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# PUBLIC TRUST DOCTRINE

AUTHORED BY - DR. NAMRATA GUPTA

The population grew in the second half of the 20th century, which also saw an increase in the overuse and depletion of the planet's natural resources. The increase of pollution, industrialization, conflict, poverty, and other factors were the primary causes of this depletion. But we never asked ourselves if there is a limit to how far we can rely on the earth's natural resources to support our existence. The natural resources of Earth belong to whom? And for many years, we have witnessed conflict between those who use the earth's natural resources for their own personal gain and those who merely use them to meet their human needs.<sup>1</sup>

People have the right to criticise how natural resources are used, which is why a Roman legal expert coined the phrase "public trust doctrine" more than 1500 years ago. They claimed that either everyone has access to resources or nobody does. This philosophy questioned the idea of using natural resources for personal gain. Many philosophers and legal experts are disputing the rights of the general public regarding the use of the planet's natural resources because this idea is regarded as an ethical principle.

## History and Origin of Public Trust Doctrine

Public trust Doctrine was introduced by the Roman Empire 1500 years ago. Roman King Justinian mentioned a section that "the air, the water, and the sea are all common to the public and is entitled to be used by anyone due to the law of nature"<sup>2</sup>

After the end of the Roman empire in 1215, the Magna Carta codified Justinian words. So in England, the King had ownership of the land but he had the duty to take care of the public trust. In the United Kingdom, the same consisted of two rights

1. Just Privatum ,meaning ownership for private parties,
2. Just Publicum ,meaning ownership which is held by the king as a trustee for the public benefit.

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<sup>1</sup> David Takacs, 'THE PUBLIC TRUST DOCTRINE, ENVIRONMENTAL HUMAN RIGHTS, AND THE FUTURE OF PRIVATE PROPERTY' [2008].

<sup>2</sup> Mark Dowie, In Law We Trust [2005].

In 1821, the Modern revival of Public trust doctrine took place in the USA in the case of *Arnold vs Mundy*<sup>3</sup> and in the landmark case of *Illinois Central Railroad v. Illinois*<sup>4</sup> in which the court came with a principle that the state cannot hand its trust of resources to private ownership in which the interest of the public is involved.

Traditionally Public trust doctrine was only limited to protect the rights like the right to fisheries, hunting, boating, navigation for anchoring or standing. But in the present scenario, it checks the state action for management of the resources and it also questions its action. It states the state as a trustee and the state holds all the resources. It is the duty of the state to preserve, prevent and protect the resources for the public use. The state is expected to perform its positive duty.

## Scope of Public Trust Doctrine

According to Joseph Sax, Governmental Regulations always create a public trust problem and it occurs in numerous varieties of situations. Public trust needs protection as against private goals. And so he stated that this doctrine which is a delicate mixture of procedural and substantive protection is appropriate for protection from air pollution, willing of wetlands, strip mining, allocation of resources to private use etc<sup>5</sup>.

M.S. Vani said that the space for community action and ‘citizen engagement in the governance of water’,<sup>6</sup> has steadily declined from the colonial times to present day notwithstanding the introduction of the Panchayati Raj System and participatory irrigation management. She concludes in favour of the public trust doctrine that: “Without a shift from ‘eminent domain’ to ‘public trust doctrine’, from ‘bureaucracy’ to ‘democracy’, from policy-based governance to governance by law, current paradigms of water resource use and management will continue to contribute substantially to the unsustainability of the resources of the earth.”<sup>7</sup> Similar sentiments are voiced by T.N. Narasimhan, who argues in favour of water legislation imbued with the public trust doctrine as a way to ensure the

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<sup>3</sup> *Arnold v. Mundy* [1821], 6 N.J.L. 1.

<sup>4</sup> *Illinois Central Railroad vs. Illinois* [1892], 146 US 387.

<sup>5</sup> Joseph L. Sax, ‘The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention’ [1970].

<sup>6</sup> M.S. Vani, *Community Engagement in Water Governance in Water And The Laws In India*, 167, 188 (2009).

<sup>7</sup> *Id.*, 209.

‘sharing of power between state and the public at large in regard to water.’<sup>8</sup> According to Kamala Sankaran, who studied water laws from a federalist perspective, the constitutional division of legislative authority between the centre and the States without giving the States a role in the process. The Panchayati Raj Institutions, which are run by the people, have resulted in a concentration of decision-making "at the very top" as opposed to, in principle, cascading’<sup>9</sup> According to her, ‘the traditional Austinian notion of sovereignty had conceived of vesting limitless exclusive powers of legislation on the Supreme Sovereign ... one is struck by the extent to which such ideas in fact disempower people from participating in decision-making.’<sup>10</sup>

The Public Trust Doctrine (‘PTD’) is attractive to those seeking an alternative to the statist model because the PTD curtails the state’s unfettered control over natural resources and does not allow unlimited rights. At its core the Public Trust Doctrine sees the state as a trustee holding the natural resource on behalf of the public at large including future generations and puts certain limits on state powers regarding what it may or may not do with the natural resource.<sup>11</sup>

According to Joseph Sax, state actions regarding transactions around natural resources may be restricted through judicial action on three grounds:

“Three types of restrictions on governmental authority are often thought to be imposed by the public trust: first, the property subject to the trust must not only be used for a public purpose, but it must be held available for use by the general public; second, the property may not be sold, even for a fair cash equivalent; and third, the property must be maintained for particular types of uses. The last claim is expressed in two ways. Either it is urged that the resource must be held available for certain traditional uses, such as navigation, recreation, or fishery, or it is said that the uses which are made of the property must be in some sense related to the natural uses peculiar to that resource.”<sup>12</sup>

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<sup>8</sup> T.N. Narasimhan, *Water Law for India: Science and Philosophy Perspectives in Water And The Laws In India* 535, 555 (1st ed., 2009).

<sup>9</sup> Kamala Sankaran, *Water in India: Constitutional Perspectives in Water And The Laws In India*, 17, 24.

<sup>10</sup> *Id.*, 24

<sup>11</sup> David Takacs, *The Public Trust Doctrine, Environmental Human Rights and the Future of Private Property*, 717 *New York University Environmental Law Journal*(2008)

<sup>12</sup> Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 *Michigan Law Rev.* 477 (1970).



## THE PUBLIC TRUST DOCTRINE IN INDIA

The Public trust doctrine in India evolved through landmark judgements. The court stated that as we follow the Common law system our constitution includes Public trust doctrine in its jurisprudence. The court took procedural and substantive rights seriously and applied this doctrine for the protection of Environment. The court also referred to various articles of the Indian constitution such as article 48A<sup>13</sup> which made a way through Article 21 by including the right to clean environment under the right to life and Article 39[Directive Principles of State Policy] which states proper distribution of the resources.

As India does not have specific environmental rights the supreme court went further and emphasised on Public Trust Doctrine. There are many such instances like when the supreme court of India declared unauthorised mining causing damage to the environment of that area as illegal as it violated Article 21 of Indian constitution and the court stated that healthy environment is necessary for protecting and safeguarding the rights of the people<sup>14</sup>. In another case, High court of Kerala held that government cannot violate Article 21 when a government action caused harm to a freshwater source<sup>15</sup>. In the Bhopal disaster case, the court linked the right to life and clean environment. The public trust doctrine in India restricts the government and the private property rights in India. After reading judgments and various interpretations it is not clear how the court invoked public trust doctrine. It is not clear whether Public trust doctrine was a part of Indian Jurisprudence or it is included now. The court only stated that it is included in the United States through various judgements and the British law also includes this doctrine and we also follow common law as a reason India should also include it. However, what court felt was necessary to protect the rights of the citizens and make the state responsible for the protection under the public trust doctrine.

**The Public Trust doctrine didn't exist in India as a doctrine but it came through a landmark judgement which was M.C Mehta vs Kamalnath.<sup>16</sup>**

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<sup>13</sup> Indian Constitution 1950, Article 48A.

<sup>14</sup> Rural Litig. & Entitlement Kendra vs. State of Uttar Pradesh, A.I.R. 1985 S.C. 652, 656.

<sup>15</sup> Attakoya Thangal vs Union of India, A.I.R. 1990 K.L.T. 580.

<sup>16</sup> M.C Mehta vs Kamalnath [1997], 1 S.C.C. 388.

The doctrine was first invoked in 1995 by the Supreme Court in the famous *M.C. Mehta v. Kamal Nath* ('Span Motels case').<sup>18</sup> In this public interest litigation, the petitioner challenged a tourist resort namely Span Motels which proposed to change the course of the river Beas by dredging, blasting and reconstructing the riverbed.<sup>19</sup> The construction of the resort was planned on protected forest land procured on a ninety-nine year lease from the government. The redirection of the course of the river had been approved by the Ministry of Environment and Forests as well as the local Gram Panchayat. The Supreme Court ruled that the lease of forest land for resort construction as well as the diversion of the river violated the PTD and therefore were not tenable.<sup>20</sup> Importantly, the court declared that the PTD, being part of the Common Law system, was 'law of the land'.<sup>21</sup><sup>17</sup>

The public trust doctrine first alluded in India through this landmark case. This case is also known as SPAN Motel case. In this case, a PIL challenged the minister of environment Mr Kamalnath [respondent] who allowed SPAN Motel company to construct a hotel near the mouth of river Beas in Himachal Pradesh and also allowed the company to change the course of the river for the construction by blasting the river bed. The supreme court held that "the public trust is more like an order for the state to use the public property for public purposes". It is the duty of the state to protect the environment, lakes and public heritage and it can be only abdicated in a rare case when it is inconsistent with the public trust. The court observed that earth's natural resources are the gift of nature; it should be protected and it also stated that the values and law must adhere to the environment. The court observed that the Public at large is beneficiary of the earth resources like water, air and wetlands and as the state is the trustee it is the obligation of the state to protect these resources and shall not give it to private ownership for the fulfilment of its own goal.

The court cited United States law review, experts on environmental law to protect the environmental rights. For example, the court cited a lengthy passage from Harvard environmental law review and the court also stated Justinian saying on Public trust doctrine and also quoted Joseph sax to justify its notion. The court asked the company to pay compensation for the restoration of the environment of that area under the polluter pay principle.

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<sup>17</sup> 18 *M.C. Mehta v. Kamal Nath*, (1997) 1 SCC 388.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

## **M.I. Builders Pvt. Ltd. v. Radhey Shyam Sahu**

In the case of M.I. Builders Pvt. Ltd. v. Radhey Shyam Sahu<sup>18</sup> the court covered Public trust doctrine under the right to life and stopped the construction of the shopping complex in the place of a public garden stating the garden as a public resource. The court observed that the park is a public place with historical importance. The court cited Public trust doctrine and M.C. Mehta case as a precedent. The court stated that allowing the construction will deprive the public of the quality of life as stated under Article 21 of the constitution. The court put the government under the obligation to maintain the public park for the citizen's as the government has obligatory duties under Public trust doctrine which is applicable in India.

The court stated that public trust doctrine is derived and evolved under Article 21 of the Indian constitution and it is evoked in India to protect the fundamental right of the people.

## **Shailesh R. Shah v. State of Gujarat**

In the earlier judgment, the court portrayed the state in a negative figure. But in Shailesh R. Shah v. State of Gujarat<sup>19</sup> the Gujarat high court portrayed the obligation of the state in a positive nature. The court stated that the state holds all the resources like the lake, pond, natural gases, wetland and as the state is held as the trustee it is the duty of the state to maintain and protect them for public use. According to the court, this is a positive duty of the state to prevent the resources and the environment from degradation and safeguard them from extinction. It is a positive duty of the state to preserve the resources.

## **Conclusion**

The word 'Environment' has too many meanings and it is a difficult job to define it. Even the environmentalists who work in this direction are not able to define it. For many centuries we have changed the environment according to us and it is proved that it is malleable. But there is a limit and we have seen the changes in environment like pollution, change in vegetation and food chain, climate change, vanishing wetlands. We, humans, have destroyed the environment.

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<sup>18</sup> M.I. Builders Pvt. Ltd. v. Radhey Shyam Sahu [1999], S.C.C. 464.

<sup>19</sup> Shailesh R. Shah v. State of Gujarat, 2002 SCC OnLine Guj 164 : (2002) 43 (3) GLR 2295.

Not surprisingly the Apex Court of India took a dynamic step to invoke the Public trust Doctrine. It was a necessary legal approach towards protecting the resources and environment. This doctrine shows consistency with the current environmental problems. Public trust doctrine enforces a legal right for the general public and a positive obligation for the state to perform its duty. Our constitution reflects the concern for the environment and it also guarantees us the right to a clean environment. The Public trust doctrine is a great way to ensure the protection of the environment as it checks the management of state and ensures good management of natural resources. It is a tool to address the increasing degradation of the environment. Public trust doctrine is an effective legal framework to solve the environmental conflicts for which India does not have proper laws and legislations. By invoking Public trust doctrine, we can promote for the protection of earth and its resources.

Subsequently, in *M.I. Builders (P) Ltd. v. Radhey Shyam Sahu*, ('M.I. Builders')<sup>22</sup> the Supreme Court ruled that the builder who had destroyed a public park during construction of a shopping complex should restore it as the park was protected under the PTD derived from the right to life under Article 21 of the Constitution. Later in the *Fomento Resorts & Hotels Ltd. .Minguel Martins* ('Fomento Resorts Case')<sup>23</sup> the Supreme Court reiterated that natural resources are common properties held by the state as a trustee on behalf of the people, especially the future generations. Therefore, the state cannot transfer public trust properties to a private party, if such a transfer interferes with the access rights of the public. The public trust doctrine allows the judiciary to protect the rights of public at large to have access to light, air and water and also to protect rivers, seas, tanks, trees, forests and associated natural eco-systems.<sup>20</sup>

In *Reliance Natural Resources Ltd. v. Reliance Industries Ltd.* ('Reliance Industries Limited'),<sup>25</sup> the Supreme Court interpreted Article 297 of the Indian Constitution,<sup>26</sup> to find that the people of India

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<sup>20</sup> 22 *M.I. Builders (P) Ltd. v. Radhey Shyam Sahu*, (1999) 6 SCC 464.

<sup>23</sup> *Fomento Resorts & Hotels Ltd. v. Minguel Martins*, (2009) 3 SCC 571.

<sup>24</sup> *Id.*,<sup>32</sup>.

<sup>25</sup> *Reliance Natural Resources Ltd. v. Reliance Industries Ltd.*, (2010) 7 SCC 1. <sup>26</sup> The Constitution of India, Art. 297 ('Things of value within territorial waters or continental shelf and resources of the exclusive economic zone to vest in the Union'. In the given case Art. 297 (1) was interpreted which states that. "(1) All lands, minerals and other things of value underlying the ocean within the territorial waters, or the continental shelf, or the exclusive economic zone, of India shall vest in the Union and be held for the purposes of the Union." Here 'vest in the Union' was interpreted to mean that the Central Government held the natural resources as a trustee on behalf of the people at large and the right and responsibilities of such trusteeship could not be abdicated in favour of private corporate interests)

as a nation are the true owners of the natural gas. The Court also relied on Article 39 included in Part IV of the Constitution which calls for an equitable distribution of India's material resources to best serve the common good which includes fairness to future generations. While earlier interpretations of the doctrine saw the obligations imposed on the state as being negative in nature – a review of actions that the state may not perform- recent judgments have started to see such obligations as positive in nature. For instance, the Gujarat High Court has recently ruled that: “The State as the trustee of all natural resources meant for public use, including lakes and ponds, in under a legal duty to protect them. This duty is of a positive nature requiring the State ...not only to protect the peoples’ common heritage of lakes, ponds, reservoirs and streams but to prevent them from becoming extinct and to rejuvenate and preserve them quantitatively... and qualitatively...”<sup>27</sup><sup>21</sup>

The very nature of a trust is that it imposes positive obligations on the trustee such that they are bound to use the property rights for the benefit of the cestui que trust. <sup>28</sup> The higher judiciary has extrapolated this understanding to the PTD, such that not only should the state abstain from certain actions, but the state is also expected to perform positive duties while using water resources to ensure the benefit of the public at large. Although, the higher courts have invoked the PTD to restrict government actions with an eye towards the common good - protection of the environment, a fair distribution of and equitable access to natural resources and concerns for intergenerational equity – in the absence of legislation, the interpretation and enforcement of the doctrine remains doubtful.

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<sup>21</sup> 27 Shailesh R. Shah v. State of Gujarat, 2002 SCC OnLine Guj 164 : (2002) 43 (3) GLR 2295.

<sup>28</sup> B.M.Gandhi, Equity, Trusts And Specific Relief<sup>13</sup>, 208-209 (2001).

<sup>29</sup> Ramaswamy R. Iyer, Why a National Water Framework Law, The Hindu (Chennai) January 7, 2013.

<sup>30</sup> Id. <sup>31</sup> Planning Commission, The Draft National Water Framework Act, available at [http://www.planningcommission.nic.in/aboutus/committee/wrkgrp12/wr/wg\\_wtr\\_frame.pdf](http://www.planningcommission.nic.in/aboutus/committee/wrkgrp12/wr/wg_wtr_frame.pdf) (Last visited on August 15, 2015).

<sup>32</sup> Ministry of Water Resources, Government of India, Report of the Committee for the Drafting of National Water Framework Law, 2013, available at <http://www.indiaenvironmentportal.org.in/files/file/national%20water%20framework%20law.pdf> (Last visited on August 15, 2015).

<sup>33</sup> The Constitution of India, Schedule VII, List II, Entry 17. <sup>34</sup> The Constitution of India, Schedule VII, List I, Entry 5. <sup>35</sup> The Constitution of India, Art. 252(1) ('Power of Parliament to legislate for two or more States by consent and adoption of such legislation by any other State' states that '(1) If it appears to the Legislatures of two or more States to be desirable that any of the matters with respect to which Parliament has no power to make laws or the States except as provided in Articles 249 and 250 should be regulated in such States by Parliament by law, and if resolutions to that effect are passed by all the House of the Legislatures of those States, it shall be lawful for Parliament to pass an Act for regulating that matter accordingly, and any Act so passed shall apply to such States and to any other State by which it is adopted afterwards by resolution passed in that behalf by the House or, where there are two Houses by each of the Houses of the Legislature of that State). <sup>36</sup> The Alagh Bill, 2016, §1(2); The Iyer Bill, 2013, Part 2.

## **THE PTD AND NATIONAL WATER FRAMEWORK LAW**

The PTD is poised to make an entry into water legislation through the National Water Framework Law. Such a law is being mooted to overcome some of the seemingly intractable problems plaguing water governance in the country today.<sup>29</sup> The idea of such a law was powerfully asserted by Ramaswamy Iyer who also headed a sub-group set up by the Planning Commission for the formulation of such a law.<sup>30</sup> The sub-group submitted a 'Draft National Water Framework Law' in 2011<sup>31</sup> ('Iyer Bill'). However, this draft was not accepted by the Ministry of Water Resources which set up a second committee for the same purpose under the chairmanship of Dr. Y.K. Alagh. This second committee too submitted its report including a 'Draft National Water Framework Bill, 2013' in May 2013<sup>32</sup> ('Alagh Bill'). However, since then the matter is pending without either of the drafts having been inducted into the statute books. One of the fundamental challenges faced in framing a national water law is the fact that water is a State subject under the Constitution,<sup>33</sup> although the Centre may legislate for the development and regulation of interstate rivers and river valleys.<sup>34</sup> Both the Alagh and Iyer Bills have worked around this problem to propose that a national framework water law can be passed under Article 252 of the Constitution, i.e., it shall apply to States which adopt it through a resolution passed in that behalf under Clause (1) of Article 252.<sup>35</sup> In identically worded provisions, both the Bills state that the Act will apply 'in the first instance to the whole of the States [whose legislative assemblies pass the resolution adopting the Act] and the Union territories; and it shall apply to such other States as they adopt the Act by resolution passed in that behalf under clause (1) of Article 252 of the Constitution'.<sup>36</sup> Both the drafts have mentioned the PTD, and yet they have very different emphases with potentially divergent outcomes with regard to democratisation. I would be comparing the two drafts with a specific focus on the provisions that have implications for restricting the state-centred model and allowing space for wider community access, peoples' participation, and local management of water resources.

**THE QUESTION OF OWNERSHIP** One of the core questions with a direct bearing on democratisation pertains to ownership claims over water resources. According to David Takacs the state or a private party cannot claim full ownership rights over natural resources because certain rights inherently accrue to the public at large: "The Public Trust Doctrine stands for the procedural and substantive rights that the citizens may have in the name of certain environmental resources that are widely understood to belong to them inherently, and to the corresponding duties that sovereigns have

in protecting and advancing those rights.”<sup>22</sup>

The property rights of a trustee are distinct from that of the owner. Ownership is a bundle of rights which includes the rights of access, withdrawal, management, exclusion and alienation. First, the PTD does not allow alienation of the property even for fair price and second the rights of management are restricted such that the state as a trustee cannot take any action which will jeopardise the rights of the public. Both the Iyer and the Alagh Bills invoke the PTD to indicate that the state is not the owner of the resource, and it is saddled with positive and negative obligations as the management decisions that it might take. Particularly the Iyer Bill clearly asserts that water is a “common property resource” and therefore neither the state nor private parties can exert ownership claims thereon.<sup>39</sup> The Alagh Bill and the Iyer Bill define PTD in identical terms as “the doctrine that the state holds natural resources in trust for the community.”<sup>40</sup>

The Iyer Bill goes further to specifically deny state ownership by introducing the concept of common pool resource using a non-obstante clause: “Notwithstanding anything contained in any other law, water in its natural form, such as river, stream, spring, natural surface-water body, aquifer and wetland, is neither state property nor private property but is a common pool resource of the community to be managed by the community or by the state for the community.”<sup>41</sup>

The state has created its claims of ownership over water through a plethora of legislations, such as the Irrigation Acts and Revenue Codes. For instance, §20(1) of the Maharashtra Land Revenue Code, 1966 declares that all ditches, dykes, the bed of the sea and of harbours and creeks, rivers, streams, nallas, lakes and tanks and all canals and watercourses, as well as all standing and flowing water, which are not the property of persons legally capable of holding property, are the property of the State government.<sup>42</sup> Similarly, Section 26 of the Madhya Pradesh Irrigation Act, 1931, disallows the use of water resources without the explicit permission of the state authorities based on the state’s claims of control over water resources. The ‘notwithstanding’ or nonobstante clause dismantles all such ownership claims by giving the national framework law the power to override all such provisions.

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<sup>22</sup> David Takacs, The Public Trust Doctrine, Environmental Human Rights and the Future of Private Property, 717 New York University Environmental Law Journal (2008)

<sup>39</sup> The Iyer Bill, 2013, Part 2 (“Common property resource” means a resource owned in common by a village or group or community, as distinguished from private ownership or ownership by the state). <sup>40</sup> The Alagh Bill, 2016, §2(xxiv); The Iyer Bill, 2013, Part 2  
The Iyer Bill, 2013, Part 5