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CONSTITUTIONALITY OF THE PLACHIMADA TRIBUNAL BILL, 2011 AN ASSESSMENT

Sujith Koonan

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1

INTRODUCTION

Since the Bhopal gas leak disaster in 1984, damages caused to individuals, property and the environment by industries have become an important challenge for the legal system in India. 'Plachimada' has once again brought this legal challenge into the limelight. Plachimada is a village in the Palakkad district in the State of Kerala, which is mainly known for the dispute between the local village panchayat and the people on the one side and the Hindustan Coca Cola Company (hereafter the Company) on the other side.

The Company started a soft drink manufacturing factory in Plachimada village in 2000. The public protest against the Company began within two years. The major reasons for the protest were groundwater depletion, groundwater pollution and land pollution allegedly due to the functioning of the Company and their health and economic implications.¹ Thus, in a broad sense, the Plachimada dispute reopened the debate on the legal regime for control and use of groundwater and the issues of liability and compensation for damages caused to individuals, property and the environment by industries.

It is in this context that the Plachimada Coca-Cola Victims Relief and Compensation Claims Special Tribunal Bill, 2011 (hereafter the Bill or the Plachimada Tribunal Bill) was passed by the Kerala Legislative Assembly on 24 February 2011. The Bill provides for the constitution of a special tribunal to settle compensation claims of the people in Plachimada. The Bill has been reserved for the assent

of the President of India because of the perceived conflict between the Bill and some of the existing laws enacted by Parliament. The assent is still awaited. In the meantime, the Union government (hereafter the central government) has sought some clarifications from the State government regarding the latter's legislative competence under the Constitution to enact such a legislation.²

The power of the Kerala government is questioned mainly on the ground that the existence of laws passed by Parliament such as the Environment (Protection) Act, 1986 and the National Green Tribunal Act, 2010 renders the Bill ineffective and inoperative if brought into force. The power of the Kerala government has also been questioned on the ground that the Kerala Assembly passed a resolution in 1968 which vests the power to pass laws for the State on 'prevention of water pollution from domestic and industrial waste' in Parliament, and therefore the Bill is outside the scope of the Kerala legislature to the extent that it covers matters referred to in the 1968 resolution.³

The constitutional validity of a law depends on two criteria - violation of fundamental rights and violation of constitutional provisions relating to legislative competence. Since there is no question of violation of fundamental rights arising in the context of the Bill, this paper focuses on the second issue, that is, the issue of legislative competence of the Kerala government to adopt the Bill. This paper contains four parts apart from the introduction. The second part explains the background and the salient features of the Bill. The third part examines the constitutional provisions relevant to examine the validity of the Bill and is followed by the fourth part which assesses the constitutional validity of the Bill in the light of constitutional provisions and relevant cases. The paper, in the fifth part, explains the need to examine the issue of the constitutional validity of the Bill beyond the question of legislative competence to understand its larger socio-political implications.

1 For a detailed account on the factual and legal issues, see Sujith Koonan, 'Groundwater: Legal Aspects of the Plachimada Dispute', in P. Cullet, A. Gowlland-Gualtieri, R. Madhav & U. Ramanathan (eds), *Water Governance in Motion: Towards Socially and Environmentally Sustainable Water Laws* 159 (New Delhi: Cambridge University Press, 2010) and C.R. Bijoy, 'Kerala's Plachimada Struggle: A Narrative on Water and Governance Right' 41/41 *Economic and Political Weekly* 4332 (2006).

2 C. Gouridasan Nair, 'Plachimada Tribunal Bill: Centre Seeks Clarifications', *THE HINDU*, 17 September 2011.

3 *Ibid.*

2

PLACHIMADA TRIBUNAL BILL, 2011

2.1 Developments Leading to the Plachimada Tribunal Bill

The adoption of the Bill is a recent legal development that forms a significant part of a series of developments since the public protest against the Company began in Plachimada. The ongoing legal dispute between the Perumatty Grama Panchayat (hereafter Panchayat) and the Company constitutes an important legal development. The legal dispute began when the Panchayat refused to renew the license of the Company and ordered its closure on the ground that groundwater extraction by the Company resulted in drinking water scarcity in the area. The dispute eventually reached the High Court of Kerala. In the meantime, the Kerala Pollution Control Board directed the Company to close its factory until it complies with the provisions of the Hazardous Waste (Management and Handling Rules), 1989 as amended in 2003 (hereafter the Hazardous Waste Rules). The reason for the closure order issued by the Kerala Pollution Control Board was the illegal dumping of hazardous wastes by the Company.

A Single Judge of the High Court held that the Panchayat has no authority to issue a closure order on the ground of excessive extraction of groundwater. At the same time, the Single Judge upheld the power of the Panchayat to restrict or prohibit the use of groundwater within its jurisdiction. The legal position that emerges from the Single Judge's decision is that 'the Panchayat can at best, say, no more extraction of groundwater will be permitted and ask the company to find alternative sources for its water requirements'.⁴

The decision of the Single Judge was challenged before a Division Bench of the High Court. The Division Bench, in principle, reversed the Single

Judge's decision by asserting that the right to extract groundwater is a part of the private property right of the landowner. The Division Bench further asserted that any restriction on this property right shall be made through legislation. The case is now pending before the Supreme Court of India.

Another major legal development was the adoption of the Kerala Groundwater (Control and Regulation) Act, 2002. The Act is not directly relevant to the ongoing legal dispute mainly for two reasons. First, the Act was not in force when the legal battle began. Second, even if the Act had been in force, the Panchayat could not have invoked the Act to order the Company to stop extracting groundwater from its land because the Act does not give power to grama panchayats to regulate groundwater use within their jurisdiction. Instead, the Act envisages a separate Groundwater Authority to implement such regulations. Nevertheless, the Act is relevant in a broader context because it provides the legal basis to control the right of a landowner to extract groundwater from her/his land and has the potential to prevent the repetition of incidents like Plachimada in the future.

From a legal angle, the closure order issued by the Kerala Pollution Control Board in 2004 is another relevant development. The immediate reason for the order was the findings of the Supreme Court Monitoring Committee on Hazardous Wastes.⁵ After visiting the area in 2004, the Committee noticed the dumping of wastes by the Company outside its premises.⁶ In addition, a study conducted by the Central Pollution Control Board found that sludge containing heavy metals such as lead and cadmium in excess of the permissible limits was supplied by the Company to farmers for use as a

⁴ *Perumatty Grama Panchayat v. State of Kerala*, 2004 (1) *Kerala Law Times* 31, Para. 12, available at www.ielrc.org/content/e0328.pdf.

⁵ The Supreme Court Monitoring Committee on Hazardous Wastes was constituted as per the order of the Supreme Court in *Research Foundation for Science, Technology and Natural Resource Policy v. Union of India*, Supreme Court of India, Writ Petition No. 657 of 1995, Order dated 14 October 2004.

⁶ The report of the Supreme Court Monitoring Committee on Hazardous Wastes can be accessed at www.thesouthasian.org/archives/2006/pdf_docs/SCMC_Report_on_Kerala_Visit%5B1%5D%20August%202004.pdf.

fertiliser. The Central Pollution Control Board, thus, concluded that the sludge should be treated in accordance with the Hazardous Waste Rules. In this background, the Kerala Pollution Control Board directed the Company to close the factory until it complies with the provisions of the Hazardous Waste Rules.⁷ The Company remains closed down since the Kerala Pollution Control Board's closure order in 2004.

There have been a number of significant developments on the Plachimada issue during the last decade. These include the legal dispute pending before the Supreme Court and intervention by agencies such as the Kerala Pollution Control Board, the Central Pollution Control Board and the Supreme Court Monitoring Committee.⁸ However, the issues of liability and compensation were not a part of these developments. Even though the Kerala Pollution Control Board issued a closure order on the ground of pollution due to hazardous wastes, no further action was taken to assess the damages, if any, caused by the Company. This is very critical as the Hazardous Waste Rules explicitly recognise the responsibility to dispose hazardous wastes properly and in case of failure to do so, liability for damages caused to the environment.⁹

A significant development with regard to the issue of compensation took place when the Kerala Government constituted a High Power Committee (hereafter Committee) in May 2009 to assess the scale and nature of damages in Plachimada. The Committee submitted its report in March 2010 confirming the role of the Company in causing damages to individuals, agricultural economy and the environment. The report estimated Rupees 216.26 Crores as reasonable compensation to be recovered from the Company. The Committee also recommended the setting up of a special tribunal to assess damages and to recover that amount from the

Company.¹⁰ It is in this background that the Bill was adopted by the Kerala Assembly.

2.2 Salient Features

The Bill provides for the establishment of a special tribunal - the Plachimada Coca-Cola Victims Relief and Compensation Claims Special Tribunal (hereafter the Tribunal) - for adjudication of disputes between the local people and the Company and for recovery of compensation for the victims for damages suffered due to the activities of the Company. Being a tribunal to address environmental issues, its membership essentially includes scientific and technical experts in addition to legal experts. The Tribunal will have three members. While a legal expert would be the chairperson, the Tribunal will have an engineer from the government service and a person having knowledge and experience on environmental matters as members.

The word 'dispute' has a specific meaning and scope in the Bill. The term 'dispute' as defined under the Bill shall conform to two prerequisites. First, the parties to the dispute shall be the Company on the one hand and residents of Perumatty and Pattanchery panchayats on the other hand. The Bill gives the power to the State government to expand the list of panchayats as and when necessary. Hence, there is scope for the Kerala government to include other nearby villages if those villages are found to be affected eventually.

Second, the subject matter of the dispute shall be 'any issue in respect of matters arising out of violation of the provisions of laws relating to environment, air and water pollution'. So the key legal questions before the Tribunal will be:

- Whether the Company has violated any law relating to environment, air and water pollution?
- Whether such a violation has caused damage to the residents of Perumatty and Pattanchery

⁷ See Kerala Pollution Control Board's direction to Hindustan Coca-Coal Beverages Private Limited, vide Order No. PCB/HO/H&R/485/04, 23 August 2004.

⁸ A detailed note of these developments has been made elsewhere, see Koonan, note 1 above.

⁹ See Rules 4 and 16 of the Hazardous Waste (Management and Handling) Rules, 1989.

¹⁰ Report of the High Power Committee constituted to study the extent and nature of losses incurred due to the functioning of the Coca Cola Company at Plachimada, 22 March 2010 at 89, available at www.groundwater.kerala.gov.in/english/pdf/report_text.pdf.

panchayats or such other panchayats as identified by the State government?

The dispute may be brought before the Tribunal in three ways. First, the Tribunal has original jurisdiction to ‘entertain applications for compensation or restitution of property damaged’. Second, the Bill provides that disputes pending before any court or other authority shall be transferred to the Tribunal. However, the term ‘any court or authority’ does not include the High Court or the Supreme Court. This means that disputes pending before the High Court or the Supreme Court on the subject matter covered under the Bill will not be affected. Third, even though the Bill does not aim to affect the pending cases before the High Court or the Supreme Court, it explicitly grants the High Court the discretion to refer to the Tribunal ‘any matter pending before it relating to the company for which Tribunal is empowered to adjudicate...’ In such instances of reference from the High Court, the case shall be treated as if it was originally filed before the Tribunal.

There are provisions in the Bill that refer to the laws and principles to be applied by the Tribunal while deciding cases. The provision that defines the word ‘dispute’ uses the term ‘laws relating to environment, air and water pollution’. This means that the pollution control laws will be the applicable legal framework. Further, the Bill makes it mandatory for the Tribunal to apply the principle of sustainable development, the precautionary principle and the polluter pays principle. Thus, the legal framework addressing environment, air and water pollution together with the three key environmental law principles constitute the applicable legal framework for the Tribunal.

3

RELEVANT CONSTITUTIONAL PROVISIONS

3.1 Division of Legislative Powers

The Seventh Schedule of the Constitution of India provides separate lists of subject matters on which

state governments and the Union government may make laws. The Seventh Schedule consists of three lists – Lists I, II and III. While List I (Union List) provides matters on which the Union government has the exclusive power to make laws, List II (State List) provides matters on which state governments have the exclusive power to make laws. List III (Concurrent List) contains matters on which both state governments and the Union government can make laws. With regard to any matters not specifically enumerated in any of these three lists, Article 248 of the Constitution vests exclusive residuary power to the Union government to make laws.

Parliament can make laws on the matters in the State List under certain conditions prescribed in the Constitution, that is, national interest (Article 249), when an emergency is in operation (Article 250) and when two or more states pass resolution to vest such a power in Parliament (Article 252).

The existence of three lists with a large number of entries makes overlapping of laws probable.¹¹ The problem arises when the Union or a state encroaches upon the powers of the other. When either the Union or a state encroaches upon the other’s jurisdiction, the encroaching law will be declared invalid. In such situations, the doctrine of pith and substance has to be applied, that is, the subject matter or the substance of both the laws needs to be examined in order to determine which List/entry the laws correspond to. The Supreme Court, in the *Hoechst Pharmaceuticals* case, relied on the decision of the Privy Council in *Prafulla Kumar Mukherjee v. Bank of Commerce* and said that “once it is found in pith and substance an impugned Act is a law on a permitted field, any incidental encroachment on a forbidden field does not affect the competence of the legislature to enact that Act”.¹²

Conflict may also arise when there are no such encroachments, yet two laws clash with each other. Such a situation arises when the subject matter of the conflicting laws corresponds to entries in List III (Concurrent List). The question of repugnancy

¹¹ *State of West Bengal v. Kesoram Industries*, (2004) 10 SCC 201, available at www.ielrc.org/content/e0420.pdf.

¹² *Hoechst Pharmaceuticals v. State of Bihar*, 1983 SCR (3) 130 at 171.

arises in such situations and the central law will prevail over state laws, that is, the state law will be declared void to the extent to which it is repugnant to the central law (Article 254).

3.2 Establishment of Tribunals

Articles 323-A and 323-B of the Constitution deal with the establishment of tribunals. While Article 323-A gives authority to Parliament to constitute a tribunal to deal with service disputes, Article 323-B provides a range of other matters on which a tribunal can be constituted. However, the power to constitute tribunals is limited by the entries in the Seventh Schedule. Parliament has the power to constitute tribunals on matters listed in List I and similarly state governments have the power to constitute tribunals on matters listed in List II. Both state governments and the Union government have the power to constitute tribunals on matters listed in List III.

4 ISSUES CONCERNING CONSTITUTIONALITY OF THE BILL

4.1 Power to Constitute Tribunals

The validity of the Bill needs to be examined in the context of the power of the Kerala government to constitute a tribunal to adjudicate disputes between a private company and the residents of a panchayat for recovery of compensation for damages caused by the company. The key question here is whether the Constitution empowers the Kerala government to establish a tribunal as envisaged under the Bill.

The subject matter (that is, recovery of compensation for damages caused by an industry) addressed under the Bill has not been mentioned explicitly in the constitutional provision dealing with tribunals, that is, Article 323-B. It is not necessary to consider Article 323-A because the disputes in the context of the Bill are not related to recruitment or service conditions. However, the absence of explicit inclusion of the subject matter

addressed under the Bill in Article 323-B does not as such take away the power of the State government to adopt the Bill. Articles 323-A and 323-B are enabling provisions and they cannot be interpreted to restrict the state government from setting up tribunals on matters not listed therein. The state government has the power to set up tribunals in relation to the matters not listed in Article 323-B provided that it is competent to make laws on such matters.¹³ This means that the state government can make laws to set up tribunals even on matters not listed in Article 323-B provided the subject matters to be addressed by such tribunals are mentioned in List II or List III. Hence the power of the Kerala government to adopt the Bill needs to be essentially found in the entries in List II or List III. If the subject matter of the Bill cannot be linked to any of the entries in List II or List III, the power vests in Parliament either through List I or its 'residuary powers' under Article 248.

4.2 Legislative Competence

It has already been noted that over-extraction of groundwater, groundwater depletion, soil degradation, water contamination, agricultural loss and public health implications are the major issues that may form the subject-matter of disputes before the Plachimada Tribunal. It can be argued that these subject matters are covered by some of the entries in List II, namely public health and sanitation (Entry 6), agriculture (Entry 14), water (Entry 17) and land (Entry 18).

The subject matter of the Bill is also linked to an entry in List III (Concurrent List), namely 'actionable wrongs' (Entry 8). Being included in List III, both state governments and the Centre have the power to make laws on 'actionable wrongs'.¹⁴ The

13 See *Union of India v. Delhi High Court Bar Association*, (2002) 4 SCC 275, Para. 13. See also *State of Karnataka v. Vishwabharathi House Building Co-operative Society*, (2003) 2 SCC 412, Paras. 36 & 37.

14 The word 'wrong' in ordinary legal language means and signifies 'privation of right'. An act is wrongful if it infringes the legal right of another and 'actionable' means nothing else than that it affords grounds for action in law. [*State of West Bengal v. Brindaban Chandra Pramanik*, AIR 1957 Cal. 44, Para. 26]. 'Actionable wrong' means a wrong in respect of which an action lies [*Suresh Chandra Dam v. Union of India*, AIR 1959 Cal. 94, Para. 21].

entry 'actionable wrongs' was the basis of a similar law passed by Parliament, that is, the Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985.¹⁵ Thus, it can be argued that the Kerala government has the power to adopt the Bill under the Constitution.

Another possible argument is that the subject matter of the Bill substantially relates to 'environment' and since the term 'environment' has not been specifically included in any of the three Lists, it would fall within the competence of Parliament under 'residuary powers'. However, this argument is unlikely to sustain as the subject matter of the Bill is patently linked to a few entries in List II and an entry in List III.

As there are a few entries in List II and at least one entry in List III that empower the State government to pass the Bill, the question of *ultra vires* does not arise. This means that the adoption of the Bill is within the power vested in the State under the Constitution. However, this is not sufficient to determine the legislative competence of the Kerala Assembly to adopt the Bill. Even if the Bill is not *ultra vires* in the light of the entries in List II or List III, the competence of the Kerala Assembly can still be challenged if the State Legislature has, by resolution, vested legislative competence on the matters covered under the Bill in Parliament. A resolution passed by the Kerala Legislative Assembly in 1968 under Article 252 of the Constitution on water pollution (hereafter the 1968 resolution) is relevant in this context.

The 1968 resolution vests the power to make laws for 'prevention of water pollution' and 'maintaining and restoring of wholesomeness of water' in Parliament. The resolution also covers the establishment of 'Water Pollution Prevention Boards' and 'all other consequential and incidental

matters'. Accordingly, Parliament passed the Water (Prevention and Control of Pollution) Act, 1974 (hereafter the Water Act). The Water Act is in force in Kerala.

The effect of a resolution under Article 252 is that it transfers the powers of the state assembly to Parliament on subject matters covered under the resolution. The Supreme Court, in the *Thumati Venkaiah* case, explains the effect of a resolution under Article 252 as follows:

The resolutions operate as abdication or surrender of the powers of the State Legislatures with respect to the matter which is the subject of the resolutions and such matter is placed entirely in the hands of Parliament and Parliament alone can then legislate with respect to it. It is as if such matter is lifted out of List II and placed in List I of the Seventh Schedule to the Constitution.¹⁶

The validity of a law passed by the Centre pursuant to a resolution under Article 252, or its relation with another law passed by the state which passed the resolution, depends upon the extent to which legislative power has been surrendered or transferred. This means 'the question as to whether or not there is surrender by the State Legislature of its power to legislate, and if so, to what extent, must depend on the language of the resolution passed under Art. 252(1)'.¹⁷

The relationship between the Bill and the Water Act is therefore a critical issue to be addressed in order to determine legislative competence in the context of the Bill. The Supreme Court, when faced with a similar situation in the *Krishna Bhimrao Deshpande* case, adopted the 'distinct and separately identifiable' test and held that 'the one topic that is transferred in the resolution passed under Article 252 is *distinct and separately identifiable* and does not include the remaining topics under Entry 18 in respect of which

15 *Charan Lal Sabu v. Union of India*, (1990) 1 SCC 613. In her argument challenging the constitutionality of the Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985, Ms. Indira Jaising, counsel for one of the petitioners, submitted that "...it was also contended by the Government that it was a legislation relating to 'actionable wrong' under Entry 8 of the Concurrent List of the Seventh Schedule" (Para. 38).

16 *Thumati Venkaiah and Ors. v. State of Andhra Pradesh and Ors.*, (1980) 4 SCC 295, Para. 2.

17 *Union of India v. Valluri Basavaiah Chaudhary*, AIR 1979 SC 1415, Para. 13.

the State alone has the power to legislate' (emphasis added).¹⁸ The test of 'distinct and separately identifiable' has been applied by the Supreme Court subsequently in *Her Highness Maharani Shantidevi P. Gaikwad v. Savjibhai Haribhai Patel* where it was held that 'it cannot be said that by surrendering its right to legislate on the subject of imposition of ceiling on urban immovable property, the State Legislature also surrendered the right of development and town planning'.¹⁹

Hence, whether or not the subject matter of the 1968 resolution is distinct and separately identifiable from the subject matter of the Bill must be examined. The subject matter of the 1968 resolution is 'prevention of water pollution' and the 'maintaining and restoring of wholesomeness of water'. The corresponding central law (the Water Act) explicitly states that the subject matter is relatable to entry 17 (water) and entry 6 (public health and sanitation; hospitals and dispensaries) of List II. The provisions of the Water Act also confirm that it addresses the issue of water pollution by providing a regulatory framework and an institutional framework to implement the regulation (that is, pollution control boards). The subject matter of the Bill, as can be seen from the preamble, is 'adjudication of disputes and recovery of compensation' which has not been addressed explicitly in the 1968 resolution or the Water Act. Hence, the subject matters of the laws in question are 'distinct and separately identifiable' even though they are relatable to the same entries in List II.

Another contentious issue in the context of the 1968 resolution is the meaning of the term 'all other consequential and incidental matters'. The key question here is whether a narrow or wide interpretation should be followed. The issue has been addressed by the Supreme Court in the *R.M.D.C. (Mysore) Private Ltd.* case. The Court was faced with the question whether the term 'control and regulation of prize competition' also included the 'power to tax'. It was argued before the Court that

the 'control and regulation of prize puzzle competitions and all other matters consequential and incidental thereto' includes the 'power to tax'. The Court linked both the subject matters to different entries in List II and held that 'the pivot of the appellants' argument is that the words 'control and regulation' and 'incidental and ancillary thereto' included the power of taxation but this argument is not well founded'.²⁰

The *R.M.D.C.* case seems to favour a narrow interpretation of a resolution under Article 252 in case of ambiguity in order not to upset the division of legislative powers envisaged under the Constitution. To put it differently, the *R.M.D.C.* case disapproves a wide interpretation of a resolution under Article 252 to include all possible or connected matters within the purview of the legislative competence of Parliament. Thus, a plausible argument that can be advanced by applying the *R.M.D.C.* case in the context of the Bill is that the term 'all other consequential and incidental matters' does not include the subject matter of 'adjudication of disputes and recovery of compensation'. It is therefore within the competence of the State Assembly to make laws on this matter. The power of the State Assembly to make laws dealing with the adjudication of disputes arising from water pollution is not affected by the 1968 resolution.

4.3 Conflict with the Existing Central Laws

The validity of a state law can be questioned on the ground of its inconsistency with a central law or laws. The question of inconsistency arises and the validity of a state law may be questioned in two ways. First, where the laws passed by the Union and the state are on a subject matter included in the Concurrent List, the state law shall be void to the extent to which it is inconsistent with the central law (Article 254). Thus, in case of conflict, the central law will prevail. However, the validity of the state law can be upheld if it has received the assent of the President. Second, where a state law is inconsistent

18 *Krishna Bhimrao Deshpande v. Land Tribunal, Dharwad*, AIR 1993 SC 883, Para. 6.

19 *Her Highness Maharani Shantidevi P. Gaikwad v. Savjibhai Haribhai Patel*, Supreme Court, Appeal (Civil) 3530 of 1998, Decided on 21 March 2001, JT 2001 (4) SC 43, available at www.indiankanoon.org/doc/1858757/.

20 *R.M.D.C. (Mysore) Private Ltd v. The State of Mysore*, Supreme Court, Decided on 8 August 1961, available at www.indiankanoon.org/doc/475489/.

with a law passed by Parliament to implement any international agreements under Article 253, the central law shall have overriding effect over state laws on the same subject matter.

In the context of the Bill, the issue of inconsistency is unlikely to arise on the basis of the Bill covering a subject matter included in the Concurrent List. This is mainly because the Bill corresponds more to the entries in the State List than the Concurrent List. In case an entry in the Concurrent List can be linked to the Bill (that is, actionable wrongs), there appears to be no corresponding central law passed under that entry that may be in conflict with the Bill.

The issue of overlapping may arise in the context of a few central laws passed under Article 253. The three relevant central laws are the Air (Prevention and Control of Pollution) Act, 1981; the Environment (Protection) Act, 1986; and the National Green Tribunal Act, 2010. These three laws have been passed by Parliament to implement international agreements and they are linked, in some way or the other, to the subject matter of the Bill.

Before examining the nature and extent of overlapping between the Bill and the existing central laws, the effect of central laws implementing international agreements on state laws needs to be stated. The Constitution is clear that the power to make laws to implement international agreements vests with Parliament. Thus, Parliament has the power to make laws on subject matters in the State List for the purpose of implementing international agreements and such laws would override and prevail over any inconsistent state laws.²¹ Otherwise, it would be difficult to implement obligations under international agreements. This being the legal position, any inconsistency with the above mentioned central laws would make the Bill ineffective.

The inconsistency between a central law and a state law may be ascertained by considering the following factors:

- (1) Direct conflict between the provisions of the two laws - This includes situations where one law cannot be obeyed without disobeying the other law and when one law takes away the right(s) conferred by the other law.
- (2) If Parliament intended to lay down an exhaustive code in respect of the subject matter.
- (3) If both the laws occupy the same field.²²

Hence, the first issue to be examined is whether the Bill and the above mentioned central laws are 'fully inconsistent and absolutely irreconcilable'. The Air (Prevention and Control of Pollution) Act, 1981 (hereafter the Air Act) provides a regulatory framework for prevention and control of air pollution. The Environment (Protection) Act (hereafter the EP Act) is an umbrella legislation providing for protection and improvement of the environment as a whole. Both these laws do not address the issue of civil liability which is the issue addressed under the Bill. Further, the Bill does not provide any substantive rules and instead refers to the existing legal framework which essentially includes the Air Act and the EP Act. This is clear from the definition of the word 'dispute' under Section 2(e) of the Bill as 'any issue in respect of matters arising out of violation of the provisions of laws relating to environment, air and water pollution'. Thus, the Bill complements the Air Act and the EP Act.

The EP Act is relevant to the question of inconsistency from another angle. The issue of compensation in the Plachimada context could have been addressed under the EP Act as section 3 of the said Act empowers the central government to constitute an authority for the implementation of the Act which includes the issue of compensation for damages to persons and the environment. A precedent in this regard is the constitution of the Loss of Ecology (Prevention and Payments of

²¹ *S. Jagannath v. Union of India*, (1997) 2 SCC 87, Para. 48; *Manganbhai Isbwarbhai Patel v. Union of India*, AIR 1969 SC 783, Para. 82.

²² *M. Karunanidhi v. Union of India*, AIR 1979 SC 898, Paras. 24 & 35. See also *Hoechst Pharmaceuticals*, note 12 above.

Compensation) Authority (hereafter the Authority) for the State of Tamil Nadu.²³ The power of the said authority includes assessment of loss to ecology and environment, computation of compensation for restoring the environment and for payment to individuals and to determine the compensation to be recovered from the polluters as cost of reversing the damaged environment.²⁴

The constitution of an authority under the EP Act is significantly different from a tribunal as envisaged under the Bill. A tribunal is an adjudicating body and it is judicial in nature whereas an authority such as the Authority functions as an administrative body. A tribunal adjudicates the disputes brought before it whereas an authority investigates a matter as mandated by its constituting document and decides accordingly. An authority such as the Authority is a viable option where there is *prima facie* proof of damage to people, their property and the environment caused by one or more identifiable sources.

Hence, it can be concluded that the Bill does not impinge upon the power of the central government as provided under the EP Act. It cannot therefore be argued that the power of the central government under section 3 of the EP Act prevents the State government from making a law to constitute a tribunal in order to address the issue of civil liability arising from violation of laws relating to protection of the environment.

The National Green Tribunal Act, 2010 (hereafter the NGT Act) is another important law in the light of which the consistency of the Bill needs to be examined. The National Green Tribunal was established on 18 October 2010. As per the NGT Act, the National Green Tribunal has jurisdiction over 'all civil cases where a substantial question relating to environment is involved'. Its jurisdiction also includes questions arising out of implementation of environmental laws in India (section 14). The National Green Tribunal can order remedies such

as compensation to victims of environmental damage, restitution of property and restoration of the environment (section 15).

It can be seen that the Bill and the NGT Act occupy substantially similar fields, if not the same field. Both the laws address the same thing, that is, the issue of civil liability in the context of environmental damage. All environmental laws relied on under the Bill have also been referred to in the NGT Act. All the issues covered under the Bill are therefore covered under the NGT Act *albeit* in a comprehensive manner. It is undoubtedly clear that there is substantial overlap between the two laws.

The substantial overlap between the Bill and the NGT Act itself may make the Bill ineffective, if Parliament has enacted the NGT Act with the intention of making it an exhaustive code. In such cases, 'the inconsistency is demonstrated not by a detailed comparison of provisions of the two statutes but by the mere existence of the two pieces of legislation'.²⁵ Hence, the most important question is whether Parliament intended to enact the NGT Act as an exhaustive code.

In principle, the NGT Act covers all disputes involving substantial questions relating to the environment. It covers questions arising out of Schedule I statutes (seven statutes related to the environment) which include almost all environment related statutes in force in India. The central government has the power to amend Schedule I. This means that the range of issues covered under the NGT Act can be updated or modified. Hence, it can be plausibly argued that the NGT Act is comprehensive in nature and it was enacted to provide a single forum for resolution of environmental disputes and determination of the issue of civil liability in the context of environmental damage.

It can be seen that the issue addressed under the Bill is covered under the NGT Act. However the coverage of the subject matter of the dispute is limited by temporal factors under the NGT Act. It has been explicitly provided that the National Green

²³ See *Vellore Citizen's Welfare Forum v. Union of India*, (1996) 5 SCC 647, Para. 25.

²⁴ Ministry of Environment and Forests' Notification constituting the Loss of Ecology (Prevention and Payments of Compensation) Authority, Notification No. S.O. 671(E), 30 September 1996.

²⁵ *State of Orissa v. M.A. Tulloch*, AIR 1964 SC 1284, Para. 15.

Tribunal has no jurisdiction to entertain applications for compensation or restitution of property or environment five years after the date on which the cause for such compensation first arose. There can be a maximum six months relaxation in the five years rule, provided the National Green Tribunal is satisfied with the reason (section 15).

The subject matter of the Plachimada issue is more than five years old. The Company is not functioning in Plachimada since 2004 after the Kerala Pollution Control Board ordered closure of the Company's plant. Thus, there is no question of inconsistency as the Bill occupies a field not addressed by the NGT Act. The Bill actually complements the NGT Act by addressing an issue not covered under the NGT Act.

5

CONSTITUTIONAL VALIDITY AND ITS IMPLICATIONS

The fact that the Plachimada Tribunal Bill has been referred to the President for assent is not *per se* a reason to doubt its validity. Its inconsistency or repugnancy needs to be established in the light of the constitutional provisions. The validity of the Bill may be questioned on two grounds, that is, legislative competence and inconsistency with central laws. An examination of the constitutional provisions dealing with the legislative competence of state government reveals that the subject matter of the Bill corresponds to more than one entry in the State List. Therefore, the Kerala Assembly has the power to pass the Bill. Even though the presence of environmental laws, particularly the NGT Act, appears to affect the validity of the Bill, this is not the case. The Bill addresses issues or areas that are unaddressed by the NGT Act and therefore it complements the existing environmental laws passed by Parliament. The co-existence of the Bill and the related central laws is possible and plausible.

The issue of constitutional validity of the Bill is not just a question of establishing validity on the basis of constitutional provisions. It has other wider

implications too and therefore, it also needs to be viewed in a broad legal and political context.

The public protest against the Coca-Cola Company in Plachimada has been ongoing for about a decade. A committee constituted by the Kerala government, in its report submitted in 2010, has confirmed that the Company has caused damage to individuals, property and the environment in Plachimada. The importance of the issue is such that it cannot be left unaddressed. The issues of liability and compensation are to be determined legally and settled finally. Therefore, efforts should be made to support and strengthen the initiative of the Kerala government instead of arguing against the validity of the Bill. If at all there are issues concerning the validity of the Bill, only a court can determine them. Therefore, if there is any doubt regarding the constitutionality of the Bill, it should be left to the judiciary to determine it. It is obviously not within the jurisdiction of the executive wing of the government.

Even if the court decides against the constitutionality of the Bill, it does not mean that the issues of liability and compensation are irrelevant. They remain critical issues to be settled legally. The question of constitutionality relates to the legal validity of one initiative to address the liability and compensation issues. If that initiative is invalid, the State government is responsible for creating another valid mechanism to settle the issues legally.

The ongoing debate about the constitutionality of the Bill has implications for the relationship between the Centre and states. The Constitution envisages a healthy relationship between the Centre and states. The legislative power of the Centre and states has been clearly delineated. Transgression of states or the Centre into the jurisdiction of the other is not only illegal but capable of creating an unhealthy political relationship. It should be thus a key concern of the Centre (and for that matter states as well) to take all possible care to ensure that it is not overstretching its legislative power to restrict the legislative power of states. Therefore, any attempt on the part of the central government to make the Bill ineffective by citing the weak reason of the existing environmental laws would amount to overstretching of its powers. This may prejudicially affect

the Centre-state relationship not only between the State of Kerala and the Union but also in general. For better Centre-state relations, the Union needs to positively explore the possibility of the co-existence of the Bill and the existing central laws dealing with the environment.

The debate on the constitutionality of the Bill also needs to be viewed in the light of its linkage with the NGT Act. The National Green Tribunal, which is functional since October 2010, is the existing legal mechanism addressing the issues of liability and compensation. Being a new initiative, it is very important to build trust among the people about the National Green Tribunal. It is very important to send a clear message that the legal system in India is sensitive to the issue of environmental civil liability and committed to deliver justice. Providing a legal mechanism to determine and settle civil liability in the Plachimada context is thus an opportunity to emphasize the sensitivity and commitment of the government to the issue. This would also build confidence among people about the potential of the legal system to settle the issue of civil liability and thus would strengthen the National Green Tribunal.

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