unless the cost for deviance is less than that for complying with the law, the industries would not be compelled to follow the law. Imaginative strategies like increased water rates, probation, closure for non compliance and so on are to be devised.
- Legal regulation becomes problematic when the state policies result in the depletion of groundwater resources. There is massive deforestation in the country due to many factors. Neither the Forest Act nor the Forest Policy have been successful in checking further deterioration. The forest laws have shown 'repressive' potential. Massive deforestation directly affects the groundwater table. Unless the forests laws and policies are

changed to stop further depletion of this resource, the situation will aggravate in the near future. Alongwith this, certain development activities like construction of dams have adverse effect on the groundwater table. There is hardly any way of making the state accountable in such a situation. The only alternative is to get policy decisions and laws reversed by building up pressure groups through peoples movements.

Overview ;

- The discussion on the problems and prospects of groundwater law in India have revealed the following facts :
- Firstly, it is not possible **to** articulate a uniform law relating to groundwater whether it is region wise or sector wise. The problems relating to groundwater use and misuse are divergent in different parts of the country and therefore the regulation has also got to be different. Sector-wise also this divergence is very evident.
- Secondly, simply having a region and sector specific groundwater law will again not suffice. As we have already seen, there are various policies, programmes and laws that influence the utilisation of the resource. The Acts relating to forests, industries development, irrigation, electricity, co-operative societies, land distribution and so ^{on} determine the fate of this resource. The various Governmental policies like, the Forest Policy, The Industrial Policy, The Water Policy and so on have the same effect on it. Therefore just enacting a comprehensive legislation to deal with groundwater without first

looking into the amendments required in the above mentioned statutes said policies will only add to the confusion. However, this is not to say that a groundwater law is not feasible at **all**. It is only to say that before any law relating to groundwater is made, it would be absolutely necessary to review the already existing legislations.

- Thirdly, keeping in mind efficiency and equity, the choice will have to be made whether private or public ownership of wells for extraction of the resource is preferred. The discussion has revealed that regulation of private use is difficult, no matter what strategy is adopted. Even though granting public usufructory rights is not devoid of problems; problems of efficient management, yet it is more equitable and just.
- Fourthly, ensuring state accountability, it has been **seen**, is a difficult task. What is imminently required is a review of those laws and policies which contribute to the deterioration of the resource.
- Fifthly, choice of an effective forum for the settlement of disputes relating to groundwater use is absolutely necessary. The traditional courts are ^{not} competent to deal with environment disputes which involve complicated matters of fact, letting up specialised courts have to be seriously thought about.
- Lastly, for reasons already recorded, ^{if} sustainable development and equitable distribution of groundwater resources is to be ensured, than it has to be treated as a common property resource. Only than can State intervention, institutionalisation,

and community development be contemplated.

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