

# Groundwater legal regime: limitations and prospects

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# Groundwater and climate change

- Dependability and safety
  - Diminishing
  - Implications for climate change adaptation
- Issues: over exploitation, pollution
- Inequity in access to GW
- Need for a legal framework
  - Control of use/exploitation
  - Conservation and protection
  - Equity
  - Fundamental right to water

# Common law rule

- Land owner's uncontrolled right to extract groundwater
  - Contrast: surface water under PTD
- Source: 19<sup>th</sup> century case laws from England
  - *Acton v. Blundell* (1843)]
  - A rule based on convenience and ignorance
  - A rule that can probably be justified only in time of plenty

# Common law rule's influence

- Indirect recognition under the Indian Easements Act, 1882
- Even if the extraction by a land owner adversely affects others, it is not legally actionable (*Kesava Bhatta v. Krishna Bhatta*, AIR 1946 Mad. 334)
- Applying the rule - out of place, out of time
  - Kerala High Court in *Plachimada* case (2004)

# New groundwater laws

- Separate GW Act in many states
  - Kerala, Bihar, West Bengal etc.
- Based on Model Groundwater Bill, 2005
- No change in the nature of GW right
- Limited government control
  - Permit/registration system
  - Centralised command and control approach

# Implications

- Artificial distinction of GW and SW
- Common law rule
  - Outdated
  - Do not reflect the current scenario
  - Inequity in access and use (Plachimada)
  - Implications for the fundamental right to water
- New groundwater laws
  - Land-based groundwater right remains intact
  - Narrow approach on regulation of use
    - Little help in climate change adaptation

# Towards a new groundwater law

- Abolition of land-based groundwater right
  - Common law rule is obsolete
- Legal bases
  - Public trust doctrine
    - *Kesoram* case, Supreme Court, 2004
  - Fundamental right to water
    - Lack of regulation leads to violation of FRW
  - Right to pollution free environment
    - *Bichhri* case, Supreme Court, 1996
    - *Thilakan* case, Kerala HC, 2007

# Contd.

- Model Groundwater Bill, 2011
  - GW under public trust
  - Emphasis on protection and conservation
    - GW protection zones
  - Aquifer based approach
  - Decentralised institutional framework
    - Regulation, protection and conservation