

Taxonomy of Public Trust Doctrine vis-à-vis Water Depletion: A Critical Analysis

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ABSTRACT:

India is suffering from grave scarcity of water due to an increase in demand of water. While the government has proposed several groundwater recharge schemes, it is more important to fix the problem of over

exploitation. In India 60% of the water needs is met by using groundwater, this level changes to 90% in rural areas where people highly rely on wells and natural lakes, rivers. With increase in urbanization, commercialization and development, the use of groundwater has increased explicitly. Studies and reports show that regions are becoming more water stressed as scarcity and depletion of water is on the rise. Private companies have also been one of the major exploiters of water resources. People over-exploit water resources for personal gains. In this paper, the author has discussed the application of public trust doctrine in protection of water resources in India. We seek to analyse how the doctrine is applied and whether the doctrine is a solution to the problem of water depletion in India.

Keywords: groundwater, urbanization, commercialization, water resources, over-exploit.

INTRODUCTION:

The doctrine of Public Trust is based on the concept that natural resources are property. Natural resources such as forests, rivers and groundwater are the property of the public. The state and the individual share certain rights with respect to such public property. The purpose behind the doctrine is to control and limit the power of the government authorities to transfer public property to private parties for the purpose of industrialization, commercial or personal profit. The doctrine recognizes and protects people's right to public property and restricts the transfer of it. Essentially the doctrine prohibits the holding of such public properties by private parties as the general public has a right to access and use them, that which is for greater good cannot be transferred for the benefit of few.

The public trust doctrine pertains to preservation, use, protection and nature of title of essential resources that are considered to be public property. The doctrine is based on the concept of trusteeship where the government is the trustee of the property. The state is not the owner of the property but it acts as a trustee preventing it from falling into hands of private parties. The state has the duty to protect and preserve such property for the better use of all and to ensure the right to use public property to all individuals. Thus the state holds the property resources and has the duty to distribute it in a way that it does not infringe the right of individuals or hamper the environment. The state has the power to distribute it for use as well as the duty to protect it from exploitation and preserve it for the use of future generations. It is required to take measures and actions in order to rightly perform its duties.

JURISPRUDENTIAL ANALYSIS OF PUBLIC TRUST DOCTRINE:

The Supreme Court has applied the public trust doctrine in several landmark cases in India. The court has derived and deduced the doctrine from Article 21¹ and Article 39² of the Constitution and Common Law.

The public trust doctrine was invoked in the Span Motels Case, M.C. Mehta v Kamal Nath.³ In this case, a public interest litigation was filed against a resort which sought to change the natural course of the river Beas.⁴ The proposal of the resort was to reconstruct, blast and dredge the river bed. The project also required a lease of forested land for private construction. The plan of the project received approval from the Gram Panchayat and the Ministry of Environment and Forests. The court upheld the doctrine and disallowed the construction from taking place.⁵ It commented that certain resources like water, forests have greater importance to the public in general than private ownership of these resources. The government being the trustee of such resources is restricted to use them only for public purpose and for use by people in general. The property resources can in no circumstance be sold for money or any consideration by the government. Such resources are also required to be maintained when put to certain uses.⁶

In another case, the National Green Tribunal stated: drawing of groundwater for commercial purpose without permission for requisite authority is not a guaranteed right and groundwater is scarce and limited. Semi-

critical areas are where the drawal of groundwater exceeds the coupling resulting in a depletion of the water resources; in such areas, the drawal of water for industrial purposes should be prohibited. Commercial activities can be dependent on other sources of water such as harvested or treated water. The tribunal relied on its previous order in the case of Shailesh Singh v Hotel Holiday Regency⁷ where it stated that unregulated withdrawal of groundwater cannot be allowed in the absence of replenishment. Demand for commercial activities cannot be met with exploitation and industries are required to comply with norms formed by the CGWA for usage of water resources.

The courts until recently have interpreted the doctrine as having a negative obligation.⁸ In 2002 the court gave a wider interpretation to the doctrine by including positive obligations under it. It held that the trustee of water resources such as ponds and lakes, it has a legal duty to protect such resources. The duty has a negative obligation of prevention of depletion of rivers, lakes, reservoirs and other water resources, as well as a positive obligation of preserving them from extinction, rejuvenating and ensuring their qualitative and quantitative aspects.⁹ The inherent nature of a trust is the imposition of positive obligation on the trustee who is bound to use the property resources for the benefit of the beneficiary or for the

¹ Article 21, The Constitution of India, 1950.

² Article 39, The Constitution of India, 1950.

³ M.C. Mehta v. Kamal Nath, (1997) 1 SCC 388.

⁴ Shivshankar, K.V., 2010. Role of judiciary in the protection of environment.

⁵ Narain, V., 2009. Water as a fundamental right: A perspective from India. *Vt. L. Rev.*, 34, p.917.

⁶ Hiremath, V.N., 2016. A Critical Study of Law and Policy Relating to Conservation of Natural Resources in India.

⁷ Shailesh Singh v Hotel Holiday Regency, I.A. No. 640/2019 in Original Application No. 176/2015.

⁸ Shailesh R. Shah v. State of Gujarat, 2002 SCC OnLineGuj 164: (2002) 43 (3) GLR 2295.

⁹ Gopalkrishna, B.S., 2005. Legal regime relating to conservation of natural resources a critical study.

om the trust is created. The judiciary has used this meaning of trust in interpreting and applying the public trust doctrine where the state is the trustee.¹⁰

PLACHIMADA STRUGGLE:

The Plachimada struggle was a conflict between the multinational giant Coca-Cola and the primitive Adivasis of Kerala.¹¹ The MNC withdrew between 500-1500 liters of water per day, the water table vastly fell from 45 to 150 meters and 260 wells dried up in 3 years. The villagers faced water shortage which yielded lesser crops and affected their commercial activity. The wells near the company were so highly concentrated of chlorides that it became unfit for human, agricultural or any compensation. The field productivity of surrounding and nearby fields depleted significantly. The company destroyed the quantitative as well as qualitative nature of water. The MNC was forced to stop operating its plant by the villagers. It was a struggle by the poor and backward villagers against a corporate giant which had ties with the government and political parties. The Panchayat did not renew the operational license due to protests by the Adivasi community. The company challenged the non-renewal of license in the High Court of Kerala. The community demanded the shutdown of the plant due to devastation of the source of their survival. It demanded that the company take responsibility for destruction of environment and resources.¹² In an appeal to the High Court by the Panchayat the court stated that groundwater is a public property which should be protected by the authority or government and should not fall into the hands of private parties for exploitation.¹³

The struggle shows how corporates can abuse natural resources for personal profits, how government inaction and lack of regulations hurt the environment and local communities and lastly how vague the law pertaining to groundwater is in our country. It takes years of struggle, protest and legal battle to protect the environment. The statutory laws and the common law has failed to strike a balance in the use of groundwater. The vague status of law in this matter has allowed exploitation and depletion of groundwater resources.¹⁴

The Groundwater Authority of Kerala formed under the Kerala Groundwater Act, 2002 allowed Coke to pollute, contaminate and deplete resources, it failed to conserve the resources despite several protests and agitation. The authority violated the Water (Prevention and Control of Pollution) Act, 1974 amended in 1988 as it failed to contain and prevent pollution of water under its watch. Over-exploitation of water at Kerala led to creation of health risks for the local people, and degradation in quality of water.¹⁵

The World Water Conference was organized in Kerala for the purpose of spreading awareness about the importance and scarcity of groundwater. The Plachimada declaration of protecting and preserving

¹⁰Rengarajan, S., Palaniyappan, D., Ramachandran, P. and Ramachandran, R., 2018. National Green Tribunal of India—an observation from environmental judgements. *Environmental Science and Pollution Research*, 25(12), pp.11313-11318.

¹¹Perumatty Grama Panchayat v State of Kerala, High Court of Kerala, 2005 (2) Kerala Law Times, 554.

¹²Menon, M., 2013. Lessons from Plachimada for Water Law: Who Should Own the Groundwater? SSRN Electronic Journal. Available at SSRN: <https://ssrn.com/abstract=2270681> or <http://dx.doi.org/10.2139/ssrn.2270681>

¹³Rajesh K. P., 2017. The Anti-Coca-Cola Movement in Plachimada, Kerala. *Journal of Developing Societies*, 35(4), pp.437-457.

¹⁴Berglund, H. and Helander, S., 2015. The Popular Struggle against Coca-Cola in Plachimada, Kerala. *Journal of Developing Societies*, 31(2), pp.281-303.

¹⁵Swamy, R., 2011. Water Insecurity: The Plachimada Struggle. *Indian Journal of Public Administration*, 57(1), pp.26-33.

round water was adopted. It was claimed in the conference that water is just not a commodity, it is the fundamental obligation of the society to sustainably use the ground water so as to preserve it for future generations. The governments should prohibit the corporatization, privatization, marketing and misuse of ground water. The fundamental right of all individuals to water can only be ensured if we prevent exploitation and preserve it for the greater public use.¹⁶

The Plachimada struggle was a result of administrative inefficiency and lack of environment-friendly measures. Laws protecting the environment existed at that time, however, the depletion of ground water was a result of administrative failure. The government authority failed to notify the Ground Water Act, 2002 and did not implement the pollution control laws. The Environment Protection Act, 1986, the Water (Prevention and Control of Pollution) Act, 1974 amended in 1988 were operational during the exploitation of water at Plachimada, however, government inaction resulted in harm to the environment and local community.¹⁷

Justice Nair observed that ground water is a part of the nation's wealth, it belongs to general population and water is more important than industrial use and over-exploitation of water should be stopped. The High Court bench in the Plachimada case held that ground water is a public natural resource, it cannot be disbursed into the hands of private individuals and the society has the right to use such water. The court applied the public trust doctrine in this case to protect ground water from over-exploitation. No person can become the owner of ground water, ownership of land does not give the unregulated water extraction rights. However, the division bench of the same court did not follow the same doctrine, it relied on the common law theory where the owner of the land has the right to extract ground water.

OTHER RELEVANT STRUGGLES:

The Plachimada struggle is not a stand-alone incident of water exploitation. Despite presence of laws and the application of the public trust doctrine by the courts, exploitation and depletion still takes place. In Kaladeravillage of Rajasthan, the operation of a coke plant led all the wells to dry up. People of the village have been protesting and opposing such operations which disrupt the ecological balance.¹⁸

In Mehdiganj village of Uttar Pradesh, a plant was established which resulted in depletion of the ground water table. The village here suffered losses due to scarcity of water for agriculture irrigation. In both these cases, the state governments did nothing to stop depletion or protect the public rights. In the village of Sivaganga, Tamil Nadu, the plant set up dried up almost the entire water table. The delay on the part of the Ministry of Environment and Forests to act and stop the plant from operating was exceptionally late.

¹⁶ Camkin, J. and Neto, S., 2016. Roles, Rights, and Responsibilities in Water Governance. *World Affairs*, 179(3), pp.82-112.

¹⁷ C.R. Bijoy, 2006. Kerala's Plachimada Struggle: A Narrative on Water and Governance Rights. *Economic and Political Weekly*, [online] 41(14), pp.4332-4339. Available at: <<https://www.jstor.org/stable/4418807>> [Accessed 11 March 2020].

¹⁸ Hindu, The. 2004a. Water Board Disputes Coca-Cola's Claim on Ground Water, *The Hindu* (June 17), available at: <http://www.hindu.com/2004/06/17/stories/20040617030305_00.htm> last accessed on 11 March 2013.

e. The exploitation of water resources could not be stopped or controlled due to administrative inefficiency of the government body.¹⁹

POLLUTERS PAY PRINCIPLE:

Even though the public trust doctrine is applicable to the natural resources in India, pollution and over-exploitation of resources has been extant. Causing pollution and harm to the environment comes with a cost. Similarly, courts should fine and levy compensation on private parties for over-exploiting or contaminating water resources.²⁰ The Polluters pay principle was applied in the case of *Enviro-*

*Legal Action vs. Union of India*²¹ where the court held that the person liable for causing harm to the environment should pay for the losses and harm done to the ecosystem. The court also held that the public trust doctrine is a law of the land.²²

The Central Pollution Control Board (CPCB) has recommended the levy of environmental compensation for groundwater in its report on Assessment of Environmental Compensation in Case of Illegal Extraction of Groundwater which was submitted before the National Green Tribunal. The compensation has been set according to the type of usage of water and type of area. The tribunal specially emphasized on the need to deter industries and commercial exploiters.²³

CONCLUSION:

The public trust doctrine combined with the framework for national water law can give us a holistic, improved way of using water sustainably, it can reform the state-centric water law to a more democratized framework by having public participation. Natural resources have been owned and controlled by state and government bodies, this has allowed few corrupt and inefficient bureaucrats and officials to unduly gain from the loss and harm to both public and the nature.²⁴ By democratization, having public participation, checks can be kept at the way of using these natural resources. The national law framework for water is not sufficient for ensuring the right use of water resources. History and experience has shown that despite courts passing orders and making the state responsible for protection of water resources, the inefficiency of government bodies has prevailed, resulting in over-exploitation of water.²⁵

Public participation has become the need of the hour, the last few decades have seen the development and need for such participation. Legislations such as the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 have provided for public participation in

¹⁹ India Resource Centre. 2011. Coca-Cola Extracts Groundwater Even as Farmers and Community Left Without Water, India Resource Center News Release September 21, available at: < <http://www.indiaresource.org/news/2011/1008.html>> last visited on 11 March 2013.

²⁰ Kumar, M., 2011. Case Name: Indian Council for Enviro-Legal Action v Union of India Court Name: Supreme Court of India, New Delhi, India.

²¹ *Enviro-Legal Action vs. Union of India*, JT 1996 (2) 196.

²² Kumar, M., 2011. Case Name: Indian Council for Enviro-Legal Action v. Union of India Court Name: Supreme Court of India, New Delhi, India.

²³ Jain, A., 2020. Illegal Extraction of Groundwater May Soon Carry A Fine Of Min Rs 10,000. [online] Livelaw.in. Available at: <<https://www.livelaw.in/environment/extracting-groundwater-fine-of-min-rs-10000-every-household-146364>> [Accessed 10 March 2020].

²⁴ Blumm, M. and Paulsen, A., 2016. The Public Trust as an Antimonopoly Doctrine. SSRN Electronic Journal,.

²⁵ Blumm, M., 2003. Public Property and the Democratization of Western Water Law: a Modern View of the Public Trust Doctrine. *Issues in Legal Scholarship*, 3(1).

nacquisition of land resources, the water laws in India can borrow this principle from this legislation so as to ensure efficiency and absolute government discretion. As the water resources are public property, for the benefit and use of all, the public should have the right in deciding its use. Democratization of water resources would prevent centralization and ensure sustainable development. For a holistic water regulating law, public trust doctrine is one of the solutions and not the only or the best solution as the state cannot misuse its position of trustee. The doctrine should be applied along with rules of public participation in order to keep checks and balances.²⁶

REFERENCES:

1. Shivshankar, K. V., 2010. Role of judiciary in the protection of environment.
2. Narain, V., 2009. Water as a fundamental right: A perspective from India. *Vt. L. Rev.*, 34, p. 91
3. Blumm, M. and Paulsen, A., 2016. The Public Trust as an Antimonopoly Doctrine. *SSRN Electronic Journal*
4. Blumm, M., 2003. Public Property and the Democratization of Western Water Law: a Modern View of the Public Trust Doctrine. *Issues in Legal Scholarship*, 3(1)
5. Swamy, R., 2011. Water Insecurity: The Plachimada Struggle. *Indian Journal of Public Administration*, 57(1), pp. 26-33.
6. Camkin, J. and Neto, S., 2016. Roles, Rights, and Responsibilities in Water Governance. *World Affairs*, 179(3), pp. 82-112.
7. C.R. Bijoy, 2006. Kerala's Plachimada Struggle: A Narrative on Water and Governance Rights. *Economic and Political Weekly*
8. Rajesh K. P., 2017. The Anti-Coca-Cola Movement in Plachimada, Kerala. *Journal of Developing Societies*, 35(4), pp. 437-457.
9. Berglund, H. and Helander, S., 2015. The Popular Struggle against Coca-Cola in Plachimada, Kerala. *Journal of Developing Societies*, 31(2), pp. 281-303.
10. Rengarajan, S., Palaniyappan, D., Ramachandran, P. and Ramachandran, R., 2018. National Green Tribunal of India— an observation from environmental judgements. *Environmental Science and Pollution Research*, 25(12).

²⁶Paromita Goswami, Public Trust Doctrine: Implications for Democratization of Water Governance, 9 *NUJS L. Rev.* 68 (2016)