

WATER: BONE OF CONTENTIONS GROUND WATER MANAGEMENT: INDIA'S WAY FORWARD

Aakriti Shahi*

INTRODUCTION

Groundwater is water that is found underground in the cracks and spaces in soil, sand and rock. Groundwater is stored in and moves slowly through layers of soil, sand and rocks called aquifers. The model bill of ground water conservation 2016 defines it as “water occurring under its natural state, where it exists below the surface in the zone of saturation whereby it can be extracted through wells or any other means or emerges as springs and base flows in streams and rivers.” India is the largest user of groundwater in the world. It uses an estimated 230 cubic kilometres of groundwater per year - over a quarter of the global total. More than 60% of irrigated agriculture and 85% of drinking water supplies are dependent on groundwater. Urban residents increasingly rely on groundwater due to unreliable and inadequate municipal water supplies. Groundwater acts a critical buffer against the variability of monsoon rains. And with climate change the water resources are going to get strained further in the coming time. Thus if the resource is not given the adequate attention now soon we will be facing an aggravated water crisis. What India needs today is a radical transformation of laws and policies to accommodate water resources at a better place than what they have been at till today.

REASONS FOR LACK OF GROUND WATER REGULATION

Out of all the water resources ground water is still the most ignored water resource in terms of regulations and policies provided for it. This majorly happens because of a two-fold reason:

- i. It's an invisible resource, and
- ii. The legal perspective toward it has always been that of a complimentary good.

INVISIBILITY OF THE RESOURCE

The invisibleness of ground water has quite played a role in keeping the resource aside from drawing attention towards itself. As one cannot see the water table, its depletion is not as alarming to common folk as the disappearance of forests or drying of rivers and melting of glaciers. But nonetheless it's still depleting, amidst of our ignorance. Black's law dictionary defines water table as Ground water's upper surface of filled voids in soil where water pressure in the soil is equal to air presser. The lowering of this surface leads to digging deeper

* Student @ School of Law, Christ University, Bangaluru

for locating a groundwater source, thus decreasing the feasibility of it in all (economic, social and technological) terms. Because doing so means more expenses, which is the greatest problem of all knowing that almost 30 percent of the Indian population falls below the poverty line and that the developing nation of ours is home to the world's second largest population. It also means hindering more with the natural state of things, thus leading to an imbalance however slight.

COLONIAL LEGAL PERSPECTIVE

The legal perspective toward ground water has always been that of a complimentary resource for the owner or occupier of the land under which such water is present. The origin of this theory dates back to the India under British rule. British colonial water law had two main strands. First, control over water and rights to water were regulated through the progressive introduction of common law principles, emphasizing the rights of landowners to access water. For surface waters, riparian rights allow a landowner the right to take a reasonable portion of the flow of a watercourse. For groundwater, landowners had a virtually unlimited right to access water under their holdings. Common law principles, enshrined in the Indian Easements Act (1882)¹, evolved over time but have substantially survived until the present day. Second, a series of regulatory statutes were enacted, including laws to protect and maintain embankments, to acquire land for embankments, and to entrust the Controller for implementing such laws. Water law even after the post-colonial period is shaped by the legacy of colonial times. Such laws will include Transfer of Property Act, Indian Easement Act, and land reforms Act and many other State Acts dealing concerning land. Transfer of Property Act² does not define land or groundwater specifically, but while interpreting immovable property in sec 3 of the act, it goes on to define '*attached to the earth*' as:

- a) Rooted in the earth, as in the case of trees and shrubs;
- b) Imbedded in the earth, as in the case of walls or buildings; or
- c) Attached to what is so embedded for the permanent beneficial enjoyment of that to which it is attached.

Registration Act 1908³ define 'immovable property' as " it shall include land, buildings, hereditary allowances, right to ways, lights, ferries, fisheries or any other benefits to arise out of land or things attached to the earth or permanently fastened to anything which is attached to the earth but not standing timber, growing crops or grass".

After analysis the above definitions it may be concluded that the following objects and things are included in 'Immovable property': (1) Land – Land includes earth's surface, column of

¹ Indian Easements Act (1882)

² Transfer of Property Act (1882)

³ Registration Act (1908)

space above the surface, the ground beneath the surface, all objects which are on or under the surface in its natural state e.g. minerals, land covered by water e.g. lakes, river and ponds, object placed by human agency with the intention of permanent annexation e.g. buildings, walls and fences. (2) Benefits arising out of land – The benefits arising out of land are also known as ‘profit a prendre’. All benefits arising out of immovable property and every interest in such property are also regarded as immovable property as such benefits cannot be severed from the land e.g. hereditary allowances, rights of ways, right to collect fish from ponds and this also includes the right to draw ground water underneath the land.

Further The Right To Fair Compensation And Transparency In Land Acquisition, Rehabilitation And Resettlement Act, 2013⁴ Section 3(p) states that ‘land’ includes benefits arise out of land, and things attached to the earth or permanently fastened to anything attached to the earth, including ground water as a complimentary again.

Indian Easement Act⁵ sec 7(g) 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, gives the owner of a land exclusive and unfettered rights to exploit the water table of the place.

With all these laws in place, regulating ground water usage and exempting the land owners from their exercising their exclusive right over it, would need a change to be brought about on a much larger scale than what the legislature expects by introduction of a mere bill for groundwater regulation. The bill definitely is an important step towards ground water conservation and regulation, but its implementation demands amendments to be made on many other laws and policies which concern the subject matter directly or indirectly.

WATER AS A MATTER OF RIGHT

Water is not an economic resource, but a human right. And hence it should not be priced but managed and shared and this can be done only with the help of an effective legislation. Article 21 of the Indian Constitution guarantees to all persons a fundamental right to life. As Supreme Court observed that right to life is not confined to mere animal existence but extends to the right to live with basic human dignity,⁶ A.P High Court observed that enjoyment of life and its attainments and fulfilment guaranteed by Article 21 of the constitution embraces the protection and reservation of the nature’s gifts, without which life cannot be enjoyed.⁷ The court further observed that protection of environment is not only the duty of the citizens but is also the obligation of the state and all other state organs including the courts. The Supreme Court in while dealing with Article 21 of the Constitution has held

⁴ The Right To Fair Compensation And Transparency In Land Acquisition, Rehabilitation And Resettlement act (2013)

⁵ Indian Easement Act (1882)

⁶ *Maneka Gandhi vs. Union of India*, AIR 1978SC 597

⁷ *T. Ramakrishna Rao v. Chairman, Hyderabad Urban* 2002 (2) ALT 193

that the need for a decent and civilized life includes the right to food, water and a decent environment.⁸

The Supreme Court further observed: “Water is a gift of nature. Human hand cannot be permitted to convert this bounty into a curse, oppression. The primary use to which water is put being drinking, it would be mocking nature to force the people who live on the bank of a river to remain thirsty⁹.” The Supreme Court further observed in an another case that “drinking is the most beneficial use of water and this need is so paramount that it cannot be made subservient to any other use of water, like irrigation. So the right to use of water for domestic purpose would prevail over other needs¹⁰.” Thus water is a fundamental right, as is made evident by words of the judiciary but what we lack is the practical implementation of it, which hasn’t been done yet.

Article 14 too guarantees to our citizens equal treatment before law, and this equality needs to be maintained in terms of life needs too, Article 14 has been interpreted by the judiciary as guaranteeing inter-generational equity¹¹ i.e. the right of each generation of human beings to benefit from natural and cultural inheritance from past generations. This therefore requires conserving the biological diversity and the sustainable use of other renewable and non-renewable natural resources including water) for future generations.

Regulation of ground water is necessary for sustainable development, which now has been accepted worldwide due to ongoing environmental deterioration. International conventions have accepted and suggested sustainable development as a way forward. Some salient principles of sustainable development as culled out from the Bruntland report which was published in 1987 following the WCED¹² and other international documents such as Rio Declaration¹³ and Agenda 21 are as under:

- 1) Inter-generational equity,
- 2) Precautionary principle,
- 3) Public Trust Doctrine,
- 4) Polluter Pays Principle, and
- 5) Eradication of poverty.

Keeping in mind the first three principles, water conservation and regulation becomes an integral part of sustainable development.

⁸ *Chameli Singh v. State of UP*, Appeal (Civil) 12122 of 1995

⁹ *Delhi Water Supply and Sewage v. State of Haryana* 1996 SCC (2) 572

¹⁰ *S.K. Garg v. State Of U.P.* (1998) 2 UPLBEC 1211

¹¹ *State of Himachal Pradesh v. Ganesh Wood Products*, AIR 1996 SC 149

¹² 1983 World Commission on Environment and Development (WCED)

¹³ The Rio Declaration On Environment And Development (1992)

ANALYSIS OF THE BILL

The Model Bill for the Conservation, Protection, Regulation and Management of Groundwater, 2016, drafted on 11th May, 2016 consists of 40 sections contained in 13 chapters and 3 schedules. The objects of the bill emphasize on the importance of water as a unitary resource and hence aim ensures groundwater security through availability of sufficient quantity and appropriate quality. In further statements the act emphasizes on climate change, over exploitation of underground water, leading to farmer suicides and the inappropriate status of underground water as reasons for introducing the bill, which should in this very form enacted by the legislature as an Act.

Chapter I of the bill states that the bill should commence into action 90 days after its adoption by the state legislature. It bestows power to individual states per say to manage their underground water resources and it goes on to define ‘Appropriate government’ as the lowest possible public authority, including gram sabhas, gram panchayats, block panchayats, district panchayats, ward sabhas, municipal authorities and the State Government; thus including all layers of governance in the management of the resource. This is an appreciable thing as the lower levels of authorities would be able to connect to people better and hence work well within the theory of “public trust doctrine” as emphasized in the statement of reason of the Act. It goes on to define important terms including groundwater, aquifers, and water for life which emphasizes on right to water being a fundamental right. But the definition clause does not define land within itself, further it adds a clause saying, “Terms not defined in this Act have the meaning assigned to them under other laws.” This would further the conflict which already exists between implementation of this act and the previous laws defining right to underground water as a complimentary right to the owners and occupiers of the land above it.

Chapter II of the act tittles water as an element of right to life, and goes on to elucidate about it further. It bars privatisation of water sources in any form and allows the appropriate government a maximum span of 12 months to act on a complaint in regard to the provisions of the bill.

Chapter III of the bill deals with basic principles to be imbibed in the act, which are equality decentralisation and precaution to be precise. The act aims at maintaining the intergenerational equity. It also allows states the leverage to have regulations as per their needs and usage. The question which arises here is regarding some states which may share the same aquifer, how would they address this issue? There is no clause in the bill to resolve such a situation, which may arise.

Chapter IV elucidates about the legal status and prioritisation in usage of underground water. It mentions that state shall be a mere trustee for the common pool resource and water would be allocated as per priority, i.e. , it will be made available for primary needs as drinking before its used for secondary ones as irrigation.

Chapter V of the bill talks about ground water protection zones and their security plans based on the need of the area. It obliges the state as well as the central water board to look into areas and demarcate them as per the water table levels there. The ones which are over exploited are to be placed under protection zones. But this too is done at state levels and it would not accommodate well the idea of two states sharing the same aquifer.

Chapter VI addresses the bill on the institutional level, that is, it allocates the powers and functions to the appropriate government at both rural and urban areas. Provisions are made for ground water advisory boards at district as well as state levels. The chapter however does not address the many differences between the rural and the urban area, else for the municipal level differences. These areas not only differ in the way their governance is appointed and managed, but also on the innate level of water usage and priorities. These differences would play a vital role when water resources are being allocated and hence provisions should be made for them as well.

Chapter VII elaborates on the duties and liabilities of the users of ground water, and their role to be in regulating and conserving it. The act specifies the ways of rain water harvesting, recycling and re-use of water for its conservation. The chapter also addresses the issues of water pollution and waterlogging prohibiting them with assigned sanctions for the same.

Chapter VIII of the model bill is associated with the regulations of ground water usage for irrigation and other livelihood purposes. Appropriate government is supposed to look after the same. They also are supposed to give permissions to the irrigation projects which may begin or are on-going. This may lead to a tussle between the state authorities and projects which are already in use by the residents may get affected, thus implementation for this part should be preceded with utmost planning and accuracy to prevent such happenings.

Chapter IX illustrates the procedure of abstraction of ground water, and the permits and authorisations required from the same. Schedule II of the bill elaborates further on the eligibility rules and cancellation reasons. The bill also prescribes regulations for transfer of permits and authorisations. Sec 22 of the chapter regulates mining activities, thus checking on the pollution of water which is caused by mining activities.

Chapter X is concerned with the SIA and EIA (social impact assessment and environmental impact assessment respectively) and transparency and accountability of the rules and regulations framed under the act. They set forth a grievance addressal mechanism for receiving complaints and objections with independent audits and enquiries at the state level, justifying the title of the chapter.

Chapter XI states about the offences and penalties in cases of violation of the rules established under the said act. The bill ensures peaceful settlements by stating courts as only a second stage option. All the cases coming before the authorities have to be mandatorily addressed the first stage options, i.e., opted for possible options of alternate dispute resolution

before coming to the second stage of options.

Chapter XII deals with the dispute resolution mechanism, appointment and disqualification rules for the authorities so involved, setting up of the “Nyaya Mitra” at local levels. The sections also specify jurisdictions, procedure and appeal provisions for dispute resolution.

Chapter XIII addresses miscellaneous issues needed for the smooth functioning of the bill and easy transition of the society towards its rules. It gives the authorities the power to make laws and bylaws. It also has provision for notices to be issued for removal of any difficulties which may arise in the way of implementation of the bill with a time limitation of two years for doing so. Further the chapter deals with drilling, and fund collection and most important of all the pre-existing rights. As per the section, all pre-existing rights along with any dues remaining for them will come to an end after one year of implementation of the act. The act also specifies that it would supersede any other law that it contravenes, thus addressing the conflicting laws but not resolving the conflict though.

SUGGESTIONS/REFORMS

The bill represents a progressive and a well thought of step in direction of ground water regulation, but it in turn has its own drawbacks on paper as well as in the practical sphere. Some reforms which can be accommodated within the bill are:

- i. The bill does not talk about the financial aspects if it elaborately, which need to be addressed specifically,
- ii. Two states may happen to share the same aquifer and then laws which distinguish at the state level may lead to conflicts, there should be a provision addressing this situation,
- iii. The distinction between rural and urban areas is much more than on the mere appropriate authority level. These places differ in their very basic levels of usage and priorities. Hence the regulations for them should also be addressed that differently,
- iv. Chapter XII of the bill explicitly mentions its superseding effect on other acts, but chapter I says that any definition not mentioned in the bill will be taken from other laws, thus contradicting themselves in a matter where definition of land or immovable property is to be considered for the purpose of other acts,
- v. Although the bill in its very statement of reasons addresses the public trust doctrine, there is no mention of a public private partnership in the provisions. Accommodation of such norms would result in better involvement of public in the attempt of ground water conservation and hence have a better chances for the attempt to be a successful one,

- vi. Declaring water as a fundamental right, the bill talks about the right to easy access to water resources. But does not mention about people in places where supplying water is difficult and sometimes cannot be done at all. And if these people claim the right in such spaces, how will the government be able to accommodate their demands?

CONCLUSION

The need for ground water regulation has always been there, but the attention it has received till now is evident enough to be categorized as inappropriate. The subject matter for a bill of 1950 is till date remained the subject matter of a bill itself, with mere 10 states adopting it as a law. With the depleting ground water resources and the inadequate method of dealing with the resource, the Model Bill For the Conservation, Protection, Regulation and Management of Groundwater, 2016 was more of a necessity than a mere initiative. The bill may have its own shortcomings, but it's indeed a well thought of step forward for the nation and now is the time to give it the attention and concern it has deserved since ages and protects this invisible resource from disappearing totally.