**[Groundwater rights](https://www.dawn.com/news/1434688/groundwater-rights)**

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THE Supreme Court has initiated suo motu proceedings regarding the excessive and unregulated extraction of groundwater by bottling companies. To be fair, the court is driven by a genuine desire to conserve our aquifers but because judges are not perceived as well suited to handling questions of policy, the focus thus far has been on short-term fixes only. A proper resolution of the issue requires us to address the structural problem first.

Groundwater is a scarce resource and every time a state is confronted with conditions of scarcity, it must undertake the process of resource allocation. This effectively means that when there are multiple people with competing claims over the same resources, society must devise a mechanism to determine how those limited resources are to be distributed amongst the claimants and which claim is to be prioritised over the other. Property law serves that function. It helps allocate limited resources and then provides a framework through which those resources can be transferred between people once the initial allocation has taken place.

Our structural difficulties with the regulation of groundwater extraction start here because we have never managed to do the initial allocation of rights in groundwater correctly. If property rights in groundwater are not properly delineated, it is simply not possible to regulate its use effectively.

*A mechanism is needed to resolve the distribution of limited resources.*

Consider the case of Punjab where groundwater is subject to the overlapping control of a number of different bodies. Under section 11(i)(a) of the Wapda Act, 1958, Wapda has “control over the underground water resources of any region in a Province”. A verbatim reproduction of this text can be found in section 8 of the Punjab Irrigation and Drainage Authority Act, 1997, which gives the Irrigation Authority “control over … underground water resources within the Province”. This creates a situation where groundwater in Punjab is under the control of two separate bodies: one federal and the other provincial.

But that’s not all. Section 62-A of the Irrigation and Drainage Act, 1873, mandates the provincial government to take all steps for the “proper management of the sub-soil water to protect the aquifer”. That’s the third piece of legislation empowering a different entity to conserve, control and manage groundwater. Furthermore, in cities to which the Punjab Development of Cities Act, 1976 ,or the LDA Act, 1975, apply, the concerned authority for each city has the “exclusive right to use groundwater resources” in its area. There is the further question of how these authorities interact with local governments in an environment where they enjoy identical functions and powers under the law?

To be sure, one can look at this with some nuance and argue that these laws apply in different contexts and there is room to interpret them harmoniously, but that should not obscure the larger point that is being made here: our delineation of property rights in groundwater is shoddy. Unless this is clarified by legislation, we cannot move towards the effective regulation of groundwater, and thrashing out a policy solution through courts — no matter how good the intentions might be — will offer only temporary respite. Any steps taken to protect the aquifer will be of very limited effect.

Where the courts can play a major role though is in developing jurisprudence on property law and user rights once the legislative changes are in place. For instance, section 7(g) of the Easements Act, 1882, still gives each land owner the right to “collect all water” under his land. This is based on the archaic notion dating back to Roman law where “whoever owns the soil, holds title all the way up to the heavens and down to the depths of hell”. With the advent of aircraft, courts now recognise that an owner’s rights to the airspace above his land extends to reasonable use only.

Corresponding changes, however, have not taken place — at least in our jurisprudence — with respect to the use and ownership of resources under land. Groundwater is still subject to the ‘rule of capture’ where a person owns whatever he extracts from the aquifer. The rule encourages excessive extraction. Alternative legal rules include the reasonable use doctrine and the correlative rights doctrine that can be used in conjunction with a metering system. These rules can be developed by the judiciary once cases are litigated under the new legislative framework.

One such attempt was made in Sindh Institute of Urology vs Nestle Milkpak where the court held that groundwater was held on public trust by the state but the Easements Act was never brought to the court’s attention in that case. More clarity is still needed and that will have to come from the legislature first. That is one area in which the new government can push its agenda of reform.

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