

A dark, atmospheric forest scene with a path leading towards a bright light at the end of the tunnel. The trees are tall and thin, with bare branches, creating a dense canopy. The light at the end of the path is a bright, glowing yellow-green, casting a long shadow on the path. The overall mood is mysterious and ethereal.

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## COMPARATIVE ANALYSIS OF THE EVOLUTION OF THE PUBLIC TRUST DOCTRINE

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### Abstract

The public trust doctrine entrusts the state with the responsibility to act as a trustee of natural and man-made resources on behalf of the public. The state will look after these resources, without having any claims of ownership over the resources. This millennium old doctrine had evolved throughout the years, from the Roman law, English Law, American law and finally to the Indian law. Unlike its American counterpart, India expanded the scope of this doctrine to be applicable to more than just water resources. The Indian Supreme Court has included forests, soil, oil resources, spectrum, etc., to all be protected by the state as a part of the Public Trust Doctrine. One of the main advantages of this doctrine in Indian jurisprudence is its natural law construction, due to which no legislation will be able to remove or even constrain this doctrine beyond what the judiciary has laid down. Although this doctrine has been applied in every sectors of natural resources, water resources remains of one the strongest importers of this doctrine., which can particularly be seen in the case of *Hindustan Coca-Cola Beverages v. Perumatty Grama Panchayat*. Within the water sector, along with the judiciary's active involvement, the legislature has also gone about legislating on the topic of Public Trust Doctrine in the form of the Draft National Water Framework Laws, which evidences how integral this doctrine is for the Indian Environmental jurisprudence.

## INTRODUCTION

The term “trust” according to the Webster’s dictionary is an arrangement in which a party (called the trustee) holds a certain property as its nominal owner and looks after it for the good and benefit of one or more beneficiaries.<sup>87</sup> When this term is extrapolated to the context of the bigger public and society, the Public Trust Doctrine (“PTD”) emerges. So, this doctrine primarily assigns the state to act as a trustee and hold certain properties and resources – like water, air, minerals, forests, etc. – in trust as its nominal owner and look after the same so that the beneficiaries – who are the people currently living in the society and the future generations – are benefited from having access to those properties and resources.<sup>88</sup>

After having been declared as common resources or belonging to the commons, such properties and resources cannot be owned or commercially utilized by any private individual or even the state. They belong to the entire society and the state is only tasked with the responsibility of maintain and protecting them.<sup>89</sup> Over the years, the PTD has emerged as one of the cardinal principles of environmental governances and protection around the world. This is particularly used by the judiciary by weighing the state’s imperative to interfere with the resource and its importance and significance to the general public to decide whether such a state action is justifiable or not.<sup>90</sup>

When this is answered in the negative, courts (particularly in India) have gone about granting different kinds of reliefs, like shutting down industries, imposing penalties, asking the state/private party to restore the common property, etc.<sup>91</sup> This article aims to explore the

<sup>87</sup> *trust*, MERRIAM WEBSTER, <https://www.merriam-webster.com/dictionary/trust%20in>.

<sup>88</sup> *public trust doctrine*, LEGAL INFORMATION INSTITUTE (May 2022), [https://www.law.cornell.edu/wex/public\\_trustDoctrine](https://www.law.cornell.edu/wex/public_trustDoctrine).

<sup>89</sup> Raphael D. Sagarin & Mary Turnipseed, *The Public Trust Doctrine: Where Ecology Meets Natural Resources Management*, 37 *Annu. Rev. Environ. Resour.* 473 (2012).

<sup>90</sup> MICHAEL C. BLUMM & MARY CHRISTINA WOOD, *THE PUBLIC TRUST DOCTRINE IN ENVIRONMENTAL AND NATURAL RESOURCES LAW* (Carolina Academic Press, 2021).

<sup>91</sup> Vijay K. Sondhi, *The Doctrine of Public Trust*, OAK BRIDGE PUBLISHING, <https://www.oakbridge.in/uncategorized/the-doctrine-of-public-trust/>.

development and scope of the PTD in environmental governance in India. To that effect, this article is divided into three sections. *Firstly*, this paper delves into the history of the PTD on the global front, tracing it from Rome, England, the US and finally in India. *Secondly*, this paper locates the manner of interpretation of the PTD in India, in the Natural Law Theory, with evidences from judicial reasoning and academic literature. *Lastly*, this paper explores the importation of the PTD into the water management sector of the state, both through judicial precedents and the Draft National Water Framework Bill.

#### HISTORY AND EVOLUTION OF THE PTD

##### ***Roman and English Origins of The PTD***

From a historical perspective, the PTD can trace its origins in the ancient Roman law, particularly the Institutes of Justinian, which was a part of their civil law drafted in 530 AD.<sup>92</sup> This law described the universal notion that all waterbodies and water course be protected from acquisition by private individuals, so that the lifelines of communal existence are preserved and promoted.<sup>93</sup> In this articulation, the Romans developed a theory of “common property” to include rivers, seas, air, beaches, seashores, etc., which was to be protected by the state, and should only be used for the general public benefit and not be subject to private ownership. They were owned by everyone in commons (*res communio*), or by no one (*res nullius*).<sup>94</sup>

Since the Roman law served as a source of inspiration for almost all of Europe’s future legal systems, this doctrine was also incorporated into various European legal systems, with the most famous being the English Magna Carta.<sup>95</sup> Paragraph 5 of this document makes a direct reference to the state’s responsibility as the guardian of land and resources, like houses, fish

ponds, mills, parks, tanks, and all other things linked to the land.<sup>96</sup> Even the English House of Lords, in as early as the 19<sup>th</sup> century, elaborated upon the scope of public trust and said that all navigable rivers and seas, are to be vested in the Crown, and this should be used for the benefit of the public.<sup>97</sup> The law therefore, imposed a fiduciary duty on the Crown to utilize these resources in interest of the beneficiaries.<sup>98</sup> So, in essence, the English common law differentiated from the type of property which could be transferred to private parties (called *ius privatum*) and the property which was held in trust for the public (called *ius publicum*).

##### ***Application of The PTD in The US***

This doctrine was then adopted in numerous countries around the world, with US being one of the most significant ones. One of landmark cases in American jurisprudence, which adopted this doctrine was the *Illinois Central Railroad v. Illinois*.<sup>99</sup> This case dealt with the grant of most of the lakebed of Lake Michigan in Chicago Harbour to the railroad department. The US Supreme Court upheld the revocation of this grant by the legislature by stating that the State of Illinois held the title of the land in issue, in trust for the beneficiaries, who are the people. Any attempt to transfer this property and change its nature would be derogatory to its role as a trustee of the public.<sup>100</sup>

This doctrine has been used in a number of subsequent cases to not entirely stop the privatisation of all forms of public trust resources. Instead, it only aims to restrict the state, i.e., the trustee, from substantially impairing the use of these resources by the public without any justifiable reasons.<sup>101</sup> So, any form of such substantial impairment cannot be done without an explicit directive by statute, or a finding by the legislature that the action

<sup>92</sup> SHEFALI SONI, THE STATUS OF PUBLIC TRUST DOCTRINE IN INDIA (Grin Verlag, 2020).

<sup>93</sup> Erin Ryan, *A Short History of the Public Trust Doctrine and its Intersection with Private Water Law*, 38 Va. Environ. Law J. 135 (2020).

<sup>94</sup> Melissa Kwaterski Scanlan, *The Evolution of the Public Trust Doctrine and the Degradation of Trust Resources: Courts, Trustees and Political Power in Wisconsin*, 27 Ecol. Law Q. 135 (2000).

<sup>95</sup> Anmol Rathore & Hansaja Pandya, *Mining Woes: Application of Public Trust Doctrine to Preservation of Mineral Resources in India*, 7 J. Environ. Law 87 (2020).

<sup>96</sup> The Magna Carta 1215, Paragraph 5.

<sup>97</sup> *Diana Shooting Club v. Husting*, 145 N.W. 816, 818 (Wis. 1914).

<sup>98</sup> *Gann v. Free Fishers of Whitstable*, 11 E.R. 1305 (1865).

<sup>99</sup> 146 U.S. 387 (1892).

<sup>100</sup> Michael C. Blumm, *The Public Trust Doctrine and Private Property: The Accommodation Principle*, 27 Pace Environ. Law Rev. 649 (2010).

<sup>101</sup> *Marks v. Whitney*, 491 P.2d 374, 380, 381 (Cal. 1971).

would be substantially impairing the remaining public trust resource.<sup>102</sup>

A lot of these cases on the PTD existed as a fragmented collection of precedents. It was in 1970 that Professor Joseph Lawrence Sax wrote and published his article on a compiled understanding of the public trust doctrine as used by the judiciary in natural resource management law.<sup>103</sup> He further elaborated on the PTD to show how it could be a “useful tool of general application for citizens seeking to develop a comprehensive legal approach to resource management problems”.<sup>104</sup>

#### INTERPRETING THE PTD

This section will, *firstly*, illustrate the operation of the PTD within the penumbra of natural law, and *secondly*, depict how the Indian courts have incorporated this natural law version of the PTD within India’s environmental jurisprudence.

#### **PTD Within the Natural Law Penumbra**

In spite of Natural Law being an abstract and immense sphere of legal theory, it provides a foundational direction and bearing for the legitimisation of the PTD, and also for prescribing its scope and limits.<sup>105</sup> There are various iterations of this explanation of the natural law aspect of the PTD. While the judges (both in the US and in India) have heavily relied on the natural law origins of the PTD, there are also numerous legal scholars who present the PTD in the context of natural law.

There is the libertarian argument put forward by Richard Epstein which essentially states that any property/resource which is held in commons, is in its original position, and this predates the civil society itself because of which the state should engage in public trust protection of these properties/resources.<sup>106</sup> Then, there is the argument made by Gerald Torres and Nathan Bellinger which states that

the PTD reflects the inherent and pre-existing rights which have been present since time-immemorial.<sup>107</sup> The state is merely securing and re-articulating these rights by putting it down in documents and stating them in precedents. While natural law and its subsequent reasoning can be a part of the law, it cannot exist as a standalone consequentialist legal doctrine. They have to be posited into the legal regime and reconciled with any other law saying otherwise.<sup>108</sup>

#### **PTD Jurisprudence In India**

Compared to the English and American jurisprudence on the PTD (both of which have existed for over a century), the Indian counterpart, which emerged just in 1996, has much more substantial coverage and jurisprudence with a much larger scope and application. The first time this doctrine was used in the Indian legal system was in the case of *M.C. Mehta v. Kamal Nath*.<sup>109</sup> The respondent in this case was a minister of environment and he had given the permission physically reconstruct the riverbed of the Beas River to change its direction so that a resort was not threatened by the full force of the river.

This was challenged by the petitioner citing major environmental damage, which not only threatened the forests but also the neighbouring villages with flooding and landslides. It was in this situation that the Indian Supreme Court invoked the PTD. For this the Court drew inspiration from both the American jurisprudence on the PTD (including the *Illinois Central Railroad v. Illinois* case), and adopted Professor Sax’s recommendation to use the PTD as a sword to protect the environment rather than a shield from advocates of property rights.<sup>110</sup>

It incorporated the doctrine into the Indian legal system and declared it as the law of the land.

<sup>102</sup> Gould v. Greylock Reservation Commission, 215 N.E.2d 114 (Mass. 1966).

<sup>103</sup> Joseph Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich. Law Rev. 471 (1970).

<sup>104</sup> *Id.*

<sup>105</sup> Paromita Goswami, *Public Trust Doctrine: Implications for Democratisation of Water Governance*, 9 NUJS Law Rev. 67 (2016).

<sup>106</sup> Richard A. Epstein, *The Public Trust Doctrine*, 7 CATO J. 411 (1987).

<sup>107</sup> Gerald Torres & Nathan Bellinger, *The Public Trust: The Law’s DNA*, 4 Wake Forest J.L. & Pol’y 281 (2014).

<sup>108</sup> Robert W. Adler, *Natural Resources and Natural Law Part II: The Public Trust Doctrine*, 10 MJEL 225 (2020).

<sup>109</sup> (1997) 1 SCC 388.

<sup>110</sup> Dr. Partha Pratim Paul, “*Doctrine of Public Trust and its Application by Judiciary in Environmental Governance of India: A Critique*”, 5 IJLJ 82 (2014).



Moreover, the court located this doctrine, not in the positive law, but in the natural law sphere. It claimed that this doctrine was a law of nature which is imposed on people by the natural world, and the same should inform all social institutions and actions. Therefore, it held the lease of the government to the resort as being violative of the PTD and invalidated the same.<sup>111</sup>

In 1999, the Indian Supreme Court was faced with another similar case in *M.I. Builders Private Ltd. v. Radhey Shayam Sahu*,<sup>112</sup> where a local development authority had given its approval to the petitioner to construct an underground shopping mall within the premises of a public park. The Supreme Court once again invoked the PTD and held the public park to be common property which should be looked after by the state for the usage and benefit of the public because it held historical and environmental importance.

The court in this case, not only drew upon the natural law perspective of the PTD, but also went ahead to posit the same within Article 21 of the Constitution, to be a part of an individual's right to life. So, it held that that the park should not be tampered with by any private party for any purpose. Thus, the court reprimanded the local development authority and the petitioner, suspended the construction and also ordered the petitioner to restore the park to its original condition.<sup>113</sup>

Moreover, in addition to Article 21, subsequent cases have even invoked Article 39(b) (Ownership and Control of all material resources are equally distributed among members of the society), Article 48A (Protection and improvement of environment and safeguarding of forests and wild life) and Article 51A(g) (Fundamental duty to protect and improve the natural environment) of the Constitution to have aspects of the PTD.<sup>114</sup> By locating this doctrine in the Indian constitution, the judiciary has not only ensured the

constitution recognised the property rights of individuals, but also the rights of the sovereign people to collectively experience the best and highest use of the land and the natural resources.<sup>115</sup>

The natural law aspect of this doctrine was further stated in the case of *Fomento Resorts & Hotels v. Minguel Martins*,<sup>116</sup> where the Indian Supreme Court linked this doctrine to the Indian society's natural social life of living with nature. It drew upon the preaching of sages and saints in the country to justify the need for preserving these resources because it belonged to all living creatures in the nature. While this formulation of the law may be abstract and vague (as compared to any positivist law), the advantage lies in the fact that this doctrine can never be changed, amended or repealed by any political act of the state. It has been located in natural law since time immemorial, so, irrespective of the political ideology which is in power, this doctrine will continue to direct environmental governance in the country.

While land and resources like water, air, minerals, oil, natural gas,<sup>117</sup> and forests, are all conventional examples of resources which are held in public trust by the state, in modern times, there also arises more modern forms of resources related to technology, the most widespread being spectrum.<sup>118</sup> This was the case of *Centre for Public Interest Litigation v. Union of India*,<sup>119</sup> where the court was faced with the question of whether the distribution of spectrum to private parties through licenses was valid and abided by all the statutory regulations. The term "natural resources" was defined in an expansive manner to include all such elements in the society, which can have intrinsic utility to humankind. This broad definition was enough to expand its scope to not only include resources provided by nature,

<sup>111</sup> *supra* note 23.

<sup>112</sup> (1999) 6 SCC 464.

<sup>113</sup> *Id.*

<sup>114</sup> Jona Razzaque, *Application of Public Trust Doctrine in Indian Environmental Cases*, 13 J. Environ. L. 221 (2001).

<sup>115</sup> G.J.H.K. Siriwardana, *The Application of Public Trust Doctrine as a Mechanism to Ensure Environmental Protection by Means of Law: A Comparative Analysis between Sri Lankan and Indian Legal Context*, (Proceedings of 8th International Research Conference, KDU, Published November 2015) 131.

<sup>116</sup> (2009) 3 SCC 571.

<sup>117</sup> *Reliance Natural Resources Ltd. v. Reliance Industries Ltd.*, (2010) 7 SCC 1.

<sup>118</sup> *Sondhi supra* note 5.

<sup>119</sup> (2012) 3 SCC 1.

but also those man-made resources which can be used for the betterment and utility of mankind (like radio spectrum and perhaps even the internet).

While discussing the state's duty of distribution, the court brought up the issue of distribution of natural resources through the PTD, and subsequently held that spectrum was also a resource which was held by the state in trust and the distribution of the same should also abide by the PTD to ensure it happens for the benefit of the general public and not for the detriment of the public. Hence, the court held the 2G Spectrum Allocation to be cancelled because the first-come-first-serve policy goes against the PTD.<sup>120</sup>

Due to the judiciary's active and strong construction of the doctrine in the country, instead of being a negative duty wherein the state should not itself interfere with the enjoyment of these rights or prevent others from interfering with these rights, it takes the form of a positive right.<sup>121</sup> This positive right, in certain cases, mandates the state to take affirmative action for the effective and efficient management of the land and natural resources (held in public trust) and also ensure citizens have the right to access and enjoy the same.

#### PTD IN THE WATER SECTOR

##### ***Emergence of PTD in Water Right Adjudication***

The *M.C. Mehta v. Kamal Nath* case, being the first case invoking the PTD, actually dealt with the issue regarding the Beas River. But it was also concerned with the environment surrounding the river as well, and considered the entire situation of the river and the environment within the forest as being held in public trust. One US case which has been referred to in the *M.C. Mehta v. Kamal Nath* while deciding issues of water resource vis-à-vis public trust is *National Audubon Society v. Superior Court*.<sup>122</sup>

In this case, the Los Angeles City had diverted water from the Mono Lake basin to its service and industrial areas. The City had acquired the required permits of water rights over the Mono Lake, but this diversion caused excessive damage to the environment and the saline aquatic life (mainly consisting of shrimps). For the first time in US jurisprudence, the court imported the PTD to cases dealing with appropriation of water rights and wetlands. It held that by applying the PTD, the water rights present with the City are not vested in it to use it in any way it deemed fit.<sup>123</sup>

It is always subjected to the state control and regulation, and more importantly public trust. But the court also put in a caveat saying that appropriation of water by the state did not mean that public trust is being violated outrightly. For deciding whether the land/resource is being held as public trust, the court will have to take into consideration the protection of ecological values wherein environment protection and ecology become relevant factors. After this, the court will also have to balance the economic benefits from such an appropriation against the environmental values in granting the rights over water.<sup>124</sup>

It has also been stated by Professor Sax that no particular individual owns any property right over water, be it on the surface or underground. What anyone has is an usufructuary right which also incorporates the interests and needs of others as well. He states that it is the responsibility of the state to regulate the water and its uses for the overall benefit of the society by taking into account the public nature and interdependency of these resources.<sup>125</sup>

Then, there was the case of *State of West Bengal v. Kesoram Industries Ltd.*,<sup>126</sup> where the Indian Supreme Court invoked the doctrine while dealing with groundwater as a common

<sup>120</sup> S. Raghavan, *With a self-appointed trustee like this*, THE HINDU (Sep. 08, 2012), <https://www.thehindu.com/opinion/op-ed/with-a-self-appointed-trustee-like-this/article3871311.ece>.

<sup>121</sup> *Shailesh R. Shah v. State of Gujarat*, (2002) 43 (3) GLR 2295.

<sup>122</sup> 33 Cal.3d 419 (1983).

<sup>123</sup> Erin Ryan, *The Public Trust Doctrine, Private Water Allocation, and Mono Lake: The Historic Saga of National Audubon Society v. Superior Ct.*, 45 Environ. L. (North-western School of Law) 561 (2015).

<sup>124</sup> George P. Smith & Michael W. Sweeney, *The Public Trust Doctrine and Natural Law: Emanations Within a Penumbra*, 33 B.C. Envtl. Aff. L. Rev. 307 (2006).

<sup>125</sup> Sax *supra* note 17, 485.

<sup>126</sup> (2004) 10 SCC 201.

property resource. The court considered groundwater as being a part of the national wealth due to which it belongs to the entire society. The court imposed a positive obligation on the state to protect groundwater for the public's use and to also ensure that it is not subject to excessive exploitation.<sup>127</sup>

### **Coca-Cola Case**

One of the other cases in recent times concerning the invocation of the PTD in the context of water resource management in India was the Kerala High Court single judge bench case of *Hindustan Coca-Cola Beverages v. Perumatty Grama Panchayat*.<sup>128</sup> In this case, there was a Coca-Cola bottling plant which was situated on 34 acres of land in the Plachimada district of Kerala. At its peak, the bottling plant nearly produced 5.61 lakh litres of the Coca-Cola beverage every day, for which it drew almost 20 lakh litres of groundwater from two ponds and six borewells put on its land.<sup>129</sup>

Due to this large consumption coupled with the pollution emitting from the bottling plant, the neighbouring villages and village people were facing acute shortage of groundwater and health concerns. As a result, the Perumatty Grama Panchayat withdrew their previously given consent when their license came up for being renewed. As a result of the conflict between the beverage company and the Perumatty Grama Panchayat, the case went to the Kerala High Court to adjudicate on the matter of whether Coca-Cola use of the groundwater was permitted and legal.<sup>130</sup>

In the Indian legal system, this case was greatly similar to the American case concerning Mono Lake (*National Audubon Society v. Superior Court*) and the court also adopted a similar reasoning. Drawing on the PTD, the court held that groundwater is a life sustaining resource present on the earth which is a national wealth

belonging to everyone living in the society. The court also distinguished this case from the previous cases which permitted the unrestricted use of groundwater, and said that due to the new development in technologies like borewells and heavy-duty pumps, such an unlimited permission may result in extreme environmental damage and non-reversible effect on groundwater.<sup>131</sup>

The court went ahead to rely on the *M.C. Mehta v. Kamal Nath* case, the Stockholm Declaration of 1972,<sup>132</sup> and Article 21 of the Indian Constitution to invoke the PTD. It rejected the argument that the groundwater below one's private property will belong to the land owner and concluded that groundwater, irrespective of whether it is being extracted from one's private property is a common property which belongs to the public. The state will act as a trustee of groundwater present across the country and it should actively work to prevent the over-exploitation of the resource and hence, safeguarding the right to water and right to life of the people living in the society.<sup>133</sup>

Similar to the US jurisprudence on the PTD, the court didn't entirely prohibit the use of groundwater by private individuals. It imposed a limit on the same while still permitting the use of groundwater for agricultural and domestic purposes, but not for commercial purposes.<sup>134</sup> The court also linked the PTD to the Tragedy of Commons theory wherein it stated that if Coca-Cola is permitted to extract such large amount of groundwater, then every land owner in the country will start doing the same for commercial reasons, ultimately leading to the exhaustion of this resource.<sup>135</sup>

<sup>127</sup> Mahesh Menon, *Groundwater Management and the Human Right to Water in India: The Need for a Decentralised Approach*, in N. SINGH (ED.), *THE HUMAN RIGHT TO WATER* (Springer International Publishing Switzerland, 2016).

<sup>128</sup> (2005) 2 KLT 554.

<sup>129</sup> Gayatri Raghunandan, *A Look at the Legal Issues Plachimada's Struggle for Water Against Coca-Cola Has Brought Up*, *THE WIRE* (Aug. 20, 2017), <https://thewire.in/law/coca-cola-plachimada-kerala-water>.

<sup>130</sup> Philippe Cullet, *Use and Control of Groundwater: Towards A New Framework*, 1 *Environ. L. & Prac. Rev.* 73 (2011).

<sup>131</sup> Sujith Koonan, *Legal Implications of Plachimada: A Case Study*, (International Environmental Law Research Centre 2007) IELRC Working Paper 2007-05.

<sup>132</sup> The Stockholm Declaration 1972, Principle 2; Aishwarya Nayak, *Short Overview of Public Trust Doctrine, Precautionary Principle & Polluter Pays Principle*, *AEQUIVIC* (Oct. 29, 2021), <https://www.aequivic.in/post/short-overview-of-public-trust-doctrine-precautionary-principle-polluter-pays-principle>.

<sup>133</sup> Melissa Scanlan, *A comparative analysis of the public trust doctrine for managing water in the United States and India*, in ALISTAIR RIEU-CLARKE (ED.), *ROUTLEDGE HANDBOOK OF WATER LAW AND POLICY* (1st ed., Routledge 2017).

<sup>134</sup> Jessica Leigh Zaylia, *Questioning the Coke Side of Life: Groundwater Appropriation, Absolute Property Rights, the Public Trust Doctrine and Gender Inequality in India*, 6 *Manch. J. Int. Econ.* 159 (2009).

<sup>135</sup> *Supra* note 42.



It is in order to prevent this that the court vested the ownership of the groundwater to everyone in the society and the same should be managed by the state as a trustee so that everyone in the society and even those coming to live in the society in the future can benefit from the same.<sup>136</sup> The single judge bench finally decided the case against the Coca-Cola company and ordered it to stop extraction of water. This judgement was appealed before the division bench which overruled the single judge decision and directed the Gram Panchayat to resume its consent to Coca-Cola's license.<sup>137</sup> The same has been appealed before the Supreme Court, but since Coca-Cola shut down its operation in that village, the matter was never taken up.<sup>138</sup>

#### **The Role of Panchayat in PTD**

While this case brings up various aspects of the PTS, there are some critics which can be made about the division bench judgement which essentially overlooked the importance of the role of the Gram Panchayat in the operation of the PTD, particularly against such large corporations which tend to interfere with the resources being enjoyed by the village people. This role arises from the high constitutional status that has been accorded to these local self-governing bodies like the Gram Panchayats.<sup>139</sup>

The 73<sup>rd</sup> amendment to the Indian Constitution gave these bodies constitutional recognition for governing within their jurisdictions.<sup>140</sup> Article 243 of the Indian Constitution imposes a constitutional duty on the panchayat to regulate and manage resources, like air, water, soil, etc., within its jurisdictions to ensure that there is judicial use of the same and they are also protected and held in trust to be used by future generations as well.<sup>141</sup> This has also been reinforced through the Kerala Panchayat Raj

Act, 1994, through which Gram Panchayats have been vested with common properties which through custom, can be used by everyone living in the village, and the same also belongs to everyone in the village.<sup>142</sup>

The Gram Panchayat is merely holding and managing those properties as a trustee. Moreover, there is also the Kerala Ground Water (Control and Regulation) Act, 2002 which declared Palakkad as being "overexploited", which requires special protection for its groundwater resources.<sup>143</sup> All this highlights the importance of the role of Panchayats in the preservation of natural resources through the PTD. Therefore, the Panchayats decision to revoke its consent for the license being given to the Coca-Cola company is entirely valid as per the laws of the land and the PTD.<sup>144</sup>

#### **National Water Framework Law**

Therefore, this form of a regulation which takes into account the people's interests in the water resource leads to the democratization of water resources in the country. The state will not have any absolute authoritarian control over the water. It is merely a trustee, which takes into account the public needs, voices and participation both in the utilisation of the water and in its governance.<sup>145</sup> There is no sovereign control and ownership. Since, PTS is the *sine qua non* for the participation of people in water governance, the process of democratisation has to take place though the establishment of substantive and procedural rights and mechanisms beyond just merely recognising the PTD by the judiciary.<sup>146</sup>

The foremost law which appears for this inculcation of PTD within India's statutory water governance laws is the Draft National Water Framework Law of 2013 and of 2016. Since water is a state subject, these draft laws were to be passed under Article 252 of the Indian

<sup>136</sup> Zaylia *supra* note 48.

<sup>137</sup> Hindustan Coca-Cola Beverages v. Perumatty Grama Panchayat, (2005) 3 KLT 10.

<sup>138</sup> Koonan *supra* note 45.

<sup>139</sup> Michael C. Blumm & Rachel D. Guthrie, *Internationalizing the Public Trust Doctrine: Natural Law and Constitutional and Statutory Approaches to Fulfilling the Saxion Vision*, 44 U.C. Davis L. Rev. 741 (2012).

<sup>140</sup> The Constitution (73rd Amendment) Act 1992.

<sup>141</sup> The Constitution of India 1950, art 243.

<sup>142</sup> The Kerala Panchayat Raj Act 1994, s.171.

<sup>143</sup> Raghunandan *supra* note 43.

<sup>144</sup> Gayathri D. Naik, *Groundwater Regulation in India: Applicability of Public Trust Doctrine and Right to Participation in Decision Making to achieve Right to Water*, 2 The Asian Yearbook of Human Rights and Humanitarian Law 327 (2018).

<sup>145</sup> Goswami (n 19).

<sup>146</sup> Ramaswamy R. Iyer, *Why a national water framework law*, THE HINDU (Jan. 07, 2013), <https://www.thehindu.com/opinion/lead/why-a-national-water-framework-law/article4280263.ece>.

Constitution, due to which the Parliament could pass the law for the state, which could then consent and adopt the law through a resolution passed in the state legislature.<sup>147</sup> These draft laws have specifically mentioned the PTD within their provisions.

These draft laws do not indicate the state to be the owner of these water resources, so there is no option to alienate the resource for even a fair price. The draft law imposes both positive and negative obligations on the state to manage the water resources as a trustee of the same, and this management cannot be to jeopardise the interests and rights of the public. Moreover, these draft laws also have a non-obstante clause within them, due to which it would overrule any other law (like the Maharashtra Land Revenue Code, 1966,<sup>148</sup> the Madhya Pradesh Irrigation Act, 1931,<sup>149</sup> etc.) that declares water bodies like rivers, stream, springs, etc., to be state property or private property. Such property would just be "common property resource" which is owned by the public at large.<sup>150</sup>

### CONCLUSION

The PTD is a doctrine which has seen its evolution since more than a millennium. From having its origins in the Roman law, to being incorporated in the English, American and the Indian jurisprudence, the doctrine gone through different iterations and modifications. While the American jurisprudence and literature on this doctrine has served as a source of inspiration for its incorporation into different jurisdictions like Philippines, South Africa, Kenya, etc., no other country has expanded its scope of application to such an extent as India.

Unlike its American counterpart at that time, India went above and beyond in applying this doctrine by not only limiting it to the water sector (which is where the doctrine found its

birth), but also extended the same to forests, soil, minerals, spectrum, etc. In this entire exercise, the Indian courts have not relied on the positivist law to invoke the doctrine. Judges have relied on an entirely nature law understanding and justification of the doctrine. Utilising this doctrine as being an inherent right of man as a being of nature, and also linking the same to the Indian society and culture, the courts have gone and placed this doctrine in a position where no government, irrespective of its political ideology, can repeal or even tone down this doctrine to serve any political or economic purpose that it may have.

Among all the different resources which have been covered and brought under the protection of this doctrine, the first resource, i.e., water has one of the most elaborate and detailed jurisprudence on the subject. From the *M.C. Mehta v. Kamal Nath* case to the *Hindustan Coca-Cola Beverages v. Perumatty Grama Panchayat*, the Supreme Court has come a long way in extending the protection of the PTD to every single water resource in the country, like lakes, rivers, wells, groundwater, rainwater, etc. And in this process, the court has also linked this doctrine with various other legal principles of Intergenerational Equity, Polluter Pays Principle, Precautionary Principle, etc.

In addition to the judiciary's active role in securing this doctrine, the legislature has also broadened the scope of the doctrine through numerous legislations like the different state panchayat acts, the different state ground water acts and most importantly the Draft National Water Framework Laws. In this way, the state, as trustees, and the judiciary, as an enforcer, have gone about governing and protecting the environment and natural resources to be enjoyed by the public as a whole and not private parties.

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