

**GROUND WATER LAW: CONFLICT BETWEEN LEGAL RIGHT AND
FUNDAMENTAL RIGHT IN CONTEMPORARY INDIAN
JURISPRUDENCE**

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ABSTRACT

India, being highest Groundwater consumer in world facing groundwater crisis. The solution of bore wells to deal with water crisis has become the major reason for groundwater crisis. Inefficient irrigation systems are also one of the major reason for increase in groundwater consumption. Even with highest dependency on groundwater, India doesn't have legal measures to govern its extraction.

The legal right to extract groundwater has been taken from Common Law. This legal right is unlimited in the sense of extraction of groundwater. Due to exercise of this unlimited legal right; the fundamental right under Article 21 of Indian Constitution is in threat. This conflict between legal right and fundamental right underlines the gravity of governance of groundwater in India. This conflict is still unresolved and it is one of the reasons for the groundwater crisis in India.

There had been attempts to deal with groundwater governance in better manner. It includes the doctrines for environmental sustainability, Groundwater Model Bill mainly. Even with such attempts, we are not at par with efficient groundwater management. Thus, it is high time to have paradigm shift in jurisprudence governing groundwater in India. Researchers here tried to analyse the existing legal framework underlining the contemporary issues. The suggestions will help with regard to have paradigm shift in Groundwater Governance in India.

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INTRODUCTION

Dependency on Groundwater in various sectors in India has increased in recent years. Groundwater in India is a critical resource. However, an increasing number of aquifers are reaching unsustainable levels of exploitation. If current trends continue, in 20 years about 60% of all India's aquifers will be in a critical condition says a World Bank report, Deep Wells and Prudence. This will have serious implications for the sustainability of agriculture, long-term food security, livelihoods, and economic growth.¹ Water which is found beneath the land surface is termed as 'groundwater'. It is found in the pores and cracks of material like soil, sand and rock. It is stored under the ground surface and moves through layers of soil, sand and rocks.²

Major reason for groundwater crisis lies in jurisprudence governing groundwater sector. Even though groundwater is most used natural resource in India; it is unregulated and ambiguity leads to legal vacuum. It is not explicitly defined by any legislations that whether the groundwater would be considered as public resource under public trust doctrine or whether it would be under the ownership of an individual on basis of principle of riparian owner because some legislations are based on proprietary rights whereas some of the judgments of Supreme court considers groundwater to be a public trust like surface water.

According to the Indian Easement Act, 1882, Section 7, illustration (g), every landowner has the right to "collect and dispose" of all water under the land within his own limits, and all water on its surface that does not pass in a defined channel.³ Similarly, the transfer of property act, 1882 also recognizes proprietary rights to groundwater. At the other hand, Article 21 of Indian Constitution recognises right to life is inclusive of right to clean water. This position is recognized by various judgements by the Supreme Court and High Courts.

Apart from this the major issue regarding groundwater in today's time is depletion in quantity and quality. This is because due to absolute rights over groundwater granted to the land owners groundwater is being overexploited in many of the regions. This has increased even more after the introduction of advanced groundwater extraction structures with excessive abstraction

¹ India Groundwater: a Valuable but Diminishing Resource, World Bank, available at: <https://www.worldbank.org/en/news/feature/2012/03/06/india-groundwater-critical-diminishing> (last visited on October 20, 2022).

² What is Groundwater?, Groundwater Foundation, available at: <https://groundwater.org/what-is-groundwater/> (last visited on November 10, 2022).

³ The Indian Easements Act, 1882, s.7 (g)

power. Not only the quantity but also the quality of the groundwater is depleted in many parts of India as many industries fail to implant Effluent Treatment Plant to purify the waste water before it gets discharged. Moreover, these industries extract the groundwater to an extreme level leaving no groundwater for people living in nearby villages.

Unfortunately, the existing groundwater regulations fail to regulate the quantity or quality of groundwater and instead focus mostly on allocation of the groundwater. These regulations are focused on the property rights for the purpose of granting allocation of groundwater. But these problems are not going to be solved unless and until there are new explicit legislations regarding groundwater.

It is very important to understand the need for explicit legislations to regulate the groundwater in order to realize the human right to water which is also considered as a fundamental right as per the constitution of India. This paper discusses about such issues relating to groundwater due to lack of legislation to regulate the same and the solutions to these problems in form of new statutory frameworks.

DEVELOPMENT OF LEGAL FRAMEWORK TO GOVERN GROUNDWATER

Although the judiciary does not have power to legislate, it has established various principles for governance of groundwater through its decisions. These principles would not only help the people to ensure that their fundamental right to water is protected but will also form the basis for new statutory framework. This section throws light upon such developments that have taken place in legal framework before independence in British era and post-independence. In regards to pre-independence development it discusses American jurisprudence from which Indian rules for governing groundwater were derived. It also covers the provisions of the law of tort and Indian easement act regarding groundwater regulation. Further this section provides insights of post-independence legal framework for groundwater regulation that includes Groundwater Model Bill of 1970 and 2017.

1. American jurisprudence:

Initially rules governing control over, and access to, groundwater in India were largely derived from English cases. It can be understood from various cases that the water laws were based on proprietary rights in the past and were based on very limited scientific understanding of the

groundwater. These rules were not adequate to regulate the groundwater that would ensure sustainable use of it. Some of the cases are mentioned below.

*Acton v Blundell, 1843*⁴ is the case talks about limitless control of landowners over groundwater. It provides that the person who owns the surface may dig therein, and apply all that is there found to his own purposes at his free will and pleasure; and that if, in the exercise of such right, he intercepts or drains off the water collected from underground springs in his neighbour's well, this inconvenience to his neighbour falls within the description of *damnum absque injuria*, which cannot become the ground of an action. Here, owner's right to extract groundwater is absolute and non-actionable. It is clear that groundwater is considered as 'property'.

After years, it was held in *Chesmore v Richards, 1859*⁵ that, water 'percolating through underground strata, which has no certain course, no defined limits, but which oozes through the soil in every direction in which the rain penetrates' is not subject to the same rules as flowing water in streams or rivers. Thus, groundwater shall be treated differently than the surface water.

With the passage of time, US jurisprudence has modified this absolute right of owner to extract groundwater. It can be understood that way before in US Jurisprudence, groundwater has been recognised different than surface water. Even though groundwater is to be considered different than surface water, there has to be co-operative approach between surface water and groundwater.

2. Common Law Jurisprudence - Law of Torts:

Later on, in India in order to restore the water rights of people or to prevent water pollution, the law of nuisance was applied to various cases. For instance, affecting an individual's right to use water from a particular water channel flowing through his land would constitute private nuisance. Generally, the remedies available in case of tort like nuisance are damages and injunction.

The plaintiff would prefer to seek an injunctive relief in order to stop the activity forever. But the defendant would prefer to pay damages and dispose of the case to continue their activity for economic benefits. Because of such conflicting interest and more negotiation power of big

⁴ 1843, 132 ER 1223, 1235

⁵ 1859, 7 HLC 349, 374.

manufacturing plants or other companies they tend to continue the act after paying damages to the plaintiff. Thus, keeping this in mind, the tort law has developed by establishing few principles through the case.

In the case of *Nirmal Chandra Sanyal v. Municipal Commissioners*⁶ it was decided that in cases of continuing nuisance injunction should be granted in some form unless the injury complained is of trivial nature. From industrialists' perspective, extraction of groundwater may be trivial wherein it affects lives of citizens. Thus, this has been proved beneficial to reduce and control water pollution only to a certain extent. Considering economic and industrial development, the situation is worsening in this regard.

3. The Indian Easements Act, 1882

As per existing legal system in India, groundwater extraction rights are based on pre-independence law i.e., The Indian Easements Act, 1882 which is based on the principle that the landowner has the right to access the water beneath his land. Simple, groundwater extraction rights are connected with ownership of immovable property. Section 7 of the Act gives landowners the right to manage, control and use unlimited groundwater in their land. This implies that according to this existing law right to groundwater is basically an individual negative right which cannot be infringed or interfered by any external agency, even the state which is 'riparian right'.

Riparian rights are natural results that occur as rights because of residence in a specific area. The rights which are included under the category of riparian rights are: (a) authority to use the bank of a watercourse as well as water bed, (b) access to and from water (c) rights of certain uses such as drinking and other domestic purposes (d) fishing (e) erection of structures (f) use of water⁷.

In *The Secretary Of State for India v. Sannidhtraju Subbarayudu*⁸, riparian right was recognized to be the natural right and thus it cannot be taken away from anyone. At the same time, it is not a right that is granted and is not acquired by immemorial user. In *N. Arivudai Nambi Vs. State of Tamil Nadu*⁹ it was held that, if the lower riparian owners have no objections, the upper riparian owners can take water from a river by forming a channel

⁶ *Nirmal Chandra Sanyal v. Municipal Commissioners*, AIR 1936 Cal 707

⁷ Riparian Rights in India, Annie Mampilly, available at: http://www.nhassam.ac.in/docs/lex%20terra/lex_terra_issue_29.pdf, (last visited on November 10, 2022).

⁸ *Secretary of State For India v. Sannidhtraju Subbarayudu* (1932) 34 BOMLR 506 (India)

⁹ *Arivudai Nambi Vs. State of Tamil Nadu* AIR 1990 Mad 240 (India)

manually and can also discharge the surplus of naturally brought water from his land on to the lower lands if required. Thus, the water rights of an individual are completely based on the property that belongs to him and those are not defined in any exclusive enactment but are dependent upon the property law.

4. Groundwater Model Bill, 1970:

This model bill is basically a set of guidelines passed for adoption by states and to develop their own specific groundwater Acts. When the introduction of large-scale mechanised pumping or tube-well technology in the 1960s resulted in falling of water tables in many parts of the country as the groundwater was being extracted in large amount states did not make any laws to regulate use of such technology to extract groundwater. Thus, Government of India came up with a Model Bill to Regulate and Control the Development and Management of Ground Water in 1970 (1974, 1992, 1994, 2005 – Revised version of Model bill) for adoption by the states.

4.1. Basic scheme of this Bill

- Providing for establishment of a groundwater authority under the direct control of the government. (It can notify areas wherein there is necessity to regulate and control the development and management of groundwater.)
- Excludes public participation or decision-making by locally elected bodies of governance, a crucial deficiency given that groundwater is primarily a local resource that needs to be managed locally according to the principle of subsidiarity.
- If any person in any of the notified areas by the authority is using any other methods for extracting groundwater than the manual handpump he must apply for the permit of the same.
- Wells need to be registered even in non-notified areas.
- Basis for decisions of the authority in granting or denying permits
 - Technical factors - availability of groundwater, the quantity and quality of water to be drawn, and the spacing between groundwater structures.
 - Although the domestic use of water is not prioritized over other the purpose for which groundwater is to be drawn has to be considered.
 - Basic drinking water needs are indirectly considered thus hand-operated devices do not require a permit even in notified areas.

- **Implementation**

- Without changing the basic framework of model legislation some acts focus only on notified areas and others focus on groundwater belonging to all the regions.
- Some acts vary in the composition of the authorities or institutions set up.
- In Andhra Pradesh, state has gone further than other states in putting its groundwater legislation broader that directly links surface and groundwater in a general context of environmental conservation

4.2. Shortcomings of Groundwater Model Bill, 1970

- This model bill does not constitute an appropriate framework for regulating groundwater in a socially equitable and environmentally sustainable manner as it has lagged behind the scientific development in the use of groundwater.
- This bill and other existing laws relating to groundwater focuses on proprietary rights only. Thereby it neglects landless people's right to access groundwater in spite of it being their main source of water for drinking and other livelihood purposes.
- It does not talk about sustainable use of groundwater as there are no limitations placed on the amount of water, landowners can extract. It has also failed to cover the issue of groundwater quality.
- Bill empowered the states to have control over the use of groundwater through the registration of sources of groundwater and the introduction of permits for groundwater extraction in regions where it was over-exploited. This system has failed because of absence of rules to govern groundwater overuse.
- The institutional framework for groundwater proposed by the Bill failed to
 - Providing a single institution with a general mandate to look after groundwater in all its dimensions.
 - Ensuring coordination between the different institutions relating to groundwater use and conservation, such as pollution control boards and groundwater authorities.
 - Providing provisions for institutional presence at local levels

LANDMARK PLACHIMADA COCA-COLA CASE

The Plachimada Coca-Cola Struggle was a chain of protests in the year 2000 which was undertaken to close the Coca-Cola factory in the village of Plachimada, Kerala. Villagers protested against it as they observed that their wells turned dry and the water turned

contaminated and toxic after the factory was set up. Thus, the Plachimada panchayat stopped renewing the exploitation license granted to the Coca Cola Company. The Panchayat ordered the closure of the plant because the water tables were lowering and the water quality was decreasing. The company challenged the authority of the Panchayat before the High Court of Kerala.

The major legal issue was the right of a landowner to extract groundwater from his land and the power of the Panchayat to regulate the use of groundwater by private individuals. This was landmark decision to recognise that the present legal framework was inappropriate and the single judge of the High Court of Kerala determined that groundwater should be considered as a public trust. The state has a duty to protect it against excessive exploitation. The judge also made a link between the public trust and the right to life which is fundamental right under constitution of India. It also put forth the concern that such a discretion of landowners regarding groundwater exploitation can result in negative environmental consequences.

I. Reasons to bring the necessary changes in the earlier legislations

- (a) Overexploitation of ground water would lead to conflicts among the adjacent users.
- (b) The protection of aquifers and the conservation of groundwater are of tremendous importance in a context of falling water tables which cannot be achieved unless the individual landowners do not have absolute control over the water.
- (c) Groundwater is one of the primary resources to fulfil the human right to water. This right is one of the fundamental rights that needs to be guaranteed by the state and thus there has to be intervention in such rights.

NEED FOR REFORMS IN GROUNDWATER LAW

Indian laws relating to groundwater shall be restructured by reconsidering the priorities and principles that promote equity in access, such as the principle of public trust. This would provide a way to address all types of water with laws based on similar principles as surface water has already been recognized as a public trust. This would also reduce the problem of incoordination between the two committees namely Central Ground Water Board and Central Water Commission established to regulate two different types of water resources. The principles for regulation such as decentralisation and subsidiarity to ensure that local issues are given priority while not preventing macro-management where it is needed are required. The legislation shall also ensure the quality along with the quantity of the water. Hence the rights for groundwater must be framed in such a manner that it would give justice to the fundamental right guaranteed under Article 21 of the constitution. This section provides different reforms that need to be inculcated in upcoming legislations for good governance of groundwater to ensure protection for fundamental human right to water.

1. Application of Public Trust Doctrine:

To ensure distributive justice in regards to the groundwater it is of utmost importance to grant the right to access or use the groundwater to all people. This would be ensured if the groundwater is treated as a public resource as per the public trust doctrine. Public trust doctrine is based on the idea that 'certain interests are so intrinsically important to every citizen that their free availability tends to mark the society as one of citizens rather than of sects'¹⁰ Thus, it can be said that certain natural resources like water are gifts of nature and state is trustee and duty bound to use them for benefit. Herein trustee cannot hold any other rights than the usufructuary right in water and it has the duty of responsibility towards the public. The Supreme Court has also made it clear that these resources which fall under public trust doctrine cannot be converted into private ownership.¹¹ Thus, the groundwater shall be made a public trust along with some specific safeguards that would ensure that the trustee's powers are self-regulatory in nature. This can also be done by decentralization of power given to the trustee.

The Supreme Court of held that "the right to live 'includes the right of enjoyment of pollution free water and air for full enjoyment of life. If anything endangers or impairs that quality of

¹⁰ Joseph Sax, 'The Public Trust Doctrine in Natural Resource Law – Effective Judicial Intervention' (1970) 68 Michigan L Rev 471, 484.

¹¹ *MC Mehta v Kamal Nath* (1997) 1 SCC 388 (Supreme Court of India, 1996) para 34

life in derogation of laws, a citizen has right to have recourse to Article 32 of the Constitution for removing the pollution of water or air which may be detrimental to the quality of life.¹² In *M.C. Mehta v. Union of India*¹³, the Supreme Court acknowledged the right of riparian owner by declaring that in common law if the riparian owner brings an action against municipal corporation on a ground that the river water or any other water resource is being polluted due to discharge of sewage into it, the municipal corporation could be restrained by an injunction.

In *Vellore Citizen's Welfare Forum v. Union of India*¹⁴ the Supreme Court held that "the constitutional and statutory provisions protect a person's right to fresh air, clean water and pollution-free environment, but the source of the right is the inalienable common law right of clean environment. Also the Supreme Court has observed that industries are of vital importance to the country's development as they provide employment opportunities and also to country's progress in foreign exchange through import and export. But these industries shall not be allowed to operate unless they set up pollution control devices keeping in mind that along with the development of a country, they also tend to destroy the ecology, degrade the environment and pose a health hazard. Hence the principle of "sustainable development" has to be adopted as a balancing concept between ecology and development. Remediation of the damaged environment is part of the process of sustainable development and as such the polluter is liable to pay the cost to the individual sufferers as well as the cost of reversing the damaged ecology. "The Precautionary Principle" and "Polluter Pays Principle" were also established in this case.

*M.C. Mehta v. Kamal Nath*¹⁵ was landmark because the court declared that "Our legal system-based on English common law-includes the public trust doctrine as part of its jurisprudence. The State is the trustee of all-natural resources which are by nature meant for public use and enjoyment. Public at large is the beneficiary of the seashore, running waters, air, forests and ecologically fragile lands. The State as a trustee is under a legal duty to protect the natural resources. These resources meant for public use cannot be converted into private ownership.

All the above decisions given by the courts depicts that there is an urgent need to bring certain reforms to the legislations that regulate the groundwater. Because as the judiciary cannot assume the functions of legislation and provide the water laws, unfortunately the human right to water developed along with various other principles in the above-mentioned case laws

¹² *Subhash Kumar v State of Bihar* AIR 1991 3C-420 (Supreme Court of India, 1991) para 7

¹³ 1987 AIR 1086, 1987 SCR (1) 819

¹⁴ *Vellore Citizen's Welfare Forum v. Union of India* AIR 1996 SC 2715

¹⁵ *M.C. Mehta v. Kamal Nath*, (1997) 1 SCC 388.

remains at the level of a general framework. Thus, it is high time that the legislature takes up this matter and works on it to ensure that the fundamental right of people is guaranteed. The legislative gap formed here has to be filled with the exhaustive laws on regulation of groundwater and its quality by considering it a primary resource for drinking purpose.

2. Decentralisation and Local Management of Groundwater:

The principle of decentralisation has been taken into consideration by the provisions of the constitution but in practicality it stops at the state level itself.¹⁶ The need for further decentralisation is a point not subject to much disagreement. There is, however, no consensus on the form that decentralisation should take. Also, only in few areas the local water users have been successful in managing their water resources. For improving such management and increasing the number of such local users the Planning Commission recommended following steps while planning for ground water management:¹⁷

- Determining the relationship between surface hydrological units such as watershed or river basins, and hydrological units below the ground such as aquifers.
- Identification of ground water recharge areas.
- Maintaining ground water balance at the level of the village or the watershed.
- Creating regulatory options at the community level such as panchayat. Examples of activities that could be regulated at the local level include drilling depth, distance between wells, cropping patterns to ensure sustainability of aquifers and participatory ground water management.

For achieving decentralisation and effective local management of groundwater the community participation should also be encouraged by making people aware about the issues relating to groundwater. Moreover, incentives can be provided to villages in order to ensure their participation to find out various ways to tackle with the issues and effective management of groundwater. Also, Mihir Shah Committee Report filed as "A 21st Century Institutional Architecture for India's Water Reforms: Restructuring the CWC and CGWB" has given several recommendations. These recommendations need to be studied and implemented in order to improve the coordination between apex authorities- Central Water Commission (CWC) and

¹⁶ Rahul Banerjee, 'What Ails Panchayati Raj?' (2013) 48/30 Economic & Political Weekly 173.

¹⁷ 12th Five Year Plan, Planning Commission, 2013

http://planningcommission.gov.in/plans/planrel/fiveyr/12th/pdf/12fyp_vol1.pdf

Central Ground Water Board (CGWB) in order to effectively regulate the water resources of two different types.

EXISTING GROUNDWATER GOVERNANCE IN INDIA

The Model Groundwater (Sustainable Management) Bill, 2017, addresses some of the major concerns in the existing regulatory framework and offers a holistic way forward. Some of the reforms it takes into consideration are as follows:

1. Application of Public Trust Doctrine

Taking into consideration the Draft National Water Framework Bill, 2016 which acknowledges the need to ensure integration of legislations taken for surface and groundwater this bill considers the application of the doctrine of public trust to groundwater. By doing this, this bill has highlighted the importance of groundwater as the main source of drinking water and other livelihood needs and thereby realised the human right to water as a fundamental right. Earlier groundwater laws were based on proprietary rights but now all the legislations based this bill would be conceived from the perspective of the community needs, rather than only the individual needs of landowners.

2. Environmental Perspective for Groundwater Regulation –

This bill also pays attention to regulation of quality of water resources and thus includes protection principles that have been applicable in environmental law for decades. For instance, it includes 'prevention principle' which means that environmental damage shall be prevented whenever it is foreseeable instead of addressing it through compensation after damage has occurred.¹⁸ Apart from this principle it also includes the precautionary principle and polluter pays principle which have been discussed above in the paper.

3. Recognition of Fundamental Right to Water –

The judiciary through its various judgements has already recognized the human right to water as a fundamental right included in Article 21 of the constitution. But this bill has taken a step forward and integrated this right into the statutory framework. It has done this by keeping purpose of drinking water at the highest priority among competing groundwater uses.¹⁹

¹⁸ Model Groundwater (Sustainable Management) Bill, 2017, s 7(2)

¹⁹ *Ibid*, s 10

4. Provision for Multi-tier Institutional Framework –

The bill provides for multi-tier institutional framework at the Block, District and State level, whereby the higher-level institutions are called upon to coordinate activities taken at the lower level, and to take decisions on matters that require coordination between more local institutions.²⁰

5. The last two substantive chapters of the Groundwater Bill, 2017 deal with offences and penalties, and grievance redressal. In Chapter IX, relatively specific and stringent penalties are introduced to ensure that the substantive provisions of the act are effectively complied with.²¹ Whereas, chapter X seeks to ensure speedy redressal of the grievances at the local level through mediation and conciliation.²²

In short it provides template for state-level groundwater regulation along with a frame work based on decentralization and subsidiarity. Not only this but it also holds strong environmental perspective that is to conserve and protect aquifers.

CONCLUSION AND SUGGESTIONS

The existing legislations framed on the basis of earlier Model Bill has several drawbacks which are required to be addressed for effective regulation of quantity as well as quality of groundwater. The groundwater is being over-extracted by landowners due to the absolute right they have over the groundwater beneath their land. This issue along with certain other issues need to be addressed as soon as possible because the groundwater resource is depleting day by day.

Also, in many states most of the population is dependent upon the groundwater for drinking purpose as well other livelihood purposes. Hence sustained interventions to update the legal framework is required for purpose of addressing needs and challenges faced by such states.

In India we also need a legislation on water which can incentivise conservation, in order to ensure participatory approach of people for purpose of groundwater management and governance.

²⁰ *Ibid* s 17(a)

²¹ *Ibid*, s 32

²² *Ibid*, s 36

The Groundwater Bill, 2017 pays attention to the significant changes needed in the groundwater sector as it considers all those issues that have been discussed above. It can be considered as a starting point of new era for groundwater regulation. This model bill touches upon all those aspects that are required to solve the contemporary issues prevailing in today's time.

But the main issue here would be of effective implementation of this Groundwater Bill, 2017. As per entry 17 list II, states are empowered to make laws for regulation of water. Hence, it is of utmost importance that the states consider all the relevant and important provisions of the bill while drafting a legislation for their state. Thus, the process does not stop at the drafting of model legislation at the centre but requires further effective legislative drafting in each state. The states shall consider all the relevant legal principles and then frame regulatory measures based on the same.

Even after the effective drafting of the legislation by the state, the local institutions shall be in a position to efficiently implement all these provisions to achieve the success of the legislation in practical scenario. Hence particular attention to the working of local institutions would be required in certain states where bodies of local governance remain institutionally relatively weak. These are potentially significant challenges.

Hence it can be concluded that even though previous legislative frameworks are considered to be failure to certain extent, availing the legal reform would not help the states in any way. The states with the help of particular committees shall identify the limitations and issues for particular framework and tackle with those issues by bringing new legislative frameworks. In similar way the Groundwater Bill, 2017 provides a framework to address the limitations of past reforms thus it needs to be taken forward in a sensitive manner by considering that there are different hydrological, environmental and social contexts in every state of India. States shall take initiative and adopt new changes that are required in the area of groundwater legislation so that all the states respect and implements principles of equity, human rights and sustainable environment. It is the need of an hour that states consider the need for realizing the human right to water which is a fundamental right and legislate laws that would guarantee these rights.