

## **Putting Public Trust Doctrine to Work: A Study of Judicial Intervention in Environmental Justice**

Muhammad Wajid Munir\*

This article analyses the judicial intervention in enforcing the Public Trust Doctrine ('PTD') in Pakistan. According to the PTD, a government is responsible to protect certain natural resources like clean air, water, rivers, public parks, and forests. The government acts as a trustee to protect these unique natural resources. This article critically examines the application of the PTD by the superior judiciary in Pakistan. It does so by tracing out the theoretical framework, origin, and background of the PTD. The article analyses the development, application, and geographical scope of this doctrine in Pakistan by critically examining the leading case law. It is argued that the superior judiciary in Pakistan has applied this doctrine in two ways — directly and impliedly. It has done so by relying on Indian and American case law and leading international environmental treaties. This article examines two widely applicable tests namely, the 'Legislative Test Approach' and the 'Substantive Test Approach' to assess the scope of the PTD. Finally, the article traces the limitations of the PTD. It concludes with the suggestion that policy makers should treat environmental rights as fundamental human rights by including it in Part II, Chapter I of the Constitution of Islamic Republic of Pakistan 1973.

### **Introduction**

Professor Joseph Sax<sup>1</sup> expounded the Public Trust Doctrine ('PTD') in 1970 in his influential study 'The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention'. It is based on the Roman concept of common properties (*res communis*).<sup>2</sup> Before Professor Sax's article, the PTD appeared into English (Magna Carta 1215) and American jurisprudence

---

\* LL.M (Corporate Law), and LLB (Hons) Shariah & Law, International Islamic University, Islamabad.

<sup>1</sup> Joseph Sax was Professor of Law at the University of Michigan. He also drafted the Michigan Environment Protection Act (MEPA).

<sup>2</sup> Joseph L. Sax, 'Liberating the Public Trust Doctrine from its Historical Shackles' (1980) 14 *U.C. Davis L. Rev.* 185.

(*Arnold v Mundy*)<sup>3</sup> via legislation and court decisions respectively. The PTD stipulates that certain resources are held in trust in the hands of sovereigns and cannot be given away to private citizens arbitrarily. It means that states have a general duty to act for the benefit of the public, and a special duty to act as trustee to preserve these resources. In other words, certain natural resources are held as a public trust and the governments, being the chosen representative of the public, are supposed to act as the trustees of these resources. Moreover, every citizen enjoys the right to file a suit against government authorities to hold them accountable for their treatment of these resources in the designated judicial body. Environmental experts, such as James Huffman, criticise the PTD's common law historical roots. Critics point out that the doctrine violates the property rights of individuals, the concept of popular sovereignty, and the doctrine of separation of powers. They also criticise the role of the judiciary in the application of the PTD instead of relying on the statutory laws in violation of the doctrine of separation of powers.

In Pakistan, the *Shehla Zia* case is the seminal case on environmental jurisprudence, and it sets the tone for the judiciary to dispense environmental justice.<sup>4</sup> The Supreme Court of Pakistan ('SC') relied on Indian case law, the latest environmental research – primarily relying on the 'Precautionary Principle',<sup>5</sup> and leading environmental law treaties such as the Rio Declaration 1992 to declare that the 'right to life' included the right to live in a healthy environment. The procedure adopted in the *Shehla Zia* case has been consistently followed by the judiciary in all subsequent environmental law cases. There are a few pertinent questions that need to be addressed. Mainly, how is the judiciary applying this doctrine in Pakistan? Moreover, what is the methodology being employed by judges in Pakistan and how is it different from the methodology used in other civil cases? This essay will also go on to reflect on the scope of the PTD and different approaches that will be required to determine it.

Judiciary in Pakistan has tried to answer the abovementioned questions in various cases by engaging leading environmentalists such as Dr.

---

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

<sup>4</sup> *Shehla Zia v WAPDA* PLD 1994 SC 693.

<sup>5</sup> The Rio Declaration on Environment and Development 1992, principle 15. It states:

'In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation'.

<[http://www.unesco.org/education/pdf/RIO\\_E.PDF](http://www.unesco.org/education/pdf/RIO_E.PDF)> accessed 6 October 2017.

Pervez Hassan<sup>6</sup> and relying on academic debates, environmental treaties, and comparative case law, primarily from India and the United States of America. The judiciary has applied this distinctive doctrine in two ways – directly and impliedly. *The Sindh Institute of Urology and Transplantation* case was the first instance where the court applied the PTD directly.<sup>7</sup> Previously, the courts had only applied it impliedly without making a specific reference to the PTD. Later, Justice Tassaduq Hussain Jillani elaborated on the PTD and described its scope and parameters in the suo moto case relating to the matter of cutting of trees in Lahore to widen the canal.<sup>8</sup> Recently in 2015, Justice Syed Mansoor Ali Shah, in the case of *Imrana Tiwana* invoked the PTD and also enlarged its theoretical framework.<sup>9</sup> The significant aspect of this doctrine is that it regards environmental rights as fundamental human rights. Likewise, the doctrine guarantees the right to a healthy environment which has not been expressly protected by the framers of the Constitution.

This article investigates the application of the PTD by the superior courts in Pakistan. The article is divided into five parts. Part I elaborates the theoretical framework of the PTD, as expounded by Joseph Sax, by discussing the fiduciary duty of public institutions to preserve certain public resources. Subsequently, the relation of trust, trustee, and the beneficiary is discussed in terms of the PTD. Part II surveys the origin and background of the PTD by examining its historical roots starting from the Roman emperor Justinian and its development in England, America, and India. Part III analyses the development and the application of the PTD in Pakistan. It also critically evaluates the direct and implied application of the PTD by the superior judiciary in Pakistan and the methodology employed by and relief granted by the courts. Part IV surveys the geological scope and the parameters of the PTD. It also discusses two approaches: ‘the Legislative approach’ and ‘Substantive approach’ to determine the scope of the application of the PTD. Part V traces the limitations of the PTD. The article concludes with a suggestion that policy makers should treat environmental rights as fundamental human rights and include it in Part II, Chapter I of the Constitution as has been done in Article 24 of the Constitution of South Africa 1997.

---

<sup>6</sup> Senior Advocate Supreme Court of Pakistan. He chaired the panel which drafted the Pakistan Environmental Protection Act, 2007. He also drafted the Pakistan Environmental Protection Ordinance, 1983.

<sup>7</sup> *Sindh Institute of Urology and Transplantation v Nestle Milkpak Limited* 2005 CLC 424.

<sup>8</sup> *Cutting of Trees for Canal Widening Project Lahore* 2011 SCMR 1743.

<sup>9</sup> *Imrana Tiwana v Province of Punjab* PLD 2015 Lahore 522.

## **Theoretical Framework**

The PTD stipulates that the state has a fiduciary duty to protect certain natural resources like air, water, parks, wild life, rivers, lakes, and forests for the benefit of the general public and future generations. The governmental institutions act as trustees to safeguard these natural resources and the public.<sup>10</sup> This doctrine empowers a state to act as a trustee to manage these public resources since the title of these resources is vested in the state. Hence, the state has a fiduciary obligation to preserve these resources.<sup>11</sup> Therefore, a sovereign cannot alienate these resources to private citizens, because the resources are inherently public. The PTD gives a cause of action to the public against any person who interferes with the enjoyment of these resources as well as against the state which fails to protect them. Further, the judiciary can hold a sovereign accountable in the event of neglect or failure to protect the natural resources. This doctrine is a powerful tool to compel administrators and legislators to recognize the public's right to a healthy environment and allows the judiciary to take a proactive approach in terms of environmental protection. The primary aim of the doctrine is to provide a much-needed legal avenue to protect environmental rights.

Professor Sax explains the doctrine in his influential article 'The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention' in terms of the preservation of natural resources by a sovereign as a trustee, its exclusive usage by the general public, and the non-alienation of public resources to private parties.<sup>12</sup> For justification of the doctrine, Professor Serena Williams describes three conceptual principles taken from Joseph Sax's article. First, 'certain interests are so intrinsically important to every citizen that their free availability tends to mark the society as one of the citizens rather than of serfs'. Second, 'certain interests are so particularly the gifts of nature's bounty that they ought to be reserved for the whole of the populace'. Third, 'certain uses have a peculiarly public nature that makes their adaptation to private use inappropriate'.<sup>13</sup> While analysing the case of *Illinois Central Railroad*,<sup>14</sup> David Takacs describes the essential elements of

---

<sup>10</sup> Dave Owen, 'The Mono Lake Case, the Public Trust Doctrine, and the Administrative State' (2011) 45 *UCDL Rev.* 1099-1107.

<sup>11</sup> Hope M. Babcock, 'The Public Trust Doctrine: What a Tall Tale They Tell' (2009) 61 *S.C.L. Rev.* 393.

<sup>12</sup> Joseph L. Sax, 'The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention' (1970) 68 (3) *Mich. L. Rev.* 471, 477.

<sup>13</sup> Serena M. Williams, 'Sustaining Urban Green Spaces: Can Public Parks Be Protected Under the Public Trust Doctrine?' (2002) 10 *SC Env'tl LJ* 23, 31.

<sup>14</sup> *Illinois Central Railroad v Illinois* (1892) 146 U.S. 387.

the PTD in his influential article ‘the Public Trust Doctrine, Environmental Rights, and the future of Private Property’. A government maintains certain resources for the enjoyment of the public. Thus, judicial acts in relation to the application of the PTD even though may seem against the separation of powers, serve democracy by preserving these rights for the people.<sup>15</sup> In simple terms, certain natural resources are held in an inalienable public trust with the government acting as a trustee. Furthermore, any person in his capacity as a beneficiary can institute a suit against the violator of these resources and against the state for failing to protect these resources.<sup>16</sup> The PTD functions as a public easement, which allows public access to natural resources without infringing the property rights of other individuals.<sup>17</sup>

The PTD imposes some restrictions on government authorities. Firstly, it is the duty of the state to provide access to these natural resources to members of the public without any interference. Secondly, the government must not sell these natural resources or property to private individuals. Lastly, these resources should be utilized for a specific purpose. To clarify the last point, Professor Sax gives an example of the San Francisco Bay, which must be used for commercial or amenity purposes and must not be used for trash disposal or any other housing project.<sup>18</sup> The courts must recognize the dual nature of governmental duties in enforcing the PTD.<sup>19</sup>

The PTD serves two important purposes. Firstly, it forces government officials to manage natural resources in a conservative and productive way. Secondly, it authorizes the citizens to hold the relevant government officials accountable before the designated judicial forum.<sup>20</sup> Further, the PTD gives a cause of action to the general public against private parties who interfere with these resources and against the government officials for breach of their duties as trustees.<sup>21</sup> Nevertheless, the most important feature of the PTD is that it ensures the right to a healthy

---

<sup>15</sup> David Takacs, ‘The Public Trust Doctrine, Environmental Human Rights, and the Future of Private Property’ (2008) 16 *N.Y.U. Envtl. L.J.* 711.

<sup>16</sup> Peter H. Sand, ‘Global Environmental Change and the Nation-state: Sovereignty Bounded?’ in Gerd Winter (ed), *Multilevel Governance of Global Environmental Change: Perspectives From Science, Sociology, and the Law* (Cambridge University Press 2006) 523.

<sup>17</sup> (n 10) 1120.

<sup>18</sup> (n 14) 477.

<sup>19</sup> *Ibid.*, 478.

<sup>20</sup> (n 8) [23].

<sup>21</sup> Bradley C Karkkainen, ‘NEPA and the curious evolution of environmental impact assessment in the United States’ in Jane Holder and Donald McGillivray (eds), *Taking Stock of Environmental Assessment: Law, Policy and Practice* (Routledge 2007) 52.

environment besides the right to life, which is not expressly protected in the Constitution.<sup>22</sup>

In sum, public institutions must conserve natural resources for future generations. These resources should be preserved for future generations and be utilized for sustainable development by not being neglected and/or being impaired by private parties.

### **Origin and Background**

The PTD is a common law doctrine, which has its roots in Roman and English Law.<sup>23</sup> Justinian codified the PTD – *jus publicum*<sup>24</sup> (Public Affair) – in *Corpus Juris Civilis* about 529 B.C. in following words: ‘by the law of nature these things are common to all mankind, the air, running water, the sea and consequently the shores of the sea’.<sup>25</sup> On the other hand, Patrick Deveney contends that the concept was first developed by the third-century jurist Marcian.<sup>26</sup> Following that, an English Judge, Justice Henry Bracton, declared that the concept of *jus publicum* is also a part of the law of England.<sup>27</sup> In addition, Charles Wilkinson traced out the reference to public trust in Chinese water law 249-207 B.C., Islamic water law, traditional customs of Nigeria, medieval Spain, and medieval France.<sup>28</sup>

In 1215, in England, the Magna Carta codified this concept<sup>29</sup> around the same time as when King John failed to protect his friends’ exclusive rights to fishing and hunting in 1225.<sup>30</sup> Subsequently, in 1821, the PTD

---

<sup>22</sup> Jona Razzaque, ‘Participatory Rights in Natural Resource Management: The Role of Communities in South Asia’ cited in Jonas Ebbesson and Phoebe Okowa, *Environmental Law and Justice in Context* (Cambridge University Press 2009) 120.

<sup>23</sup> (n 11) 396.

<sup>24</sup> James L. Huffman, ‘Speaking of Inconvenient Truths—A History of the Public Trust Doctrine’ (2007) 18 *Duke Envtl. L. & Pol’y F.* 1.

<sup>25</sup> (n 17) 713.

<sup>26</sup> (n 26) 16.

<sup>27</sup> *Ibid.*, 10.

<sup>28</sup> Charles F. Wilkinson, ‘The Headwaters of the Public Trust: Some Thoughts on the Source and Scope of the Traditional Doctrine’ (1989) 19 *Envtl L.* 425, 426.

<sup>29</sup> (n 26) 19 - Chapter 16 of Magna Carta states: ‘No riverbanks shall be placed in defense from henceforth except such as were so placed in the time of King Henry, our grandfather, by the same places and the same bounds as they were wont to be in his time’; (n 26) 20 - Chapter 23 of Magna Carta provides that: ‘All weirs for the future shall be utterly put down on the Thames and Medway and throughout all England, except on the seashore’.

<sup>30</sup> (n 8) [20].

entered into the jurisprudence of the United States, in the *Arnold* case<sup>31</sup> quoted as;

[T]he government could not, consistently with the principles of the law of nature and the constitution of a well-ordered society, make a direct and absolute grant of the waters of the state, divesting all the citizens of their common right.<sup>32</sup>

The PTD further made progress in American jurisprudence in the case of *Illinois Central Railroad*,<sup>33</sup> wherein the State of Illinois granted land to the Illinois Central Railroad in 1869.<sup>34</sup> After four years, the State of Illinois rescinded the land and Illinois Railroad sued the government. The court declared that:

[A] title held in trust for the people of the state that they may enjoy the navigation of the waters, carry on commerce over them and have the liberty of fishing therein freed from the obstruction or interference of private parties.<sup>35</sup>

The PTD did not remain confined to Europe and the United States. This doctrine found its way into Indian jurisprudence in *M.C. Mehta* case where the Division Bench held that ‘the State is the trustee of all natural resources which are by nature meant for public use and enjoyment’.<sup>36</sup> Moreover, the PTD was also incorporated in some state constitutions in the United States such as those of Wisconsin<sup>37</sup> and Pennsylvania.<sup>38</sup>

### **Development and Application of the Public Trust Doctrine in Pakistan**

Professor Sax argues that judicial attitude matters a lot in the advancement of the PTD.<sup>39</sup> It has also been argued that judges should take action when officials are destroying the environment or in the same spirit are failing to protect it.<sup>40</sup> The seemingly proactive attitude of the courts in Pakistan is

---

<sup>31</sup> (n 3).

<sup>32</sup> (n 8) [20].

<sup>33</sup> (n 16).

<sup>34</sup> James L. Huffman ‘Why Liberating the Public Trust Doctrine is Bad for the Public’ (2015) *Environmental Law* 337-377.

<sup>35</sup> (n 8) [21].

<sup>36</sup> *M.C. Mehta v Kamal Nath* (1997) 1 SCC 388.

<sup>37</sup> (n 15) 32, 33.

<sup>38</sup> (n 15) 33, 34 - Pennsylvania Constitution, art. I, s. 27.

<sup>39</sup> (n 14) 521.

<sup>40</sup> (n 17).

reflected in many *suo moto* actions taken by the judiciary to enforce environmental laws.<sup>41</sup> The courts in Pakistan have applied this doctrine in two ways; directly and impliedly. The doctrine was applied impliedly, albeit without referring its name, in the cases of *Ardeshir Cowasjee*<sup>42</sup> and *Salt Miners*.<sup>43</sup> However, after the case of *Sindh Institute of Urology and Transplantation*,<sup>44</sup> the courts are now applying it directly.

In the case of *Shehla Zia*, the seminal case on environmental law in Pakistan, the Supreme Court's Larger Bench defined the word 'life' under Article 9 read with Article 14 of the Constitution to include 'life includes all such amenities and facilities which a person born in a free country, is entitled to enjoy with dignity, legally and constitutionally'.<sup>45</sup> This landmark case sets out a conceptual framework on which the judiciary is now heavily leaning on. The facts in the *Shehla Zia* case were that the petitioners had filed a suit against the Water and Power Development Authority ('WAPDA') for its construction of a grid station in their residential area. The petitioners were of the view that the electromagnetic field created by the grid station could pose a threat to the health of the residents. This case is significant for a number of reasons. Firstly, it expanded the definition of the right to life by including environmental rights within its ambit. Secondly, it laid the foundation for the rule of the Precautionary Principle, which has a close relation with the PTD. Thirdly, the court relied on the Rio Declaration 1992 stating that it should be implemented at least in spirit, if not in letter, despite it not being directly binding on the SC.<sup>46</sup> Fourthly, the court also initiated a tradition of appointing a commission<sup>47</sup> which set the tone for the development of the PTD. Lastly, but most importantly, the court interpreted the term 'right to life' to include environmental health, clean atmosphere, and unpolluted environment. This case has been referred to in almost all subsequent environmental law cases in Pakistan.

The judiciary in Pakistan does not distinguish the PTD from the right to life, unlike courts in India. In India, the right to life includes 'the right to have a healthy environment and right to livelihood' under Article 21 of

---

<sup>41</sup> *Human Rights Case* 1994 SC 102; *New Murree Project* 2010 SCMR 361; *Cutting of Trees* 2011 SCMR 1743.

<sup>42</sup> *Ardeshir Cowasjee v Karachi Building Control Authority* 1999 SCMR 2883.

<sup>43</sup> *General Secretary, West Pakistan Salt Miners Labour Union (CBA), Khewra, Jhelum v Director, Industries and Mineral Development, Punjab, Lahore* 1994 SCMR 2061.

<sup>44</sup> (n 7).

<sup>45</sup> (n 4) [12].

<sup>46</sup> *Ibid.*

<sup>47</sup> *Ibid.*, [16] - The commission was appointed to study the scheme, planning, device and technique employed by WAPDA.



Indian Constitution. The PTD is the third aspect of the right to life.<sup>48</sup> As the courts in Pakistan have been heavily relying on Indian case law, the PTD is impliedly included in the right to life. Additionally, the doctrine has also branded environmental rights as fundamental human rights.<sup>49</sup>

### **Direct Application of the Public Trust Doctrine**

The direct application of the PTD by courts in Pakistan started in 2005. The *Sindh Institute of Urology and Transplantation* was the first case in which the court specifically referred to the PTD. In this case, Nestle wanted to acquire a certain piece of land for setting up a water plant, which could have had a potentially negative impact on sub-soil water. The court decided the case and declared certain resources such as clean air, water, and forests as the public trust. The court directed state officials to make these resources available to everyone irrespective of economic inequalities.<sup>50</sup> The court ruled that it was the duty of the state to protect natural resources for the people and for future generations. The conversion of these natural resources into private use would hamper fundamental rights of the citizens. Therefore, underground water belonged to the general public.<sup>51</sup> This is an important case for three reasons. First, the court applied the PTD for the very first time since it was envisioned by Professor Sax. Second, this was the first time that the court expanded the doctrine to include ground-water as a natural resource. Third, that in this case the court referred to Principle 2 of the Stockholm Declaration 1972, which safeguards natural resources like earth, air, water, land, flora, and fauna for the benefits of present and future generations.<sup>52</sup>

Chronologically, the second case on this subject was the *Moulvi Iqbal* case,<sup>53</sup> wherein the petitioner challenged the construction of a golf course on a public park. The Supreme Court declared that the conversion of a public park into a golf course was a violation of the fundamental rights of the citizens. The then Chief Justice, Mr. Iftikhar Chaudhry observed that ‘reasonable access to the sea and the right to cross the dry sand beach is an integral component of the public trust doctrine’.<sup>54</sup>

---

<sup>48</sup> (n 24).

<sup>49</sup> (n 8) [24].

<sup>50</sup> (n 7) [24].

<sup>51</sup> Ibid, [15].

<sup>52</sup> Ibid, para 13.

<sup>53</sup> *Moulvi Iqbal Haider v Capital Development Authority and others* 2006 PLD SC 394.

<sup>54</sup> Ibid.

Another case which further strengthened the inclusion of the PTD into Pakistani jurisprudence was the case of Muhammad Tariq Abbasi. Justice Sarmad Osmany invoked Article 9 of the Constitution to hold that ‘the doctrine of public trust has long been recognised all over the world, which enjoins the State to preserve and protect the public interest in beaches, Lakeshores etc’.<sup>55</sup> This case was important because the PTD was expanded to include the right to access to public places. This case gave an additional remedy to citizens for unhindered access to public places in addition to the one provided by the Constitution.

The true nature of the doctrine was reflected in the *Cutting of Trees suo moto* matter,<sup>56</sup> wherein the petitioner objected to the widening of the Canal Bank Road, Lahore. The Division Bench of the Lahore High Court after explaining the doctrine declared the green belt of the road as a public trust.<sup>57</sup> This case was the most important PTD case because it explained the PTD comprehensively for the first time in the context of Pakistan. Firstly, the court appointed the renowned environmentalist Dr. Pervez Hassan as a mediator. Secondly, the court delineated the scope and parameter of the PTD<sup>58</sup> using an influential article by Professor Serena M. Williams.<sup>59</sup> Thirdly, the court determined the scope of the doctrine by indicating that public property could not be converted into private property except for a public purpose. Lastly, the court explained the concept of sustainable development,<sup>60</sup> a closely related concept of the PTD.

Four years later, the doctrine emerged again in the *Lahore Bachao Tehrik* case.<sup>61</sup> Speaking on behalf of the Larger Bench of the Supreme Court, Justice Mian Saqib Nisar demarcated the scope of the doctrine, stating that ‘... a public trust resource cannot be converted into private use or any other use other than a public purpose...’<sup>62</sup>

In the same year, in the case of *Young Doctors Association*, the petitioners challenged the Signal Free Junction at Azadi Chowk in Lahore because it was purportedly affecting a portion of the Lady Willingdon

---

<sup>55</sup> *Muhammad Tariq Abbasi v Defence Housing Authority* 2007 CLC 1358 [Karachi].

<sup>56</sup> (n 8).

<sup>57</sup> *Ibid*, [35].

<sup>58</sup> *Ibid*, [32].

<sup>59</sup> (n 15).

<sup>60</sup> (n 8), [36]-[39].

<sup>61</sup> *Lahore Bachao Tehrik v Dr Iqbal Muhammad Chauhan and others* 2015 SCMR 1520.

<sup>62</sup> *Ibid*, [20].

Hospital. The court rejected the petitioner's claim that the scheme violated the PTD and the concept of sustainable development.<sup>63</sup> For this the court heavily relied on the *Cutting of Trees* case, wherein it was declared that 'the diversion of one half acre of park space was upheld under the public trust doctrine as "merely a diversion of a minimal quantum of public land from one public purpose to another public purpose"'.<sup>64</sup>

The latest case on the PTD is the *Imrana Tiwana* case,<sup>65</sup> which widened the sphere of the doctrine by including the process of the Environment Impact Assessment ('EIA') in it. In the *Imrana Tiwana* case, the petitioner challenged the Signal Free Corridor Project before the Larger Bench of the Lahore High Court. The petitioner contended that the Lahore Development Authority never undertook the EIA.<sup>66</sup> The court ruled in favour of the petitioner stating that:

[T]o us environmental justice is an amalgam of the constitutional principles of democracy, equality, social, economic and political justice guaranteed under our Objectives Resolution, the fundamental right to life, liberty and human dignity (article 14) which include the international environmental principles of sustainable development, precautionary principle, environmental impact assessment, inter and intra-generational equity and public trust doctrine.<sup>67</sup>

The court suspended further work on the signal free corridor. The case was important for the following reasons. Firstly, the court declared that the Environment Protection Agency (EPA) was suffering from a complete 'Regulatory Capture'.<sup>68</sup> Secondly, the court referred principle 1 of the Stockholm Declaration, which stated:

Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.<sup>69</sup>

---

<sup>63</sup> *Young Doctors Association v Government of Pakistan* 2015 PLD 112, [14].

<sup>64</sup> *Ibid*, [10].

<sup>65</sup> *Imrana Tiwana v Province of Punjab* PLD 2015 Lahore 522.

<sup>66</sup> *Ibid*.

<sup>67</sup> *Ibid*, [25].

<sup>68</sup> *Ibid*, [33].

<sup>69</sup> *Ibid*, [24].

Thirdly, the court observed that the purpose of environmental laws is to protect life and nature which include ‘the principle of ‘Sustainable Development’,<sup>70</sup> the Precautionary Principle,<sup>71</sup> the EIA, inter and intra-generational equity and the PTD’.<sup>72</sup> Finally, the court explained the scope, meaning and the review process of the EIA.<sup>73</sup> The case further expanded the PTD by including the EIA in it.<sup>74</sup> However, the Supreme Court overturned the decision of the Lahore High Court by stating that the Objectives Resolution, Principles of Policy, and Article 2-A of the Constitution could not be used to strike down laws.<sup>75</sup>

### **Implied Application of the Public Trust Doctrine**

The PTD was applied impliedly in numerous environmental law cases in Pakistan. Although, the courts in Pakistan have applied various concepts relating to the doctrine, they have never specifically mentioned the PTD. The courts delivered judgments on the basis of public policy and the right to life by relying solely on the above mentioned *Shehla Zia* case.<sup>76</sup> Additionally, the courts applied various principles of the doctrine including the principle related to the availability of public property to the general public, the particular type of usage of the public property, right to have clean water, and non-conversion of public property to private property.

Justice Munib Akhtar has provided a list of superior court cases in Pakistan wherein the PTD was impliedly applied.<sup>77</sup> These include cases

---

<sup>70</sup> Ibid, [35] - ‘Development that meets the needs of current generations without compromising the ability of future generations to meet their own needs’.

<sup>71</sup> Ibid. ‘Principle 15: In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation’.

<sup>72</sup> Ibid, [25].

<sup>73</sup> Ibid, [35]-[41].

<sup>74</sup> It is important to note that section 2(xi) read with section 12 of the Pakistan Environmental Protection Act, 1997 also deals with EIA and its requirements.

<sup>75</sup> Faryal Siddiqui, ‘Signal Free Corridor: A Reflection on Inter-Governmental Power Struggle, Judicial Restraint and Regulatory Capture’ <<https://sahsol.lums.edu.pk/law-journal/signal-free-corridor-reflection-inter-governmental-power-struggle-judicial-restraint-and>> last assessed 1 September 2017.

<sup>76</sup> (n 4).

<sup>77</sup> Justice Munib Akhtar, ‘Environmental Law Enforcement and Judicial Power: the View from Pakistan’ (2012)

<<http://webcache.googleusercontent.com/search?q=cache:Tz8MI1po70YJ:ajne2.itkeep.com/>

related to housing schemes,<sup>78</sup> power plants,<sup>79</sup> companies' usage of antennae and towers,<sup>80</sup> construction of high-rise buildings,<sup>81</sup> air pollution (asbestos),<sup>82</sup> CNG stations,<sup>83</sup> parks,<sup>84</sup> disposal of effluent, waste and water,<sup>85</sup> and smoke pollution.<sup>86</sup>

The first case in which the PTD was impliedly applied was the case of *Ardeshir Cowasjee*, wherein a larger bench of the Supreme Court was tasked with resolving the issue of the construction of a revolving restaurant on a plot near a public park instead of commercial-cum-residential building. The court observed that the plot near the public park must be used for the construction of a revolving restaurant for the benefit of the people. The court held that 'the use of the Park involves enjoyment of life which is covered by the word life employed in Article 9 of the Constitution as interpreted by this Court'.<sup>87</sup> This case is significant because it expounded on Professor Sax's concept of non-alienation of public property to private ownership was impliedly applied. Additionally, the court also declared that the plot in question must be used for a 'particular type of usage', i.e. for the construction of the revolving restaurant. This concept of 'particular type of usage of public property' is a central pillar of Professor Sax's theory. To clarify the last point, he gives an example of San Francisco Bay, which must be used for commercial or amenity purposes only and must not be used for

---

wp-content/uploads/2013/07/2-Env-Law-Enforcement-and-Judicial-Power-View-from-Pakistan-J-Munib-Akhtar.pdf+&cd=1&hl=en&ct=clnk&gl=pk> assessed 28 June 2016.

<sup>78</sup> *Re: Environmental hazard of the proposed New Murree Project* 2010 SCMR 361.

<sup>79</sup> *Shehri CBE v Government of Pakistan and others* 2007 CLD 783, PLD 2007 Karachi 293.

<sup>80</sup> *Rabiya Associates v Zong (China Mobile) and others* PLD 2011 Karachi 132.

<sup>81</sup> *Zubaida A. Sattar v Karachi Building Control Authority and others* 1999 SCMR 243; *Al Jamiaul Arabia Ahsanul Aloom and Jamia Masjid and others v Syed Sibte Hasan and others* 1999 YLR 1634; *Zahir Ansari and others v Karachi Development Authority and others* PLD 2000 Karachi 168; *Shamsul Arfin and others v Karachi Building Control Authority and others* PLD 2007 Karachi 498; *Navid Hussain and others v City District Government Karachi and others* 2007 CLC 912; *Farooq Hamid v LDA and others* 2008 SCMR 483; *Nighat Jamal v Province of Sindh and others* 2010 YLR 2624; *Muhammad Aslam v Real Builders and others* PLD 2011 Karachi 204.

<sup>82</sup> *Dadex Eternit Ltd. v Haroon Ahmed and others* PLD 2011 Karachi 435.

<sup>83</sup> *Ummatullah v Province of Sindh and others* PLD 2010 Karachi 236; see also *Sultan Ahmed v Dr. Shaheen A. Hussain and others* 2009 MLD 231.

<sup>84</sup> *Muhammad Tariq Abbasi and others v Defence Housing Authority and others* 2007 CLC 1358; *Shehri and others v Province of Sindh and others* 2001 YLR 1139.

<sup>85</sup> *Muhammad Shafiq and others v Arif Hameed Mehar and others* PLD 2008 SC 716, 2008 CLD 1103; *Muhammad Yousaf and others v Province of Punjab and others* 2003 CLC 576; *Anjum Irfan v Lahore Development Authority and others* PLD 2002 Lahore 555.

<sup>86</sup> *Syed Mansoor Ali Shah v Government of Punjab and others* PLD 2007 Lahore 403.

<sup>87</sup> (n 44) [12].

trash disposal or any housing project.<sup>88</sup> A similar issue was raised in *Shehri-CBE*, wherein the Supreme Court stopped the construction of a multiplex cinema on a ground where the public used to play cricket, football, and hockey.<sup>89</sup>

In the case of *Salt Miners*, the petitioners filed a suit for the enforcement of their right to clean water. The defendant, Industries and Mineral Development Punjab, was responsible for polluting the water reservoir and reduction of the water catchment area. The petitioners contended that the impugned project would contaminate the watercourse and reservoirs. Justice Saleem Akhter quoted the *Shehla Zia* case extensively and ruled that ‘the right to have water free from pollution and contamination is a right to life itself’.<sup>90</sup> The court ordered the Pakistan Mineral Development Corporation to install an additional pipeline to preserve clean water. Additionally, the court also directed the establishment of a commission to investigate the mining operation.

In the same year, in the *Human Rights* case, the Supreme Court took *suo moto* action on a daily newspaper report regarding dumping of nuclear and industrial waste in the coastal land of Baluchistan. The Supreme Court ruled that:

The coast land of Baluchistan is about 450 miles long. To dump waste materials including nuclear waste from the developed countries would not only be a hazard to the health of the people but also to the environment and the marine life in the region.<sup>91</sup>

The latest case in which the doctrine has been impliedly applied is the *New Murree Project* case. The Supreme Court disbanded the project by raising the corollary principles of the PTD: Sustainable Development and Protection of the environment for future generations. The full bench of the Supreme Court declared that the project was an environmental hazard owing to the fact that acres of forests could be affected by it.<sup>92</sup>

## Methodology of the Courts

---

<sup>88</sup> (n 14) 477.

<sup>89</sup> (n 82).

<sup>90</sup> (n 45).

<sup>91</sup> *Human Rights Case (Environmental Pollution in Balochistan)* PLD 1994 SC 102.

<sup>92</sup> *Suo Motu Case No. 10 of 2005* 2010 SCMR 361.

The courts in Pakistan have adopted a unique methodology in applying the PTD, which is slightly advanced as compared to the methodology applied in other civil rights matters. The courts equated environmental rights to fundamental human rights. Hence, the doctrine ‘seems embedded in [A]rticle 9 of the [C]onstitution’.<sup>93</sup> Additionally, the courts gave injunctive relief to the petitioners in several cases, but no money damages were awarded till now.<sup>94</sup> The courts in Pakistan constituted advisory committees and commissions for technical assistance.<sup>95</sup> Furthermore, the courts have relied on international environmental treaties like the Stockholm’s Declaration 1972, the Rio Declaration 1992, and have also requested assistance from leading experts.<sup>96</sup>

Judicial intervention in environmental matters is a positive development. Yet there is no substitute for a clear-cut environmental right provision in the constitution. The government should incorporate environmental right in Chapter I of the Constitution as it is done in South Africa by insertion of section 24 in the constitution which reads as:

In terms of section 24 of the Bill of Rights, it has been unequivocally declared that everyone has the right: a) to an environment that is not harmful to their health or well-being; and b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that:

- i) prevent pollution and ecological degradation;
- ii) promote conservation; and
- iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.<sup>97</sup>

#### **Part IV: Geological Scope and Parameter of the Public Trust Doctrine**

Professor Sax, in his theory, explained that the PTD would apply to natural resources like forests, ecosystems, and fisheries.<sup>98</sup> Harrison C. Dunning

---

<sup>93</sup> Michael C. Blumm and Rachel D. Guthrie, ‘Internationalizing the Public Trust Doctrine: Natural Law and Constitutional and Statutory Approaches to Fulfilling the Saxion Vision’ (2011) 45 *UCDL Rev.* 766.

<sup>94</sup> *Ibid.*, 770.

<sup>95</sup> Parvez Hassan, ‘The Role of the Judiciary and Judicial Commissions on Sustainable Development Issues in South Asia.’ (2007) 37 *Envtl. Pol’y & L.* 186.

<sup>96</sup> *Ibid.*

<sup>97</sup> (n 8) [31].

identified the practice of courts in the United States in three important areas of natural resource requiring attention: navigation, commerce, and fishing.<sup>99</sup> The PTD was also applied in parks,<sup>100</sup> wildlife and wildlife habitat,<sup>101</sup> swimming, fishing, pleasure boating, sailing, environmental preservation,<sup>102</sup> and enjoying of scenic beauty.<sup>103</sup> In the case of *Marks v. Whitney*, the California Supreme Court ruled that the purposes of the doctrine are sufficiently flexible in order to protect the environment.<sup>104</sup>

A unique application of this doctrine is to be found in the case of *National Audubon Society*,<sup>105</sup> which entailed the preservation of the land for ecological and recreational use<sup>106</sup> including 'ecological study, open space, fish and wildlife habitat and scenic resources'.<sup>107</sup> In the case of *Kootenai Environmental Alliance*, the court also included aesthetic beauty and water quality in the PTD.<sup>108</sup>

In Pakistan, the scope of the doctrine is very broad.<sup>109</sup> The doctrine has been directly applied in cases involving waters,<sup>110</sup> recreational usage of public property,<sup>111</sup> parks,<sup>112</sup> green belts,<sup>113</sup> and the conversion of public property into private property.<sup>114</sup>

---

<sup>98</sup> Alyson C. Flournoy, 'The Case for the National Environmental Legacy Act' in Alyson C. Flournoy and David M. Driesen (eds), *Beyond Environmental Law: Policy Proposals for a Better Environmental Future* (Cambridge University Press 2010) 7.

<sup>99</sup> Harrison C. Dunning, 'The Public Trust: A Fundamental Doctrine of American Property Law' (1988-1989) 19 *Envtl. L.* 515, 517.

<sup>100</sup> *Citizens to Preserve Overton Park, Inc. v Volpe* 401 U.S. 402 (1971). According to Serena M. Williams, it is the most frequently cited decision in the history of environmental law. See also *Paepke v Public Bldg. Commn.* 263 N.E.2d 11, 15 (Ill. 1970); *Timothy Christian Schs. v Village of W. Springs* 675 N.E.2d (Ill. 1996).

<sup>101</sup> (n 26) 4 - Gary Meyers has argued that the public trust doctrine can be the vehicle for a more holistic approach to the management of wildlife and wildlife habitat.

<sup>102</sup> Janice Lawrence, 'Lyon and Fogerty: Unprecedented Extensions of the Public Trust' (1982) 70 (4) *California Law Review* 1138, 1149.

<sup>103</sup> (n 15) 33 - *State v Town of Linn* 556 N.W.2d 394, 402 (Wis. App. 1996); *State v Public Servo Commn.* 81 N.W.2d 71, 74 (Wis. 1957).

<sup>104</sup> (n 10) 1110.

<sup>105</sup> *National Audubon Society v Superior Court of Alpine County* 658 P.2d 709 (Cal. 1983), cert. denied, 464 U.S. 977 (1983).

<sup>106</sup> (n 26) 7.

<sup>107</sup> Helen Ingram and Cy R. Oggins, 'The Public Trust Doctrine and Community Values in Water' (1992) 32 *Nat. Resources J.* 517.

<sup>108</sup> (n 112) 523, 524 - *Kootenai Environmental Alliance v Panhandle Yacht Club* 671 P.2d 1085 (Idaho 1983).

<sup>109</sup> (n 97) 769.

<sup>110</sup> (n 7).

<sup>111</sup> *Muhammad Tariq Abbasi v Defence Housing Authority* 2007 CLC 1358.



Furthermore, the doctrine is also implicitly applied in various cases such as those involving particular type of usage of public property,<sup>115</sup> clean water,<sup>116</sup> environmental hazard,<sup>117</sup> housing schemes,<sup>118</sup> power plants,<sup>119</sup> cellular companies' usage of antennae and towers,<sup>120</sup> construction of high-rise buildings,<sup>121</sup> air pollution (asbestos),<sup>122</sup> CNG stations,<sup>123</sup> parks,<sup>124</sup> disposal of effluent, waste, and water,<sup>125</sup> and smoke pollution.<sup>126</sup>

In Pakistan, the scope of the PTD is addressed in two important environmental law cases. In the *Cutting of Trees* case<sup>127</sup>, the court explained the scope of the doctrine. The Constitution obliges the courts to observe judicial restraint in policy matters. The court decided that the doctrine only intervenes in matters wherein the governmental authorities violate a law or a constitutional provision 'or when it relates to the enforcement of a fundamental right which *inter alia* includes environmental human rights'.<sup>128</sup> Justice Jillani posed the following question to determine the scope of the doctrine:

How far the public or private project can be stalled by invoking this concept and to what extent the public use of a trust resource can be converted to private use or for a different public purpose?<sup>129</sup>

---

<sup>112</sup> *Moulvi Iqbal Haider v Capital Development Authority and others* PLD 2006 SC 394.

<sup>113</sup> (n 8).

<sup>114</sup> (n 64).

<sup>115</sup> (n 44); *Shehri-CBE v LDA* 2006 SCMR 1202.

<sup>116</sup> (n 45).

<sup>117</sup> (n 95).

<sup>118</sup> (n 81).

<sup>119</sup> (n 82).

<sup>120</sup> (n 83).

<sup>121</sup> (n 84).

<sup>122</sup> (n 85).

<sup>123</sup> (n 86).

<sup>124</sup> (n 86).

<sup>125</sup> (n 88).

<sup>126</sup> (n 89).

<sup>127</sup> (n 8).

<sup>128</sup> *Ibid*, [53].

<sup>129</sup> *Ibid*, [32].

For this, he quoted an article by Professor Williams,<sup>130</sup> who identified two broader approaches: the legislative approach and the substantive test approach<sup>131</sup> to determine the scope of the PTD.

According to Professor Williams, the doctrine is not an absolute concept and has minor limitations.<sup>132</sup> The two approaches mentioned above are widely pertinent in the application of the doctrine. The first is the ‘Legislative Approach’ or the ‘Massachusetts Approach’. The case of *Gould v. Greylock* prohibits ‘alienation or diversion of parkland without plain and explicit legislation to that end’.<sup>133</sup> Therefore, the doctrine can be circumvented through legislation.

The second approach is the ‘Substantive Approach’ or ‘Wisconsin Approach’. The two important Wisconsin cases<sup>134</sup> describe the five conditions to alienate or divert a public land. These conditions are as follows:

- (1) that public bodies would control use of the area in question;
- (2) that the area would be devoted to public purposes and open to the public;
- (3) the diminution of the area of original use would be small compared with the entire area;
- (4) that none of the public uses of the original area would be destroyed or greatly impaired; and
- (5) that the disappointment of those wanting to use the area of new use for former purposes was negligible when compared to the greater convenience to be afforded to those members of the public who are using the new facility.<sup>135</sup>

In the case of *Lahore Bachao Tehrik*, the Supreme Court delimited the scope of the doctrine declaring that public property could not be converted into private property. However, in the instant case, it was held that the widening

---

<sup>130</sup> (n 15).

<sup>131</sup> (n 8) [32].

<sup>132</sup> (n 15) 40.

<sup>133</sup> (n 15) 41 - *Gould v Greylock Reservation Commn* 215 N.E.2d 114, 121 (Mass. 1966); *Williams v Gallatin* 128 N.E. 121, 122 (N.Y. 1920).

<sup>134</sup> (n 15) 42 - *City of Madison v State* 83 N.W.2d 674 (Wis. 1957); *State v Pub. Service Commn.* 81 N.W.2d 71 (Wis. 1957).

<sup>135</sup> (n 15) 42.

of a road is for the benefit of the general public and so should be allowed. In this case, the purpose of widening the road was to ease traffic congestion and to facilitate commuters.<sup>136</sup>

The courts demarcated the scope of the PTD by declaring that even if any project is beneficial to the general public but was negligibly violating the doctrine, the PTD would not apply. In other words, in public good projects, the doctrine has a slightly limited scope.

### **Part V: Limitation of the Public Trust Doctrine**

James Huffman is one of the critics of the PTD. He maintains that the PTD violates the private property rights of individuals, the popular sovereignty, the rule of law, and the doctrine of separation of power.<sup>137</sup>

Experts question the common law background of the doctrine and its impact on administrative and statutory governance.<sup>138</sup> William Araiza also criticizes the common law foundation of the doctrine and questions the interaction of an unwritten common law doctrine with constitutionally protected environmental rights.<sup>139</sup> According to Dave Owen, it is a doctrine that has disputed ambiguous and old roots.<sup>140</sup> Araiza also argues that the legal foundation of the PTD is murky with limited scope and unsound policy supports.<sup>141</sup> The doctrine's legal underpinnings are vague and its scope is murky and paradoxical.<sup>142</sup> Owen argues that often high-profile doctrines do not work well similar to statutory provisions of law.<sup>143</sup> This is also one of the reasons that land-mark cases often have limited scope.<sup>144</sup>

Critics also question the judicial logic of giving overriding effect to the doctrine as opposed to a piece of legislation especially considering the fact that the latter can supersede common law.<sup>145</sup> Araiza maintains that the

---

<sup>136</sup> Ibid, [20].

<sup>137</sup> James L. Huffman, 'Protecting the Great Lakes: The Allure and Limitations of the Public Trust Doctrine.' (2016) 93 *U. Det. Mercy L. Rev.* 239, 271.

<sup>138</sup> (n 10) 1151.

<sup>139</sup> William D. Araiza, 'The Public trust Doctrine as an Interpretive Canon' (2011) 45 *UCDL Rev.* 693, 702.

<sup>140</sup> (n 10) 1102.

<sup>141</sup> (n 145) 693.

<sup>142</sup> Paul Schinner, 'Wisconsin's Public Trust Doctrine: A New Framework for Understanding the Judiciary's Role in Protecting Water Resources.' (2015) *Wis. L. Rev.* 1129, 1136.

<sup>143</sup> (n 10) 1102.

<sup>144</sup> Ibid, 1102.

<sup>145</sup> (n 145) 702.

doctrine provides the courts with wide-ranging authority.<sup>146</sup> The PTD has become equivalent to judicial constitution-making in the field of environmental law.<sup>147</sup> Huffman argues that judges have an important but a limited role in the constitutional republics and hence they should exercise restraint in issues related to public policy.<sup>148</sup> The courts cannot determine public good simply by becoming acquainted with the view of self-interested parties on a particular issue.<sup>149</sup> Moreover, judges should not interfere with affairs of the legislators, since the latter have the duty to make laws as per the principle of separation of powers.<sup>150</sup> Public good and individual liberty are better safeguarded when there is a clear-cut separation of power between the legislature, executive, and the judiciary.<sup>151</sup> The issue remains that courts are ignoring popular sovereignty in the application of the PTD.<sup>152</sup> This is because courts do not have the authority to invalidate laws enacted by the legislators if they are in tandem with popular demand. If the courts invalidate duly enacted laws on the basis of popular demand, it means that they are ignoring popular sovereignty.<sup>153</sup> James Huffman laments that the constitution of the United States, which is based on popular sovereignty, relies on the monarchical doctrine or the concept of parliamentary sovereignty.<sup>154</sup> He argues that the PTD is not a rule of law because it is judge-made law. He further argues that the PTD, being judge-made law, is not a rule of law. He states,

The latter approach, rooted in the supply-side view that judges should be attentive to public needs and should rewrite the law accordingly, positions the judge as lawmaker in the context of particular disputes. This is the rule of the judge, not the rule of law.<sup>155</sup>

Huffman further argues that,

Along the lines of the earlier hypothetical judicial holding, imagine a law, judicially declared or statutorily enacted, providing that property owners may do as they please with

---

<sup>146</sup> Ibid, 738.

<sup>147</sup> (n 148).

<sup>148</sup> (n 36) 341.

<sup>149</sup> Ibid, 374.

<sup>150</sup> Ibid, 375.

<sup>151</sup> (n 143) 267.

<sup>152</sup> Ibid, 267.

<sup>153</sup> Ibid, 268.

<sup>154</sup> Ibid, 269.

<sup>155</sup> Ibid, 269.

their property subject to the unlimited discretion of the state to restrict use of private property. Would judicial adherence to such a rule be consistent with the rule of law? Of course not. A property right thus guaranteed would be no right at all. Enforcing such a rule as precedent would be a mockery of the rule of law.<sup>156</sup>

Moreover, it is contended that the PTD is also the antithesis to the economic prosperity of a country. Economic prosperity is vital for infrastructure, environmental protection, and education.<sup>157</sup> ‘By making private property rights increasingly contingent, a liberated public trust doctrine will not serve the public good’.<sup>158</sup> Richard Lazarus argues that people do not need the doctrine due to the development of statutory and administrative environmental law.<sup>159</sup> He argues that the ‘doctrine would undermine regulatory environmental law by breathing life into a common law – and property-based legal scheme that had operated to the detriment of environmental protection’.<sup>160</sup> Furthermore, the economy of a country will wither away in absence of proper property rights.<sup>161</sup>

The issue of judicial restraint has been raised in numerous cases in Pakistan. In the *Cutting of Trees* case, Justice Jilani observed that many times the executive’s policy actions were brought before the court having socio-political or economic connotation. The constitution demands judicial restraint in respect of the trichotomy of power. However, the court intervenes whenever the Executive’s policies and actions violate any provision of law or constitutional provision or fundamental human rights including environmental human rights.<sup>162</sup> In the *Young Doctors Association* case, the court decided a limited application and scope of the PTD by deciding that if a project was launched by a competent authority after consulting the relevant departments or agencies and taking expert opinion into account from reputed firms like NESPAK, then the issue of public trust would not arise.<sup>163</sup>

In the case of *Lahore Conservation Society*, the petitioners challenged the construction of a flyover. They were of the view that the

---

<sup>156</sup> Ibid, 270.

<sup>157</sup> (n 143) 374.

<sup>158</sup> Ibid, 375.

<sup>159</sup> (n 10) 1121.

<sup>160</sup> Ibid.

<sup>161</sup> (n 143) 263.

<sup>162</sup> (n 8) [53].

<sup>163</sup> (n 66).

construction would require cutting down a number of plants and trees, which would adversely affect the health of the inhabitants of the area. The court dismissed the petition on the ground that the flyover would be very beneficial for the citizens especially in the future as it would solve the problem of traffic blockages. Moreover, it was stated that the construction of the flyover would also save precious time.<sup>164</sup> Similarly, in the case of *Kamil Khan Mumtaz (Lahore Orange Line Metro Train Project Case)*, the Lahore High Court noted that the court was not authorised to entertain matters regarding policy matters and decision-making of competent authorities. However, in the event of violation of the law or irrational, unreasonable, and arbitrary decision making, the courts can direct the state or government to strictly adhere to the law.<sup>165</sup>

Babcock argues that despite all its criticism, the PTD acts as a gap filler in the absence of a positive law on the subject.<sup>166</sup> For this, he gives an example of the formation of Executive Economic Zone ('EEZ') which deals with the issue of endangered wild fish owing to a regulatory gap.<sup>167</sup> The PTD has the potential to fill the vacuum. This doctrine is particularly essential in common property resources because these resources are not fully protected by positive law.<sup>168</sup> It can also address regulatory commons which arises 'when there is not "a matching political-legal regime, leaving the underlying social ill unattended."' <sup>169</sup> Furthermore, Babcock argues that the doctrine's historical roots are less important than the social purpose it is performing.<sup>170</sup> Similarly, he favours judicial intervention in environmental justice by quoting the words of Professor Felix Cohen who states that:

A judicial decision is a social event. Like the enactment of a Federal statute, a judicial decision is an intersection of social forces: Behind the decision are social forces that play upon it to give it a resultant momentum and direction; beyond the decision are human activities affected by it.<sup>171</sup>

---

<sup>164</sup> *Lahore Conservation Society through President and 3 others vs. Chief Minister of Punjab and another* PLD 2011 Lahore 344.

<sup>165</sup> *Kamil Khan Mumtaz v. Government of Punjab* Writ Petition No. 39291/2015, [27].

<sup>166</sup> (n 11) 394.

<sup>167</sup> *Ibid*, 395.

<sup>168</sup> *Ibid*, 406.

<sup>169</sup> *Ibid*, 406.

<sup>170</sup> *Ibid*, 398.

<sup>171</sup> *Ibid*, 399.

He argues that because of the PTD many states have legislated new laws.<sup>172</sup> Albert Lin argues that the doctrine is an effective weapon in preventing governments and private parties from violating public rights.<sup>173</sup> He argues that the PTD protects public interest similar to Tort's Public Nuisance doctrine. It should be noted that both of the doctrines have a common law background.<sup>174</sup> In both doctrines, judges take decisions regarding public policy considerations.<sup>175</sup> Lin acknowledges that the doctrine developed through individual case law, which works well in a limited context. But this individual case by case solution is inadequate for comprehensive regulation. He argues that although statutory laws protect the environment directly and systematically, yet there always remains some lacunae. The doctrine is a perfect gap-filling and corrective device to remove lacunae left by the statutes.<sup>176</sup> Some scholars point out that the doctrine is normally applied by generalist judges, who often lack expertise in environmental matters.<sup>177</sup> Richard Lazarus maintains that instead of the doctrine, we should expand regulatory power to resolve environmental disputes.<sup>178</sup> However, Lin argues that the doctrine must be taken as 'corrective responses to political failures in the democratic process than as undemocratic or unaccountable interventions'.<sup>179</sup> The doctrine has the prowess to fix the inability of environmental laws and addresses problems like declining fisheries, climate change, and toxic substances.<sup>180</sup>

Justice Tassaduq Jilani has perfectly summarized the intervention of the judiciary in environmental matters in the following words:

The rationale behind public interest litigation in developing countries like Pakistan and India is the social and educational backwardness of its people, the dwarfed development of law of tort, lack of developed institutions to attend to the matters of public concern, the general inefficacy and corruption at various levels. In such a socioeconomic and political milieu, the non-intervention by Court in complaints of matters of

---

<sup>172</sup> Ibid, 410.

<sup>173</sup> Albert C. L., 'Public Trust and Public Nuisance: Common Law Peas in a Pod.' (2011) 45 *UCDL Rev.* 1075, 1077.

<sup>174</sup> Ibid, 1078.

<sup>175</sup> Ibid, 1083.

<sup>176</sup> Ibid, 1083.

<sup>177</sup> Ibid, 1083.

<sup>178</sup> Ibid, 1084.

<sup>179</sup> Ibid, 1084.

<sup>180</sup> Ibid, 1085.

public concern will amount to abdication of judicial authority.<sup>181</sup>

## **Conclusion**

The courts in Pakistan apply the PTD in its true letter and spirit; which maintains that certain natural resources are inalienable public trusts, the government is the trustee of these natural resources and the citizens as beneficiaries may take recourse to the courts if anyone tries to alienate, modify or destroy these resources. It is a common law doctrine which has its roots in Roman and English laws. Environmental experts also criticise its common law historical roots. Critics state that the PTD violates the property rights of individuals, the popular sovereignty, and the doctrine of separation of powers. They also criticise the role of the judiciary in the application of the PTD. They argue that the courts should have limited authority in environmental matters. The courts should rely on the statutory laws instead of the PTD. However, environmental experts defend the doctrine and state that it can be an important gap-filler. It can also play an important role just like the common law doctrine of public nuisance.

In Pakistan, prior to the case of *Sindh Institute of Urology and Transplantation*, the doctrine was applied impliedly, but now courts are applying it directly. The courts are not only applying this doctrine in its full spirit, but they have also successfully determined its true scope and parameter. In Pakistan, the scope of the doctrine is very broad. The doctrine was directly applied in the cases related to waters, recreational usage of public property, parks, green belts, and conversion of public property into private property. For this, courts are appointing commissions and mediators to provide technical support on issues related to the environment.

Furthermore, although Article 9 of the Constitution has been interpreted over time by the constitutional courts to include environmental rights and the PTD,<sup>182</sup> yet a proper and dedicated piece of legislation would be more appropriate. The government should consider the place of such legislation in Part II, Chapter I of the Constitution as it is done in South Africa by the insertion of section 24 in the South African constitution.<sup>183</sup>

---

<sup>181</sup> (n 8) [49].

<sup>182</sup> (n 4).

<sup>183</sup> (n 8) [31].