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# RES EXTRA COMMERCIIUM, PUBLIC TRUST, AND THE RECLASSIFICATION OF THE VRISHABHAVATHI RIVER BASIN

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## ABSTRACT

The classification of natural resources under law has serious implications for constitutional governance, public or collective ownership, and property rights. The *Vrishabhavathi River* Basin, a historically significant river system in Bengaluru that has been the subject of significant environmental litigation, regulatory intervention, and restoration before the National Green Tribunal and Karnataka High Court, has received considerable attention surrounding issues relating to pollution, ecological degradation, and rejuvenation efforts. However, in light of this focus, the property law implications of the administrative reclassification of the river, to "*Kengeri Mori*", appear to have been under-explored. I argue that this controversy raises an important jurisprudential question: does the State have the power to change the legal identity of a natural resource through administrative reclassification?

Using the principles of the Public Trust Doctrine, the concept of "*res extra commercium*"<sup>1</sup> the Constitution of India Article 21<sup>2</sup>, 48A<sup>3</sup>, 51A(g)<sup>4</sup>, and 300A<sup>5</sup>, and other judicial and regulatory documents related to the *Vrishabhavathi River*, this paper investigates the differentiation between the administrative classification and the juridical status of public resources in relation to law. To determine whether a resource continues to have its legal character, regardless of how it may be reclassified administratively, the paper develops a Juridical Identity Theory as the basis for this inquiry. The Theory means to define "Statutory Deception," for those situations in which formal legal, administrative classifications do not reflect underlying, substantive legal realities related to natural resources. It argues that for a natural river, it cannot lose its protected legal status solely because it has been reclassified administratively, given that it has maintained its ecological function, hydrological continuity, and public significance. The paper situates the

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<sup>1</sup>*Res extra commercium*

<sup>2</sup>*Constitution of India Article 21*

<sup>3</sup>*Constitution of India Article 48A*

<sup>4</sup>*Constitution of India Article 51A(g)*

<sup>5</sup>*Constitution of India Article 300A*

Vrishabhavathi controversy in the larger, conceptual debates regarding property, public trust, and the power of the State, contributing to current property law jurisprudence, by defining the constitutional boundaries of governmental authority to redefine common natural resources.

## INTRODUCTION

The Vrishabhavathi River Basin is one of the most historically significant river systems that constitute part of the hydrology of the Bengaluru area. It flows westward into the Arkavathi River, and it has historically been an important source of groundwater for agricultural purposes as well as providing a means of connecting many of the city's various bodies of water.

Over the past several decades, the Vrishabhavathi River has been drastically altered through urbanization, as well as the growth of industry and poor practices for managing waste. As a result, urbanization has caused long stretches of the river to be transformed into disparaged urban watercourses, as the continuous dumping of raw sewage, industrial discharge, encroachment and other forms of physical development have caused significant changes to the river and its ecosystems.

Due to the rapid degradation of the riverbed and adjacent land, the Vrishabhavathi River has received significant attention from environmental monitoring agencies; civil society groups; and judicial courts. Establishing the basis for pollution abatement and ecological restoration has been the Subject of Cases filed before the National Green Tribunal, as well as through the Karnataka High Court's involvement with numerous river restoration projects which have all emphasized issues related to pollution, degradation and environmental governance to the Vrishabhavathi River. Despite these efforts, the river continues to face a significant number of environmental challenges, which raises broader questions regarding how to protect and manage the river in the future.

This action makes the reclassifications of portions of the river being called “Kengeri Mori” an important, but under-researched area. The existing discussions around ecological restoration have largely neglected the legal ramifications or property issues related to the reclassification. This raises the question of whether or not the new administrative designation changes the fact that this natural body of water has always been considered a public resource under property law. This question is the focus of the present study.

## **HISTORICAL DEVELOPMENT OF RES EXTRA COMMERCIIUM**

The res extra commercium doctrine came from Roman law and was one of the first doctrines to cover things that could not be privately owned, gifted, or used in the same way as other trades (or transactions) of a normal trade. Roman law said certain things were considered common property of all men and mankind, i.e. air, flowing water, the seas. These items were considered of great importance to mankind. The reason for this was because these items are used and enjoyed in common. Therefore, they cannot be owned or appropriated by a single person.

The res extra commercium doctrine demonstrates that the public character of these items overlaps and intersect with one another and, as such, are not eligible for unrestricted trade or appropriation. An example is the use of rivers, which is viewed as necessary for navigation, transportation and to provide drinking water and food to humans. Because rivers are viewed as of great importance to the public good, they cannot be traded freely.

While the term res extra commercium is not used in modern law systems, the principle of res extra commercium continues to be a part of today's legal systems. In India, we can see the principle of res extra commercium in the Constitution of India, environmental legislation and in court cases where the courts have stated that rivers, lakes, forests and wetlands of the earth are resources that require special protection. The res extra commercium doctrine serves as the foundation for determining if natural resources (especially rivers) are able to lose their protected legal status from their original classification or for commercial purposes through an administrative reclassification.

## **PUBLIC TRUST DOCTRINE AND CONSTITUTIONAL FRAMEWORK**

The Public Trust Doctrine establishes the guidelines for how to manage and control natural resources. Initially created in Roman law, but evolving into common law as well, this principle establishes that specific resources are so vital for all citizens that they cannot be controlled by individual citizens or given away by the government without restriction. Therefore, the state has the responsibility to manage these natural resources on behalf of all current and future citizens as "trustees," not as "absolute owners."

The concept of the public trust has been firmly established in India (through cases such as *M.C.*

*Mehta vs. Kamal Nath*<sup>6</sup>; *Intellectuals Forum vs. State of Andhra Pradesh*<sup>7</sup>; and *Hinch Lal Tiwari vs. Kamala Devi*<sup>8</sup>) as part of environmental law and property law through judicial decisions. Each of these cases has held that rivers, lakes, forests, and other types of commonly owned property are held in trust for the benefit of the public by the state, and therefore should be protected against any actions which would detract from their public character.

The Public Trust Doctrine is also supported by Articles 21 (right to life), 48A (protection of environment), and 51A (g) (duty to protect planet) which are contained within the Constitution of India. These articles work together to ensure that both natural and man-made resources are protected from harm and that natural and man-made resources are managed in a sustainable manner. Any administrative agency who acts in connection with a natural resource must do so in accordance with their fiduciary duty to the public trust. Thus, the doctrine is an important framework to determine if the administrative re-classification of the Vrishabhavathi River Basin can be done legally in regards to affecting the Basin's public benefit as a resource.

## **STATUTORY FRAMEWORK GOVERNING RIVERS AND JUDICIAL DECISIONS ON VRISHABHAVATHI RIVER LAND ENCROCHMENT**

Rivers are legally protected by the convergence of constitutional duties, specific environment legislation, and courts' legal doctrines. For example, the Water (Prevention & Control of Pollution) Act, passed in 1974, and the Environment (Protection) Act, passed in 1986, put obligations on public entities to stop pollution and conserve water bodies. Additionally, constitutional Articles 21 (Right to Life), 48A (Protection and Improvement of Environment), and 51A(g) (Duty of Citizens to Protect & Improve Environment) provide further statutory backing to protect the environment.

Judicial action has been brought against the deteriorating condition of the Vrishabhavathi River repeatedly. In *National Green Tribunal Southern Zone v. Union of India (2021)*, the National Green Tribunal noted that the river was continuing to be polluted and ordered that government authorities take effective restoration and pollution control measures<sup>9</sup>. The same and further

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<sup>6</sup> *M.C. Mehta vs. Kamal Nath*

<sup>7</sup> *Intellectuals Forum vs. State of Andhra Pradesh*

<sup>8</sup> *Hinch Lal Tiwari vs. Kamala Devi*

<sup>9</sup> *National Green Tribunal (Southern Zone) v. Union of India, Original Application No. 06 of 2020 (SZ), Judgment dated 14 July 2021; National Green Tribunal v. Union of India, 2022 proceedings concerning restoration of the Vrishabhavathi River Basin.*

concerns were raised in other matters before the Tribunal, which stressed that govt. agencies are obligated also to restore and protect the river's ecosystem.

The Karnataka High Court has taken note of matters that impact the river basin as well. In the case of *Bangalore Environmental Trust vs. State of Karnataka*, the High Court considered a proposed diversion project influencing the river and underscored the importance of conducting scientific evaluations and implementing environmental protection measures before proceeding with any activity that could change the ecological character of the river<sup>10</sup>.

More recently, in monitoring the restoration efforts, the High Court expressed frustration with the very slow progress made by civic authorities restoring the river and charged the BBMP for its role in river restoration<sup>11</sup>

These types of interventions show that the legal protection of the Vrishabhavathi River goes far beyond simply addressing pollution and also includes safeguarding the ecological integrity, public character, and the status of the river as a resource held in personal trust on behalf of the entire community.

### **STATUTORY DECEPTION AND JURIDICAL IDENTITY THEORY**

There is a major question behind the designation of the land for the Kengeri Mori, which raises serious problems regarding the relationship of legal classification to legal reality. While the administrative authority has the authority to classify, regulate and manage the earth's resources, these authorities cannot have the authority to change the true legal nature of something; they cannot change the legal classification of something through the use of words. That's where Statutory Deception and Juridical Identity Theory become important.

In Statutory Deception, the State does not commit fraud and will not falsely represent or misrepresent things. Statutory Deception occurs when such legally valid classifications create a legal foundation for a resource that does not conform to that resource's substantive and legal characteristics or its substantive nature. In reality, it is not the terminology itself that is harmful; it is the legal implications associated with the terminology. For example, if an administrator

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<sup>10</sup> *Bangalore Environment Trust & Ors. v. State of Karnataka & Ors., High Court of Karnataka, Public Interest Litigation concerning the Vrishabhavathi River diversion project*

<sup>11</sup> *Karnataka High Court, Restoration of Vrishabhavathi River: Karnataka High Court imposes Rs. 5,000 cost on BBMP (2025).*

designates the natural river as a drainage ditch, drainage pipe, or drainage channel; that designation will eventually affect regulatory practices, regulatory obligations, the public's understanding of the resources, and ultimately the future land use designation of that river. This process will create confusion as to whether the resource continues to provide ecological and hydrological functions of a river despite the fact the terminology has been changed.

Take for example the Vrishabhavathi River. The level of pollution that has affected the river has changed the river itself dramatically, but just because it has deteriorated does not mean the river has lost its legal identity. A river still exists as a river, no matter how polluted it is. If the mere existence of environmental degradation could change the legal status of a resource, the States would be able to circumvent their constitutional and statutory responsibilities related to protected resources, by allowing the gradual degradation of those resources and then classifying an entire resource based upon its existing state of deterioration. Such action would contravene the principles of the Public Trust Doctrine and the general constitutional commitment to protecting the environment.

The purpose of this paper is to develop a theory of Juridical Identity that distinguishes the legal identity of a resource from the administrative classification that may be applied to it. Juridical identity refers to the legal identity of a natural object determined by the object's basic ecological attributes, rather than the terminology used by governments to describe those objects. As long as a river will have the elements of ecological continuity, hydrological existence, and public importance, the river will continue to exist legally. Although an administrative classification would change the ways in which the resource would be regulated, an administrative classification alone cannot change the legal identity of the resource or the underlying legal entity.

By applying this theory to the Vrisha Bhavani River Basin, we demonstrate that calling the river Kengeri Mori does not eliminate the river's continued existence as a natural river system. The river still flows in the Arkavathi river valley and is capable of functioning as a drain and providing hydrological services. In addition, the river remains protectively subject to the legal system (via judicial intervention), subject to environmental restoration projects, and part of the public trust obligations of the State to its people. Thus, despite the destructive effects of environmental degradation and reclassification of the river by administration agencies, the legal identity of the river still exists.

The theory accords with Indian environmental law. For example, in *M.C. Mehta v. Kamal Nath* ((1997) 1 SCC 388)<sup>12</sup>, the Supreme Court of India upheld the principle that the State holds natural resources in trust for the benefit of the public. The precedent of protecting common property against the alternative uses of administrative and commercial interests is clearly established in *Intellectuals Forum v. State of Andhra Pradesh* ((2006) 3 SCC 549)<sup>13</sup>, *Hinch Lal Tiwari v. Kamala Devi* ((2001) 5 SCC 971)<sup>14</sup>, and *Jagpal Singh v. State of Punjab* ((2011) 11 SCC 396)<sup>15</sup>. Therefore, the case law indicates that the nature of classification of a particular resource does not determine whether that resource is legally protected; rather, the nature of whether that resource is public will determine whether it is legally protected.

Thus, the reclassification of the Vrishabhavathi River Basin is not only an administrative function but also raises larger issues regarding whether or not there exists state authority to redefine natural resources or if the legal protections associated with those resources could be weakened by reclassifying them. To differentiate between administrative terminology and legal reality, Statutory Fraud and Juridical Identity Theory can be utilized to support maintaining constitutional and public trust protections to resources that continue to have their intended purpose as public commons institutions.

## FINDINGS AND RECOMMENDATIONS

### Findings:

Rivers have an inherent legal character, distinct from all other types of property, and thus cannot be treated like all other types of property. The concept of *res extra commercium* is important in providing a theoretical framework to protect those resources that serve the public and ecological interest. The public trust doctrine creates a fiduciary obligation on behalf of the state to protect and maintain those resources for the use of present and future generations. It has also been determined that classifying rivers via administrative classification creates issues of commodifying public resources because it can obfuscate their true character under law and under ecological principles. Therefore, when determining the legal status of a natural river, the ecological realities of that river should take precedence over any legal classifications.

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<sup>12</sup> *M.C. Mehta v. Kamal Nath* ((1997) 1 SCC 388)

<sup>13</sup> *Intellectuals Forum v. State of Andhra Pradesh* ((2006) 3 SCC 549)

<sup>14</sup> *Hinch Lal Tiwari v. Kamala Devi* ((2001) 5 SCC 971)

<sup>15</sup> *Jagpal Singh v. State of Punjab* ((2011) 11 SCC 396)

### Recommendations:

This study recommends that rivers be recognized by statute as public trust assets to provide continued legal protections. All proposals to reclassify a river should require an environmental assessment before the reclassification occurs and should be subject to judicial review. The public should also have greater participation in the governance of rivers, and there should be an increase in enforcement measures against encroachments. There should also be protections in the form of legislation to maintain the ecological integrity and public character of river corridor.

## CONCLUSION

The intention behind this research is to investigate the impact of the Vrishabhavathi River Basin's reclassification under the doctrines of *res extra commercium* and the Public Trust Doctrine. The research has shown that there exists a separate legal classification of Rivers in Property Law, establishing that Rivers cannot simply be classified in the same manner as other forms of Property.

Despite the severe pollution and significant drainage problems caused to the River Vrishabhavathi, it continues to maintain its hydrologic, ecologic and public functions thereby maintaining its legal classification as a natural River. The study has demonstrated that when natural resources are administratively reclassified, they can be misrepresented thereby assisting with the commodification of those Publicly Held Resources. The analysis and findings of the project were completed using the concepts of Statutory Deception and Juridical Identity Theory to assist with demonstrating that administrative terminology does not alter a natural resource's juridical classification, as protected by principles in the Constitution and under Public Trust obligations.

Ultimately the study concluded that ecological facts are paramount to administrative nomenclature and whether or not the State is authorized to regulate Natural Resources is not dependent upon the State being able to extinguish the protected legal classification of a natural resource through reclassification.

Since it was found that it is imperative to have legal protections for rivers to ensure that they are maintained as Public Common Lands for both current and future generations.

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