

# GRANTING A LAWFUL WATER ENTITLEMENT TO GROUNDWATER-DEPENDENT ECOSYSTEMS IN INDIA: AS LEGAL PERSONS OR WITH THE STATE AS TRUSTEE

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Groundwater is the primary water source for drinking needs and irrigation in India. Most rural areas and a considerable population in urban areas depend on this source for their drinking water and domestic needs.<sup>1</sup> Most formal water supply schemes introduced by the central government and various state governments rely on groundwater as the primary water source.

The government's support for agriculture through machinery, finance and technology has led to a situation where groundwater constitutes 90 per cent of minor irrigation in India.<sup>2</sup> The 5th Minor Irrigation Census data report shows an increasing trend in groundwater schemes while surface water schemes are decreasing,<sup>3</sup> which suggests the reliability of groundwater and shows its predominance in the irrigation sector.<sup>4</sup>

India's heavy reliance on groundwater for irrigation, making it the most groundwater-dependent country globally, has led to severe over-exploitation, threatening the sustainability of groundwater resources in many places. Scholars have pointed to this groundwater development as a 'race to below' for tapping the deeper aquifers, increasing the gravity of issues of over-exploitation.<sup>5</sup>

This 'atomised development' of groundwater, characterised by an uncoordinated and individualistic approach to groundwater extraction, and the increased reliance on this resource led to its over-exploitation.<sup>6</sup> Several factors such as hydrogeological availability and technological

developments that facilitate access to aquifers contribute to the dynamics of groundwater exploitation in India, despite the availability of subsidised surface water supplied by the government. Out of all the factors that influence groundwater extraction and exploitation, the role and contribution of the current regulatory framework is crucial.

This framework, which regulates groundwater access and allocations using land-water nexus principles developed by the judicial decisions of industrial era Britain and applied in India, is not effectively addressing the issue, leading to its continued exploitation. According to this land rights-based regulatory framework, groundwater is a chattel attached to land, and property rights on the land determine its access and allocations. Any depletion of your water table due to excessive water extraction by your neighbour will only constitute *damnum sine injuria*, meaning damage without legal injury, so no damages can be claimed against the neighbour.

This land-water nexus-based groundwater framework continues to regulate access to and allocation of groundwater in India, though the executive, legislature and judiciary have adopted measures to address groundwater exploitation. In the context of the significance of groundwater for India's drinking water and food security, and with the current groundwater development situation raising alarms over its exploitation and the role of the regulatory framework in perpetuating this over-exploitation, this article describes why groundwater regulations should be reconceptualised in India and how that could be achieved. Currently, through judicial decisions since *MC Mehta v Kamal Nath*, the courts have applied the public trust doctrine to water governance in India.<sup>7</sup> According to this Roman law principle, the state is the trustee of certain natural resources, including water, which should be held in trust for the benefit of the public. It prohibits the appropriation of these natural resources to private use. Despite upholding and applying this trusteeship principle to water governance, including groundwater, the land-water nexus continues to dominate groundwater access and allocation in India. This situation continues because the laws enacted to regulate groundwater use, development and management in different states and provinces have not changed the regulatory framework.

Nevertheless, groundwater continues to be regulated by the common law framework of the land-water nexus. The

1 World Bank *Deep Wells and Prudence: Towards Pragmatic Action for Addressing Groundwater Overexploitation in India* (The World Bank 2010) ix; S Janakarajan 'Unequal power, unequal contracts and unexplained resistance: the case of the peri-urban areas of Chennai' in KJ Joy and others (eds) *Water Conflicts in India: A Million Revolts in the Making* (Routledge 2008) 69.

2 Ministry of Water Resources, River Development and Ganga Rejuvenation *Report of the 5th Census of Minor Irrigation Schemes* (Government of India 2017) v.

3 *ibid*.

4 Tushaar Shah, OP Singh and Aditi Mukherji 'Some aspects of South Asia's groundwater irrigation economy: analyses from a survey in India, Pakistan, Nepal Terai and Bangladesh' (2006) 14(3) *Hydrogeology Journal* 286 at 292.

5 Tushaar Shah *Taming the Anarchy: Groundwater Governance in South Asia* (Routledge 2009).

6 M Dinesh Kumar *et al* *The Water, Energy and Food Security Nexus: Lessons from India for Development* (Routledge 2014) 2; M Dinesh Kumar *Food Security and Sustainable Agriculture in India: The Water Management Challenge* (International Water Management Institute 2003); Aditi Mukherji 'Groundwater development and agrarian change in Eastern India' *IWMI-Tata Comment* 2003/9; Tushaar Shah *et al*. 'Global groundwater situation: opportunities and challenges' (2001) 36(43) *Economic & Political Weekly* 4142.

7 *MC Mehta v Kamal Nath* (1997) 1 SCC 388.

land-water nexus perpetuates the private control over this natural resource, whereas the public trust doctrine supports more state control.

In that context, this article explores the concept of the state as a trustee of groundwater resources under the public trust doctrine and how it could help the movement away from the private rights-regulated groundwater regulations. But with the nature of public trust attached to property rights and its anthropocentric focus, it is doubtful whether this doctrine can balance human and ecological water demands. Acknowledging this, the article tries to see how the newly developing discourse on legal personhood to rivers and water bodies could be applied to groundwater regulation and whether it could bring a harmonious approach to balancing water for the ecosystem and human rights.

## THE CURRENT GROUNDWATER LEGAL FRAMEWORK

Water law in India has not been codified.<sup>8</sup> The existing legal framework regulating groundwater in India is pluralistic with constitutional provisions, various irrigation and land laws, state and central legislations, judicial decisions, common law principles and customary practices.<sup>9</sup> While irrigation laws have been amended to adapt to the changing needs of the time, rights to access surface and groundwater are governed by common law principles of the late 19th century in many parts of the country.<sup>10</sup> The right to groundwater is derived from unwritten and written law, with customary law incorporating locally evolved norms and practices adapted to changing environmental, social, economic, and political conditions.<sup>11</sup>

### Historical background

Groundwater regulation in India is largely derived from common law principles and case law<sup>12</sup> decided by the English courts in the 19th century.<sup>13</sup> Those principles, developed in another country, suited to different climatic conditions when the groundwater-surface water hydrology was not well known, were implanted in a country with different hydrogeological, climatic and social situations and continue to be used in India today.<sup>14</sup>

The common law principles that govern groundwater rights in India have a rich historical context. They adopted a differentiated approach to surface water and groundwater management, considering groundwater a 'chattel', a legal term meaning a personal possession attached to land with unregulated extraction powers for landowners. This historical perspective is crucial to understanding the current legal landscape and the unique status of groundwater in India.

The House of Lords in *Chesmore v Richards* observed that the rules applicable to groundwater are different from surface water, noting 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.

The landmark judgment also established that 'percolating water below the surface of earth is a common reservoir in which nobody has any property but of which everybody has the right of appropriating the whole'.<sup>15</sup>

Common law did not recognise the natural or prescriptive right to water flowing in an undefined channel but considered it a 'common supply' constituting the absolute property of the owner who appropriated it.<sup>16</sup> Any diminution of such water by his neighbour was treated only as *damnum absque injuria*,<sup>17</sup> as held by the Court of the Exchequer Chamber in *Acton v Blundell*<sup>18</sup> that groundwater fell

... within that principle which gave to the owner of the soil 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; that the party who owns the surface may dig therein and apply all that is there found to his 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 neighbours' well, this inconvenience to his neighbours fall within the description of *damnum absque injuria*, which cannot become the ground of an action.

Though common law allowed landowners to extract or divert groundwater from their land, it distinguished between percolating groundwater and that flowing in a defined channel.<sup>19</sup> Percolating groundwater, which does not flow in a defined channel, is considered part and parcel of the land above it, hence, the water belongs to the landowner as long as it is beneath his land.<sup>20</sup> However, the ownership of such water is not absolute.<sup>21</sup>

In the case of groundwater flowing in a defined channel, the restrictions applicable to surface water required landowners to use the water only for reasonable purposes and ensure that it did not materially affect or diminish the supply of water to downstream riparian owners in the exercise of their rights to such water, as applicable. Although different sets of principles were applied to

8 Philippe Cullet *Water Law, Poverty, and Development; Water Sector Reforms in India* (OUP 2015) 33.

9 Daniel Aguilar, 'Groundwater reform in India: an equity and sustainability dilemma' (2010) 46 Tex. Int'l L. J. 623. See also Planning Commission of India Ground Water Management and Ownership: Report of the Expert Group (Planning Commission 2007) 16.

10 Cullet, Note 8 above, at 33.

11 MS Vani 'Groundwater in India: a new approach' in Ramaswamy R Iyer (ed) *Water and the Laws in India* (SAGE Publications 2009) at 442.

12 Cullet, Note 8 above, at 57; NS Soman 'Legal regime of underground water resources' (2008) *Cochin ULR* 147.

13 Cullet, Note 8 above, at 41.

14 *ibid.*

15 *Chesmore v Richards* (1859) 7 HLC 349324; *English v Metropolitan Water Board* (1907) 1 KB 588324, in Sujith Koonan 'Legal regime governing groundwater' in Philippe Cullet, Alix Golland Gaultieri, Roopa Madhav and Usha Ramanathan (eds) *Water Law for the Twenty-First Century: National and International Aspects of Water Law Reform in India* (Routledge 2010) at 185; see also GC Mathur (ed) *Amin and Sastry's Law of Easements* (Eastern Book Company 1984) at 434.

16 Koonan, Note 15 above, at 185.

17 Vani, Note 11 above, at 445.

18 [1843] 152 ER 1223.

19 Koonan, Note 15 above, at 171.

20 *Mahomedans of Lonar v Hindus of Lonar* AIR 1945 Nag. 106.

21 *Malayam Patel Basavana Gowd v Lakka Narayana Reddi*, AIR 1931 Mad. 284, where the court held that 'the ryot has no right whatever recognizable in law until the water has actually reached his field' and 'therefore the only remedy for him, if the water in his visual irrigation channel has been abstracted by a neighbour whose land is irrigated by a different channel, would be to petition Government for his proper supply of water.'

percolating groundwater and that flowing in defined channels, determining whether groundwater is flowing in defined channels was easy thanks to primitive technology. Indian courts upheld and applied these common law principles while deciding issues on groundwater access and allocations. The Madras High Court, in one of its judgments, held that:

The general rule is that the owner of a land has got a natural right to all the water that percolates or flows in undefined channels within his land and that even if his object is digging a well or a pond from his field or land it does not matter in the least because it is the Act and not the motive which must be regarded. No action lies for the obstruction or diversion of percolating water even if the result of such abstraction be to diminish or take away the water from a well in an adjoining land.<sup>22</sup>

Groundwater regulatory framework in statutes could be traced to the provisions of the Indian Easement Act 1882, even though scholars disagree with this. Groundwater is considered as a chattel attached to the land property, with rights in groundwater being vested in the landowner based on the *ad coleum* principle. By section 7(b) of Easement Act,<sup>23</sup> every owner of the land has an elementary right to collect and dispose of within his own limits all waters under the land which do not pass in a defined channel.<sup>24</sup> As per land-related legislation such as the Transfer of Property Act 1882 and the Land Acquisition Act 1894, groundwater extraction rights cannot be separated from land; and for its transfer, land transfer is necessary,<sup>25</sup> as groundwater rights are linked to land as an easement right.<sup>26</sup>

However, many scholars disagree that groundwater is linked to easement rights.<sup>27</sup> Some scholars like MS Vani observe that the right to groundwater is not an easement right but a right attached to land that *easements may restrict*.<sup>28</sup> The justification could be drawn from the definition of an easement right, which is 'the right which the owner or occupier of certain land possesses, 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'.<sup>29</sup> An

easement that requires a dominant and servient heritage cannot co-exist with land ownership in a single person.<sup>30</sup>

The right to groundwater is not an easement but only a right attached to land since there is no requirement of a servient heritage to enjoy the right, as evident from the Indian Easement Act 1882 section 7(g), which provides the right to groundwater as the natural advantage co-existent with the right possessed under land ownership. Easement rights would enable the rights- holder to take innumerable legal actions for remedy whenever the act of any person on his land diminished water in the adjacent land, which is not available in case of groundwater issues. Diminishing the groundwater level in one's land only constitutes *damnum sine injuria* and not *injuria sine damnum*.

### Inequitable and unfair regulatory framework: necessary reforms

With its enormous importance for drinking water and food security, groundwater has become the lender of last resort for all water needs. However, its depletion is considered the first indicator of looming water scarcity.<sup>31</sup> The current legal framework that links groundwater access and allocation to land rights creates inequity and issues of inclusiveness as the majority of the farmers and tenant cultivators are landless. This land-water nexus discriminates against such groups as the landless, tribals and women.

The inequitable and unjust legal framework has led to injustice among water users and various water uses like agriculture, drinking water and industrial water sectors. The government supports the agriculture sector through subsidies for power, technology, credit, and in other ways, triggering an excessive reliance on groundwater, which is the easiest way to access water resources compared to the unreliable, disrupted surface water supply by the state.

Despite attempts by governments to regulate excessive exploitation through statutory frameworks, the statutes grandfather the existing legal framework. These principles, formulated when the knowledge of basic water hydrology was not yet developed, have proved inapplicable in an era where advances in science and technology made it possible to determine various characteristics of groundwater flows and their interrelation with surface water, thus calling for a holistic treatment of both. Moreover, human rights jurisprudence, which declared the right to water to be a fundamental human right and the Supreme Court's landmark declaration on the right to water being a fundamental right<sup>32</sup> under Article 21 of the Constitution, also makes the private ownership of groundwater untenable.

22 *Kesava Bhatta v Krishna Bhatta* AIR 1946 Mad 334.

23 Section 7 (b) *Rights to advantages arising from situation*: 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.

24 *Halsbury's Laws of India* (2000) 29(2) (Butterworth) at 447.

See also Illustration (g) to section 7(b) providing that 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.

25 Marcus Moench 'Allocating the common heritage: debates over water rights and governance structures in India' (1998) 33(26) *Economic and Political Weekly* A 46 at A48.

26 Maria Saleth 'Groundwater markets in India: a legal and institutional perspective' (1994) XXIX (2) *Indian Economic Review* 157 at 161; Héctor Garduno *et al* 'India groundwater governance case study' (2011) *World Bank* 13.

27 Vani, Note 11 above, at 444; Sitarama Rao *Law relating to Water Rights* (Asia Law House 1996) at 185.

28 Vani, Note 11 above, at 444; V Sitarama Rao, Note 27 above, at 195-96; Sujith Koonan 'Groundwater: legal aspects of Plachimada dispute' in Philippe Cullet *et al* (eds) *Water Governance in Motion: Towards Socially and Environmentally Sustainable Water Laws* (Cambridge University Press 2010) at 170.

29 Indian Easement Act 1882, section 4.

30 Vani, Note 11 above, at 444.

31 PS Vijayshankar, H Kulkarni and S Krishnan, 'India's groundwater challenge and the way forward' (2011) 46(2) *Economic and Political Weekly* 37.

32 The Supreme Court in *Subhash Kumar v State of Bihar* AIR 1991 SC 420 held that right to life includes right to enjoyment of pollution-free water, air for full enjoyment of 'life' and any violation of the same empowers the citizens the right to move the Supreme Court under Article 32 of the Constitution.



## GROUNDWATER AS A PUBLIC TRUST: MOVING BEYOND PRIVATE PROPERTY RIGHTS IN ACCESS AND ALLOCATION

The common law-based groundwater regulation prioritises individual rights in access to and allocation of groundwater. This land-water nexus in groundwater access and allocation, read through various case law of the British era<sup>33</sup> and section 7 of the Indian Easement Act 1882 upholds the rights of landowners over the groundwater resources. Private rights in groundwater lead to inclusions and exclusions in water access and allocations, contributing to inequity and non-inclusiveness. The questions of inequity and inclusiveness are highly significant, considering the contribution of groundwater to the country's drinking water and food security.

Since the *Kamal Nath* judgment, increasing concerns about water encroachments have led to applying the public trust doctrine ('the PTD') to water governance. The public trust doctrine recognises state trusteeship in property that benefits the public. Accordingly, the state is the trustee of all natural resources meant for public use, and the public is the beneficiary of all natural resources, including running water. The state must protect natural resources and cannot convert them for private use or ownership.<sup>34</sup>

The PTD attempts to delink its land-water nexus from individual property rights and vests property rights in the state for the benefit of every person, which can help limit individual control over natural resources like groundwater and reduce the inequities created by uncontrolled exploitation.<sup>35</sup> It can reduce everyday inequality in access and allocations with more state control over water resources, recognised rights and duties, and lead to the conservation of water sources, contributing to source sustainability.<sup>36</sup>

However, the PTD is of limited scope in groundwater regulation due to its property rights regime. Though the public trust doctrine shifts control from the individual to the state, the land-water nexus or property rights link to the groundwater still remains intact. The property rights-based regulatory framework cannot be addressed even by the PTD, which limits its scope in mainstreaming the rights and concerns of groundwater as a resource.<sup>37</sup> In that light, the developing discourse of rights of nature implemented through granting legal personhood to rivers and water bodies where property rights do not dominate could be the best possible way to ensure ecological justice for water resources.

33 *Kesava Bhatta v Krishna Bhatta*, Note 22 above.

34 *MC Mehta v Kamal Nath* MANU/SC/1007/1997.

35 Gayathri D Naik 'Groundwater regulation in India: applicability of public trust doctrine and right to participation in decision making to achieve right to water' in Javaid Rehman and Ayesha Shahid (eds) *The Asian Yearbook of Human Rights and Humanitarian Law* (Brill Nijhoff 2018) 327.

36 Gayathri D Naik 'Realizing sustainable development and water justice through procedural justice' in Alan Diduck, Kirit Patel and Aruna Kumar Malik (eds) *Advancing Environmental Justice for Marginalized Communities in India* (Routledge 2021) 53.

37 Gayathri D Naik *Water Justice and Groundwater Subsidies in India: Equitable and Sustainable Access and Regulation* (Routledge Taylor & Francis Group 2024).

## DEVELOPMENT AND APPLICATION OF RIGHTS OF NATURE: RELEVANCE AND EFFICACY IN GROUNDWATER GOVERNANCE

The High Court of Uttarakhand in India in March 2017 led the way for new legal discourse in domestic environmental jurisprudence when it declared the rivers Ganges and Yamuna to be legal persons. Later the same court extended this legal personhood to all natural bodies in that state, including glaciers like Gangotri and Yamunotri. The High Court followed the New Zealand model, where the legislature, through Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, recognised the Whanganui river as a legal entity and a legal person with judicially enforceable rights.<sup>38</sup> In New Zealand, rivers derived legal personhood as a statutory right; in India this is a judicially recognised and developed right, like many other environmental law developments, including the human right to a clean environment

These developments mark a significant step in nature-oriented water governance patterns where rivers and their rights receive adequate focus. In light of increased anthropocentric encroachments over rivers and water bodies and pollution of ecosystems, the judicial decisions in India provided a place for discussions and debates on the scope, limits and challenges of this recognition and its application to groundwater governance.<sup>39</sup>

### Rights of rivers recognised by the judiciary

In a public interest litigation that dealt with an administrative matter concerning Ganga protection, the court held Ganga and Yamuna to be legal persons. *Mohammed Salim v State of Uttarakhand*<sup>40</sup> challenged the failure of the State of Uttarakhand to cooperate with the central government in constituting the Ganga Management Board under the Uttar Pradesh Reorganisation Act 2000 section 80.

According to that Act, the central government shall set up the Ganga Management Board for the administration, construction, maintenance and operation of irrigation, water supply, power generation, navigation, and industrial projects on the river Ganga.<sup>41</sup> The board's constitution includes a chairman appointed by the central government, and two full-time and four part-time members nominated by Uttar Pradesh and Uttarakhand, the two riparian states sharing the Ganges.<sup>42</sup>

In its judgment directing the central government to set up the Ganga Management Board, the court highlighted the need to protect the Ganges and Yamuna because the Hindu community considers these rivers sacred. Relying on theories and judicial precedents on attributing legal personhood and juristic persons to non-human entities,

38 Abigail Hutchison 'The Whanganui River as a legal person' (2014) 39 *Alternative Law Journal* 179; Te Awa Tupua Act 2017.

39 Stellina Jolly and Gayathri D Naik 'Rivers as legal personalities in India and Bangladesh from an eco-centric perspective: balancing developmental needs and environmental protection' (2022) 6 *Chinese Journal of Environmental Law* 253.

40 *Mohammed Salim v State of Uttarakhand* MANU/UC/0050/2017.

41 Uttar Pradesh Reorganisation Act, 2000, Notification No. S.O. 950(E), dated 20 October 2000, s 80 (1).

42 *ibid* s 80(2).

the court explained the need to grant legal personhood to these rivers. However, the rationale of this attribution is twofold: religious – to protect the recognition and faith of society, and constitutional – protection of the environment as per Articles 48-A and 51(A)(g) of the Constitution.<sup>43</sup>

For its implementation, the court exercised its *parens patriae* jurisdiction to direct three members – the Director of the Namami Ganga project, the Chief Secretary of Uttarakhand and the Advocate General of Uttarakhand – as persons *in loco parentis*, as the human face to protect, conserve and preserve these rivers and tributaries, to uphold their status and protect their health and well-being.<sup>44</sup> The Advocate General shall represent the rivers in judicial proceedings to protect their interests.<sup>45</sup>

In another litigation filed to declare the Himalayas, glaciers, streams, water bodies and so on as legal entities/juristic persons on a par with the Ganges and Yamuna, the High Court of Uttarakhand invoked its *parens patriae* jurisdiction and declared:

The Glaciers including Gangotri & Yamunotri, rivers, streams, rivulets, lakes, air, meadows, dales, jungles, forests wetlands, grasslands springs and waterfalls, to be legal entity/legal person/juristic person/juridical person/ moral person/artificial person having the status of a legal person, with all corresponding rights, duties, and liabilities of a living person, to preserve and conserve them. They are also accorded the rights akin to fundamental rights/legal rights.<sup>46</sup>

Upholding the legal personhood of these natural entities, the court accorded them all rights, duties, and liabilities akin to fundamental or legal rights of a living person, implying the extension of the application of constitutional and statutory protection to these resources.

Despite applying the right of nature discourse, following its adoption in different jurisdictions worldwide, the Supreme Court of India stayed the implementation of these judgments that articulated a new discourse in environmental law on the grounds of administrative hurdles.<sup>47</sup>

### Rationale and justification

The rights of nature discourse developed across the globe received attention in India when legal personhood was applied to rivers, the Ganges and Yamuna, glaciers and other natural entities by the High Court of Uttarakhand. While granting legal personhood to the Ganges and Yamuna, the High Court justified its application of legal personhood to rivers highlighting the necessity of protecting these rivers from the current extraordinary crisis of ecosystem damage.

With the global population burgeoning, water demands also increase. Around 1.1 billion people in developing countries lack safe drinking water globally, and about 2.6 billion face sanitation problems.<sup>48</sup> Inadequate drinking

water and sanitation issues often arise due to institutional failures and political decision-making.<sup>49</sup> Anthropocentric encroachments on rivers and water bodies have impacted their ecosystem, threatening their survival. For instance, the Uttarakhand High Court noted in *Mohd Salim v State of Uttarakhand* the extraordinary situation of the Ganges and Yamuna, which require special measures to reverse the anthropogenic harm suffered.<sup>50</sup> In this context, might the developments in environmental law that recognise and mainstream the concerns and rights of rivers by granting them legal personhood prove to be a step towards an ecocentric approach to water governance?

### Religious sacredness

The Uttarakhand High Court declared the Rivers Ganges and Yamuna to be legal persons or juristic persons ‘to protect the recognition and faith of the society’.<sup>51</sup> Citing several precedents of the Supreme Court that the ‘concept of juristic persons arose out of necessities in the human development – recognition of an entity as a juristic person – is for subserving the needs and faith of society’,<sup>52</sup> the court noted that for socio-political-scientific development to have greater impact, the evolution of a fictional personality to be a juristic person becomes inevitable. This may be any entity, living inanimate, objects or things.<sup>53</sup>

The court justified adopting the constitutional concept of a juristic person to protect the Ganges and Yamuna on three tenets: religious sacredness, the importance of these rivers to community life, and the constitutional provision of environmental protection. The court started with a religious connotation: ‘Rivers Ganges and Yamuna are worshipped by Hindus. These rivers are very sacred and revered. The Hindus have a deep spiritual connection with Rivers Ganges and Yamuna ... Ganga is also called Ganga Maa’.<sup>54</sup>

Nevertheless, the court also noted the significance of these rivers to the development of the community:

Rivers Ganga and Yamuna are central to the existence of half of the Indian population and their health and well being. The rivers have provided both physical and spiritual sustenance to all of us from time immemorial. Rivers Ganga and Yamuna have spiritual and physical sustenance. They support and assist both the life and natural resources and health and well-being of the entire community. Rivers Ganga and Yamuna are breathing, living and sustaining the communities from mountains to sea.<sup>55</sup>

It also provided a constitutional dimension to its observation: ‘There is utmost expediency to give legal status as a living person/legal entity to Rivers Ganga and Yamuna r/w Articles 48A and 51A(g) of the Constitution of India’.<sup>56</sup>

43 *Mohammed Salim v State of Uttarakhand* paras 16–17.

44 *ibid* 19.

45 *ibid* 20.

46 *Lalit Miglani v State of Uttarakhand* MANU/UC/0202/2016 [62].

47 *Union of India v Lalit Miglani* Special Leave Petition (Civil) Diary No 34250/2017; *State of Uttarakhand v Mohammed Salim* Special Leave to Appeal (C) No 016879/2017, Order dated 7 July 2017.

48 UNDP *Human Development Report 2006: Beyond Scarcity: Power, Poverty, and the Global Water Crisis* (Palgrave Macmillan 2006) 2.

49 Lyla Mehta ‘Contexts and constructions of water scarcity’ (2003) 38 *Economic and Political Weekly* 5066.

50 *Mohd Salim v State of Uttarakhand* MANU/UC/0050/2017 [10].

51 *Mohd Salim v State of Uttarakhand*, Note 50 above.

52 *Shiromani Gurdwara Prabandhak Committee, Amritsar v Shri Som Nath Dass and Others* AIR 2000 SC 1421.

53 *Mohd. Salim v State of Uttarakhand*, Note 50 above, para 16.

54 *ibid* 11.

55 *ibid* 17.

56 *ibid* 18.

Thus, the court, beginning with a religious connotation, substantiated the rationale of granting legal personhood to rivers with the significance of these rivers to the health and well-being of communities and the duties of the state and citizens in protecting the environment. Despite relying on the role of these rivers in the social, economic, and cultural life of the communities and the constitutional duties of the state and citizens in protecting these rivers, the predominance attached to the religious sacredness of these rivers makes the decision complex. In the secular fabric of a democratic country, these rivers' contribution to a community's socioeconomic life should have received more attention from the court than religious significance.

Nevertheless, the pollution of these rivers resulting from spiritual practices and rituals arising from the sacredness attached to them by a significant section of society is a contributing factor to the deterioration and depletion of the water quality of these rivers. In that context, beginning with the discussion on religious sacredness will not reduce the merit of this decision.

### **Is groundwater regulation possible by granting legal personhood?**

As noted above, the newly emerging discourse where water resources like rivers are granted legal personhood is a landmark development in environmental governance in India. Though these judgments are on hold in implementation per the Supreme Court order, these developments raise jurisprudential questions on our future approach to water governance.

By granting legal personhood to rivers and water bodies, recognising their concerns and mainstreaming their needs, it aims to move beyond anthropocentric water governance, where human water needs get priority, to an eco-centric approach.

Could this discourse address the issues of groundwater over-exploitation? The current regulatory framework is anthropogenic, where the land-water nexus regulates access and allocation. This framework skews the benefit towards the landowners, and concerns of groundwater and aquifers are sidelined along with the issues of distributive justice among human water users.

In that context, scholars have highlighted the application of the public trust doctrine to groundwater regulation. The PTD recognises state trusteeship in property that is beneficial for the general public.<sup>57</sup> This could move individual control over groundwater to state control. However, the

property rights link still remains and it addresses the water needs of current and future generations. The ecosystem and its needs are also sidelined.

In that situation, the rights of nature implemented through legal personhood to rivers could be extended to groundwater and aquifers, which could help mainstream the rights of aquifers. The need for ecosystem protection could provide a right-duties paradigm where human responsibility to protect aquifers takes on a new dimension.

However, the main point that requires attention here is implementation. Even though legal personhood is a welcome approach, its implementation could be possible only through human intervention, which again brings humans to the centre. Reverting to human-centric implementation is an argument against this discourse. Nevertheless, this discourse where the rights of natural resources and entities are considered on a par with human beings could provide one of the most suitable ways to address the growing challenge of groundwater exploitation. So far, anthropogenic water governance has only prioritised human water needs through human rights discourse. Supply sustainability has always been the key. Ensuring sustainable access to all water users and ensuring equity and inclusiveness in coverage have been the focus of all water schemes. Water conservation measures have also been short-sighted, with conservation for the next season emphasised.

By adopting this emerging discourse, the rights of water resources to get their concerns addressed is possible. The major concern of groundwater depletion could be addressed here, where the focus would shift from supply to source sustainability. The conservation angle would also reflect a pro-environmental/ pro-natural resource perspective.

Recognising the criticism that humans are responsible for implementing this right for nature on its behalf, the most feasible way of implement this is by adopting the New Zealand model of community-led, community-driven participatory water management and governance. The rights of communities that live in consonance with the ecosystem should also get attention. Instead of granting the responsibility to a group of bureaucrat/technical entities, communities that are well-versed in local hydro-geological, climatic, social and cultural situations that influence groundwater availability, access and allocation can be given a significant say in water management. This could break the individual property rights regime and bring equity, inclusiveness and democratic participation to water management.

57 Ved P Nanda and William K Ris 'The public trust doctrine: a viable approach to international environmental protection' (1975) 5 *Ecology Law Quarterly* 291 at 296.