International Environmental
Law Research Centre

GROUNDWATER

LEGAL ASPECTS OF THE PLACHIMADA DISPUTE

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Published in: P. Cullet et al. eds., *Water Governance in Motion: Towards Socially and Environmentally Sustainable Water Laws* (New Delhi: Cambridge University Press, 2010) p. 159-98.

7

Ground Water – Legal Aspects of the Plachimada Dispute

SUJITH KOONAN

1. Introduction

Plachimada is a small village in the Palakkad district of the state of Kerala. 'Plachimada' has become synonymous with debate on legal regime of control and use of ground water after the Hindustan Coca-Cola Beverages Private Limited (hereafter the Company) started a plant in Plachimada. The plant was commissioned in March 2000 to produce its popular brands such as Coca-Cola, Fanta, Sprite, Limca, Kinley Soda, Maaza and Thumps Up.[1]

The local people in Plachimada started their protest against the Company within two years after the Company started production.[2] The local people complained that the quality and quantity of ground water in the area has deteriorated due to over-exploitation of ground water by the Company.[3] While the public protest against the company was growing, the Perumatty Grama Panchayat (hereafter the Panchayat) refused to renew the license of the Company in 2003.[4]

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[1] C.R. Bijoy, 'Kerala's Plachimada Struggle: A Narrative on Water and Governance Right', 41/41 *Economic and Political Weekly* 4332, 4333 (2006).

[2] *See* the special volume of *Keraleeyam* on Plachimada issue, Vol. 90, January 2005. *See also* Bijoy, note 1 above at 4334.

[3] Ibid.

[4] Ibid., at 4335.

The refusal to renew the licence of the Company by the Panchayat was the beginning of the legal battle.[5] The issue reached the Department of Local Self Government, Government of Kerala for 'appropriate orders' as per the direction of the Kerala High Court.[6] However, the legal battle did not end at the level of the Department of Local Self Government. The issue of ground water depletion and the refusal of the Panchayat to renew the license of the Company came before the Single Judge and subsequently before the Division Bench of the Kerala High Court as appeal. The matter is now pending before the Supreme Court of India.

The major legal issues discussed by the Kerala High Court in the Plachimada case was the right of a landowner to extract ground water from his land and the power of the Panchayat (or Local Bodies in general) to regulate the use of ground water by private individuals.[7] Apart from this, the legal framework regulating the quality of ground water (pollution control laws) also forms part of the legal regime. Even though the issue of pollution and its impacts on public health and local economy were raised in the protest against the Company, pollution control laws have not been a major focus in the Plachimada case.

In this background, the first part of the paper briefly describes the factual background leading to the Plachimada case. The second part analyses the legal and institutional framework addressing the issue of ground water depletion and pollution. The third part discusses the Plachimada case as decided by the Kerala High Court. The Kerala government enacted the Kerala Ground Water (Control and Regulation) Act in 2002. The Act was notified in 2003. By this time the matter had already come before the Kerala High Court and therefore, this Act has not been applied in this case. Since the Act is the major statutory framework to address situations like Plachimada in future, an analysis of the Act is included in the

[5] The Company challenged the cancellation of license in the Kerala High Court. *See Hindustan Coca Cola Beverages Private Limited v Perumatty Grama Panchayat and Anr*. The Kerala High Court, Original Petition No. 13513 of 2003, Judgement of 16 May 2003.

[6] Ibid.

[7] The word 'Plachimada case' is used in this paper to indicate cases decided by the single judge and division bench of the Kerala High Court. These decisions are discussed in detail in the later part of this paper.

fourth part. The fourth part also describes the major contentions raised in the pending appeal in the Supreme Court of India.

2. The Factual Background

Palakkad district in the state of Kerala, where the Coca Cola plant is situated, is an important agricultural region and is popularly known as the 'rice bowl of Kerala'.[8] Majority of the people in this district depend upon agriculture for their livelihood.[9] Plachimada depends on ground water and canal irrigation for agricultural and domestic purposes.[10] Plachimada is also home to several scheduled castes and scheduled tribes.[11] The villagers are predominantly landless and agricultural labourers.[12] The site of the plant is surrounded by a number of water reservoirs and canals built for irrigation.[13] Palakkad district is in the rain shadow area of the Western Ghats and is thus a drought-prone area.[14]

The local people started their agitation against the Company within a year after the Company set up its plant in Plachimada.[15] The major demand of the protest was the immediate closure of the Company.[16] Later, several non-governmental and political

[8] Jananeethi, Report on the Amplitude of Environmental and Human Rights Ramifications by the HCCBPL at Plachimada 1 (Thrissur: Jananeethi, July 2002).

[9] Ibid.

[10] *See* Bijoy, note 1 above at 4333.

[11] The area, which is said to have affected due to the working of the Company, consists of thirty to forty per cent tribals and ten per cent dalits. *See* C.R. Bijoy, 'Kerala's Plachimada Struggle: A Narrative on Water and Governance Right', 41/41 *Economic and Political Weekly* 4333 (2006).

[12] *See* Jananeethi, note 8 above at 1.

[13] The site is located barely three kilometers to the north of the Meenakkara Dam reservoir and a few hundred meters west of the Kambalathara and Venkalakkayam water storage reservoirs. The Moolathara main canal of the Moolathara barrage passes less than ten metres north of the factory compound and the main Chittoor River runs very close to the Coca Cola plant. *See* Jananeethi, note 8 above at 1.

[14] R.N. Athavale, Water Management at the Coca Cola Plant at Moolathara Village, Palakkad District, Kerala State, India (on file with the author, 2002).

[15] *See* Keraleeyam, note 2 above.

[16] *See* Bijoy, note 1 above at 4334.

organisations joined the agitation. Several study reports have been published explaining the causes and effects of the deterioration of ground water quality and quantity in Plachimada. They give different explanations regarding the causes and effects of ground water problems in Plachimada.

Keraleeyam, a Malayalam journal which actively supports public protests against the Company, reported that the people started facing adversities within six months after the Company started its production.[17] A study conducted by Jananeethi, an NGO based in Kerala, reported that salinity and hardness of water had risen after the Company started its manufacturing process.[18] A study conducted by Dr Sathish Chandran revealed that water from some open wells and shallow bore wells in the nearby area has an extremely unpleasant, strong, bitter taste.[19] The people who used this water complained of a variety of illnesses such as burning sensation in the skin, greasy, sticky hair; stomach disorders and skin deformities.[20] It was also reported that a few wells in the nearby area had become dry after the Company started ground water extraction.[21] The insufficiency of water had also resulted in the decline of agricultural production. Consequently, local economy and life in the area was alleged to have been ruined.[22]

R.N. Athavale, Emeritus Scientist in National Geophysical Research Institute, Hyderabad, conducted a study on the issue of water problems in August 2002 at the request of the Company. The Athavale Report concluded that there was no 'field evidence available to indicate over-exploitation of ground water from the premises of the Coca-Cola Plant'.[23] The report observed that the

[17] *See* Keraleeyam, note 2 above. *See also* Yuvajanavedi, Report on the Environmental and Social Problems Raised due to Coca-Cola and Pepsi in Palakkad District (Thiruvananthapuram: Yuvajanavedi, November 2002).

[18] *See* Jananeethi, note 8 above.

[19] Sathish Chandran, Adverse Environmental Impact of the Hindustan Coca-Cola Beverages Pvt. Ltd. Located in the Plachimada Area in the Perumatty Panchayat in the Chittur Taluk of the Palakkad District (report on file with the author, 2002).

[20] Ibid.

[21] *See* Athavale, note 14 above.

[22] *See* Yuvajanavedi, note 17 above.

[23] *See* Athavale, note 14 above.

depletion of ground water in Plachimada could be due to the deficit in rainfall and consequent insufficiency in the recharge or replenishment of ground water. The report further concluded that 'water quality deterioration of any well in the neighbourhood cannot be considered as due to the pumping activity in the plant area'.[24]

The problem of pollution due to solid wastes in Plachimada came to popular attention through a British Broadcasting Corporation (BBC) report. On 25 July 2003, the BBC reported the presence of heavy metals – lead and cadmium – in quantities higher than the approved limit in the sludge supplied by the Company as fertiliser.[25] The BBC report has also alleged that the Company had clandestinely dumped the sludge in the nearby river-bed. The BBC study shows that the sludge supplied by the Company is dangerous to health and it had no value as manure. The heavy dumping of the sludge in agricultural fields has also been reported by Jananeethi in 2002.[26]

The Kerala Pollution Control Board (KPCB) examined the sludge samples from the factory premises and found cadmium in higher concentration than the approved maximum limit under Schedule 2, Class A of the Hazardous Waste (Management and Handling) Rules, 1989 as amended in 2003 and therefore directed that it should be treated as hazardous waste. The KPCB, thereafter, directed the Company to 'take immediate action to stop the supply of this waste to external agencies and also internal use as manure'.[27] The Company was also directed to recover the sludge that has been already transported outside and store the same in a secured site within the factory premise.[28]

The KPCB conducted a further study on this matter and concluded that: 'the concentration of cadmium and other metals were found to be below the limit prescribed under the Schedule 2 of the Hazardous Waste (Management and Handling) Rules, 1989

[24] Ibid.

[25] A transcribed version of the BBC report is on file with the author.

[26] *See* Jananeethi, note 8 above; Yuvajanavedi, note 17 above.

[27] Letter issued by the KPCB to the Hindustan Coca Cola Beverages Private Limited, Letter No. PCB/HO/HWM/CC-PLT/2003 dated 7 August 2003.

[28] Letter issued by the KPCB to the Hindustan Coca-Cola Beverages Private Limited, Letter No. PCB/HO/HWM/CC-PLT/2003 dated 7 August 2003.

as amended in 2003, and hence the solid wastes generated in the Company will not come under the said rules'.[29] But it was also stated in the report that the presence of cadmium in the common Panchayat well is double the permissible limit and touches the permissible upper limit in another well. The KPCB's comment about this was that: '…in the common Panchayat well could a small quantity of cadmium be detected'.[30] Later, the KPCB sent a letter to the President of the Perumatty Grama Panchayat informing them that water in the Panchayat well should not be used for drinking purposes.[31]

Another study conducted by the Central Pollution Control Board (CPCB) two months after the KPCB study concluded that the sludge from the Effluent Treatment Plant (ETP) and the sludge supplied by the Company to farmers for using as fertiliser contain heavy metals like lead and cadmium in more than permissible limits. The CPCB report warrants the sludge to be treated as per the Hazardous Waste (Management and Handling Rules) 1989, as amended in 2003.[32]

The Supreme Court Monitoring Committee (SCMC), constituted by the Supreme Court of India in Writ Petition No. 657/95, visited the Company and nearby areas in August 2004.[33] The SCMC noticed that the drinking water source adjacent to the Company was contaminated due to the illegal dumping of wastes by the Company.[34] By taking note of the SCMC findings, the KPCB

[29] Kerala State Pollution Control Board, A Study Report on the Presence of Heavy Metals in Sludge Generated in the Factory of M/s Hindustan Coca-Cola Beverages Pvt. Ltd., Palakkad (Thiruvananthapuram: Kerala State Pollution Control Board, September 2003).

[30] Ibid.

[31] Letter No. PCB/PLKD/W-217/2001 dated 31 October 2003.

[32] Central Pollution Control Board, Report on Heavy Metals and Pesticides in Beverages Industries (Delhi: Central Pollution Control Board, November 2003).

[33] *See Research Foundation Science Technology Natural Resource Policy v Union of India*, Supreme Court of India, Writ Petition No. 657 of 1995, Order dated 14 October 2004, para. 7.

[34] Supreme Court Monitoring Committee On Hazardous Wastes (SCMC), Report of the visit of the SCMC to Kerala with recommendations, 14 August 2004, *Source:* http://www.thesouthasian.org/archives/2006/pdf_docs/SCMC_Report_on_Kerala_Visit%5B1%5D%20August%202004.pdf.

directed the Company to close the factory until it complies with the provisions of the Hazardous Waste (Management and Handling Rules), 1989 as amended in 2003.[35]

The legal battle related to the ground water issue in Plachimada began when the Perumatty Grama Panchayat passed a resolution on 7 April 2003 refusing to renew the license given to the Company.[36] The Company challenged the action taken by the Panchayat in the Kerala High Court.[37] The Kerala High Court directed the Company to approach the appropriate forum, that is, the Department of Local Self-Government.[38] The Department of Local Self-Government directed the Panchayat to constitute an expert group to study the matter and decide accordingly.[39] Having felt aggrieved by the direction of the Department of Local Self-Government, the Panchayat approached the Kerala High Court.

3. Legal and Institutional Framework

The Coca-Cola Company started their operation in the year 2000 and the people's agitation against the Company began in 2002. Meanwhile, the Kerala legal system underwent a major change in 2002 through the enactment of the Kerala Ground Water (Control and Regulation) Act. But the said Act was not applicable as it was notified only in 2003. In the absence of a specific statutory framework, principles such as the public trust doctrine and the common law rule regarding the right of the landowner over ground water have been discussed in the Plachimada case. Apart from these principles, there are a number of environmental laws that could have been applied in the Plachimada case.

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[35] The KPCB's direction to the Hindustan Coca-Coal Beverages Private limited, vide order No. PCB/HO/H&R/485/04 dated 23 August 2004.

[36] *See Perumatty Grama Panchayat v State of Kerala and Ors*., The Kerala High Court, Original Petition (Civil) No. 34292 of 2003, Judgement of 16 December 2003, para. 2.

[37] *Hindustan Coca-Cola Beverages Private Limited v Perumatty Grama Panchayat and Anr*., The Kerala High Court, Original Petition No. 13513 of 2003, Judgement of 16 May 2003.

[38] Ibid.

[39] *See Perumatty Grama Panchayat*, note 36 above, para. 3.

3.1 Principles

One of the basic issues in water law is that of rights, that is, what kind of rights do the people have, or ought to have, and what are the rights of the state.[40] This implies that the legal relationship between and among the state, individuals and water resources is one of the basic issues that need to be defined legally. Even though there have been a number of enactments defining rights of the state and individuals regarding surface water resources, there was no such specific law(s) regarding ground water.[41] Hence, the regime mainly consisted of principles of which two important principles discussed in the Plachimada case are the Public Trust Doctrine and the common law principle on ground water rights.

3.1.1. Public Trust Doctrine

The Public Trust Doctrine (PTD) describes the state's relationship with water resources and citizens of the state.[42] The doctrine is based not on the notion of rights but that of duties.[43] It means, state has a duty to protect, preserve, manage and use the trust property in the public interest. The trust has been reposed in the state by the public as a fundamental contract that the state will act in public interest and in the interest of ecology.[44] The meaning of the doctrine can be expressed as: 'the state which holds the natural waters as a trustee, is duty- bound to distribute or utilise the waters in such a way, that it does not violate the natural right to water of any individual or group and safeguards the interest of the public and of ecology (or nature)'.[45]

Tracing the origin of the public trust concept, most scholars look to the Institutes of Justinian, a body of Roman civil law

[40] Chhatrapati Singh, 'Water Rights in India', *in* Chhatrapati Singh ed., *Water Law in India* (Delhi: Indian Law Institute, 1992).

[41] Chhatrapati Singh, *Water Rights and Principles of Water Resource Management* 39 (Bombay: Tripathi, 1991).

[42] Melissa Kwaterski Scanlan, 'The Evolution of the Public Trust Doctrine and the Degradation of Trust Resources: Courts, Trustees and Political Power in Wisconsin', 27 *Ecology Law Quarterly* 135 (2000).

[43] *See* Singh, note 41 above.

[44] *See* Singh, note 41 above at 76.

[45] Ibid., at 76.

assembled approximately in 530 CE.[46] This text articulated the universal notion that water courses should be protected from complete private acquisition in order to preserve the lifelines of communal existence.[47] Ancient Roman law recognised public right in water and the seashore which were unrestricted and common to all. These rights were considered as part of natural law. It was considered as 'common to mankind by the law of nature. No one is forbidden provided he respects habitations, monuments and buildings'.[48]

The roots of public trust doctrine can also be seen in *dharmasatra,* as the king was the upholder and protector of natural resources for and on behalf of the people.[49] The 'public trust values in water' can also be found in many other ancient legal systems. For instance, in Chinese water law of 249–207 BC, in ancient and traditional customs of people of Nigeria, in Islamic water law, in the laws of medieval Spain and France, in the Mexican laws, etc.[50]

The concept of public trust was originated to provide public access to the waterways for commercial benefit, and their preservation was viewed as a factor to facilitate trade and establish communication lines.[51] The scope of the doctrine has been widened, in the course of time, from 'access to all' to 'preservation of all natural resources'.[52] The widening of the scope of the doctrine can

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[46] Joseph L. Sax, 'The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention', 68 *Michigan Law Review* 471 (1970); Patricia Kameri-Mbote, 'The Use of the Public Trust Doctrine in Environmental Law', 3/2 *Law, Environment and Development Journal* 197 (2007).

[47] George Smith and Michael Sweeny, 'Public Trust Doctrine and Natural Law: Emanations within a Penumbra', 33 *Boston College Environmental Affairs Law Review* 307–344 (2006).

[48] *See* Scanlan, note 12 above at 140.

[49] *See* Singh, note 41 above at 76.

[50] *See* Sax, note 46 above.

[51] *See* Smith and Sweeny, note 47 above.

[52] *See* Joseph L. Sax, 'The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention', 68 *Michigan Law Review* 471 (1970); Patricia Kameri-Mbote, 'The Use of the Public Trust Doctrine in Environmental Law', 3/2 *Law, Environment and Development Journal* 197 (2007). *See also* Cynthia L. Koehler, 'Water Rights and the Public Trust Doctrine: Resolution of the Mono Lake Controversy', 22 *Ecology Law Quarterly* 541–589 (1995).

be mainly attributed to American courts.[53] Hence, it could be seen that the PTD is not new to the legal system. It has been in existence for a long time and has been widened in scope over the years to respond to the changing needs.

In the contemporary context, the PTD seems to cast a duty upon the state to protect and preserve natural resources for and on behalf of beneficiaries, that is, the people. The beneficiary not only includes the present generation but future generations also.[54] The duty of the state also includes the duty to furnish information regarding the trust property to the beneficiaries.[55]

There is no statute in India which makes the PTD a part of the Indian legal system. The doctrine has been incorporated into the Indian legal system by the Supreme Court of India. The Supreme Court in *M.C. Mehta v Union of India (1997)* took note of the development of the doctrine through American case laws and scholarly writings.[56] By quoting relevant American case laws and scholarly articles, the Supreme Court seems to have recognised and accepted the PTD as a valid legal principle having contemporary relevance in the Indian context. In the said case, the Supreme Court declared that 'our legal system – based on English common law – includes the public trust doctrine as part of its jurisprudence'.[57] It was further held that the state is the trustee of all natural resources which are by nature meant for public use and enjoyment. Public at large is the beneficiary of the sea-shore, running waters, airs, forests and ecologically fragile lands.[58]

The PTD, as explained by the Supreme Court in *M.C. Mehta Case*, has been recognised in several subsequent case laws.[59] The legal validity and contemporary relevance of the doctrine has also

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[53] *M.C. Mehta v Union of India*, Supreme Court of India, (1997)1 SCC 388, para. 33.

[54] *See* Kameri-Mbote, note 46 above.

[55] Ibid.

[56] *M.C. Mehta v Union of India*, (1997)1 SCC 388, paras 24-33.

[57] Ibid., para. 34.

[58] Ibid., para. 34.

[59] *See M. I. Builders Pvt. Ltd. v Radhey Shyam Sahu* (1999) 6 SCC 464; *Intellectual Forum v State of Andhra Pradesh* (2006) 3 SCC 549; *Karnataka Industrial Area Development Board v Kenchappan (*2006) 6 SCC 371.

been recognised in a report of the law commission of India.[60] Moreover, as per the Constitution of India, 'the law declared by the Supreme Court shall be binding on all courts within the territory of India'.[61] Supreme Court decisions are to be regarded as law of the land unless and until changes have been made through a subsequent Supreme Court decision or an express statutory provision. Therefore, the PTD can be considered as a part of environmental law in India and should be followed mandatorily.[62]

The public trust doctrine, in principle, can be a basis of the power of the state to control the use of ground water by private individuals. It can also be a theoretical basis to explain the duty of the state to take measures for the protection and preservation of natural resources (ground water in the present case) for present and future generations. Inaction on the part of the state would amount to violation of the trust and cannot be justified in law. It is also mandatory for all courts in the country to follow the law as declared by the Supreme Court.

3.1.2 Common Law Rule on Ground water

One of the peculiar facts in the history of water law is the separate development of law governing surface water sources – such as lakes and rivers – and that governing ground water. British Common law recognised rights of riparians, that is, the usufructuary right subject to state control. Principles evolved under common law mainly addressed rights in surface water. Ground water was dealt with under a different regime, that is, as part of an individual's right to enjoy property. The government's control was not applicable to water sources like wells, tanks, tube wells existing in private land. Early irrigation laws and the Indian Easements Act establish the existence of a different set of principles for surface water and ground water.[63]

Common law considered ground water as part of the soil in which it exists. Ground water was considered as a chattel attached

[60] *See* Law Commission of India, Report on Proposal to Constitute Environmental Courts, 186th Report (New Delhi: Law Commission of India, 2003).

[61] *See* Article 141 of the Constitution of India *in* P.M. Bakshi, *The Constitution of India* (Delhi: Universal Law Publishing Co., 2006).

[62] *See* Bakshi, note 61 above at 134–135.

[63] *See* Singh, note 41 above.

to the land without having a distinctive character of ownership from the earth.[64] Common law rule permitted the landowner to extract any extent of ground water, even though it is dangerous to his neighbours or may diminish or take away the water from neighbouring wells.[65] Common law dismisses such a problem with the curt observation that such a result is *damnum absque injuria* (not actionable under law).[66]

Law of easements is not applicable to ground water.[67] Right to draw water from a well to irrigate the field cannot be acquired as an easement right by prescription.[68] Section 17 (d) of the Easements Act lays down that there could not be any prescriptive right in ground water, not passing in a defined channel. The law on this question is discussed at great length in the case of *Acton* v. *Blundell* that the easement right cannot be obtained over the percolating ground water flowing in undefined channels.[69]

This common law position has been followed in India also. It is very clear from the words of Chandra Shekhara Aiyar J. that:

> The general rule is that the owner of a land has got a natural right to all the water that percolates or flows in undefined channels within his land and that even if his object in digging a well or a pond be to cause damage to his neighbour by abstracting water from his field or land it does not matter in the least because it is the act and not the motive which must be regarded. No action lies for the obstruction or diversion of percolating water even if the result of such abstraction be to diminish or take away the water from a neighbouring well in an adjoining land.[70]

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[64] *See* Singh, note 41 above at 39.

[65] V. Sitararama Rao, *Law Relating to Water Rights* 185–186 (Hyderabad: Asian Law House, 1996).

[66] Frazier v. Brown, 12 Ohio st. 294 (1861) as cited in Robert Emmet Clark ed., *Water and Water Rights*, Vol. I, 71 (Indiana: The Allen Smith Company Publishers, 1967).

[67] *See* Rao, note 65 above at 185.

[68] *Het Singh v Anar Singh*, A.I.R. 1982 All. 468.

[69] *Manturabai v Ithal Chiman,* A.I.R. 1954 Nag. 103 [A.I.R. 1951 Nag. 447 reversed] as cited in G.C. Mathur ed., *Amin and Sastry's Law of Easements* 434 (Lucknow: Eastern Book Company, 1984).

[70] *Kesava Bhatta v Krishna Bhatta*, AIR 1946 Mad. 334, 335.

Common law recognised it as a right of the land owner to divert or appropriate ground water from his land. The control which common law applies over this right is that when exercising this right, a landowner shall not cause any damage to water flowing in a defined channel. The same idea has been reiterated by Lord Hatherley as 'if you cannot get at the underground water without touching the water in a defined surface channel you cannot get at it at all. You are not by your operation or by any act of yours, to diminish the water which runs in a defined channel'.[71]

The historical reason for the evolution of these rules seems to be the lack of knowledge about ground water hydrology which prompts one to leave it out of control.[72] Since the mechanisms for tapping ground water was not much improved, the chance of extraction of too much water was not in existence and as such it was unlikely to cause any serious social problem which requires mediation through law. Both these reasons have now become obsolete. The science of hydrology developed fast and now the processes involved in the recharge and discharge of ground water and the quantity of water available in a region are matters within the human knowledge. The behaviour of ground water is no longer a mystery. Availability of powerful mechanical devices for drawing ground water has also resulted in tilting the balance.[73] The quality and quantity of ground water have deteriorated due to indiscriminate exploitation. Another implication of the common law rule is that it leaves out all landless people and tribals who may have group (community) rights over the land but not private ownership. These situations necessitate the evolution of a new jurisprudence to ensure access to water for all and the protection and preservation of the resource.

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[71] *Grand Junction Canal Co. v Shugar*, (1871) 6 Ch. A. 483 as cited by Chandra Sekhara Aiyar j. in *Kesava Bhatta v Krishna Bhatta*, AIR 1946 Mad. 334.

[72] *See* Lawrence J. MacDonnell, 'Rules Guiding Groundwater Use in the United States', 1 *Indian Juridical Review* 43, 46 (2005); Sanjiv Phansalkar and Vivek Kher, 'A Decade of the Maharashtra Groundwater Legislation: Analysis of the Implementation Process', 2/1 *Law, Environment and Development Journal* 67 (2006).

[73] A. Narayanamoorthy and R.S. Deshpande, *Where Water Seeps: Towards a New Phase in India's Irrigation Reforms* 36 (New Delhi: Academic Foundation, 2005).

3.2 Environmental Laws

Environmental laws in India have developed in the last three decades. Since the 1970s, a number of statutes have been enacted to address various aspects of the environment such as prevention and control of pollution, conservation of forest and protection of wildlife.[74] One of the important features of this development is the emphasis on protection and preservation of the environment. Prior to this phase, Indian environmental law mainly consisted of claims made against tortious actions such as nuisance and negligence.[75] The Indian judiciary, particularly the higher judiciary, also made remarkable contributions to the development of environmental laws in this country.[76] Thus it could be said that environmental law in India has been developed through legislative and judicial initiatives.[77]

The Water (Prevention and Control of Pollution) Act, 1974 (hereafter 'The Water Act'), the Environment Protection Act, 1986 (hereafter 'The EP Act') and the Hazardous Wastes (Management and Handling) Rules, 1989 as amended in 2003 (hereafter 'The Rule') are the major legal frameworks that have been in force since the beginning of the Plachimada problem. These enactments

[74] Some of the major environmental legislations are: Water (Prevention and Control of Pollution) Act, 1974; Air (Prevention and Control of Pollution) Act, 1981; Environment Protection Act, 1986; Forest (Conservation) Act, 1980; Wild Life (Protection) Act, 1972; Biological Diversity Act, 2002; Public Liability Insurance Act, 1991; National Environment Tribunal Act, 1995 and National Environment Appellate Authority Act, 1997. For an analysis of environmental legislation in India, *see*, Shyam Divan and Armin Rosencranz, *Environmental Law and Policy in India: Cases, Materials and Statutes* (Oxford: Oxford University Press, 2001).

[75] B.N. Kirpal, Developments in India Relating to Environmental Justice, Paper presented in Global Judges Symposium on Sustainable Development and the Role of Law in Johannesburg, South Africa, on 18–20 August 2002. *Source:* http://www.unep.org/law/Symposium/Documents/Country_papers/INDIA%20.doc.

[76] Major principles and doctrines of environmental law have been incorporated as part of Indian law by the Indian judiciary through case laws. Some of the important case laws are discussed later in this paper. For further references, *see* Divan and Rosencranz, note 74 above.

[77] *See* Kirpal, note 75 above.

provide legal and institutional mechanisms to address various aspects of ground water quality and quantity issues in Plachimada.

The central government enacted the Water Act with the object of 'prevention and control' of water pollution and to 'maintain or restore' the 'wholesomeness' of water. The preamble to the Water Act gives an indication that the Act is meant for protecting and preserving water in the larger interest of living and non-living organisms. The EP Act also sets forth the same philosophy in a comprehensive manner to cover the whole ecosystem. It is expressly stated that the object of the EP Act is the 'protection and improvement' of the environment. Hence, these laws provide the framework for the protection and preservation of the environment.

The word 'pollution' under the Water Act is defined broadly to include all direct and indirect actions, which can render water harmful or injurious to public health, safety or to the life of other organisms.[78] The authority constituted under the Water Act, Pollution Control Board, is empowered to carry out the objectives of the Act, that is, prevention and control of water pollution. The Water Act prescribes a two-tier institutional mechanism, one at the central level (hereafter 'Central Board') and the other at the state level (hereafter 'State Board'). The Pollution Control Board also has the responsibility to implement the EP Act. Therefore, powers and responsibilities of the Pollution Control Board are very wide and it is the primary agency responsible to take care of the quality of the environment as a whole.

The State Board under the Water Act is empowered to enter and inspect any premises, conduct investigation and advise the state government with regard to the prevention, control or abatement of water pollution.[79] Moreover, the State Board is also empowered to issue any order, which includes the order requiring any person concerned to construct sufficient mechanisms for the disposal of sewage and trade effluents or to modify, alter or extend any such existing system or to adopt such remedial measures necessary to prevent, control or abate water pollution. It also has the power to issue an order of closure, prohibition or regulation of

[78] The Water (Prevention and Control of Pollution) Act, 1974, Section 2 (e). *Source:* http://www.ielrc.org/content/e7402.pdf.

[79] Ibid., Section 16 (h).

industries.[80] The Water Act also makes it mandatory for any industry that is likely to pollute water to obtain a license under the Act.[81]

The Water Act also gives some special and overriding powers to the Central Government. The Central Government is empowered to give directions to any person, officer or authority in exercise of its powers under the Act.[82] This includes power to direct closure of any industry, prohibition or regulation of any industry and stoppage or regulation of supply of water, electricity or any other services.[83] The person or authority against whom such directions have been given is bound to comply with them.[84]

The Rule has been enacted under the EP Act to specifically address the alarming problem of hazardous wastes.[85] The Rule lays down detailed schedules, which consists of lists of hazardous wastes to be treated as per the Rule. Hazardous wastes are classified into different categories depending upon toxicity; prohibition or restriction is prescribed accordingly.

The Rule requires only authorised dealers to deal with hazardous wastes. The generator of hazardous wastes is duty bound to give the authority (the Pollution Control Board) all details about the waste.[86] The generator is also required to obtain authorisation from the authority to handle, treat, transport and dispose of the waste.[87] The authority will grant permission after examining whether facilities are in compliance with the Rule or not. It is the duty of the authority to make sure that the concerned industry has sufficient mechanisms to treat hazardous wastes so as to avoid implications upon public health, public safety and the environment. In the event that pollution does occur, the rule expressly places the

[80] Ibid., Sections 16 (l) & 33A.
[81] Ibid., Section 25.
[82] *See* The Water Act, Section 33A.
[83] Ibid., Section 33A.
[84] Ibid., Section 33A.
[85] The legal regime regulating toxic substances in India has been developed largely as a response to the Bhopal Tragedy that occurred in December 2004. For details, *see* Divan and Rosencranz, note 74 above at 514–562.
[86] The Hazardous Wastes (Handling and Management) Rule, 1989, Rule 5 (2). *Source:* http://envfor.nic.in/legis/hsm/hsm1.html, Rule 4.
[87] Ibid., Rule 5 (2).

liability upon the polluter to reinstate or restore the damaged element(s) of the environment.[88] If the polluter fails, the authority has the power to order the polluter to deposit an estimated amount that will be adjusted towards the expenses incurred to restore the environment.[89]

The normative contents of environmental laws in India have been widened through the interpretative role played by the Indian higher judiciary. Some of the cardinal principles developed as part of international environmental law are now part of Indian law. Of which, important principles relevant to the Plachimada case are the precautionary principle, polluter pays principle, public trust doctrine and the principle of absolute liability.[90]

After discussing the constitutional and statutory provisions related to the environment, the Supreme Court of India in *Vellore Citizens' Welfare Forum case* held that '…we have no hesitation in holding that the precautionary principle and polluter pays principle are part of the environmental law of the country'.[91] The Court further defines the precautionary principle. The precautionary principle casts duty upon the state to take measures to '…anticipate, prevent and attack the causes of environmental degradation'.[92] As per the precautionary principle, the precautionary measures shall not be postponed because of scientific uncertainty.[93]

The polluter pays principle has been recognised as part of Indian law by the Supreme Court in the *Bichhri case*.[94] It was held that '…once the activity carried on is hazardous or inherently

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[88] Ibid., Rule 16 (2).

[89] Ibid., Rule 16 (2). The polluter pays principle has also been incorporated expressly in the National Environment Tribunal Act of 1995. *See* Section 3 of the National Environment Tribunal Act of 1995.

[90] The Law Commission of India in its 186th report has recognised these principles and recommended it to be applied. For details, *see* Law Commission of India, Report on Proposal to Constitute Environmental Courts, 186th Report (New Delhi: Law Commission of India, 2003), Chapter VII.

[91] *Vellore Citizen's Welfare Forum v Union of India,* Supreme Court of India, (1996) 5 SCC 647, para. 14.

[92] Ibid., para. 11.

[93] Ibid.

[94] *Indian Council for Enviro-Legal Action and Ors. v Union of India*, Supreme Court of India, (1996)3 SCC 212.

dangerous, the person carrying on such activity is liable to make good the loss caused to any other person by his activity irrespective of the fact whether he took reasonable care while carrying on his activity…'[95] The polluter pays principle as understood and illustrated by the Supreme Court of India seems to be linked with the liability of the polluter in the case of hazardous substances.[96] The Court seems to have used the principle as a basis of the liability of the polluter vis-à-vis damages caused to individuals and the environment. The liability as illustrated by the Supreme Court is absolute in nature.[97] The Supreme Court further held that sections 3 and 5 of the EP Act empower the Central Government to give directions and take measures for giving effect to this principle.[98]

Hence, it appears that environmental laws in India provide legal framework to deal with pollution related problems. The legal framework also provides institutional mechanism to implement laws. The scope of environmental laws has been widened through judicial initiatives, that is, by incorporating some of the cardinal principles as part of environmental laws in India. The Government and courts in the country are bound to follow and apply these principles.

This legal and institutional framework seems to be relevant in the ground water related issues in Plachimada. The powers under the abovementioned legal framework have been invoked more than once. This is clear from various investigations and directions given by the KPCB to the Company including the closure order.

However, it is to be noted that investigations and actions taken by the KPCB and other government bodies such as Central Ground Water Board have been criticised by the Plachimada Struggle Committee. After analysing the CGWB's report, *Keraleeyam*, a Malayalam magazine pointed to the presence of high TDS (Total

[95] Ibid., para. 65; *see also M.C. Mehta v Union of India*, AIR 1987 SC 1086 (Oleum Gas Leak Case).

[96] For details regarding the origin and development of the polluter principle, *see* Nicolas de Sadeleer, *Environmental Principles: From Political Slogans to Legal Rules* (Oxford: Oxford University Press, 2002).

[97] Ibid., para. 66; *see also M.C. Mehta v Union of India*, AIR 1987 SC 1086 (Oleum Gas Leak Case).

[98] Ibid., para. 67.

Dissolved Substances), hardness, EC (electrical conductivity) and high chloride content in the wells situated within hundred meter circumference from the Company. This element should have been an important one to decide the link between the Company and the ground water pollution in Plachimada. But CGWB has neglected this fact.[99] It has been further criticised that the report by the Kerala Ground Water Department, though identified pollution problem in some of the wells, neglected it as marginal.[100]

It could be seen that most of the reports recognise depletion and pollution of ground water in Plachimada but investigations conducted by government agencies do not find a link between the depletion of ground water in Plachimada and the Company.[101] However, it is to be noted that the environmental jurisprudence in India, particularly the precautionary principle, requires the Government to take adequate measures even in the absence of sufficient scientific evidence. At the same time a report by the KPCB confirms the pollution (including ground water pollution) caused by the dumping of hazardous waste by the Company. This fact seems to be sufficient for the KPCB to invoke the polluter pays principle. The Central Government is also empowered to give effect to the polluter pays principle under the EP Act. No such action is reported to have been taken by the KPCB or the Central Government.

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[99] *See* Keraleeyam, note 2 above. *See also* Central Ground Water Board (CGWB), A Report on the Groundwater Conditions in and Around Coca Cola Beverages Private Limited Company, Plachimada Village, Palakkad District, Kerala (Thiruvananthapuram: CGWB, 2003).

[100] *See* Keraleeyam, note 2 above.

[101] *See* Kerala Ground Water Department, Report on the Monitoring of Wells in and Around the Coca Cola Factory in Plachimada, Kannimari, Palakkad district (Kerala Ground Water Department, September, 2003). A later report by the Kerala Ground Water Department recognised that the depletion of groundwater could be '…the combined effect of lower than normal rainfall and groundwater draft, especially by the wells in the factory'. *See* Kerala Ground Water Department, Report on the Monitoring of Water Levels and Water Quality in Wells in and Around the Hindustan Coca Cola Factory at Plachimada, Palakkad District (Thiruvananthapuram: Kerala Ground Water Department, 2006).

3.3 The Role of the Panchayat

The role and powers of the Panchayat to regulate the use of ground water requires a special mention in relation to the Plachimada case. This was the major issue before the Kerala High Court in the Plachimada case.

The decentralisation policy, as it stands now, has been introduced as a result of 73rd and 74th Constitutional Amendment in 1992.[102] It envisages the constitution of the panchayat and devolution of power by the State Government to enable the panchayat to act as a micro level unit of local self-governance. However, the constitutional provision does not transfer powers and authority to panchayats. Powers and authority of the panchayat is required to be devolved through state legislation. Hence, the role of the panchayat necessarily depends upon the concerned state legislation. Most of the states have enacted laws to implement the constitutional norm envisaged in the 73rd and 74th amendment.[103] The Kerala State Government enacted the Kerala Panchayat Raj Act in 1994 (hereafter the PR Act).

The power of the panchayat over water resources in its jurisdiction is recognised in the Constitution and the PR Act. The subjects 'minor irrigation, water management and water shed development' and 'drinking water' has been included in the Schedule of the powers and functions of the panchayat in the Constitution of India.[104] The PR Act provides that all water resources, except the one passing through more than one panchayat, shall be considered as 'transferred to and absolutely vested' in the panchayat.[105] It means the panchayat has the power to control the use of drinking water resources in its jurisdiction. The Act requires factories and industries to obtain a license from the panchayat to

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[102] The 73rd and 74th amendment deals with the Panchayat and Municipality respectively. *See* P.M. Bakshi, *The Constitution of India* (Delhi: Universal Law Publishing Co., 2006).

[103] Government of India, Annual Report of the Ministry of Rural Development (New Delhi: Ministry of Rural Development, Government of India, 2002–2003).

[104] *See* Bakshi, note 102 above, Article 243G, Eleventh Schedule, Entry 3 and 11.

[105] The Kerala Panchayat Raj Act, 1994, Section 218.

establish factories.[106] Further, the PR Act gives responsibility to the panchayat to abate the nuisance created by any factory or industries in its jurisdiction.[107]

A combined reading of all these provisions indicates that the panchayat has the responsibility to maintain water resources and to take necessary measures to abate pollution problems in its jurisdiction. Public health and welfare seem to be the rationale for granting these powers to the panchayat. Therefore, the panchayat has the power to take necessary actions to protect the right of the people to clean and safe drinking water. However, it has been observed that though the political decentralisation has been successful, there is minimum administrative and financial decentralisation. Administrative and financial powers generally remain with the State Government.[108] The lack of administrative and financial powers tends to weaken the capability of the panchayat to carry out its responsibilities as envisaged in the Constitution and the PR Act.

The decentralisation principle has been introduced to constitute and enable panchayat raj institutions to function as units of local self-governance. The Kerala Government has implemented this principle by enacting the PR Act. Having acknowledged this legal development and its meaning and spirit, measures or actions taken by the panchayat to carry out its responsibilities need to be respected and facilitated. The curtailment of powers of the panchayat through administrative or judicial action would be against the meaning and spirit of the decentralisation principle.

One of the important responsibilities of the panchayat, under the PR Act, is to protect and preserve drinking water resources in its jurisdiction. The Perumatty Grama Panchayat, by invoking this provision, has taken action against the Company by refusing to renew the licence of the Company. However, this action of the Panchayat triggered the legal battle.

4. Plachimada Case

It is already stated that the cancellation of the licence of the company by the Panchayat was the major bone of contention in the writ

[106] Ibid., Section 233A.
[107] Ibid., Section 233.
[108] *See* Government of India, note 103 above.

petition filed before the Kerala High Court. Hence, the major question before the High Court was the legal validity of the Panchayat's action vis-à-vis the right of the Company to extract ground water from the land owned by the Company.

4.1 Background of the Case

The legal battle began when Perumatty Grama Panchayat (hereafter the Panchayat) passed a resolution deciding not to renew the licence of the factory on 7 April 2003. The Panchayat issued a show cause notice in this regard to the Company. The rationale for the Panchayat's action was stated as to stop the heavy usage of ground water by the Company which has caused depletion of ground water, heavy drought and drinking water scarcity and to avoid other environmental issues.[109]

In response to the show cause notice, the Company denied the allegations stated in the notice. It was claimed by the Company that it runs with all statutory clearances and the Panchayat can cancel its licence only if there is any violation of conditions of licence.[110] The Panchayat rejected the Company's claim for being 'against the facts' and decided to cancel the licence and directed the Company to stop production by a Resolution dated 5 May 2003.[111]

The Company challenged the order of the Panchayat in the Kerala High Court.[112] The Company was directed to approach the

[109] *See Perumatty Grama Panchayat v State of Kerala and Ors*., The Kerala High Court, Original Petition (Civil) No. 34292 of 2003, Judgement of 16 December 2003.

[110] Ibid. The licence issued by the Panchayat consisted of eight conditions. Out of which two conditions are relevant to the Plachimada case. Condition No. 3 provided that: 'the water using for the manufacturing should be tested periodically and the source of water should be kept sanitary without causing any pollution'. Condition No. 7 provided that: 'All wastes should be disposed off (sic) properly'. Conditions in the licence have not been discussed further by the Kerala High Court. *See* Perumatty Grama Panchayat, Proceedings of the Special Grade Secretary, 27 January 2000 (a copy of the proceedings on file with the author).

[111] Ibid.

[112] *See Hindustan Coca Cola Beverages Private Limited*, note 5 above.

appropriate authority, that is, the Local Self Government Department (LSGD).[113] On appeal, the government ordered the Panchayat to constitute a team of experts from the departments of Ground Water and Public Health and the State Pollution Control Board to conduct a detailed investigation into the allegation and to take a decision based on the investigation report.[114] The Panchayat filed a writ petition, the major case in relation to Plachimada, against the order of the Government on the ground that 'protection and preservation of water resources is the exclusive domain of the Panchayat. When the Panchayat takes a decision based on relevant materials, the Government cannot interfere with it and dictate, how the Panchayat should act in the matter'.[115]

4.2 Case Law Analysis

The Plachimada Coca-Cola case came before the High Court of Kerala questioning the authority of the Panchayat to order the closure of the factory on the grounds that over-exploitation of ground water by the Company has resulted in acute shortage of drinking water. The major question addressed by the Court was, whether the Grama Panchayat has the power to regulate the right of a private individual or a company to extract ground water from their land or not and whether the Panchayat has the power to issue closure order against a company on account of over-exploitation of ground water or not. The writ petition, at the first instance, was decided by the single judge of the Kerala High Court and the appeal was decided by the division bench.

4.2.1 Single Judge Decision

The question considered by the single judge of the Kerala High Court was whether the decision of the Panchayat to cancel the

[113] Section 276 of the PR Act says that an appeal from the decision taken by the Panchayat would lie to the tribunal constituted under Section 271 (s) of the Act. But the tribunal was not constituted by the government at the time of the litigation. In the absence of the Tribunal, the LSGD used to exercise the function of the appellate body. *See Hindustan Coca Cola Beverages Private Limited*, note 5 above.

[114] *See Perumatty Grama Panchayat*, note 109 here.

[115] *See Perumatty Grama Panchayat*, note 109 here.

licence of the Company and order its closure on the ground of excessive extraction of ground water was legal and whether the intervention of the government through its appellate jurisdiction was legally sustainable.[116]

It was argued on behalf of the Panchayat that the Panchayat is authorised to preserve water resources in its jurisdiction as per the Kerala Panchayat Raj Act. Therefore, the closure order issued by the Panchayat was legitimately in the interest of the general public. Further, it was argued that the Government could not dictate to a licencing authority as to how it should work. On the whole, the Panchayat argued mainly on the basis of the discretionary and exclusive power of the Panchayat under the Constitution of India and the Kerala Panchayat Raj Act.[117]

The Company argued that the Government was the appellate authority under the Kerala Panchayat Raj Act and therefore the Government has the authority to cancel the order of the Panchayat. It is not proper for the Panchayat to challenge it. The company also justified the Government's decision by arguing that the order against the company was a non-speaking order. The order was not supported by any authoritative scientific report or investigation. It was argued further that there was no statutory prohibition on digging of bore-wells at the time when the Company started production. Therefore, legally there was no restriction upon the Company to extract ground water from its land.[118]

The Court invalidated the closure order issued by the Panchayat. It was held that the Panchayat was not authorised to issue a closure order on the ground of excessive extraction of ground water by the Company.[119] The Court further held that 'the Panchayat can at best, say, no more extraction of ground water

[116] It has been stated by the single judge that '…in this case, the notice was issued *only* on the ground of excessive exploitation of ground water and the decision to cancel the license was taken *only* on the basis of that ground. Therefore the Panchayat fairly submitted that the validity of its decision and that of the Government on this point *alone* need be considered by this Court in this case' (emphasis added). *See Perumatty Grama Panchayat v State of Kerala*, High Court of Kerala, India, W.P. (C) No. 34292 of 2003, Judgement dated 16 December 2003, para. 8.

[117] Ibid., para. 5.

[118] Ibid.

[119] Ibid., para. 12

will be permitted and ask the company to find alternative sources for its water requirements'.[120] The Single Judge seems to have recognised the power of the panchayat to restrict or prohibit the use of ground water in its jurisdiction. At the same time, to issue an order of closure on the ground of protection of drinking water sources was held as beyond the authority of the panchayat.

This legal proposition implies that the panchayat has powers to take action in proportionate to what its responsibility requires. In this instant, the Single Judge appears to have considered the closure order as not in conformity with the proportionality test. The Court considered prohibition on the use of ground water as an adequate measure to discharge the responsibility of protection of drinking water sources. If the Court had an opportunity to discuss pollution issues, the decision would have been different. This is significant given the fact that 'proper waste disposal' has been included as a condition in the licence and the Company is proved to have violated this condition.[121]

At the same time the Court answered the second question affirmatively, that is, whether the Panchayat has the power to restrict or prohibit the extraction of ground water. The Court disapproved the argument made by the Company that in the absence of law the Company can extract any quantity of ground water from its land. The contentions of the Company were held incompatible with the emerging environmental jurisprudence under Article 21 of the Indian Constitution.[122] It was held that:

> Even in the absence of any law governing the ground water, I am of the view that the Panchayat and the State are bound to protect the ground water from excessive exploitation. In other words the ground water under the land of second respondent

[120] Ibid.

[121] *See* Perumatty Grama Panchayat, Proceedings of the Special Grade Secretary, 27 January 2000 (a copy of the proceedings on file with the author). For reports of Pollution Control Board confirming the unauthorised disposal of wastes, *see* Kerala State Pollution Control Board, A Study Report on the Presence of Heavy Metals in Sludge Generated in the Factory of M/s Hindustan Coca Cola Beverages Pvt. Ltd., Palakkad (Thiruvananthapuram: Kerala State Pollution Control Board, September 2003), and Central Pollution Control Board, Report on Heavy Metals and Pesticides in Beverages Industries (Delhi: Central Pollution Control Board, November 2003).

[122] Ibid., para. 13.

> (the Company) does not belong to him. Normally, every landowner can draw a reasonable amount of water, which is necessary for his domestic use and also to meet agricultural requirements. It is a customary right.[123]

The Court appears to recognise the right of the Company to exploit ground water from its land in a 'reasonable quantity'. The Court further gives explanation as to what amounts to reasonable quantity, that is, 'the quantity that is necessary for his domestic use and also to meet agricultural requirements'.[124]

The Single Judge relied upon the Public Trust Doctrine as recognised by the Supreme Court of India in the *M.C. Mehta* case.[125] It was held that being the trustee of natural resources, it is the duty of the state to protect ground water resources against over-exploitation.[126] The inaction of the state in this regard will tantamount to the infringement of the constitutionally guaranteed right to life under Article 21.[127] The Court also found basis in the Kerala Panchayat Raj Act. It was held that 'the duty of the panchayat can be correlated with its mandatory function No. 3 under the third schedule to the Panchayat Raj Act namely, 'maintenance of traditional drinking water resources'.[128]

The common law rule on ground water was held as outdated and incompatible with the emerging environmental jurisprudence. It was stated that:

> The principles applied in those decisions cannot be applied now, in view of the sophisticated methods used for extraction like bore-wells, heavy duty pumps etc. …are incompatible with the emerging environmental jurisprudence developed around Article 21 of the Constitution of India.[129]

Based upon the above findings, it was decided that the Company should be restrained from excessive extraction of ground

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[123] Ibid., para. 13.
[124] Ibid., para. 13.
[125] *M.C. Mehta v Kamal Nath* (1997) 1 SCC 388.
[126] *Perumatty Grama Panchayat v State of Kerala*, High Court of Kerala, India, W.P. (C) No. 34292 of 2003, Judgement dated 16 December 2003, para. 13.
[127] Ibid., para. 13.
[128] Ibid., para. 13.
[129] Ibid., para. 13.

water from its land. It was further held that the Company, like any other landowner, should be permitted to extract ground water, which must be equivalent to the water normally required for irrigating crops in 34 acres of plot. The Panchayat was given the power to decide the quantity of water that can be legitimately extracted by the Company. The Panchayat was also given the power to monitor and inspect the ground water consumption of the Company.

To sum up, ground water was held as a national wealth and as a resource that belongs to the entire society, that is, a subject of public trust.[130] The panchayat and the state in general were held to be custodians of ground water resources in its jurisdiction. The right of an individual to use ground water was made subject to the restrictions imposed by the state. In result, the decision is in tune with the present water law reforms through which ground water is being shifted from the individual to Government control.[131] The Single Judge decision also recognises the fundamental right of individuals under Article 21 of the Constitution of India. It was held that the over-extraction of ground water by a person or a company is likely to infringe the fundamental right of others guaranteed under the Constitution and therefore the state is duty bound to take actions to prevent it.

4.2.2 Division Bench Decision

Being aggrieved by the Single Judge decision, both the Panchayat and the Company filed appeals. Apart from that there were other appeals in connection with the licence issuing power of the Panchayat. Since all these matters were interlinked, the division bench considered and decided all the appeals together.[132]

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[130] Ibid.

[131] Philippe Cullet, 'Water Law Reforms: Analysis of Recent Developments', 48(2) *Journal of the Indian law Institute* 206 (2006). *Source:* http://www.ielrc.org/content/a0603.pdf.

[132] Four appeals have been filed in the Kerala High Court, they are: *Hindustan Coca Cola Beverages Private Limited v The Perumatty Grama Panchayat and Ors*., W.A. No. 2125 of 2003; *The Perumatty Grama Panchayat v. State of Kerala and Ors*, W.A. No. 215 of 2004; *The Perumatty Grama Panchayat v State of Kerala and Ors*., W.A. 1962 of 2003 and *The Perumatty Grama Panchayat v Secretary to Government, Local Self Governance, Government of Kerala*, W.A. No. 12600 of 2004.

In the appeal, the Panchayat presented that it had no issues with the Company and was merely anxious about the miseries of the people. It was presented on behalf of the Panchayat that, if there are proper solutions for the scarcity of water and other environmental problems, the Panchayat would never object to an industry capable of providing employment and other development. At the same time the Company argued that the Single Judge had been wrong in saying that ground water in a piece of land does not belong to the owner of the land but to the public.

The division bench stated that in the absence of a specific statute prohibiting the extraction of ground water, a person has the right to extract ground water from his land. Such an extraction could not be considered illegal. In this context, the division bench stated that 'we do not find justification for upholding the findings of the learned judge (single judge) that the extraction of ground water is illegal...we cannot endorse the finding that the company has no legal right to extract his wealth'.[133] The division bench also disapproved the reasoning of the Single Judge based on the Public Trust Doctrine and said that 'abstract principles could not be the basis for the Court to deny basic rights unless they are curbed by valid legislation'.[134] The Court further held that 'the reliance placed…in Kamal Nath's case is not sufficient to dislodge the claim'.[135]

The division bench also rejected the reasoning of the Single Judge on the basis of powers of the panchayat under the PR Act. It was said that: '…reference to the mandatory function referred to in the third schedule of the Panchayat Raj Act, namely "maintenance of traditional drinking water resources" could not have been envisaged as preventing an owner of a well from extracting water from there as he wishes'.[136] The Division Bench appears to have recognised ground water as a 'private water resource' and accepted the proposition of law that the landowner has 'proprietary right' over it.

Based upon this premise it was held that 'the Panchayat had no ownership over such *private water resources* and in effect denying

[133] Ibid., para 35.
[134] Ibid., para. 35.
[135] Ibid., para. 43.
[136] Ibid., para. 35.

the *proprietary rights* of the occupier and the proposition of law laid down by the learned judge (single judge) is too wide for unqualified acceptance' (emphasis added).[137] The division bench asserted that '…ordinarily a person has a right to draw water, in reasonable limits, without waiting for permission from the Panchayat and the Government. This alone could be the rule and the restriction an exception'.[138]

The Court reaffirmed this proposition of law and said that 'it always will be permissible for an occupier to draw water out of his holding'.[139] In the opinion of the Court, the permissible restriction, in public interest, can only be to compel the occupier of the land to ensure that his conduct does not bring about a drought or imbalance in the water table.[140] Having said so, the division bench rejected the proposition of law as observed by the Single Judge. It was held that 'ground water under the land of the Respondent (the Company) does not belong to it may not be a correct proposition in law'.[141] The Court appears to have affirmed the common law principle and consequently rejected the power of the panchayat to restrict or prohibit this right.

The division bench rejected the allegation of pollution and the quality problem of the products of the Company. It was held that the Panchayat was ill-equipped to examine technical matters like that of pollution and the purity of the products of the Company.[142] The division bench also rejected the Joint Parliamentary Committee (JPC) report on the purity of the products of the Company on the ground that the JPC report had not referred to any samples collected from the factory in Plachimada.[143]

The division bench accepted the decision of the Government regarding the constitution of an expert committee to investigate the matter. As a result, an expert committee was constituted to

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[137] Ibid., para. 35.
[138] Ibid., para. 43.
[139] Ibid., para. 49.
[140] Ibid., para. 49.
[141] Ibid., para. 43.
[142] It is to be noted that the Court has not declared it as beyond the authority of the panchayat. It suggests that if the panchayat is technically equipped, it can go into the matter of the purity of the products.
[143] Ibid., para. 50.

study and investigate the issue. The expert committee submitted an interim and a final report in Court. By accepting the fact of water scarcity in the area, the expert committee concluded that the reason could be the declining rainfall in the last several years. The Committee had recorded the opinion that the unregulated withdrawal of ground water from wells within the factory complex and also outside had aggravated the water shortage. The report concluded that the annual ground water requirement of the Company, at the average rate of five lakh litres per day, could be allowed, if average rainfall was available. The report also suggested that the consumption should be reduced proportionately to the decrease in rain fall, for example, if rainfall was less by ten per cent, the exploitation of water was to be reduced to four lakh litres per day. The expert committee report has been accepted as such by the division bench by saying that 'it appears to be authentic, based on data collected, mature and therefore acceptable'.[144]

To sum up, major proposition of law propounded by the division bench was that the landowner or the occupier of the land has the right to withdraw ground water from his land. This is part of his proprietary right. Any restriction on this right is an exception and should be supported by express statutory authorisation. The Court expressly rejected the PTD on the ground that this principle does not find expression in statutes.

It appears that the division bench, in principle, reversed the Single Judge's decision. The Single Judge was premised on the PTD and considered ground water as 'national wealth' and therefore belongs to the society. Whereas the division bench rejected this proposition and asserted that right to draw ground water was part of proprietary rights and any restriction on this right was an exception. The division bench appears to have relied upon the common law rule on ground water. Having premised on public law concepts such as the PTD and Constitutional rights, the single judge upheld the power of the panchayat while the division bench

[144] Ibid., para. 46. The expert committee report has been criticised on the ground that it had relied upon unrealistic and unscientific data. The Committee has also been criticised for being unrepresentative of the interests of the local community and the Panchayat. *See* K. Ravi Raman, 'Corporate Violence, Legal Nuances and Political Ecology: Cola War in Plachimada', 40 (25) *Economic and Political Weekly* 2481 (2005).

upheld private property rights and disapproved the role of the panchayat to regulate ground water use.

5. The Future: An Analysis

The future course in the context of the Plachimada case consists of two important areas. First, the general legal framework of ground water developed in Kerala after the Plachimada case. The legal regime of ground water in Kerala is not the same as it was in the Plachimada case. The ground water legal regime has undergone reforms. The Kerala Ground Water (Control and Regulation Act), 2002 is the major result of legal reforms. This is the major legal framework expected to address Plachimada like situations in future. Secondly, the pending appeal in the Supreme Court of India. This is another area through which a development in the ground water legal regime is likely to occur.

5.1 Plachimada in the Supreme Court[145]

The root cause of the Plachimada case was the Panchayat's refusal to renew the licence of the Company on the grounds that the Company's over-exploitation of ground water has caused an acute shortage of drinking water and other environmental problems in the Panchayat. Therefore, all major arguments presented in appeal before the Supreme Court seeks to justify the Panchayat's action against the Company.

The Panchayat sought to justify its action on the grounds that there had been insufficient water for agricultural and drinking purposes and this shortage had resulted in popular protests in the Panchayat. The Panchayat argued that the action taken against the Company was its duty under the Kerala Panchayat Raj Act and in conformity with the underlying spirit of the 73rd Amendment to the Constitution.

The Panchayat contended that the power to control or restrict the ground water extraction comes under the mandatory duty of the Panchayat. Objectives sought to be achieved through all these provisions or powers are public safety and public welfare. By

[145] The analysis in this part is based on the Special Leave Appeal filed in the Supreme Court on behalf of the Panchayat.

relying upon this legal background, it has been strongly contented in the Special Leave Petition (SLP) that the High Court was wrong in directing the Panchayat to renew the licence. The High Court did not consider the powers of the Panchayat as envisaged under the PR Act and the Constitution of India. It was also submitted that the High Court has no power under article 226 to give such a direction to a licencing authority.

It was submitted that the over-exploitation of ground water by the Company has resulted in drying up of wells in the Plachimada area and also contamination of water resources. These 'ground realities' have been ignored by the division bench of the High Court. The Panchayat has also submitted its arguments based upon the 'right to life' jurisprudence. It has been presented that there was an acute scarcity of drinking water in the area and therefore the action taken by the Panchayat was in the larger interest of public health and safety. Otherwise it would have been a violation of the right to life and the right to livelihood under Article 21 of the Constitution.

The priority principle, the duty of the state to protect and preserve the environment and the right to livelihood are the arguments presented by the Panchayat to support its part.[146] The SLP has also relied upon on liability principles under the tort law. It was argued that property rights vested in the Company does not extent beyond the four boundaries of its property. Any activity, even though carried out in their property, if adversely affecting the life as well as the proprietary right of the owner of the adjoining property, then it is the duty of the authority to interfere with such activity and to ensure the maintenance of rights and basic amenities to its citizens. It has also been argued that when the enjoyment of property by one person causes harm to the life and property rights of the adjoining owner, the liability under tort arise and the victim is entitled to compensation.

All the abovementioned submissions tend to establish the power of the panchayat to manage and develop water resources in its

[146] The priority principle requires the government to set priorities in the allocation of water for various competing uses such as domestic, agricultural, industrial and commercial. This principle has already found expression in the National Water Policy, 2002. *See* National Water Policy (2002), Para 5. *Source:* http://www.ielrc.org/content/e0210.pdf. *See also* Cullet, note 131 above.

jurisdiction. In a way, arguments presented in the Supreme Court are an attempt to establish the state's control over natural resources.

The Plachimada case addresses primarily two issues, the pollution problem and the question of control over the private person/company's ground water extraction from their property. The first issue would help to provide a specific remedy to the Plachimada crisis and the second one may clear the way to arrive at a balance between public interest and the right of the Company and to lay down basic principles underlying the ground water legal regime. The second issue is closely related to the decentralisation principle, that is, the role of the panchayat vis-à-vis regulation of ground water use.

The pollution problem, from the very beginning, has not been an issue in the case. The Kerala High Court disposed of the issue by saying that pollution was not the main question to be decided in the case brought before the Court. In the present SLP too, the pollution problem has not been highlighted. The liability issue (of the Company) has been argued mainly on the basis of principles under tort law. Given the fact that pollution caused due to solid wastes from the Company was confirmed, the polluter pays principle could be a legal basis of compensation claims.

The second issue seeks to address the broader question of balance between the power of the state (particularly local bodies) to regulate ground water use and the right of the landowner to draw ground water from his land. The discussion on this issue is likely to be centered on the PTD and the common law rule. The subsequent changes in the ground water legal regime, that is, the Kerala Ground Water (Control and Regulation Act), 2002 and the decentralisation principle could also be an influencing factor. The said Act seeks to empower the government to regulate the ground water exploitation and prov ides legal and institutional framework for that purpose and the decentralisation principle tends to give regulatory powers to local bodies and encourage public participation in governance.

5.2 The Ground Water Act

The reforms in ground water laws is said to have begun when the Ministry of Water Resources circulated a Model Bill for Regulation of Ground Water to all States and Union Territories in 1970, which

was revised in 1992 and 1996. The Model Bill was again reviewed in 2005. Several states have enacted their own ground water laws, mostly following the Model Bill.[147] The Kerala Government enacted the Ground Water Act in 2002. The Act was not in force when the legal battle was started. Although the Act was notified later, it was too late to apply the regulatory framework envisaged in the Act in the Plachimada case. Since this major legal framework is supposed to manage similar issues in the future, the scheme of the Act is explained and analysed here.

5.2.1 Introducing the Act

The Kerala Government has enacted the Kerala Ground Water (Control and Regulation Act), 2002 for the conservation of ground water and for regulation and control of its extraction and use.[148] The Act explicitly considers the fact that ground water is a critical resource of the state and the undesired environmental impacts of the indiscriminate extraction of ground water in the state. Hence, the State Government considered it necessary to regulate the use of ground water in the interest of the public.[149] The schemes envisaged in the Act aims to control and regulate the extraction and use of ground water by private individuals and companies.

The Act provides for the constitution of a State Ground Water Authority as an institutional mechanism for implementing the Act.[150] The authority is responsible and empowered to fulfill the objectives of the Act. This is the competent body to advise the Government to initiate policy actions to protect and preserve ground water resources in the state.

The Act is not applicable to all users of ground water or to all geographical areas in the state. The application of the Act is limited by quantitative and geographical restrictions. First, the term 'user of ground water' includes only persons using ground water from

[147] *See* the Kerala Ground Water (Control and Regulation Act), 2002; The Goa Ground Water Regulation Act, 2002; The Himachal Pradesh Ground Water (Regulation and Control of Development and Management) Act, 2005; The West Bengal Ground Water Resources (Management, Control and Regulation) Act, 2005.

[148] Hereafter referred as 'the Act'.

[149] *See* the preamble of the Act.

[150] Hereafter referred to as the 'Authority'.

a pumping well.[151] The definition of the term 'pumping well, expressly excludes open wells fitted with pumps driven by an engine or motor of horse power up to 1.5 and bore wells and dug-cum bore wells fitted with pumps driven by an engine or motor of Horse Power up to three.[152] This provision tends to exclude small-scale users, most likely the domestic users. Secondly, the Act is only applicable to notified areas. The Government, on recommendation of the Authority, is entrusted with the power to declare a particular area as a notified area, if it is necessary in the public interest to regulate the ground water use in that area.[153] The notification process is the discretion of the Government and the role of the Authority is only advisory in nature.

The Act provides permit and registration system as a tool for regulating ground water use. The Act makes it mandatory for every person who desires to dig a well or to convert an existing well into a pumping well to seek permission from the Authority.[154] The Act further gives guidelines for the Authority to consider before accepting or rejecting the permit applications. It includes purposes like digging wells, quality and quantity of ground water in the area, potential danger to existing users, distance from the existing wells, etc.[155] The rules made under the Act makes it mandatory that a ground water scientist deputed by the Authority should visit the concerned place and after studying the geology and existing ground water conditions of the area give an investigation report with recommendations. If necessary, geophysical survey may also be done in addition to the hydrogeological survey.[156] The Act also requires the existing users of ground water in a notified area to register their wells.[157] Here also the Authority can accept or reject the application on reasonable grounds. The guidelines for

[151] Kerala Ground Water (Control and Regulation Act), 2002, Section 2 (h). *Source:* http://www.ielrc.org/content/e0208.pdf.
[152] Ibid., Section 2 (f).
[153] Ibid., Section 6.
[154] Ibid., Section 7 (1).
[155] Ibid., Section 7 (7).
[156] Kerala Ground Water (Control and Regulation) Rules, 2004. *Source:* http://www.kerala.gov.in/dept_irrigation/gopno.17-2004.pdf.
[157] Ibid., Section 8 (1).

accepting or rejecting the application for registration are more or less same as that required for the permit.[158]

The Act contains provisions to protect public drinking water resources. The Act requires permission from the Authority to dig wells within 30 meters of any public drinking water resources.[159] The Authority is authorised to grant permission for the purposes of drinking or agriculture, if the digging of the well is not likely to affect public water resources. The power of the Authority to grant permission is restricted by an express term 'drinking purpose or for agriculture'. This means there is no question of other competing uses like commercial or industrial purposes within 30 meters from a public drinking water resource. In the absence of express provisions dealing with priorities, this provision can be used as a guideline for the Authority to set priorities before granting a permit or certificate of registration or to put conditions in the permit or certificate of registration.

The Authority may grant the permit or certificate of registration upon conditions necessary for the implementation of the Act.[160] The Authority may also change conditions in the permit or certificate of registration.[161] The Authority can cancel the permit or certificate of registration on grounds such as non-compliance with conditions or procurement of permit/certificate based on false facts. The Authority can also use this power if the ground water situation in the area demands a higher degree of restriction.[162]

5.2.2 Critical Analysis of the Act

The object of the Act is to promote the conservation of ground water and regulate the use of ground water. The Act recognises the existing indiscriminate exploitation of ground water in some areas of the state and its negative environmental impacts. However, the legal framework as envisaged in the Act seems to be insufficient to achieve the stated objectives.

First of all, regulatory tools are applicable only to 'notified areas'. The power to notify a particular area is vested with the

[158] Ibid., Section 8 (5).
[159] Ibid., Section 10.
[160] Ibid., Sections 7 (4) and 8 (3).
[161] Ibid., Section 11.
[162] Ibid., Section 12.

government on the recommendation of the authority constituted under the Act. It would be proper if areas being commercially utilised by water- based industries are deemed to be 'notified areas'.

The Act does not incorporate the principle of prioritisation as envisaged in the National Water Policy of 2002.[163] However, the prioritisation principle could be seen as implied in the provision for the protection of public drinking water resources.[164] The provision which permits only drinking water and agriculture in areas within 30 meters from a drinking water source conveys the second priority given to agriculture. The Act does not differentiate between the competing uses of ground water. Different grades of regulation should have been envisaged under the statute for different uses like drinking water and other domestic purposes, agricultural purposes and commercial uses. Since agricultural and commercial users are the big users of ground water, the grade of the regulation and penalties for violations ought to have been prescribed separately. But the Act has drawn up a single procedure, framework and penalty for all uses. Moreover, the penalty as prescribed under the statute appears to be insufficient.[165] The penalty prescribed in the Act is not sufficient to restrain big companies from over-exploiting ground water. The cancellation of the permit or registration should have been made a punishment in addition to the fine or imprisonment for the second offence.

The polluter pays principle is considered to be an important part of environmental jurisprudence. The Supreme Court of India has incorporated the polluter pays principle as a part of the Indian legal system.[166] The principle requires the polluter to pay compensation for damages caused to the people and ecology. The Act prescribes only penalties of nominal fines and imprisonment. Despite the repeated recognition of this principle by the Supreme Court, it has not found expression in the Act.[167]

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[163] *See* National Water Policy, 2002, Section 5. *Source:* http://www.ielrc.org/content/e0210.pdf.

[164] *See* the Kerala Ground Water (Control and Regulation Act), 2002, Section 8.

[165] Kerala Ground Water (Control and Regulation Act), 2002, Section 21. *Source:* http://www.ielrc.org/content/e0208.pdf.

[166] *Vellore Citizen's Welfare Forum* v *Union of India* (1996) 5 SCC 647; *Indian Council for Enviro-Legal Action and Ors. v Union of India*, (1996)3 SCC 212.

[167] A better approach, in this regard, can be seen in the Andhra Pradesh Water, Land and Trees Act, 2002. *Source:* http://www.ielrc.org/content/e0202.pdf.

The Act prescribes a centralised planning and management strategy. The role of local communities and local bodies has not found expression in the Act. It is most unlikely that the protection and preservation of natural resources like ground water become effective without participation at the local level. Therefore, the decentralisation principle needs to be one of the bases of legal framework for ground water regulation and management. Though the Act points out conservation as a major objective, the Act does not prescribe any measures for resource augmentation. In this regard, it would be beneficial to note some features of other ground water laws in the country. For instance, The Andhra Pradesh Water, Land and Trees Act of 2002 has included rain water harvesting structures as a requirement for building constructions.[168]

Absence of base data regarding the quantity and quality of ground water in Plachimada aquifer was the major obstacle faced by government agencies in examining the causes and effects of ground water depletion in Plachimada. Therefore, the preparation of data on ground water in the state and periodic monitoring of the quality and quantity need to be an essential part of the legal framework. In fact, some states have incorporated provisions in this regard in their ground water laws. For instance, the West Bengal Ground Water Law contains provisions requiring periodic preparation of district-wise ground water data.[169]

6. Conclusion

Separate statutory framework for ground water in India has been developed since 1990s. Prior to this period, the legal regime mainly consisted of legal principles linked, to a large extent, to land ownership.[170] The development of a separate ground water legal regime was initiated by the Ministry of Water Resources through its Model Bills. A statutory framework for regulating ground water use was enacted in the state of Kerala in the year 2002, which came into force in 2003.

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[168] *See* the Andhra Pradesh Water, Land and Trees Act, 2002, Section 17 (2).

[169] *See* the West Bengal Ground Water Resources (Management, Control and Regulation) Act of 2005, Section 9 (a). *Source:* http://www.ielrc.org/content/e0502.pdf.

[170] *See* Cullet in this volume.

The issue of ground water depletion and pollution in Plachimada has arisen prior to the 2002 Act. Therefore, the reforms in ground water laws did not find place in the Plachimada case. Legal principles – common law rule and the PTD – were the major point of discussion in the Plachimada case. Both these principles were relied upon by the Kerala High Court in the Plachimada case. Given the differences in basic premises and outcome of these principles, finality was not achieved in the Plachimada case. The matter is now pending in the Supreme Court of India.

The Plachimada case, as decided by the Kerala High Court, addresses the issue of ground water depletion allegedly caused due to the over-exploitation of ground water by the Company and the consequent cancellation of licence of the Company by the Panchayat. Therefore, the focus of the case was on the power of the Panchayat to regulate ground water use in its jurisdiction and the right of the landowner to draw ground water from his land. The Kerala High Court decided the matter differently in principle. The Single Judge relied upon the PTD and decided in favour of the power of the Panchayat. Whereas, the division bench relied upon the common law rule and decided in favour of the Company's right to draw ground water from its land.

Apart from the issue of ground water depletion, pollution was another major issue raised in Plachimada. The issue of pollution due to effluents discharged from the Company was confirmed by various government agencies in their reports. The Company was directed to stop its production on this ground by the Pollution Control Board. This situation makes it viable for the Government to invoke the precautionary principle and polluter pays principle because these principles are part of environmental laws in India as per the Supreme Court decisions.[171] Moreover, the environmental jurisprudence developed under Article 21 of the Constitution of India requires the government to take appropriate actions to mitigate the problem of ground water depletion and pollution.[172]

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[171] *Vellore Citizen's Welfare Forum v Union of India* (1996) 5 SCC 647; *Indian Council for Enviro-Legal Action and Ors. v Union of India*, (1996)3 SCC 212.

[172] *Subhash Kumar v State of Bihar*, AIR 1991 SC 420; *F.K. Hussain v Union of India*, AIR 1990 Ker 321; *Venkatagiriyappa v Karnataka Electricity Board & Others*, 1999 (4) Kar. L.J. 482.

A case study on Plachimada, which largely symbolises the discussion on ground water legal regime, reveals the multiplicity of laws and institutions. The ground water laws and institutions constituted under it, the pollution control laws and PCBs, the Panchayat and the Central Ground Water Board are the major components of ground water legal regime in India. The coherence and cooperation among and between these components would be a major challenge for the legal system in the coming days.