SOUTH ASIAN ENVIRONMENTAL LAW REPORT

VOLUME 01

2021

Centre for Environmental Law and Policy
&
Centre for Environmental Justice,
Sri Lanka

SOUTH ASIAN ENVIRONMENTAL LAW REPORTS

VOLUME 1

2021

EDITORIAL COMMITTEE

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Volume 1

Centre For Environmental Law And Policy
&
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Foreword

The intrusive and inescapable changes in climate around the world, with its concomitant and inevitable consequences – often cataclysmic, of altered water cycles, deluges and famines, compel us all – from the Prince to the Pariah – to be equal partners in adaptation and mitigation of global strategies since, on this depends the survival of our race.

The United Nations Environment Programme (UNEP) has reiteratingly underscored that its ambitious targets under the '2030 Agenda' requires 'a revitalized and enhanced global partnership that brings together Governments, Civil Society, the Private Sector, the United Nations Systems and other action, mobilizing all available resources.'

Non-exploitative and lasting global bonds and collaborations are the inviolable key to environmental protection, sustainable development and equitable progress – particularly for the least developed nations, land locked developing countries and small Island developing states.

Though this alone, can the world ensure isonomic use of natural resources and mitigate the deleterious effects of rapid climate change.

Irrefragably, International Conventions and laws adopted by countries, imbued by it or consequent thereto, embodies the goals that the global society aspires and often Courts become the catalyst for its fulfilment. The march of the forensic thought and curial innovations – more than any other, help shift the society into sustainable footing and facilitate the action needed to achieve the ultimate goal.

An enchiridionic ready reckoner of the judgments of partnering jurisdictions and of the Courts of other countries would serve as a grid across legal orders, granting insight to the working and operation of the laws in specific factual matrix, but with a global vision and perspective.

This carefully curated assemblage of judgments – all of them indubitably causes celebre – from the countries of South Asia presents a global view of the strides in Environmental Law and is apodictically an invaluable treasure-trove for Judges, Lawyers, Academicians, Researchers, Administrators and Policy Makers.

I commend the CELP of the University of Colombo and the CEJ for the thought and effort which has led to the parturition of the South Asian Environmental Law Reports and am sure that it will be the harbinger of greater and cohesive global partnerships in our unending quest for an equitable environmental regime.

Justice Devan Ramachandran
High Court of Kerala
Ernakulam, Kochi.

Preface

It is evident that conservation and preservation of natural resources are not novel concepts in South Asia. Conservation of natural resources have been closely interwoven with historical events, reflecting the aspirations and lives of people over many centuries. On the one hand, the South Asian region is deemed as a repository of nature's wealth consisting of diverse ecosystems which are enriched with a wide range of faunal and floral species. On the other hand, nature has been a significant determinant in the development of civilisation and it has been interlinked to people's lives to such an extent that separation from it could result in the decline of civilisation itself. Therefore, being the representatives of the natural environment and safeguarding its resources have been carved into the mindset of the inhabitants by the cultural evolution which merged together with the origin of religions. This very association laid the foundations for sustainability and the green movement which were established since the early times and at present, environmental jurisprudence has remarkably progressed into a vast protective mechanism within the region.

The contemporary society displays an unprecedented enthusiasm towards the green movement ranging from the grass-root levels to judicial activism. Despite the concerns for the environment, the South Asian region continues to be susceptible to climate impacts and environmental problems due to the trends in emerging economic and development priorities. As a result, it is most likely that environmental jurisprudence will continue to expand and diversify to address the environmental issues arisen in this region. Undoubtedly, the most progressive aspect within environmental jurisprudence is the contribution made by the judicial organ of nations. Hence, transition from anthropocentric view of environmental protection to eco-centric approach can be traced throughout the judicial interpretations across the South Asia.

The South Asian Environmental Law Reports (SAELR) Vol. 1 is the first collaboration between the Centre for Environmental Law and Policy (CELP) of the University of Colombo and the Centre for Environmental Justice (CEJ). This publication is intended to not only heighten general awareness among the global legal audience about the rich environmental

jurisprudence of South Asia, but also to showcase a few selected landmark cases from South Asia that have significantly contributed to the development of the environmental jurisprudence in domestic, regional and global contexts.

SAELR Vol. 1 presents four landmark judgements from Sri Lanka and one significant judgement from Bangladesh, India, Nepal and Pakistan respectively. SAELR Vol. 1 is a unique initiative from other collections of legal reports because each landmark case includes a review by a legal expert analysing case fact, the judgement and necessary future developments. Composed of legal academics and lawyers who are particularly interested in environmental protection, CELP and CEJ are dedicated institutions to environmental protection, promotion, justice, research and awareness. Thereby, the members intend to continue to grow their interest in analysing the development in environmental jurisprudence and publish this series of landmark South Asian cases.

The main objectives of publishing SAELR Vol. 1 include showcasing the rich environmental jurisprudence in South Asia, providing wider access to law students, researchers, journalists and the judiciary of the evolution of environmental jurisprudence, and hinting the future judiciary, lawyers, journalists, activists, researchers and students the way forward for a rich environmental jurisprudence. As a concluding remark, given that there are many other momentous judgements, this is only the founding stone of a series of South Asian Environmental Law Reports.

Dr. Kokila Konasinghe
Editor-in-Chief
Founding Director of Centre for Environmental Law and Policy (CELP)

Note From The Centre For Environmental Justice

The Centre for Environmental Justice (CEJ) as a leading environmental organisation in Sri Lanka, is proud to present the South Asian Environmental Law Reports (SAELR) Vol. 1 in collaboration with the Centre for Environmental Law and Policy (CELP) of the University of Colombo. This publication is meant to address the long felt need of a collective publication of landmark judgements on Environmental Law in the South Asian region.

SAELR Vol. 1 brings together a collection of eight landmark judgements representing five nations from South Asia including Bangladesh, India, Nepal, Pakistan, and Sri Lanka which demonstrate the significant role played by the judiciary in developing environmental jurisprudence and the effective implementation of environmental legislation in the relevant legal jurisdiction. These judgements are beneficial examples of how the South Asian environmental jurisprudence is actively adopting the prominent international environmental concepts into public interest litigation.

This collection of reports will not only be a valuable reference for the judges, lawyers, academics, law students, and researchers but it would also provide remarkable guidance to activists, journalists, and every other person who is keen on pursuing the dynamic evolution of International Environmental Law in the global context. I would like to extend a special thanks to The Asian Foundation for providing a financial contribution to the South Asian Environmental Law Report. The remarkable contribution made by the members of CELP in providing a review of each judgement is noteworthy.

I commend the members of both institutions for their hard work since the inception of this project and convey my heartfelt wishes on successfully completing this task.

Hemantha Withanage
Senior Advisor to Centre for Environmental Justice (CEJ)
Chairperson of the Friends of the Earth Internationals

Cover Design Description:

The cover portrays 4 animal species considered to have been threatened with extinction found in the South Asian region; Red Panda (*Ailurus fulgens*), Sri Lankan Elephant (*Elephas maximus maximus*), Bengal Tiger (*Panthera tigris tigris*) and Indian pangolin (*Manis crassicaudata*), all are categorized endangered in the International Union for Conservation of Nature (IUCN) Red List of Threatened Species. The species represent South Asia, and the monochromic illustrations denote the tragic fate forcefully imposed upon them by the selfish and exploitative behaviour of generations of human beings. The Vesak Orchid flowers (*Dendrobium maccarthiae*) (වෙසක් මල්) endemic to Sri Lanka and categorized endangered by IUCN, represent the Sri Lankan identity, remarkably rich biological diversity in the country and the cruciality of conserving the rapidly disappearing threatened flora and fauna. The flowers are painted in their true colours as opposed to black and white to demonstrate hope that one-day thousands of conservationists, environmentalists and experts will succeed in putting an end to the extinction of species, environmental degradation and pollution and that one day the human race will realize they are just a part of this planet. The cover background which is in white denotes the purity and integrity of the Centre for Environmental Law and Policy of the Faculty of Law, University of Colombo and the Centre for Environmental Justice in publishing the South Asian Environmental Law Report, that this unique publication will serve academics, students, lawyers, environmentalists and every other person battling in the fight for environmental conservation and protection.

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CENTRE FOR ENVIRONMENTAL JUSTICE (GUARANTEE LIMITED) AND

WITHANAGE DON HEMANTHA RANJITH SISIRA KUMARA

v.

MINISTER OF ENVIRONMENT, WILDLIFE, LANDS AND LAND DEVELOPMENT & 18 OTHERS

COURT OF APPEAL, SRI LANKA

CA (Writ) Application No. 12/2020

BEFORE

A.H.M.D. Nawaz J. (President of the Court of Appeal)

Sobitha Rajakaruna J.

COUNSEL

Ravindranath Dabare with Nilmal Wickremasinghe instructed by Nimmi Sanjeewani for the Petitioner.

P. Ranasinghe A.S.G., P.C. for the Respondents.

DECIDED ON

17. 07. 2020

MATERIAL FACTS

This writ application was filed on behalf of the Centre for Environmental Justice (CEJ) against the Minister of Environment and eighteen other Respondents. The Petitioners mainly expected the court to grant an

order to suspend the Cabinet decision taken on 04.12.2019 pertaining to the removal of the existing requirement on obtaining permits for the transportation of sand, soil and clay which are necessary for the local industries and the construction industry as required under Section 28 of the Mines and Minerals Act, No. 33 of 1992 as amended by Act, No. 66 of 2009.

JUDGEMENT OF

A.H.M.D. Nawaz J. (President of the Court of Appeal)

MATTER FOR DETERMINATION

Whether the Cabinet decision taken on 04.12.2019 with regard to the removal of the existing requirement on obtaining permits for the transportation of sand, soil and clay necessary for the local industries and the construction industry is legitimate.

RELEVANT AREAS OF LAW

Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka - Section 13(2) (1) (d) - Section 28 (1) - Section 63 (1) of the Mines & Minerals Act, No. 33 of 1992.

PROPOSITION OF LAW ESTABLISHED IN THE DECISION

The Geological Survey and Mines Bureau (hereinafter referred to as GSMB) is the main authority that has the power to regulate exploration and mining for minerals and processing, trading and export of such minerals, by the issue of licenses.

According to Section 13 (2) (1) (d) of the Mines & Minerals Act, No. 33 of 1992, the GSMB has the power to issue licenses for the exploration, mining processing, transport, trade and export of minerals. Under Section 63 (1) of the Act, if any person who explores for, or mines, processes, stores, transports, trades in or exports, any mineral without a license on that behalf issued under the Act [...] shall be guilty of an offence.

Accordingly, the Court of Appeal reiterated that no person could explore mining, transportation, processing, trading in or export of minerals without a proper license/permit issued by the GSMB established under the Mines and Minerals Act, No.33 of 1992.

ORDER OF THE COURT

The Court of Appeal directed the Inspector General of Police (18th Respondent of the Petition) to abide by the due process of the law and enforce restrictions and continue to monitor the movements of any illegal transportation of minerals.

Application Allowed.

THE DECISION OF THE COURT OF APPEAL

The learned Additional Solicitor General Mr. Parinda Ranasinghe, President's Counsel brought to the notice of the Court that the cabinet decision dated on 04.12.2019 wherein it is specifically stated that the Cabinet has requested the Minister of Environment and Wildlife Resources to take appropriate action to do away with the existing permit system for the transportation of sand, soil, and clay. It was proposed that a committee composed of representatives knowledgeable in the field from certain nominated ministries, should be appointed to revisit the existing procedure adopted for the issuance of permits for excavation of sand, soil, clay and other such raw materials and submit a recommendation for formalising such a procedure.

The learned Additional Solicitor General further submitted that as things stand, no changes as to the powers given in section 28 of the Mines and Minerals Act have been made so far.

Learned counsel for the Petitioners brought to the notice of the Court a letter marked as Y 1 dated 08.06.2020 wherein the chairman of the GSMB referred to the Inspector General of Police to monitor the movements of

any illegal transportation. This letter has been written on the basis that transport permits would no longer be issued as per the Cabinet decision.

The learned Additional Solicitor General pointed out that no such decision was taken to stop issuing permits for transportation. Accordingly, the Court directed the Inspector General of Police to act within the purview of the law and take note of the contents of this order.

The Court mentioned this matter on 19.10.2020 for the Petitioners to inform the Court whether they would still proceed with this application.

AUTHORITIES REFERRED TO IN THE JUDGEMENT

Centre for Environmental Justice (Guarantee Limited) & Withanage Don Hemantha Ranjith Sisira Kumara v. Minister of Environment, Wildlife, Lands and Land Development & 18 Others CA (Writ) Application No. 12/2020

Mines and Minerals Act, No.33 of 1992

The Constitution of the Democratic Socialist Republic of Sri Lanka,1978

CENTRE FOR ENVIRONMENTAL JUSTICE (GUARANTEE LIMITED) AND

WITHANAGE DON HEMANTHA RANJITH SISIRA KUMARA

v.

MINISTER OF ENVIRONMENT, WILDLIFE, LANDS AND LAND DEVELOPMENT & 18 OTHERS

(Sand Mining License Case)

C. A Writ 12 / 2020

Kusal K. Amarasinghe*

ABSTRACT

This review analyses the Court of Appeal order of the C.A. Writ 12/2020 application filed on behalf of the Centre for the Environmental Justice (CEJ) against the Minister of Environment and eighteen other Respondents. The Petitioners mainly expected the Court to grant an order to suspend the Cabinet decision taken on 04.12.2019 concerning the removal of the existing requirement on obtaining permits for the transportation of sand, soil and clay which is necessary for the local industries and the construction industry as required under Section 28 of the Mines and Minerals Act, No. 33 of 1992 as amended by Act, No.66 of 2009.

KEYWORDS – Mines and Minerals Act, No. 33 of 1992, Geological Survey and Mines Bureau, illegal sand mining, public interest litigation

* Attorney-at-Law, Lecturer (Probationary) Faculty of Law, University of Colombo.

1. INTRODUCTION

Sri Lanka holds a natural river system that comprises of 103 river basins. Since prehistoric times, the inhabitants of the island have benefited greatly from the resources provided by rivers. From the establishment of ancient settlements in Sri Lanka to the present, rivers have significantly contributed to human advancement from many perspectives.[1] These river valleys are rich in biodiversity. However, unsustainable human activities pose threats to the Sri Lankan river system and associated ecosystems on a larger scale. Illegal sand mining is one such major threat for the Sri Lankan riverside ecosystems.

Sand is an essential component in the construction sector and most of the demand for sand in Sri Lanka is met by river-based sand mining. The current demand for sand in the industry of construction building islandwide is approximately 40 million cubic metres per year.[2] Due to the upward trend in the construction industry during the past 3 to 4 years the volume of construction projects has increased. As a result, excessive extraction of sand from rivers has caused adverse effects to the environment. Among various environmental problems, lowering of riverbeds, threats to drinking water systems, drying up of irrigation canals and erosion of river banks have resulted in floods and loss of land.[3]

2. THE LEGAL AND FACTUAL BACKGROUND

In Sri Lanka, mining is mainly regulated under the Mines & Minerals Act No.33 of 1992 as amended by Act No.66 of 2009. According to

1 Ranjana UK Piyadasa, 'River Sand Mining and Associated Environmental Problems in Sri Lanka, Sediment Problems and Sediment Management in Asian River Basins' (*International Association of Hydrological Sciences*) <https://iahs.info/uploads/dms/16301.19-148-153-349-10-Hyderabad-Ranjnana-Piyadasa-Sri-Lanka.pdf> accessed 15 June 2021.

2 Chandani Jayatilleke, 'A river sand substitute' *Daily News* (Colombo, 6 March 2020).

3 M Darshana & SPR. Samanthika, 'River Sand and Sea Sand Mining Industries in Sri Lanka' [2017] International Journal of Research Science & Management < https://www.ijrsm.com/issues%20pdf%20file/Archive-2017/September-2017/1.pdf> accessed 10 June 2021.

the Preamble, the purpose of the said Act *inter alia* is, 'to regulate the exploration for, mining, transportation, processing, trading in or export of minerals.'[4]

The Geological Survey and Mines Bureau (hereinafter referred to as GSMB) is established under this Act.[5] GSMB is the main authority that has the power to regulate exploration and mining for minerals and processing, trading and export of such minerals, by the issue of licences.[6] Illegal mining activities have been controlled by these permits/licences.[7]

According to section 13(2)(1)(d) of the Mines & Minerals Act No. 33 of 1992, the GSMB have the power to issue licences for the exploration, mining, processing, transport, trade and export of minerals.

Under section 28(1) of the Mines and Minerals Act No. 33 of 1992,

> No person is permitted to explore for, mine, transport, process, trade-in or export any minerals except under the authority of, or otherwise than in accordance with, a licence issued in that behalf under the provisions of the said Act and the regulations made thereunder.[8]

Section 63(1) of the Act describes the penalty for exploring, mining, processing, storing, transporting, trading or exporting any minerals without a licence.

The said section states as follows;

> (1) Any person who
>
> (a) explores for, or mines, processes, stores, transports, trades in or exports, any mineral without a licence in that behalf issued under this Act.

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4 Mines & Minerals Act, No. 33 of 1992, Preamble.

5 ibid (as amended), s 2.

6 ibid, s 12(d).

7 Nimmi Sanjeewani, Legal Issues of Sand Mining in Sri Lanka, <https://ejustice.lk/2020/04/11/legal-issues-of-sand-mining-in-sri-lanka/> accessed 8 July 2021.

8 Mines & Minerals Act, No. 33 of 1992 (as amended), s 28(1).

[…]

(d) [...] shall be guilty of an offence under this Act and shall on conviction after summary trial before a Magistrate be liable to a fine not less than fifty thousand rupees and not exceeding five hundred thousand rupees and in the case of a second or subsequent offence, to a fine, not less than one hundred and fifty thousand rupees and not exceeding two million rupees or to imprisonment for a term not exceeding two years or to both such fine and imprisonment.[9]

The matter in question for this case, was the decision of the Cabinet on 04.12.2019, to remove the current requirement to obtain permits/licences for the transportation of sand, soil, clay and rubble with immediate effect.

The Petitioners argued that the said Cabinet decision is contrary to the provision of section 28 of the Mines & Minerals Act No. 33 of 1992 as amended.[10] The Petitioners further argued in their petition that the Cabinet Ministers are not empowered to abolish the necessity of obtaining a transport licence for the transportation of the said minerals by way of a Cabinet decision without amending the Mines and Minerals Act. Hence, in the said instance the decision taken by the Cabinet on 04.12.2019 is *ultra vires*.[11]

Unless done with proper measures and regulation process, sand and soil mining could cause drastic damage to the environment resulting in landslides, soil erosion, deepening of the river beds, seawater intrusion, riverbank erosion, deepening the groundwater table, and destruction of the sand dunes which act as wind and wave barriers etc.[12]

Therefore, through the petition, Petitioners further stated before the Court that the said Cabinet decision to allow the transportation of sand, soil,

9 ibid, s 63(1).

10 Petition of Centre For Environmental Justice (Guarantee Limited) & Withanage Don Hemantha Ranjith Sisira Kumara v. Minister of Environment, Wildlife, Lands and Land Development & 18 Others CA (Writ) Application No. 12/2020, para 14, 8.

11 ibid, para 15, 8.

12 ibid, para 22, 9.

clay, and rubble without permits will negatively impact the environment in both the short and long terms and would create environmental hazards.[13]

Finally, the Petitioners prayed the Court of Appeal to grant an interim order suspending the Cabinet decision taken on 04.12.2019 with regard to the removal of the existing requirement on obtaining permits/licences for the transportation of sand, soil and clay necessary for the local industries and the construction industry as required under section 28 of the Mines and Minerals Act and the proposal of the Minister of Environment in connection thereto.[14]

Furthermore, Petitioners sought the following remedies from the Court of Appeal,[15]

(a) Grant an order in the nature of a Writ of Certiorari quashing the purported Cabinet decision taken on 04.12.2019.

(b) Grant an order in the nature of a Writ of Mandamus directing the 1st Respondent (Minister of Environment) to 17th Respondent (Geological Survey and Mines Bureau) to formalise all the transportation and mining licences which have been issued under the Mines and Minerals Act as amended.

(c) Grant an order in the nature of a Writ of Mandamus directing 17th Respondent (Geological Survey and Mines Bureau) or/and 18th Respondent (Inspector General of Police) to comply with the statutory provisions of the Mines and Minerals Act and apprehend the perpetrators who transport minerals without obtaining a licence for transportation.

(d) Grant an order in the nature of a Mandamus directing the 1st Respondent (Minister of Environment) to monitor the licences already issued under the Mines and Minerals as amended.

13 ibid, para 16, 8.

14 ibid, pray (b), 11.

15 ibid, pray (b), 11.

3. THE ORDER OF THE COURT OF APPEAL

On behalf of the Respondents, Additional Solicitor General informed the Court of Appeal, that the Cabinet decision dated 04.12.2019 specifically stated that the Cabinet has requested the Minister of Environment and Wildlife Resources to take appropriate action to reform the existing permit system for the transportation of sand, soil.[16] Also, the learned Additional Solicitor General further submitted that nothing has been changed as to the powers conferred in section 28 of the Mines and Minerals Act.[17] Finally, the Additional Solicitor General pointed out that no such decision was taken to stop issuing permits for transportation.

Accordingly, the Court directed the Inspector General of Police (18th Respondent of the petition) to act under due process of law and take note of the contents of this order.[18]

4. CONCLUSION

Public interest litigation lawsuits play an important role in the environmental protection of Sri Lanka. The Court has regulated unsustainable sand and mineral mining in several important cases on several previous occasions. In a landmark case (SCFR 81/2004) undertaken by the Green movement and Centre for Environmental Justice, the Supreme Court issued specific guidelines concerning sand and clay mining. In another case (SCFR 226/2006), the Supreme Court banned the further extraction and removal of sand from both Deduru Oya and Maha Oya.[19] Accordingly, as an extension of the public interest judicial tradition in Sri Lanka, the case of *Center for Environmental Justice v. Minister of Environment and others* (C.A. Writ

16 Centre For Environmental Justice (Guarantee Limited) & Withanage Don Hemantha Ranjith Sisira Kumara v. Minister of Environment, Wildlife, Lands and Land Development & 18 Others CA (Writ) Application No. 12/2020, 2.

17 ibid.

18 ibid.

19 'Legal Issues of Sand Mining in Sri Lanka' <https://ejustice.lk/2020/04/11/legal-issues-of-sand-mining-in-sri-lanka/> accessed 8 July 2021.

12/2020) can also be identified as an important landmark of sustainable environmental protection of the country.

Environmental sustainability is the responsibility to conserve natural resources and protect global ecosystems to support health and wellbeing at present as well as future. Therefore, it should be considered as an inevitable duty upon the present generation to protect the environment for the interest of the future generations.

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CENTRE FOR ENVIRONMENTAL JUSTICE (GUARANTEE) LIMITED

v.

CONSERVATOR GENERAL OF FOREST AND 8 OTHERS

COURT OF APPEAL OF SRI LANKA

CA (Writ) Application No. 291/2015

BEFORE

Janak De Silva J.

N. Bandula Karunarathna J.

COUNSEL

Ravindranath Dabare with S. Ponnamperuma for the Petitioner.

Manohara Jayasinghe SSC for the 1st to 6th and 8th and 9th Respondents.

Faiz Musthapha P.C. with Basheer Ahamed and N.M. Riyaz for the 7th Respondents.

DECIDED ON

16.11.2020

JUDGEMENT OF

Janak De Silva J (N. Bandula Karunarathna J agreeing)

MATERIAL FACTS

The Centre for Environmental Justice (CEJ) being the Petitioner for the case filed as a public interest litigation against nine Respondents including

the Attorney General for clearing an area of the Kallaru Forest Reserve bordering the Wilpattu Northern Sanctuary of Wilpattu National Park and resettling internally displaced persons (hereinafter referred to as IDPs) of around 1500 families who were ordered to leave the Northern Province in October 1990 by the Liberation Tigers of Tamil Eelam.

MATTER FOR DETERMINATION

Whether the actions taken by the Respondents to settle IDPs in the said cleared area which has been declared as a reserved forest under section 3 of the Forest Conservation Ordinance as amended and section 7 of the said Ordinance which prohibits several types of activities in a reserved forest including fresh clearing, clearing or breaking up of any land for cultivation or any other purpose, erection of any building whether permanent or temporary or occupation of such building and construction of any road is illegal.

RELEVANT AREAS OF THE LAW:

Article 140 of the Constitution of Sri Lanka - Section 7 and Section 3 of the Forest Conservation Ordinance, No. 16 of 1907 (as amended) - Polluter Pays Principle - Directive Principles and State Policies - Executive and Administrative Actions - Rule of law - Doctrine of Public Trust - Public Interest Litigation.

PROPOSITIONS OF LAW ESTABLISHED IN THE DECISION:

The rule of law in its fundamental meaning requires that all acts must be in accordance with law. Where land has been declared as reserved forest in terms of the Forest Conservation Ordinance, no person is entitled to act contrary to law and carry out activities such as clearing of forest, construction of houses and roads within this area.

Chapter VI of the Constitution enumerates the Directive Principles of State Policy which guide the Parliament, the President and the Cabinet of Ministers in the enactment of laws and governance of the country for the

establishment of a just and free society. Article 27 (14) of the Constitution, mandates that the State shall protect, preserve, and improve the environment for the benefit of the community.

The order P4 declaring several areas as reserved forest in terms of the Forest Conservation Ordinance is a practical application of this Constitutional Directive. It makes the provisions of section 7 of the Forest Conservation Ordinance applicable to the land in dispute and seeks to conserve the reserved forest.

The Constitutional principles and provisions constitute one of the principal safeguards against the excess and abuse of executive power; mandating the judiciary to defend the sovereignty of the people enshrined in Article 3 against infringement or encroachment by the Executive with no trace of any deference due to the Crown and its agents. Further this Court itself has long recognised and applied the public trust doctrine: that powers vested in public authorities are not absolute or unfettered but are held in trust for the public, to be exercised for the purpose for which they have been conferred, and that their exercise is subject to judicial review by reference to those purposes.

DECISION OF THE COURT

The Court issues an order in the nature of Mandamus ordering the 1st Respondent (Conservator General, Department of Forest Conservation) to take action to implement a tree planting program under and in terms of the provisions of the Forest Ordinance, No. 16 of 1907 as amended, in any area equivalent to the reserve forest area used for re- settlement of IDPs.

Also, the Court issued an ancillary or consequential order directing the 7th Respondent Rishad Badiuddeen to bear the full cost of such a tree planting programme applying the polluter pays principle since he was instrumental in using the reserved forest land for the resettlement of the IDPs according to the evidence presented before the Court. The Conservator General of the Department of Forest Conservation (1st Respondent) is directed to calculate the costs of this tree planting programme and inform the 7th Respondent

of this cost and the details of the account to which the said sum should be paid by him within two-months of the date of this judgement. The 7th Respondent shall pay the said sum within one month of such notification.

Application partly allowed.

AUTHORITIES REFERRED IN TO THE JUDGEMENT

Bulankulama and Others v. Secretary, Ministry of Industrial Development and Others (2000) 2 Sri L.R. 243

Forest Conservation Ordinance Amendment Act, No. 65 of 2009

Gabcikovo-Nagimaros project (Hungary/Slovakia) 1997 General list N 92 25th September 1997

Heather Therese Mundy v. Central Environmental Authority and Others (S.C. Appeal No. 58/2003

Indian Council for Enviro-Legal Action v. Union of India (2011) 8 SCC 161

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Wijebanda v. Conservator General of Forests (2009) 1 Sri L.R. 337

Wijeratne (Commissioner of Motor Traffic) v. Ven. Dr. Paragoda Wimalawansa Thero and Four Others (2011) 2 Sri L.R. 258

CENTRE FOR ENVIRONMENTAL JUSTICE (GUARANTEE) LIMITED

v.

CONSERVATOR GENERAL OF FOREST AND 8 OTHERS

(*Wilpattu Case*)

CA/Writ/291/2015

Samali Sudasinghe*

ABSTRACT

This case analysis considers the Court of Appeal's decision in *Centre for Environmental Justice (Guarantee) Limited v. Conservator General of Forest and 8 Others,* a notable judgement in Environmental Law, delivered on 16th November 2020 by the Court of Appeal of Sri Lanka. The case was considered under and in terms of Article 140 of the Constitution of Sri Lanka for clearing an area of the Kallaru Forest Reserve bordering the Northern Sanctuary of Wilpattu National Park for the purpose of resettling Internally Displaced Persons. The Court of Appeal held that the resettlement of Internally Displaced Persons was illegal and ordered the 7th Respondent to bear the full cost of a tree planting program to reforest in any area equivalent to the reserve forest area used for re-settlement of Internally Displaced Persons. This review denotes the Court's institutional role in the context of environmental matters, analysing the role of several key environmental legal principles in the Sri Lankan Environmental Law context.

KEYWORDS: polluter pays principle, right to environment, environmental restoration

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1. INTRODUCTION

Several deforestation incidents that happened in the country from time to time have drawn a keen interest with regard to deforestation and the conservation of forests in Sri Lanka.[1] The Forest Department and the Department of Wildlife Conservation have a duty towards the protection of the natural forests.[2] However, the deforestation in Wanathawillu, Anawilundawa, and Sinharaja have displayed the failure of the government authorities to protect the reserved forests in the country.[3]The *Centre for Environmental Justice (Guarantee) Limited v. Conservator General of Forest and 8 Others* (hereinafter referred to as *Wilpattu case)* was delivered by the Court of Appeal in this context and contends with the alleged deforestation of the Wilpattu forest reserve also indicates the failure and inattention of the public officers in protecting the environment.

2. LEGAL AND FACTUAL BACKGROUND

The Centre for Environmental Justice (hereinafter referred to as CEJ) being the Petitioner for the case filed a public interest litigation against nine Respondents including the Attorney General to impugn some of the actions taken by the Respondents in the Northern Sanctuary of Wilpattu National Park, Maraichukkaddi/Karadikkuli Reserve Forest standing westward of Wilpattu blocks II and IV and the forest area in Madu, Periyamadu and Mannar area which is part of the Madu Road Sanctuary and Madu Road Reserved Forest.[4]

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1 Umesha Satharasinghe, 'The Deforestation in Sinharaja Rainforest Reserve & Environment Law in Sri Lanka' (Colombo Telegraph, 26th March) <https://www.colombotelegraph.com/index.php/the-deforestation-in-sinharaja-rainforest-reserve-environment-law-in-sri-lanka/> accessed 26 July 2021.

2 CV Liyanawatte and KLAG Dias, 'Analysis on Deforestation and Environmental Law in Sri Lanka' (International Research Conference, General Sir John Kotelawala Defence University Kandawala Road Rathmalana, 2017).

3 Satharasinghe (n 1).

4 *Centre for Environmental Justice (Guarantee) Limited v. Conservator General of Forest and 8 Others* [2020] CA(Writ) 291/2015, 3.

The subject matter of the petition was that the said area was cleared, and several houses and roads have been constructed to settle around 1500 families who were ordered to leave the Northern Province in October 1990 by the Liberation Tigers of Tamil Eelam. The principal argument of the case was that, the actions were taken by the Respondents to settle Internally Displaced Persons (hereinafter referred to as IDPs) in the said cleared area, which has been declared as a reserved forest in terms of section 3 of the Forest Conservation Ordinance as amended[5] and section 7 of the said Ordinance prohibits several types of activities in a reserved forest including fresh clearing, clearing or breaking up any land for cultivation or any other purpose, erection of any building whether permanent, temporary or occupation of such building and construction any road.[6] In contrast, the Respondents argued that it is the duty of the government to take steps to resettle IDPs, as it is stipulated in the recommendations of the Report of Lessons Learnt and Reconciliation Commission (hereinafter referred to as LLRC). Consequently, they claimed that, the actions taken to resettle IDPs by Respondents were fulfilling their obligations both under domestic and international law.[7]

3. THE ORDER OF THE COURT OF APPEAL

The Court of Appeal issued an order in the nature of writ of *certiorari* - quashing orders made by the 1st and 6th Respondents and a writ of *mandamus* to order the 1st, 2nd, 3rd, 4th and 8th Respondents to perform the statutory duties in respect of the alleged deforestation, construction of housing project and illegal re-settlement of encroaches in the said area under and in terms of the provisions of the Forest Ordinance, No. 16 of 1907 as amended. Importantly, the Court issued an ancillary or consequential order directing the 7th Respondent Rishad Badiuddeen to bear the full

5 This declaration was significantly made on 21st September 2021 and published in the Gazette Extraordinary dated 10th October 2021. As provided by Section 3 of the Forest Conservation Ordinance, it specifies that the area covered will be a reserved forest with effect from 20th October 2012.

6 Forest Conservation Amendment Act, No. 65 of 2009, s 7.

7 *Centre for Environmental Justice* (n 4), 4.

cost of such tree planting programme applying the Polluter Pays Principle (hereinafter referred to as PPP) since it was evident before the Court that he was instrumental in using the reserved forest land for the re-settlement of the IDPs.[8]

4. ANALYSIS

4.1 Polluter Pays Principle

The PPP has been widely explained and recognised by De Silva J. as the core Principle. Even though the Petitioner has not prayed such relief in the prayer of the petition, it did not prevent the Court under its full cognisance from applying the PPP and granting ancillary or consequential relief against the 7th Respondent. De Silva J. stated, '[i]n any event, the prayer to the petition seeks "such and further relief as Your Lordships Court shall seem to meet" which in my view is sufficient to cover consequential or ancillary relief against the 7th Respondent.'[9]

Hence, imposing such compensation on the 7th Respondent is one of the greatest applications of the PPP which should be highly appreciated. In contrast, the effective application of the PPP in *Kariyawasam v. Central Environment Authority and Others*[10] decided in 2019 is questionable given the opinion of the Honourable Judge who held that at least a part of the pollution shall be borne by the polluter. While the imposition of the duty on the Respondent company to pay a sum of 20 million to be distributed as compensation among the residents of the affected area can be highly appreciated, the non-recognition of the duty of the polluter to bear the entire cost of pollution indirectly denotes that a part of it may still be imposed on the general public.

The PPP has been well interpreted by the Supreme Court of India as a polluter shall not only be liable to compensate the victim but shall also be

8 ibid.

9 *Centre for Environmental Justice* (n 4), 12.

10 *Kariyawasam v. Central Environment Authority and Others* [S.C.F.R. 141/2015, S.C.M. 04.04.2019].

liable to pay for restoring the environmental harm. Thus, the PPP has been widely recognised in India, and it has established that the polluter shall bear the cost to reverse the damaged done to the ecology. De Silva J. has cited many Indian cases such as *Indian Council for Enviro- Legal Action v. Union of India,*[11] *Vellore Citizens Welfare Forum v. Union of India,*[12] *M.C Mehta v. Kamal Nath,*[13] *M.C. v. Union of India,*[14] *S. Jagannath v. Union of India,*[15] to support his view on the application of PPP.

In this manner, the progressive utilisation of the PPP in India was adopted in *Wilpattu Case* to the environmental protection legal regime in Sri Lanka affirming that the cost of restoration of the environmental damage and compensation to the victims of such damage both be exclusively imposed on the polluter, without a burden to the taxpayer, referring to the Directive Principles of State Policies, where necessary. However, it can be questioned, whether the application on PPP on the 7th Respondent to bear the full cost of tree planting, has achieved the true sense of environmental restoration, since De Silva J. only referred to implement actions for the tree planting program 'in any area equivalent to the reserve forest area used for re- settlement of IDPs.'[16] But the interpretation of the PPP applied in the judgement remains significant.

4.2 State Sovereignty and State Responsibility Principle

De Silva J. has acknowledged the principles of state responsibility and state sovereignty by quoting international instruments and Sri Lankan judicial precedents. In *Bulankulama and Others v. Secretary, Ministry of Industrial Development and Others,* Amarasinghe J. discussed the state sovereignty and state responsibility principles as the organs of State are guardians to whom the people have committed the care and preservation of the resources

11 *Indian Council for Enviro- Legal Action v. Union of India* (2011) 8 SCC 161.

12 *Vellore Citizens Welfare Forum v. Union of India AIR* 1996 SC 2715.

13 *M.C Mehta v. Kamal Nath* (1997) 1 SCC 388.

14 *M.C. v. Union of India AIR* (1987) SC 965.

15 *S. Jagannath v. Union of India* (1997) 2 SCC 87.

16 *Centre for Environmental Justice* (n 4), 12.

of the people. This accords not only with the scheme of government set out in the Constitution, but also with the high and enlightened conceptions of the duties of our rulers, in the efficient management of resources in the process of development.[17]

The state representative officers hold natural resources of the country in trust for its citizens. This gives rise to the responsibility which is imposed on the state to conserve and protect such resources.[18] In the *Wilpattu case*, all the Respondents are government officials including the 7th Respondent a cabinet minister who has a vital role to play in protecting the environment under their trusteeship.

When a state participates in natural resources exploitation, it amounts to a human rights violation such as the right to health and right to life. De Silva J. has cited the *Gabcikovo- Nagimaros project (Hungary/Slovakia)* case[19] stating the opinion of the Vice President of the International Court of Justice C.G. Weeramantry J. He held that the protection of the environment is a vital part of human rights and damaging the environment can undermine all human rights embodied in the international instruments. Among them, Principle 21 of the Stockholm Declaration,[20] Principle 2 of the Rio Declaration,[21] Article 1(2) and Article 47 of the International Covenant on Civil and Political Rights (ICCPR)[22] and Article 1(2) of the International Covenant on Economic, Social and Cultural Rights[23] (ICESCR) are worth

17 *Bulankulama and Others v. Secretary, Ministry of Industrial Development and Others* (2000) 2 Sri L.R.

18 Kokila Konasinghe and Samya Senaratne, 'Look Beyond Wilpattu' (*Daily News E-Paper,* 14 December 2020) <https://www.dailynews.lk/2020/12/14/features/236039/look-beyond-wilpattu> accessed 14 July 2021.

19 *Gabcikovo - Nagimaros project (Hungary/Slovakia)* [1997] General list N 92 25th September 1997.

20 Stockholm Declaration on the Human Environment (adopted 16 June 1972 A/CONF.48/C.9) (Stockholm Declaration).

21 Declaration of the United Nations Conference on Environment and Development (adopted 12 August 1992 A/CONF 151/26) (Rio Declaration).

22 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

23 International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 999 UNTS 171 (ICESCR).

mentioning. As a signatory of the ICCPR and ICESCR, Sri Lanka is bound by these provisions to guarantee that the right to enjoy and utilise the natural resources by the citizens shall not be prevented and limited by the state.[24] Therefore, granting such a huge compensation for clearing the reserved area by the Respondents in the *Wilpattu* case is justifiable.

This can be accompanied by the promotion of national development.[25] where it can be argued that the combination of national advancement and ensuring the environment appears to be conflicting. But securing the environment does not mean that there cannot be economic gain. Evident that, in 2004 to 2011 in the policy of Brazil, there was a marked decrease in deforestation of the Amazon rainforest and at the same time, there was economic growth.[26]

4.3 Directive Principles and State Policy

In the *Chunnakam case* the Jayawardena J. emphasised that the directive principles are not merely written in the Constitution but also provide a living set of guidelines to which the states and its agencies shall give effect.[27]

In the *Wilpattu* judgement, the analysis of this principle is highly appreciated where the status of judiciary in Article 29 of the Constitution is being elevated to a very advanced level. The judgement has interpreted that even though the directive principles cannot be enforced judicially, the administrative officers, the court system, the executive, and legislature shall use them as a guiding authority in the decision-making process. The Court of Appeal has identified the importance of the role of the judiciary as a part of the state to protect, preserve and improve the environment for the benefit of the community under Article 27(14) of the Constitution.[28]

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24 ibid.

25 Kokila Konasinghe and Samya Senaratne, 'Look Beyond Wilpattu' (n 18).

26 ibid.

27 *Kariyawasam* (n 10).

28 *Centre for Policy Alternatives v. Dayananda Dissanayake* (2003) 1 Sri L. R. 277, 292.

The judgement of *Watte Gedera Wijebanda v. Conservator General of Forests and Others*[29] denotes that the Directive Principles and State Policies furnishes important guidance to the organs of the state to exercise good governance, yet such principles are not specifically enforceable against the state.

The Indian Supreme Court has extensively quoted the Directive Principles and State Policies in a complimentary manner to the fundamental rights.[30] In the case of *The State of Madras v. Srimathi Champakam Dorairajan*[31] stated that 'directive principles of state policy have to conform to and run as subsidiary to the Chapter of Fundamental Rights.' This view lays the foundation for the argument that the Directive Principles are to be taken seriously, even though they are not enforceable, to achieve the full implementation of fundamental rights.

Therefore, it can be assumed that the unenforceability of the Directive Principles of state policies and fundamental duties of citizens by virtue of Article 29 of the Constitution as mentioned above, are no longer to be considered as matters, in the judicial system of Sri Lanka. Especially the Superior Courts have upheld the significance of following the Directive Principles of State Policies in matters related to environmental protection. Therefore, in conclusion, the state is bound to protect, preserve and improve the environment for the benefit of the community, and it cannot escape from its liability.

4.4 Religious Principles

The discussion of the environmental protection with regards to the religious principles is highly appreciated. De Silva J. has pointed out in *Wilpattu case,* the responsibility of the government in protecting the fauna

29 *Watte Gedera Wijebanda v. Conservator General of Forests and Others,* SC Application No 118/2004.

30 *Som Prakash Rekhi v. Union of India (1981) AIR SC 212; Rural Litigation and Entitlement Kendra v. State of Uttar Pradesh (Dehradun Quarrying Case) (1988) AIR SC 2187; T. Damodhar Rao v. SO Municipal Corporation of Hyderabad* (1987) AIR AP 17.

31 *The State of Madras v. Srimathi Champakam Dorairajan* (1951) SCR 525.

and flora and taking active measures to safeguard the nature by referring to Buddhism, Hinduism and also Islamic teachings.[32] This aspect will lead to interpreting the environmental legal principles more widely in the future discussions.

5. CONCLUSION

The concept of green activism has not been well established in Sri Lanka in contrast to countries such as India. However the outrage of the public during the course of this case has made it evident that all the citizens in the country are willing to raise their voice against the corruption in Wilpattu. Thus, it is a good approach for future environmental matters.

Moreover, the Court of Appeal has also acted as an environmental activist, and recently Sri Lankan judicial system has been playing a significant role as a steward of environmental protection. The *Wilpattu case* has given a notable contribution to the development of environment law in different ways by applying the relevancy of several principles of environmental law influenced by other landmark cases of Sri Lanka such as *Bulankulama* and *Chunnankam Power Plant*. Also, it is noteworthy that the Sri Lankan court system continues to recognise and ensure the protection of the environment as a crucial part of the living beings. In fact, the case which has been filed by the Petitioner under as public interest ligation shall be admired for having the expectation on the judiciary for the relief against administrative corruption.

32 *Centre for Environmental Justice* (n 4) 13 -14.

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RAVINDRA GUNAWARDENA KARIYAWASAM

v.

CENTRAL ENVIRONMENTAL AUTHORITY AND OTHERS

SUPREME COURT OF SRI LANKA

Fundamental Rights Application No. 141/2015

BEFORE

Priyantha Jayawardena PC, J.

Prasanna Jayawardena PC, J.

LTB Dehideniya, J.

COUNSEL

Mr. Nuwan Bopage with Mr. Chathura Weththasinghe for the Petitioner.

Dr. Avanti Perera for the 1st to 4th, 9th, 10th and 11th Respondents.

Dr. K.Kanag-Isvaran PC with Mr. L Jeyakumar instructed by M/S Sinnadurai Sundaralingam and Balendra for the 5th Respondent.

Dinal Phillips PC with Mr. Nalin Dissanayake and Mr. Pulasthi Hewamanne instructed by Ms. CD Amarasekera for the 8th Respondent.

Mr. KVS Ganesharajah with Ms. Deepiga Yogarajah, Ms. Suppiah Sugandhini and Ms. A. Gayathry instructed by Ms. Sarah George for the Intervenient Petitioners-Added Respondents.

DECIDED ON

04.04.2019

JUDGEMENT OF

Prasanna Jayawardena PC, J.

MATERIAL FACTS

The Northern Power Company (Pvt) Limited operated a thermal power station in Chunnakam, a town situated about 10 kilometres north of Jaffna city in Sri Lanka, in a manner that polluted groundwater in the area and made it unfit for human use. The Petitioners accused the Central Environmental Authority (hereinafter referred to as CEA), the Ceylon Electricity Board (hereinafter referred to as CEB), the Provincial and Local Authorities, the Board of Investment of Sri Lanka (hereinafter referred to as BOI) and the National Water Supply and Drainage Board for failing to enforce the law against the Northern Power Company (Pvt) Limited and to prevent the company from polluting groundwater.

MATTERS FOR DETERMINATION

(a) Whether the CEA, the CEB and the Respondent Provincial and Local Authorities were required to obtain and consider an Initial Environmental Examination Report (hereinafter referred to as IEER) or an Environmental Impact Assessment Report (hereinafter referred to as EIAR) prior to the commencement or during the operation of the thermal power station by Northern Power Company (Pvt) Limited and whether they have failed to perform their statutory duties in that regard.

(b) Whether the Northern Power Company (Pvt) Limited is required to obtain an Environmental Protection License (hereinafter referred to as EPL) for the operation of the thermal power plant and whether the CEA, the CEB and the Respondent Provincial and Local Authorities failed to perform their statutory duties in that regard.

(c) Whether the wastewater released by the Northern Power Company (Pvt) Limited has resulted in oil contamination and polluted groundwater and soil in the area.

(d) Whether the failure by the CEA, the CEB and the Respondent Provincial and Local Authorities to perform their statutory duties in the above three instances, constitutes a violation of the fundamental rights of the residents in the area and the Petitioner guaranteed by Article 12 of the Constitution.

(e) Whether the continued operation of the thermal power station in question will cause further oil contamination and pollution of groundwater and soil in the area.

RELEVANT AREAS OF THE LAW

Fundamental Rights - Directive Principles of State Policy - Fundamental Duties of Citizens - Sustainable Development - Public Trust Doctrine - Pollution of Groundwater - Polluter Pays Principle - Precautionary Principle.

PROPOSITIONS OF LAW ESTABLISHED IN THE DECISION

(a) At the time the power station in question was constructed, it had a power generation capacity of 15 MW. Consequently, the plant did not fall within the category of 'prescribed projects' in terms of item 9 of the order dated 18th June 1993 published in the Gazette Extraordinary No. 772/22 dated 24th June 1993. However, the material before the Court suggested that the thermal power station in question had later acquired a power generation capacity that exceeded 25 MW. By operation of the above order, this addition of power generation capacity to the plant constitutes a 'prescribed project' and therefore, the submission and consideration of an IEER or EIAR is required in terms of Part IV C of the National Environmental (Amendment) Act, No. 56 of 1988. The failure on

the part of the CEA and/or the BOI to conduct an IEER or EIAR constitutes a failure to fulfil their statutory and regulatory duties.

(b) The Northern Power Company (Pvt) Limited was prohibited from carrying on the operation of its thermal power station without an EPL which authorised its operation in terms of section 23 A of the National Environmental (Amendment) Act, No. 56 of 1988 and the order dated 14th January 2008 published in the Gazette Extraordinary No. 1533/16. However, the thermal power station in question was operated without an EPL for several lengthy periods of time, and the CEA and the BOI have done nothing to prevent this violation of the law.

(c) There is clear evidence to establish that the Northern Power Company (Pvt) Limited caused oil contamination of groundwater and soil. While the operations of the Respondent company are not the sole cause of contamination of groundwater and soil in the Chunnakam area, the existence of other polluters should neither give the Respondent company the license to pollute nor release it from being held accountable for the pollution it caused. Moreover, it does not entitle the CEA and the CEB to neglect their statutory duties and responsibilities with regard to enforcing the law in respect of the operations of the Respondent's thermal power station.

(d) The failure on the part of the CEA and BOI to perform their statutory and regulatory duties and to prevent the Northern Power Company (Pvt) Limited from causing oil contamination of groundwater and soil was arbitrary, unreasonable and in breach of the public trust reposed in the two authorities. It constitutes a violation of the fundamental rights guaranteed to the residents of the Chunnakam area and the Petitioner by Article 12 (1) of the Constitution.

DECISION OF THE COURT

The Northern Power Company (Pvt) Limited is permitted to resume its thermal power station with an EPL and a Scheduled Waste Management License issued from the BOI and/or CEA with strict adherence to the conditions stipulated in these two documents. The BOI and the CEA were directed to carry out quarterly inspections of the relevant thermal power station in consultation with the National Water Supply and Drainage Board and Industrial Technology Institute. The Northern Power Company (Pvt) Limited was ordered to pay compensation for a sum of Rs.20 million to offset at least a part of the substantial loss, harm and damage caused to the residents of the Chunnakam area.

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RAVINDRA GUNAWARDENA KARIYAWASAM

v.

CENTRAL ENVIRONMENTAL AUTHORITY AND OTHERS

(Chunnakam case)

SC (FR) Application No. 141/2015

Asanka Edirisinghe*

ABSTRACT

This review analyses the Supreme Court decision in *Ravindra Gunawardena Kariyawasam v. Central Environmental Authority and others* filed against the alleged groundwater and soil pollution by a thermal power station situated in the Chunnakam area in Jaffna, Sri Lanka. Delivering its judgement on 4th April 2019, the Supreme Court of Sri Lanka held that the failure of the relevant administrative authorities to perform their statutory and regulatory duties, and to prevent the Respondent company from causing oil contamination of groundwater and soil constitutes a violation of the right of the Petitioner and the residents in the Chunnakam area recognised by the Article 12 of the Constitution of Sri Lanka. The review utilised the black letter approach of research in analysing the selected judicial decision and lays down that the case has made a remarkably significant contribution to the environmental jurisprudence in Sri Lanka through the comprehensive recognition of the environmental legal principles, wide interpretation of the Constitutional provisions and affirmation of the fundamental rights of the people in the country against environmental pollution and degradation.

KEYWORDS – groundwater pollution, soil pollution, environmental impact assessment, environmental protection license, equal protection of the law, access to clean water, right to environment

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1. INTRODUCTION

The pollution of water resources due to industrial activities has been a common occurrence over the recent years in Sri Lanka. The most critical of these incidents include the alleged water contamination by Venigros gloves factory in 2013,[1] Kelani river pollution by the Coca Cola factory in Sri Lanka in 2015,[2] aquifer pollution in Chunnakam, Jaffna due to oil contamination by the Northern Power Plant since 2008 or 2009[3] and the chronic kidney disease in the dry zone of Sri Lanka which is often linked to agricultural water pollution.[4] These incidents have adversely and irreversibly affected the environmental quality and sustainability of the country. Additionally, it is a gross violation of fundamental rights of the people including the right to life, environment, health, water and equality.

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1 'Rathupaswela water contamination, Sri Lanka' *(Environmental Justice Atlas,* 06 December 2016) < https://ejatlas.org/conflict/rathupaswela-water-contamination-sri-lanka> accessed 10 June 2021; Hemantha Withanage, 'Ask water - they will give you a bullet' (Radio Mundo, 7 August 2013) < http://radiomundoreal.fm/6977-ask-water-they-will-give-you-a?lang=es> accessed 20 June 2021.

2 Ariyesha Wickramanayake 'The Coca-Cola Incident – Are we the next Plachimada?' (*Groundviews,* 02 September 2015) < https://groundviews.org/2015/09/02/the-coca-cola-incident-are-we-the-next-plachimada/> accessed 20 May 2021; Environmental Foundation Limited, *Industrial Responsibilities towards the Environment* (Environmental Foundation Limited 2015).

3 Saravanan Suntha, 'Oil spill contamination of Groundwater in Chunnakam Aquifer, Jaffna, Sri Lanka' [2018] Open Water Journal 24; V Jeevaratnam, S Balakumar, T Mikunthan and M Prabaharan, 'Quality of groundwater in Valikamam area, Jaffna Peninsula, Sri Lanka' [2018] International Journal of Water Resources and Environmental Engineering 09; Shynuga Thirukeswaran, 'Beyond the case of Northern Power Plant and oil waste contamination in Chunnakam Sri Lanka: Social, Economic and Environmental Implications' (MSc Thesis, Central European University 2019).

4 Channa Jayasumana, Carlos Orantes, Raul Herrera, Miguel Almaguer, Laura Lopez, Luis Carlos Silva, Pedro Ordunez, Sisira Siribaddana, Sarath Gunatilake, Marc E De Broe, 'Chronic interstitial nephritis in agricultural communities: a worldwide epidemic with social, occupational and environmental determinants' [2017] Nephrol Dial Transplantation 234; Benjamin A Vervaet, Cynthia C Nast, Channa Jayasumana, Gerd Schreurs, Frank Roles, Chula Herath, Nika Kojc, Vahid Samaee, Sonali Rodrigo, Swarnalata Gowrishankar, Christiane Mousson, Rajeewa Dassanayake, Carlos M Orantes, Vincent Vuiblet, Claire Rigothier, Patrick C D'Haese, Marc E De Broe, 'Chronic interstitial nephritis in agricultural communities is a toxin-induced proximal tubular nephropathy' [2020] Clinical Investigation 350.

The case *Ravindra Gunawardena Kariyawasam v. Central Environmental Authority and others* (hereinafter referred to as *Chunnakam* case) was decided in this backdrop and it unequivocally set a milestone in the protection of water resources and the environment in Sri Lanka.

2. THE LEGAL AND FACTUAL BACKGROUND

The case was filed against the alleged groundwater and soil pollution by a thermal power station operated by Northern Power Company (Pvt) Limited situated in Chunnakam area in Jaffna. The Petitioners argued that the failure of the relevant administrative authorities to enforce the law against the Northern Power Company (Pvt) Limited and to prevent the company from polluting groundwater constitutes a violation of the fundamental rights of the Petitioner and the residents of the Chunnakam area recognised by Article 12 of the Constitution of Sri Lanka.

3. THE ORDER OF THE SUPREME COURT

The Court, delivering its decision on 04th April 2019, held that the thermal power station in question is required the consideration of an Environmental Impact Assessment Report (hereinafter referred to as EIAR) or an Initial Environmental Examination Report (hereinafter referred to as IEER) and the permission under an Environmental Protection License (hereinafter referred to as EPL) in terms of Part IV C and section 23A of the National Environmental (Amendment) Act, No. 56 of 1988 respectively, to carry out its operations. The Court held that the failure of the Central Environmental Authority (hereinafter referred to as CEA) and the Board of Investment (hereinafter referred to as BOI) to perform their statutory and regulatory duties with regard to the two matters mentioned above and to prevent the thermal power station in question from causing oil contamination of groundwater and soil was arbitrary and unreasonable and in breach of the public trust reposed in the two authorities. The Court therefore held that it constitutes a violation of the fundamental rights guaranteed to the residents of the Chunnakam area and the Petitioner by Article 12 (1) of the Constitution.

4. ANALYSIS

The Chunnakam case breached a few years of silence in the fundamental rights litigation with regard to environment issues in Sri Lanka. This case is significant for upholding the fundamental rights of the people against environmental pollution and remarkable for its progressive and creative interpretation of the existing legal provisions and principles to confer a wider protection on the environment. The following sections discuss the role of the judgement in the application and expansion of different environmental legal principles and instruments.

4.1 Environmental Impact Assessment

The Court held that any addition of power generation capacity to an existing thermal power station which results in that thermal power station acquiring a total power generation capacity of more than 25 megawatts after the addition, is a 'prescribed project' and therefore, the thermal power station in question requires an EIAR or an IEER to operate.[5] The Court referring

5 In terms of part IV C of the National Environment (Amendment) Act, No. 56 of 1988 submission and consideration of an EIAR or IEER is necessary only in the case of 'prescribed projects'. In determining whether an EIAR or IEER is required for the operations of the thermal power station in question, the court had to determine whether it constitutes a 'prescribed project' in terms of the Order dated 18th June 1993 published in Gazette Extraordinary No. 772/22 dated 24th June 1993. The item 9 of the above order recognizes 'Construction of thermal power plants having generation capacity exceeding 25 Megawatts at a single location or capacity addition exceeding 25 Megawatts to existing plants' as a 'prescribed project'. The honourable Jayawardena J. recognised two parts of item 9; (i) The first limb includes projects for the construction of a new thermal power station which will have a power generation capacity of more than 25 megawatts from its inception, (ii) the second limb includes the capacity addition exceeding 25 Megawatts to existing plants. The court had to answer the question, whether the second limb means, (i) any addition of power generation capacity to an existing thermal power station which results in that thermal power station acquiring a total power generation capacity of more than 25 megawatts after the addition or (ii) adding an additional 25 Megawatts to the existing plants. His Lordship picked the first interpretation and held that the second interpretation will result in an unacceptable situation where any project proponent will be able to flout the EIAR and IEER requirements by simply adopting a 'two-stage approach' of commencing with a power generation capacity of just under 25 MW and later adding power generation capacity of under another 25 MW. *Ravindra Gunawardena Kariyawasam v. Central Environmental Authority and others (Chunnakam case)* (2019) SC (FR) Application No. 141/2015, 16 - 23.

to *Bulankulama* judgement[6] was cognizant of the following;

> The vital function that an EIAR performs is ensuring that the adverse environmental impact of a prescribed project is minimised by identifying them [in advance] and, thereafter, formulating methods to counter these adverse environmental impacts, as far as is possible.[7]

The Court also recognised EIAR and IEER as a practical method of giving effect to the preventive principle and its ally the precautionary principle.[8] Moreover, the Court paid attention to the opportunity given to the public to comment on prescribed projects in Part IV C of the National Environmental (Amendment) Act, No. 56 of 1988 and the Order dated 18th June 1993 and held, citing the Rio Declaration,[9] environmental issues are best handled by the participation of all concerned citizens and the states shall facilitate and encourage such public participation.[10] It is extremely vital and appreciative of the importance placed by the judiciary on the EIAR and IEER process and its public hearing element as an essential safeguard put in place by the Act to ensure that the possible adverse environmental effects of prescribed projects are ascertained and minimised.

4.2 International Legal Instruments

Laying down the judgement, the Honourable Jayawardena J. held that his Lordship has 'no hesitation in being guided by the Principles of the Rio Declaration'.[11] The Rio Declaration is one of the most celebrated international environmental legal instruments in the world, the principles embodied in which have been widely accepted and respected around the globe. The willingness expressed by the Honourable Justice to be guided

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6 *Bulankulama v. Secretary, Ministry of Industrial Development* (*Eppawela phosphate mining* case) (2000) 3 Sri LR 243.

7 *Chunnakam Case* (n 5), 47.

8 ibid.

9 Declaration of the United Nations Conference on Environment and Development (adopted 12 August 1992 A/CONF 151/26) (Rio Declaration), Principle 10.

10 *Chunnakam Case* (n 5),48.

11 *Chunnakam Case* (n 5), 49.

by the principles of this landmark declaration is significant due to several reasons.

First, the *Nallaratnam Singarasa* decision[12] decided in 2006 posited an archaic dichotomy between monism and dualism[13] and adopted a strict dualistic approach which is not well-supported by the Constitutional framework in Sri Lanka.[14] *Chunnakam* case opted the path set by the *Bulankulama* case[15] and the *Watte Gedara Wijebanda* case[16] which reiterates that the international instruments form a significant part of the environmental protection legal regime in Sri Lanka instead of the *Singarasa* precedent. The case, thus, gives the assurance that the judiciary will not ignore the progressive environmental rights and principles embodied in the international instruments in arriving at its decisions in the absence of an enabling statute on the basis of some archaic theory.

Second, environmental rights and principles are vastly evolving, with environmental protection being one of the most critical concerns in the spotlight at present. The legislature and executive in Sri Lanka have not shown any major commitment towards incorporating these significant developments into the legal corpus of the country. The most viable approach of adopting international environmental law developments in domestic legal regime in Sri Lanka would, therefore, be to directly apply

12 *Nallaratnam Singarasa v. Attorney General* (2006) SC Spl (LA) No. 182/99.

13 Noel Dias and Roger Gamble, 'Nallaratnam Singarasa v Attorney General: The Supreme Court of Sri Lanka Confirms Limited Human Rights Protection for Sri Lankan Citizens' [2006] Sri Lanka Journal of International Law 445, 451.

14 According to art 27 (15) of the Constitution of the Democratic Socialist Republic of Sri Lanka 1978, the State in Sri Lanka, shall promote international peace, security, and co-operation, and the establishment of a just and equitable international economic and social order and shall endeavour to foster respect for international law and treaty obligations in dealings among nations. Art 33(h) permits the president to incorporate international customs and norms as long as they are not inconsistent with the constitution or any written law of Sri Lanka. Art 157 stipulates a dualist approach in adopting bilateral investment agreements although the latter part of the art states that such treaties cannot be contravened by legislative, executive or administrative action giving them a superior status to Acts of Parliament.

15 *Bulankulama* case (n 6).

16 *Watte Gedara Wijebanda v. Conservator General of Forest and eight others* (2007) SC Application No. 118/2004.

them in the domestic context by the superior courts. In the exact words of Amerasinghe J. in *Bulankulama* case, 'the principles in Rio and Stockholm declarations would be binding if they have been either expressly enacted or become a part of the domestic law by adoption by the superior Courts of record and by the Supreme Court in particular, in their decisions.[17] This judicial incorporation of international legal principles is what has exactly been done in the *Chunnakam* case for the betterment of the society, environment and all its components.

4.3 Public Trust Doctrine

The Court also recognised that the administrative authorities must keep in mind that the statutory and regulatory duties are imposed upon them in the public trust and 'a failure to duly perform those duties and duly exercise those powers amounts to a breach of the public trust reposed in the CEA and the BOI'.[18] The Court in holding this position, cited *Mono Lake Case* where the Supreme Court of California stated that,

> [t]hus the public trust is more than an affirmation of state power to use public property for public purposes. It is an affirmation of the duty of the state to protect the people's common heritage of streams, lakes, marshlands and tidelands, surrendering the right only in those rare cases when the abandonment of the right is consistent with the purposes of the trust.

and recognised the duty of the state and its agencies to protect the environment.[19] This decision is a reaffirmation of the role of public trust doctrine in ensuring that the powers vested in the administrative authorities are exercised only in the public interest and the natural resources of the country are protected and preserved only for the public benefit.

It is questionable why the Honourable Justice did not use the public guardianship concept as in the *Bulankulama* case which further limits the

17 *Bulankulama* case (n 6) 274 – 275; *Chunnakam Case* (n 5) 49.

18 *Chunnakam Case* (n 5) 50.

19 ibid, 49 -50.

discretion of the administrative authorities. His Lordship has cited and was seemingly guided by the subsequent cases[20] which resorted back to the public trust doctrine, and this can perhaps be the reason for the adoption of the public trust doctrine in place of the public guardianship.

4.4 Right to Environment and Access to Clean Water

The Chunnakam case very interestingly recognised the right of the people in Sri Lanka towards the environment. The Court in doing so referred to Article 27 (14) of the Constitution which imposes a duty on the state to protect, preserve and improve the environment and held that 'the Directive Principles of State Policy are not wasted ink in the pages of the Constitution. They are a living set of guidelines which the State and its agencies should give effect to'.[21] Then the Court held that the right to equal protection of the law embodied in the Article 12 (1) of the Constitution read in the light of Art. 27 (14) of the Constitution, confers on the citizens of Sri Lanka 'a fundamental right to be free from unlawful, arbitrary or unreasonable executive or administrative acts or omissions which cause or permit the causing of pollution or degradation of the environment'.[22] The right to environment is one of the most crucial rights left out of the ambit of the Constitution in Sri Lanka. Its recognition in the country has entirely been an effort of the judiciary and the *Chunnakam* case has, in fact, added to that.

The most significant contribution of the case, arguably, is the recognition of access to clean water. The Court recognised that access to clean water is a fundamental necessity to sustain life and held that it is inherent in Article 27 (2) (c) of the Constitution.[23] The right to water has

20 *Watte Gedara Wijebanda* case (n 16); *Sugathapala Mendis v. Chandrika Bandaranaike Kumaratunga* (the *Water's Edge* case) (2008) SC (FR) 352/2007; *Environmental Foundation Ltd v. Mahaweli Authority of Sri Lanka* (2010) 1 Sri LR 1; *Premalal Perera v. Tissa Karaliyadde* (2016) SC FR 891/2009.

21 ibid, 50.

22 *Chunnakam Case* (n 5) 52.

23 ibid, 53.

been increasingly recognised in the international arena.[24] It is, therefore, undisputed that the recognition of access to clean water is a remarkable step forward in environmental litigation in Sri Lanka where the access to clean water was considerably at stake in recent years.

4.5 Polluter Pays Principle

Adopting the polluter pays principle, Honourable Jayawardena J. ordered the Respondent company to pay a sum of Rs.20 million as a compensation to offset at least a part of the substantial loss, harm and damage caused to the residents of the Chunnakam area and appointed a panel to be collectively responsible for the distribution of the compensation.[25] While the imposition of the burden of compensating the victims on the polluter and creating a mechanism to ensure the proper distribution of the compensation can be highly appreciated, the judgement leads to a question whether the responsibility imposed is adequate.

The polluter pays principle cannot be considered as successfully adopted when a share of the cost of pollution is imposed on the community as a whole. Why the Supreme Court did not impose the entire cost of pollution on the Respondent is open for debate, perhaps for the reason that the Respondent company is not the sole perpetrator of the water and soil pollution in the area.[26] Moreover, there are concerns as to whether the order ensures the safety of the groundwater in the area which would be used in future for human consumption or agriculture. Therefore, it raises the question of how successful the Supreme Court has been in imposing the liability on the polluter to restore the environment into its previous condition.

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24 For instance, the General Comment No. 15 adopted by the Committee on Economic Social and Cultural Rights in 2002 states that '[t]he human right to water is indispensable for leading a life in human dignity. It is a prerequisite for the realisation of other human rights.' See, 'General Comment 15' (2002) UN Doc. E/C.12/2002/11. Moreover, in 2010, the United Nations General Assembly expressly recognised the right of human beings to water and sanitation through the resolution 64/292. UNGA Res 64/292 (3 August 2010) UN Doc A/RES/64/292.

25 *Chunnakam Case* (n 5) 64.

26 ibid, 44.

4.6 Sustainable Development

In its judgement, the Court upheld the sustainable development principle in clear and cogent terms referring to international and domestic legal authorities. The Court held that the State and its agencies are required to assist or undertake large scale development projects for the purposes of attaining economic growth, an equitable division of prosperity, a good standard of living and quality of life, but at the same time it must be ensured that all such endeavours are adapted to achieve sustainable development.[27] The Court further held that a project which harms the environment would reduce the quality of life of the people in the country and therefore, cannot be perceived as true development.[28] It laid down that the IEER or EIAR are designed to enable the CEA and BOI to promote sustainable development and therefore, the failure of the two authorities to perform those duties amount to a breach of the duty to promote and ensure sustainable development.[29]

5. CONCLUSION

The *Chunnakam* case certainly made an immense contribution to the environmental protection legal regime in Sri Lanka, most particularly towards the protection of highly threatened and degrading water resources in the country. While the judgement poses several issues and voids, the recognition of the right of the people of Sri Lanka to environment and access to water, the application of environmental legal principles and the respect to international instruments have clearly made the assurance that the judicial organ of the government will always be the guardian of the people's right towards a clean and healthy environment and the natural resources of the country.

27 ibid, 51.

28 ibid.

29 ibid, 51 – 52.

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WITHANAGE DON HEMANTHA RANJITH SISIRA KUMARA AND

CENTRE FOR ENVIRONMENTAL JUSTICE (GUARANTEE LIMITED)

v.

CENTRAL ENVIRONMENTAL AUTHORITY AND

DIRECTOR GENERAL OF CUSTOMS AND 5 OTHERS

COURT OF APPEAL, SRI LANKA

CA (WRIT) APPLICATION NO. 303/2019

BEFORE

Sobitha Rajakaruna J.

Yasantha Kodagoda J.

Arjuna Obeysekara J.

COUNSEL

Ravindranath Dabare with Nimmi Sanjeewani instructed by Nilmal Wickremasinghe for the Petitioner.

Milinda Gunathilake, SDSG with Dr. Charuka Ekanayake, SC for the 2nd and 7th Respondents.

Romesh De Silva, P.C. with Harsha Amarasekara, P.C. for the 4th Respondent.

Avindra Rodrigo P.C. with A. Deen, Himantha Wickramaratne, Vishwaka Peiris for the 5th Respondent.

P. Radhakrishnan with U. Bandara for the 6th Respondent.

DECIDED ON

14.10. 2020

JUDGEMENT OF

Sobitha Rajakaruna J.

MATERIAL FACTS

This writ application was filed by the Centre for the Environmental Justice (CEJ) on 22nd July 2019, against the Central Environmental Authority, Director General of Customs and five others for illegally importing a consignment of waste materials, which included clinical waste, used cushions and mattresses, plant parts, plastic waste and other uncategorised and hazardous waste from the United Kingdom with the intention of disposing them within the country in the guise of importing a permitted consignment of waste.

MATTERS FOR DETERMINATION

(a) Whether the official employees of the Department of Customs and Central Environmental Authority have failed to act and neglected to perform their statutory duties in permitting a consignment of waste materials containing clinical waste, used cushions and mattresses, plant parts, plastic waste and other uncategorised and hazardous waste to be imported to the country.

(b) Whether the illegally imported consignment of waste can be repatriated to the United Kingdom.

RELEVANT AREAS OF LAW

Sections 23A, 23B and 32 of the National Environmental Act, No.47 of 1980 and related Gazettes - sections 12 and 13 of the Customs Ordinance, No.17 of 1869 - Article 9 of the Basel Convention on the Control of

Transboundary Movements of Hazardous Wastes and Their Disposal - Imports and Exports (Control) Act, No.1 of 1969

PROPOSITIONS OF LAW ESTABLISHED IN THE DECISION

Article 9 of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, which was ratified by Sri Lanka in 1992 is applicable in this regard. There are no specific domestic regulations to control imports as per specifications given in the Convention. However, Gazette no. 2044/40 which was issued on 9th November 2017, under the Imports and Exports (Control) Act, No.1 of 1969, covers such illegal imports. Therefore, the Petitioners requested the Court to issue a Writ of Mandamus to repatriate the containers back to the United Kingdom.

ORDER OF THE COURT

The Court of Appeal issued an order on 2nd June 2020, instructing the parties to enter into a formal agreement to resend the waste material back to its original country, the United Kingdom. On October 14, 2020, the Central Environmental Authority and the Sri Lanka Customs agreed to repatriate the aforesaid waste containers, for which the Environment Authority in the United Kingdom also agreed.

Application Withdrawn.

THE DECISION OF THE COURT OF APPEAL

The learned Senior Deputy Solicitor General Mr. Milinda Gunathilake informed the Court that a motion dated 07.10.2020 has been filed on behalf of the 2nd & 7th Respondents wherein it is stated that the relevant authority of the United Kingdom has by way of an E-mail dated 11.09.2020, sent to the Minister of Justice, had agreed to repatriate the subject containers. All Parties had received copies of the aforesaid motion.

However, the learned Counsel who appeared for the 6th Respondent objected to any kind of repatriation of the subject containers.

The learned President's Counsel Mr. Harsha Amarasekara who appeared for the 4th Respondent brought to the notice of the Court the Journal entry dated 13.02.2020 in which it categorically stated, that all Counsel had been heard on that day and that all counsel had informed Court they had no objection to the repatriation.

The learned Counsel Mr. Ravindranath Dabare who appeared for the Petitioner informed the Court that he wished to withdraw the application on the strength of the contents of motion filed on behalf of 2nd & 7th Respondents, subject to necessary legal steps being taken against all parties who have violated the law with regard to the importation of these containers and interfering in the repatriation of these containers. The learned Counsel for the 2nd & 7th Respondents had no objection to those conditions.

The application to the withdrawal of the application by the Petitioner was allowed subject to the above conditions. The proceedings were terminated.

Upon submissions made by Counsel who appeared for the Petitioner and 2nd, 4th & 7th Respondents the Court was of the view that the withdrawal of the application should not be interpreted to give effect to any kind of prevention of the above of repatriation of the subject containers.

AUTHORITIES REFERRED TO IN THE JUDGEMENT

Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal of 22 March 1989 (*1673 U.N.T.S. 126*)

Customs Ordinance, No.17 of 1869

Imports and Exports (Control) Act, No.1 of 1969

National Environmental Act, No.47 of 1980

WITHANAGE DON HEMANTHA RANJITH SISIRA KUMARA AND

CENTRE FOR ENVIRONMENTAL JUSTICE (GUARANTEE LIMITED)

v.

CENTRAL ENVIRONMENTAL AUTHORITY AND DIRECTOR GENERAL OF CUSTOMS AND 5 OTHERS

(Imported Garbage Containers case)

C. A. Writ 303/2019

Dulki Seethawaka*

ABSTRACT

This review analyses the Court of Appeal order of the C. A Writ 303/2019 application filed by Withanage Don Hemantha Ranjith Sisira Kumara and Centre for Environmental Justice (Guarantee Limited) against the Central Environmental Authority and Director General of Customs and five others. The Court had to consider whether the illegal consignment of waste containing hazardous substances which was exported from the United Kingdom in 2017, can be repatriated according to domestic law and international conventions. Also, the Petitioners sought to take necessary legal actions against the officers in the Central Environmental Authority and the Sri Lanka Customs for failing to fulfil their duties as specified in relevant legislation, which was allowed by the Court. The Appeal was withdrawn since the parties agreed for a settlement, upon which the consignment was re-exported to the United Kingdom.

KEYWORDS – Basel Convention, hazardous waste, global waste trade, illegal waste import, waste management, recycling

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1. INTRODUCTION

In the recent decades, many countries in the Global South have become the repositories for industrial waste,[1] since exporting waste is considered to be cheaper than creating local recycling infrastructures in the Global North.[2] The developing nations generate economic profit by either recycling or processing further treatments for part of such waste, and dispose of the rest.[3]

The Basel Convention was adopted to control exporting toxic and hazardous waste to developing countries, but there are countries which illegally export such wastes.[4] An example is when Canada had dumped household and electronic waste in Manila between 2013 and 2014, by mislabelling them as plastics for recycling.[5] There were also instances of falsely labelling waste as donations to bypass international conventions.[6]

The most toxic wastes include radioactive waste, electronic waste and incinerator ash which pose direct threats to human life.[7] The labourers who process such waste in dump yards do not have the necessary safety equipment, and they are daily exposed to various harmful substances.[8] If these wastes are disposed of as landfills, it endangers the lives of children by causing irreversible damages.[9] Therefore, the repercussions of importing

1 Maryam Raashed, 'Global Waste Trade: The Ugly Contour of Globalisation' *(Centre for Strategic and Contemporary Research,* 16 January 2020) <https://cscr.pk/explore/themes/energy-environment/global-waste-trade-the-ugly-contour-of-globalisation/> accessed 15 July 2021.

2 Ian Tiseo, 'Waste trade worldwide – Statistics & Facts' (*Statista,* 27 May 2021) <https://www.statista.com/topics/7943/global-waste-trade/> accessed 15 July 2021.

3 Cameron Levis, 'Trading Trash: When International Relations and International Waste Collide' (Globaledge, 28 April 2021) <https://globaledge.msu.edu/blog/post/57016/trading-trash--when-international-relations-and-international-waste-collide> accessed 15 July 2021.

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5 ibid.

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8 ibid.

9 ibid.

waste which cannot be recycled, results in creating various economic, environmental and health concerns for the importing countries.[10]

When China declared a ban on receiving waste in 2018, the trade moved to East Asian and Southeast Asian countries such as Vietnam, Thailand and Malaysia.[11] Since these countries are now adopting restrictive measures against importing waste, South Asian countries including Sri Lanka, India, Pakistan and Bangladesh are becoming the new victims of global waste trade.[12]

2. THE LEGAL AND FACTUAL BACKGROUND

2.1 Chronology

The illegal waste import in Sri Lanka and its harmful effects were considered in the recent case of *Withanage Don Hemantha Ranjith Sisira Kumara and Centre for Environmental Justice (Guarantee Limited) v. Central Environmental Authority and Director General of Customs and 5 others.*[13] The consignment of waste in this matter came into being upon the discovery of 112 containers in the premises of the Colombo harbour by the Sri Lanka Customs Department in May 2019, which consisted of used mattresses and cushions, carpets, parts of plants, plastic and other biomedical waste.[14] During the investigation, 130 were found in the

10 Benedetta Cotta, 'What goes around, comes around? Access and allocation problems in Global North-South waste trade' (2020) 20 (255-269) International Environmental Agreements; Politics, Law and Economics <https://link.springer.com/article/10.1007/s10784-020-09479-3> accessed 15 July 2021.

11 Nathan Lee, 'How to save my hometown and Asia: The past and future of global waste trade' (*Zero* Waste Europe, 12 August 2020) <https://zerowasteeurope.eu/2020/12/global-waste-trade/> accessed 15 July 2021.

12 Hemantha Withanage, 'Sri Lanka Court of Appeal to intervene in UK waste trade scam' (*Down to Earth*, 17 August 2019) <https://www.downtoearth.org.in/blog/waste/sri-lanka-court-of-appeal-to-intervene-in-uk-waste-trade-scam-66210> accessed 16 July 2021.

13 (2019) CA (Writ) Application No. 303/2019.

14 Withanage (n 12).

Katunayaka Free Trade zone and 21 in another location, amounting to 263 containers in total.[15]

Reports indicated that these waste containers were exported from Vengaads Ltd. in London, to be received by the Ceylon Metal Processing Corporation Ltd. in Sri Lanka and the consignees were Hayleys Free Zone Ltd. and ETL Colombo Pvt Ltd.[16] These companies intended to recover some of the waste such as metal strings and cushions, while the rest was planned to be exported back to some other destinations in India.[17] However, according to the Centre for Environmental Justice, only 30% of this waste could be recovered and since these materials were imported under the Hub Operation of the Board of Investment (BOI), sending the remaining to another destination was prohibited.[18]

There were many concerns which were raised by environmentalists and citizens on this consignment. Major issue was that imported waste could cause severe damages to the environment and biodiversity in Sri Lanka, and discarded hospital waste would expose the general public of the country to unknown health risks.[19] It was also found that the authorities had not obtained a valid licence to import these containers.[20]

Hence, the Petitioners argued that importing of this consignment was against the Basel Convention and the relevant authorities in the Central Environmental Authority (CEA) and the Sri Lanka Customs had failed to act and/or neglected their duties as per the provisions in National Environmental Act, No.47 of 1980 and Customs Ordinance, No.17 of 1869 respectively.

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15 Hemantha Withanage, 'Sri Lanka Court is not anybody's dumping ground' (*Down to Earth*, 5 November 2020) <https://www.downtoearth.org.in/blog/waste/sri-lanka-is-not-anybody-s-dumping-ground-74102> accessed 16 July 2021.

16 Withanage (n 12).

17 ibid.

18 ibid.

19 Withanage (n 12).

20 ibid.

2.2 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal

According to Article 9 of the Basel Convention,

1. Any transboundary movement of hazardous wastes or other wastes:

   (a) without notification pursuant to the provisions of the Convention to all States concerned; or

   (b) without the consent pursuant to the provisions of the Convention to all States concerned; or

   (c) with consent obtained from States concerned through falsification, misrepresentation or fraud; or

   (d) that does not conform in a material way with the documents; or

   (e) that results in deliberate disposal of hazardous waste or other wastes

   shall be deemed to be illegal traffic.[21]

Since there is no valid licence, it implies that necessary consent of the Sri Lankan authorities was not obtained before exporting. Therefore, the import amounts to illegal traffic under the Basel Convention. In such a situation, Article 9 (2) of the Convention further states that,

2. In case of a transboundary movement of hazardous wastes or other wastes deemed to be illegal traffic as the result of conduct on the part of the exporter or generator, the State of export shall ensure that the wastes in question are:

   (a) taken back by the exporter or the generator or, if necessary, by itself into the State of export, or, if impracticable,…[22]

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21 The Convention on the Control of Transboundary Movement of Hazardous Wastes and Their Disposal of 22 March 1989 (*1673 U.N.T.S. 126*) art 9(1).

22 The Convention on the Control of Transboundary Movement of Hazardous Wastes and Their Disposal of 22 March 1989 (*1673 U.N.T.S. 126*) art 9(2).

Although Sri Lanka ratified the Basel Convention in 1992,[23] there are no specific domestic regulations to control imports as per specifications given in the Convention. However, Gazette no. 2044/40 which was issued on 9th November 2017, under the Imports and Exports (Control) Act, No.1 of 1969, covers such illegal imports.[24] Therefore, the Petitioners requested the Court to issue an interim order to prevent any movement or transportation of waste within Sri Lanka and a Writ of mandamus to repatriate the containers back to the United Kingdom.[25]

2.3 National Environmental Act, No. 47 of 1980 and Customs Ordinance, No. 17 of 1869

The Petitioners also sought to prosecute the officers of the CEA and the Sri Lanka Customs under section 289 of the Penal Code.[26] They argued that the officers violated their duties as per the provisions in the National Environmental Act, No.47 of 1980 and the Customs Ordinance, No.17 of 1869 respectively. Hence, the Petitioners requested the following remedies from the Court of Appeal:

a) Grant and issue an order in the nature of Writ of Mandamus directing the 1st and 2nd Respondent to act under and in terms of the National Environmental Act, (as amended) and especially under and in terms of Sections 10(f), 10(g), 10(k), 10(l), 23, 23A, 23B, 23E, 23H, 23J, 23M, 23N, 23S, 23T, 23U, 23Y, 23Z, 23AA, 23BB, 23CC, 23FF, 24A, 24B, 32.

b) Grant and issue as the order in the nature of a writ of Mandamus directing the 1st and 2nd Respondents to act under and in terms of the

23 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, 'Projects in Asia and Pacific' (*UN Environment* Programme, 2008) <http://www.basel.int/Default.aspx?tabid=2344> accessed 16 July 2021.

24 Withanage (n 12).

25 Centre for Environmental Justice, 'Case Update – Case against Imported Waste Containers CA/Writ/303/19' (*Centre for Environmental Justice*, 8 May 2020) <https://ejustice.lk/2020/05/08/case-update-case-against-imported-waste-containers-ca-writ-303-19/> accessed 16 July 2021.

26 ibid.

Gazette No. 924/13 dated 25th April 1996 and Gazette No. 1534/18 dated 1st February 2008 issued under and in terms of section 32 read with sections 23A and 23B of the National Environmental Act, No. 47 of 1980 as amended, Gazette No. 1159/22 dated 21st November 2000 issued under and in terms of section 23A of the 1980 Act, and Gazette No. 595/16 dated 8th January 1990 issued under and in terms of section 32 read with Article 44 (2) of the Constitution which is commonly known as National Environmental (Protection and Quality) Regulation, No. 01 of 1990.

The 2nd Respondent of the case, the Director General of the Customs was accused of violating sections 12 and 43 of the Customs Ordinance, No.17 of 1869.[27] Section 12 of the 1869 Ordinance prohibits any goods specified in Schedule B to be imported, brought into, exported or taken out of Sri Lanka.[28] Section 43 specifies that if such goods are found being imported or brought into Sri Lanka then they have to be forfeited and either destroyed or disposed of as the Principal Collector of Customs may direct. [29]

The Petitioners brought into the notice of the Court that these failures to act and neglect to perform statutory duties by the Respondents amounted to violation of the fundamental rights of all Sri Lankan citizens which are guaranteed by Articles 12(1), 14(1) (a), (g), and (h), and that such acts are inconsistent with the Directive Principle of State Policy and Fundamental Duties as stated in Articles 27(2) (a), (b), and (c), 27(9), 27(14), and 28(a) and (f) of the Constitution of Sri Lanka.

3. THE ORDER OF THE COURT OF APPEAL

The Court first issued an interim order not to remove the containers and requested the Government Analyst to prepare a report after inspecting the

27 Customs Ordinance, No.17 of 1869.

28 ibid, s 12.

29 ibid, s 43.

goods.[30] However, since it was rumoured that hazardous hospital waste including human body parts were among the garbage, the experts failed to duly open and investigate the containers.[31]

On 2nd June 2020, the Court of Appeal issued an order instructing the parties to enter into a formal agreement to resend the waste material back to its original country, the United Kingdom.[32] The Environment Authority in the United Kingdom also accepted this order.[33] On 14th October 2020 the CEA and the Sri Lanka Customs agreed to repatriate the aforesaid waste containers, after which the parties decided to withdraw the application.[34] The CEA and the Sri Lanka Customs were also ordered by the Court to take relevant legal action against the companies who imported the illegal cargo.[35]

As per the agreement made, the first consignment of 21 containers was repatriated from Sri Lanka on 26th September 2020, and was said to have arrived in the UK on 28th October 2020, followed by sending 20 and 65 on 30th October and 4th November respectively.[36] Accordingly, 116 out of 263 illegal containers have been re-exported. It was also reported that the Sri Lankan Ministry of Environment is demanding LKR 169 Crore for the damages that were caused.[37]

4. CONCLUSION

Global waste trade will keep getting worse with time. It is estimated that annually more than two billion tons of non-hazardous waste is generated in the world which will be increased by 19% in Global North and 40% in

30 Withanage (n 12).

31 Withanage (n 15).

32 Centre for Environmental Justice (n 25).

33 ibid.

34 Centre for Environmental Justice (n 25).

35 Withanage (n 15).

36 ibid.

37 ibid.

Global South countries by the year 2050.[38] Sri Lanka is highly exposed to the risks of illegal waste dumping, since it is located on a busy South Asian shipping route.[39] Therefore, it is important to enact new regulatory provisions in the existing Acts and Ordinances, such as the Imports and Exports (Control) Act, No.1 of 1969. These provisions must ensure that strict terms and conditions, procedures, and requirements are followed when approving any waste cargo to be brought into the country. Furthermore, the Basel Convention should be incorporated into the domestic legislative regime. Since this is a global trade, it will prove to be advantageous if international conventions are duly incorporated within the national legal sphere in Sri Lanka to avoid instances where mislabelled waste would be imported without the necessary consent. Also, it is recommended to develop advanced recycling and disposing mechanisms which will increase the capacity to handle hazardous waste in the country. It is essential that Sri Lanka can recycle and dispose of the garbage generated within the country before bringing in waste from other countries.

38 David Thorpe, 'The global waste trade has created "sacrifice zones" for health and the environment' (*Spninifex*, 15 June 2021) <https://thefifthestate.com.au/columns/spinifex/the-global-waste-trade-has-created-sacrifice-zones-for-health-and-the-environment/> accessed 16 July 2021.

39 Withanage (n 15).

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- - 'Sri Lanka Court of Appeal to intervene in UK waste trade scam' (*Down to Earth*, 17 August 2019) <https://www.downtoearth.org.in/blog/waste/sri-lanka-court-of-appeal-to-intervene-in-uk-waste-trade-scam-66210>

BANGLADESH ENVIRONMENTAL LAWYERS ASSOCIATION (BELA)

v.

THE SECRETARY, MINISTRY OF HOUSING AND PUBLIC WORKS AND OTHERS

SUPREME COURT OF BANGLADESH

WRIT PETITION NO. 6861/2007

BEFORE

Sheikh Hassan Arif J.

Md. Badruzzaman J.

COUNSEL

Ms. Syeda Rizwana Hasan for the Petitioner.

Mr. Pratikar Chakma (Deputy Attorney General), Mr. Abdul Rouf Sheikh for the Respondent.

DECIDED ON

02.08.2018

JUDGEMENT OF

Sheikh Hassan Arif J.

MATERIAL FACTS

'Khilgaon Shishu Park' is located in the urban division of Bangladesh and according to the existing law, it is considered as a 'greenery; open-

spaced and protected residence/dwelling'. Therefore, Respondents such as public and private officials including the Secretary, Ministry of Housing and Public workers are required to maintain the said park in accordance with the environmental laws and policies of the nation. However, the said officials failed to execute their duties within the purview of the environmental laws, leading to their illegal encroachment and occupation of the said park.

MATTER FOR DETERMINATION

Determining whether the Respondent's actions were illegal/ a misuse of power under the doctrine of ultra vires is the primary matter of the case. To ascertain this main matter, the following two arguments were taken as serious matters for determination: whether the land in question is considered as a green open space under the law and whether it is legal to consider a void act as still void without a formal cancellation.

RELEVANT AREAS OF THE LAW

Constitution (Article 102) - The Open Space Protection Act, 2000 (Sections 2 to 6) - The Town Improvement Act, 1953 (Section 73(2)) - Dhaka City Corporation Ordinance, 1983 - Ultra vires - Environmental Rights and Duties

PROPOSITIONS OF LAW ESTABLISHED IN THE DECISION

Ultra vires

In this case, the duties of the Respondents derived from various statutes were taken into primary consideration. Petitioners have often pointed out that authorities failed to adhere to the duties rather than act in violation of the statutory duties. Petitioners highlighted the provisions of the said Acts which imposed mandatory duties on the Respondents. It must be noted that Respondents admitted to their failure in performing the duties during the trial.

Environmental Principles

The Supreme Court of Bangladesh has been influenced by significant environmental principles while deciding on the issue. Both principles of preventive action and intergenerational equity played an imperative role in the judgement. Although the judges have not mentioned the principles, it is evident that they have distinctly adopted the principles in their judgements.

Environmental Rights and Children's Wellbeing and Development

Petitioners of the writ application have highlighted that a violation has taken place in people's right to a healthy environment and right to the enjoyment of open spaces for fresh breath and natural panorama for physical, mental and spiritual well-being. The argument was accepted by the judges of the Supreme Court. Furthermore, the judges have exposed that some violations had taken place in the domain of children rights and the Court directed the authorities to restore the same accordingly.

DECISION OF THE COURT

The Court ordered restoring the Shishu park to its original position, developing it into a modern park accessible to all children, taking immediate actions to vacate the place within ninety days and handing over the possession and control of the said park to Dhaka City Corporation. Thus, Dhaka City Corporation is directed to complete the construction within a year and is required to rebuild the greenery. Further to this main order, the Court emphasised that the authorities have acted ultra vires and reaffirmed that the void action remains void without any formal cancellation.

AUTHORITIES REFERRED TO IN THE JUDGEMENT

Begum Khaleda Zia v. *Bangaladesh* 63 DLR 385

Constitution of the People's Republic of Bangladesh 1972

Dhaka City Corporation Ordinance, 1983

M Saleem Ullah v. *Bangladesh* 55 DLR 1

Rajuk v. *Mohshinul Islam* 53 DLR (AD) 79

Sharif Nurul Ambia v. *DC* 58 DLR (AD) 253

The Open Space Protection Act, 2000

The Town Improvement Act, 1953

BANGLADESH ENVIRONMENTAL LAWYERS ASSOCIATION (BELA)

v.

THE SECRETARY, MINISTRY OF HOUSING AND PUBLIC WORKS AND OTHERS

S.C. Writ 6861/2007

R. Pavithra*

ABSTRACT

The Bangladesh Supreme Court's judgement on *Bangladesh Environmental Lawyers Association (BELA) v. The Secretary, Ministry of Housing and Public Works and Others* is a milestone endeavour that protected an urban open space from ultra vires activities of the power holders. In this notable judgement, the domestic law and decided cases on environmental protection were taken into primary consideration. However, environmental principles are certainly reflected in the judgement although the principles are not expressly mentioned. This case review tries to explain both of the mentioned perspectives of the Supreme Court decision by following a doctrinal research methodology. Ultimately, the analysis attempts to deduce that the environment is defined as a crucial legacy required to sustain the humankind.

KEYWORDS: BELA, environmental legal principles, greenery open space, ultra vires

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1. INTRODUCTION

> Urban green space is a component of "green infrastructure". It is an important part of public open spaces and common services provided by a city and can serve as a health-promoting setting for all members of the urban community. It is, therefore, necessary to ensure that public green spaces are easily accessible for all population groups and distributed equitably within the city.- Urban green spaces: a brief for action[1]

The above-mentioned guidelines by the World Health Organisation (WHO) are adequate to identify the importance of a green open space located within urban places. The case of *Bangladesh Environmental Lawyers Association (BELA) v. The Secretary, Ministry of Housing and Public Works and Others*[2] directly concerns the green space located at Ansar village of Bangladesh. In this case, the importance of an open green space was exceptionally recognised by the Supreme Court. Moreover, the case reaffirmed the judiciary's role of protecting the environment. Further, the environment is seen as a right, while its protection as a duty of relevant stakeholders. The review discusses the facts, laws, judgements and related principles applied in the case.

2. FACTUAL AND LEGAL BACKGROUND OF THE CASE

2.1 Chronology

Factual backdrop of this case involves the failure of the government officials to adhere to the public duties mainly focused on environmental protection. Petitioners of this case were Bangladesh Environmental Lawyers Association (BELA); one of the leading environmental activists in Bangladesh.[3] Khilgaon Shishu Park is located in the urban division

1 Regional office for Europe, 'Urban green spaces: a brief for action', (*World Health Organisation*, 2017) <https://www.euro.who.int/__data/assets/pdf_file/0010/342289/UrbanGreenSpaces_EN_WHO_web3.pdf> accessed 19 July 2021.

2 (2007) 6861 (SC) 3.

3 See ibid 11; See also Bangladesh Lawyers Association (BELA) <https://namati.org/network/organization/bangladesh-environmental-lawyers-association-bela/> accessed 20 July 2021.

of Bangladesh and according to the existing law, it is considered as a 'greenery; open space and protected residence/dwelling'.[4] Therefore, Respondents such as public and private officials including the Secretary, Ministry of Housing and Public workers were required to maintain the said park as mentioned in the environmental laws and policies of the nation. However, said officials failed to execute their duties, for the Petitioners have made allegations of illegal encroachment and occupation of the said park.[5] Moreover, the BELA extended their arguments claiming that the Respondents' illegal activities had violated the rights of the public for a long period.

2.2 Laws related to the case

The main principle evolved in this case was the 'duty of a public officer to protect the nation'. Whereas, the main arguments surrounded crucial eco-health rights i.e. right to healthy environment and right to enjoyment of open spaces for fresh breath and natural panorama for physical, mental and spiritual well-being.[6] To corroborate their arguments, Petitioners highlighted some important provisions from related laws and cases which are analysed below.

a. The Open Space Protection Act, 2000

The Open Space Protection Act prominently sets out to protect wetlands that are located in open space areas. In this case, sections 2 and 5[7] of the

4 ibid 2.

5 ibid.

6 ibid 3.

7 See Definition- "If nothing goes to the other side, according to this Law- (a) 'Green Space'- means the place which has been declared by the government or gazette as free space or park space on master plan or land survey map" (b) "'Open Space'- means the place which has been declared by the government or gazette as the place used by the people for Eidgah or others for a large time span" Mega city, Divisional Town and District Town's municipal areas including country's all the municipal areas' playground, open space, park and natural water reservoir Conservation Act 2000, s 2.
See also "Obligation to change classes of playground, open space, park and natural water body: Except the condition of this Act playfield, open space, park and natural water bodies which are marked cannot be used another way, it cannot be rented, leased or cannot be

Open Space Protection Act are taken into primary consideration. The Court was cognizant of the said area as a highly protected area and affirmed that, these places cannot be utilised for pecuniary or any other purposes. Furthermore, Petitioners stepped forward to cite section 6(a) which supports the prohibition derived from section 5. Under section 6(a) of the Act, it is prohibited to alter an open space by human activities.[8]

b. The Town Improvement Act, 1953

The Town Improvement Act focuses on the livelihood residences in the Capital of the Republic and also the Narayanganj and Tongi Municipalities. Its purpose is prescribed in the long title of the Act as,

> …providing open spaces for purposes of ventilation or recreation, demolishing or constructing buildings, acquiring land for the said purposes and for the re-housing of persons displaced by the execution of improvement schemes, and otherwise....[9]

Section 73(2)[10] of the Act which entails the preparation of the master plan, indicated by Petitioners to evaluate the Ministry's breach of the relevant law. In this section the measures taken before and during the development were clearly explained but the Respondents did not meet

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handover any other use", Mega city, Divisional Town and District Town's municipal areas including country's all the municipal areas' playground, open space, park and natural water reservoir Conservation Act 2000, s 5.

8 "Under the act (5) - if it is needed to change the class of the land or it's any portion, the owner should apply through the correlated authority by writing the cause to the government", Mega city, Divisional Town and District Town's municipal areas including country's all the municipal areas' playground, open space, park and natural water reservoir Conservation Act 2000, s 6 (a).

9 The Town Improvement Act 1953, Preamble.

10 "The Master Plan shall include such maps and such descriptive matter as may be necessary to illustrate the proposals aforesaid with such degree of particularity as may be appropriate, between different parts of the area, and any such plan may, in particular, define the sites of proposed roads, public and other buildings and works, or fields, parks, pleasure-grounds and other open spaces or allocate areas of land for use for agricultural, residential, industrial or other purposes of any class specified in the Master Plan", The Town Improvement Act 1953 (East Bengal Act) s 73 (2).

the due requirements. This was strongly taken as evidence to prove the misconduct of the Ministry and others.

c. Dhaka City Corporation Ordinance, 1983

The Supreme Court of Bangladesh found the promotion of the well-being of children as a crucial benefit of this park.[11] Therefore, in the concluding remarks of the decision, the judges have mentioned that Dhaka City Corporation Ordinance attempts to promote the well-being of the children.[12] In this sense, the Court agreed that the Respondents have breached the special provisions available for children under Dhaka City Corporation Ordinance and Court ordered the Ansar authority to take immediate steps to rebuild the area in favor of the Act.

d. Cases that were referred

Sharif Nurul Ambia v. *DC* 58 DLR (AD) 253

Rajuk v. *Mohshinul Islam* 53 DLR (AD) 79

M Saleem Ullah v. *Bangladesh* 55 DLR 1

Begum Khaleda Zia v. *Bangaladesh* 63 DLR 385

First three cases were taken as evidence to ensure that an open space mentioned in the master plan for a particular purpose cannot be changed without amending the master plan itself.[13] Whereas the latter case propagated the line of thought that 'a void act is void even if it is not done formally.' Therefore, the case affirmed the principle of 'void ab-Initio i.e. a void act remains void without any formal procedure of cancellation.[14]

11 *Bangladesh* (n 2) 15.

12 ibid.

13 ibid 9 - 10.

14 ibid.

e. Writ jurisdiction

Article 102(1)[15] deals with fundamental rights jurisdiction of the High Court. According to Article 102 (2)[16] of the Constitution, if High Courts are satisfied that no other equally officious remedy is provided by law on the request of any person including an aggrieved person it can make an order to that person to seek the support of writ jurisdiction. The case evolves in the same circumstances; hence the person aggrieved is directed to apply for the writ jurisdiction.

f. Locus standi of the Petitioners

In this case Respondents have not questioned or argued on locus standi of the Petitioners. However, in the judgement, BELA is identified as a 'renowned organisation'.[17] According to judicial precedent[18] the Court declared that there is no debate on the locus standi of the Petitioners since the Petitioners are working towards the environment in a reputed manner.

3. THE SUPREME COURT DECISION

The Supreme Court of Bangladesh carefully referred to the affidavits provided by both parties and came to the conclusion that the nature of the land in question could not be changed by the Respondents. The development in favor of the Respondent pointed out as 'void actions' by highlighting voided actions hereinbefore.[19] In order to do this, the Court accepted the argument of Petitioners that a void act is still void with or without formal cancellation. Since the Respondent relied on their illegal

15 "The High Court Division on the application of any person aggrieved, may give such directions or orders to any person or authority, including any person performing any function in connection with the affairs of the Republic, as may be appropriate for the enforcement of any the fundamental rights conferred by Part III of this Constitution", Constitution of the People's Republic of Bangladesh 1972, art 102(1).

16 See Constitution of the People's Republic of Bangladesh 1972, art 102(2).

17 *Bangladesh* (n 2) 11.

18 *Dr. Mohiuddin* Farooque v. *Bangladesh* (1997) 49 D L R (AD) 1.

19 *Bangladesh* (n 2) 14.

action and attempted to rectify it, the Court decided not to imprison them. Rather, the Court directed them to attend to the specific orders given by the Court including restoring the Shishu park to its original position, developing it into a modern park accessible by all children, and taking immediate actions to vacate the place within ninety days. Finally, the Court handed over the possession and control of the said park to Dhaka City Corporation. Thus, Dhaka City Corporation was directed to complete the construction within a year and was required to rebuild the greenery of the location.[20]

4. ANALYSIS

4.1 Bangladesh Constitution and Environmental Protection – A quick view

There are neither direct provisions available in the Constitution which recognise the environment as a crucial legacy of the nation nor provisions under the chapter of fundamental rights which includes the right to environment. Nevertheless, there are some inclusions of phrases at the preamble[21] and Fundamental Principles of State Policy[22] which indicate 'freedom from social and economic exploitation' and explains democracy and socialism as 'economic and social justice' respectively. Furthermore, right to life and personal security are well ensured by the Constitution as a fundamental right of any person;[23] which is often interpreted as an inclusion

20 ibid 15.

21 "State to realise through the democratic process to socialist society, free from exploitation-a society in which the rule of law, fundamental human rights and freedom, equality and justice, political, economic and social, will be secured for all citizens", Constitution of the People's Republic of Bangladesh 1972, Preamble.

22 *"…. (D)emocracy and socialism meaning economic and social justice"*, Constitution of the People's Republic of Bangladesh 1972, art 8.

23 "No person shall be deprived of life or personal liberty save in accordance with law", Constitution of the People's Republic of Bangladesh 1972, art 32.

of right to the environment by reputed Judges of many jurisdictions.[24] In light of this, it is a non-rebuttable argument that the Supreme Court of Bangladesh must give primary consideration for environment protection as it is derived from the supreme law of the country. It is also important to analyse how environmental principles were incorporated or applied in this case.

4.2 Environmental Principles related to the case

a. Principle of Preventive Action

Principle of preventive actions endeavours to reduce, limit or control environmental degradation and damages.[25] To execute the actions States generally take the respective legislation or administration as their tools. Fundamental argument of this writ application is failure of the authority to exercise their duties in accordance with law, due to the ultra vires action of the authority. It threatens the green environment of the land in question. Here, the legislation was already enacted for the benefit of the environment but the administration had failed to implement the legislation. In order to fix this matter, the judiciary accepted the suggestions given by the Petitioners. Moreover, it pointed out the misconduct of the said authority and ordered the authority to follow the related laws. As mentioned before, the Court highlighted previous instances where they considered the land in question as a green open space.

b. Principle of Intergenerational Equity

The first principle of Stockholm declaration recognises intergenerational equity as follows:

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24 "Right to life…includes the enjoyment of pollution- free water and air, improvement of public health by creating and sustaining conditions congenial to good health and ensuring quality of life consistent with human dignity" *Dr. Mohiuddin Farooque* v. *Bangladesh*, 49 (1997) DLR (AD) 1 (Bangladesh), See also *Subash Kumar v. State of Bihar* (1991) A I R SC 420 (India).

25 Manisha De Mel and Nishantha Sirimanne, *Judges and Environmental Law: A Handbook for Sri Lankan Judiciary,* (Environmental Foundation Limited 2009) 69.

> 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. In this respect, policies promoting or perpetuating apartheid, racial segregation, discrimination, colonial and other forms of oppression and foreign domination stand condemned and must be eliminated.[26]

Principle of intergenerational equity is cogently recognised in the judgement. The following order was made by the Court which directed the Dhaka City Corporation to develop the said land for the benefit of children surrounded by intergenerational equity: '… to develop the said space into a modern Shishu Park having all facilities for the children of this country and must keep it open to all children.'[27]

c. Precautionary Principle

In the famous case of *New Zealand v. France*[28] precautionary principle was simply defined as, 'there is probably a duty not to cause gross or serious damage which can reasonably be avoided.' This writ application could be considered as a precautionary action of BELA. Further, the Court also accepted that the unplanned and unlawful development of the said land will change its nature. Therefore, there is an urgent step to be taken to prevent the same. In the judgement, the Court ordered the Ministry of Housing and Public Works to stop all their developments and vacate from the place within the mentioned short period.[29] This is the main example of the precautionary activity of this case.

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26 Declaration of the United Nations Conference on the Human Environment (adopted and entered into force 16 June 1972) (Stockholm Declaration) art 1.

27 *Bangladesh* (n 2) 15.

28 (1995) ICJ Rep 288.

29 *Bangladesh* (n 2) 15.

d. Polluter-Pays Principle

According to Article 16 of the Rio Declaration, state parties must take appropriate steps against polluters to bear the cost of restoration of environmental pollution/ degradation.[30] In this case, the Court ordered both authorities which caused damages to the said land to restore the space to its original.[31] Furthermore, the Court directed the fifth Respondent to develop the said park according to the legislation.[32]

5. CONCLUSION

In conclusion, the pronouncement of Chief Seattle that, 'Only when the last tree has died and the last river has been poisoned and the last fish has been caught will we realise that we cannot eat money' is now widely recognised under sustainable development. This means that development is needed, but it must be surrounded by sustainability which links socio-economic growth and environmental protection. In the case this was impliedly emphasised by BELA as well as the Supreme Court of Bangladesh. Laws and regulations intend to build sustainable development. Therefore, working contrary to them will always cause disadvantages to the environment and to the humans who are solely dependent on the environment.

30 "National authorities should endeavor to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment" Rio Declaration on Environment and Development (adopted and enter into force 12 June 1992) art 16 (Rio Declaration).

31 *Bangladesh* (n 2) 15.

32 ibid.

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The Town Improvement Act, 1953

M.C. MEHTA

v.

UNION OF INDIA

NATIONAL GREEN TRIBUNAL OF INDIA

Original Application No. 200 of 2014

(C. Writ Petition No. 3727/1985)

BEFORE

Swatanter Kumar J.

Jawad Rahim J.

R. S. Rathore J.

Bikram Singh Sajwan

Ajay A Deshpande

Nagin Nanda

COUNSEL

Mr. M.C. Mehta (Advocate in person), Ms. Katyani and Ms. Mehak Rastogi(Advocates), Mr. Gaurav K. Bansal (Advocate), Mr. Ritwick Dutta & Mr. Rahul Chaudhary (Advocates), Mr. S.K. Bhattacharya and Mr. N.B. Paonam, (Advocate for the Applicant).

Ms. P.B. Singh (Advocate), Mr. Rahul Verma AAG with Dr. Bharti Reddy, Mr. Raj Kumar, (Advocate) Mr. Abhishek Attrey (Advocate), Mr. Abhishek Yadav (Advocate), Mr. Pradeep Mishra (Advocate), Mr. Raj Panjwani (Senior Advocate), Mr. Mukesh Verma (Advocate), Mr. Kabir S.

Bose (Advocate), Mr. Vijay Bahadur Singh (Senior Advocate) along with Mr. Ranjit Rao (AAG for State of U.P), Ms. Antima Bazaz, (Advocate for AIDA UPSMA) Mr. Sanjeev Ralli (Advocate for GNCTD/DPCC), Mr. A.R. Takkar (Advocate), Mr. Parag Tripathi (Senior Advocate), Mr. Sanjay Upadhyay (Advocate), Mr. B. V. Niren, (Advocate for CGWA), Mr. I. K. Kapila (Advocate), Mr. Devashish Bharuka, (Advocate), Ms. Yogmaya Agnihotri (Advocate for CECB), Mr. Raman Yadav (Advocate for UP Jal Nigam), Mr. Jayesh Gaurav (Advocate for JSPCB), Mr. Anil Grover, AAG with Mr. Rahul Khurana (Advocate for State of Haryana), Mr. A. K. Prasad (Advocate), Mr. Rajul Shrivastav (Advocate for MPPCB), Mr. Rajiv Nanda (Advocate), Mr. Vibhav Misra (Advocate), Ms. Shagun (Advocate for WBPCB), Ms. Priyanka Sinha (Advocate for Jharkhand), Mr. Rudreshwar Singh (Advocate for BSPCB), Ms. Alpana Poddar (Advocate for CPCB), Mr. U. K. Uniyal (AG for Uttarakhand), Mr. Asheesh Jain, Mr. Ritwick Dutta & Mr. Rahul Chaudhary, (Advocates)Mr. Suraj Prakash Singh (Advocate for UPSMA), Mr. Atul Batra (Advocate),Ms. Neelam Rathore (Advocate) , Mr. Ajay Kumar Mishra (Senior Advocate) with Mr. Kumar Anurag Singh (Advocates), Mr. Motish K. Singh (Advocate), Mr. M. Z. Choudhary (Advocate), Ms. Asha Nayyar Basu (Advocate), Mr. S. Wasim A. Qadri (Advocate), Mr.Amit Anand Tiwari (Advocate for State of UK), Mr. Rashid Saeed (Advocate for CETP) ,Ms. Diya Kapoor (Advocate), Anunaya Mehta (Advocate), Mr. S.A. Zaidi (Advocate), Mrs. Rachna Gupta (Advocate), Mr. Abhishek Paruthi (Advocate) ,Mr. Narender Pal Singh (Advocate), Mr. D. Rajeshwar Rao (Advocate for R-4) ,Mr. Krishna Kumar Singh (Advocate for MoEF) ,Mr. Moni Cinmoy (Advocate for DSIIDC for the Respondents).

DECIDED ON

13.07.2017

JUDGEMENT OF

Swatanter Kumar J. (Chairperson)

MATERIAL FACTS

The writ petition filed by M.C. Mehta in the Supreme Court (hereinafter referred to as SC) in 1985 was followed up with multiple orders issued by the court to ensure its full implementation. However, due to the ineffectiveness of these orders, the SC transferred the matter to the National Green Tribunal (hereinafter referred to as NGT) in 2014 after 30 years.

MATTERS FOR DETERMINATION

NGT had to consider the reports and scientific data obtained by various stakeholders in deciding the pollution levels of the river. During the course of the hearing, the tribunal identified the two main sources of pollution as industrial pollution and sewage (domestic) discharge. In addition to the high levels of pollutants from the above sources, the diversion and extraction of groundwater reduce the flow of the river which brings oxygen levels down. The task at hand of the tribunal was to examine each of the factors that contributed to the mass pollution of the river and issue directions to achieve the objective of reducing the pollution of river ganga. In addition to the above, the tribunal had to decide the two following issues:

(a) Whether the judgement is allowed to be published on the internet.

(b) Whether the judgement is allowed to be published in the NGT Reporter.

RELEVANT AREAS OF LAW

Article 48A and Article 51(A) of the Constitution of India - Article 21 of the Constitution of India - National Green Tribunal Act, 2010 - Polluter Pays Principle - Intergenerational Equity - Sustainable Development - Precautionary Principle - Public Trust Doctrine.

PREPOSITIONS OF LAW ESTABLISHED IN THE DECISION

In arriving at the judgement, the Tribunal decided that the financial capacity of the polluter is irrelevant when requiring them to remedy the harm caused. Therefore, the directions issued reflected this line of thought. The Tribunal also has taken due care to frame the judgement to be inclusive of most of the projects that have already been planned by the stakeholders or are under partial execution, so that public funds are properly utilised.

DECISION OF THE COURT

As part of the judgement, the Tribunal issued multiple directions which can be divided into two different but interlinked segments. The first relates to generic directions, while the second category was project-centric. The generic orders were in relation to the effective and systematic implementation of the directions that were already dealt with in the operative part of the judgement. Apart from these general directions, the Tribunal also made several specific directions relating to environmental flow, demarcation of flood plains, zero liquid discharge, continuous emission monitoring system (CEMS) and online monitoring system, and directions with regard to individual drains joining river Ganga or its tributaries.

Also, the two issues of whether the judgement is allowed to be published on the internet and whether the judgement is allowed to be published in the NGT Reporter were answered in the affirmative.

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Vellore Citizens Welfare Forum v. Union of India (1996) 5 SCC 647

M. C. MEHTA

v.

UNION OF INDIA

(Ganga Pollution Case)

Original Application No. 200 of 2014

(C. Writ Petition No. 3727/1985)

Nipunika Rajakaruna*

ABSTRACT

This review analyses the judgement of the National Green Tribunal of India in respect of the mass pollution of River Ganga. The matter which originated in the Supreme Court as a writ petition in 1985 was transferred to the Tribunal due to the failure in implementing the Supreme Court orders issued over a span of 30 years. The Tribunal which heard the application together with several others of the same nature delivered this judgement while issuing directions to effectively counter the multiple factors that contributed to the pollution of the river. The significance of the judgement is entirely attributed to the immense value of the river to the Indian nation.

KEYWORDS: river pollution, sewage waste and industrial effluents, polluter pays principle, precautionary principle

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1. INTRODUCTION

From the onset of civilisation, rivers have proven to be a lifeline to humans in countless ways. However, with the rapid growth of population and extensive industrialisation, river life takes an inevitable toll. Such has been the predicament of Ganga, the holiest river in the Indian Subcontinent. This transboundary river running across eleven states, nourishing 43% of its population, was once given the status of the 'first living entity of India'.[1] Thus, the protection of this sacred river has become a duty cast on the Indian State and citizenry alike.

This review focuses on a landmark judgement delivered by the National Green Tribunal (hereinafter referred to as NGT) of India for the furtherance of this objective. An exhaustive discussion of a judgement of such nature is beyond the scope of this brief review. What has been attempted instead is to outline the factual elements of the case and to analyse the judgement along the underlying judicial reasoning and its ecological/socio-political impact.

2. LEGAL & FACTUAL BACKGROUND OF THE CASE

2.1 Factual Background

This judgement, pronounced on the 13th of July 2017 by the NGT of India, finds its origins in a Writ petition filed in the Supreme Court in 1985 by the prominent environmental activist and public interest attorney M.C. Mehta.

This petition highlighted the issues that arise with the increasing pollution of the River Ganga, due to the release of untreated effluents from industries into water bodies. The petition mainly prayed that these industries should fix necessary equipment to mitigate the pollution. The Supreme Court[2] issued directives for industries to not discharge effluents without treating them as required by the Central Pollution Control Board

1 *Salim v. State of Uttarakhand*, Writ Petition (PIL) No.126 of 2014; *Lalit Miglani v. State of Uttarakhand and Others* Writ Petition (PIL) No. 140 of 2015.

2 *M.C. Mehta v Union of India & Others* (1988) AIR 1115; 1988 SCR (2) 530.

(hereinafter referred to as CPCB) and directed the closure of nearly 29 tanneries for the effective control of pollution in River Ganga.

To ensure compliance with the directions issued, many orders were passed over a course of 30 years. Finally, while observing that no fruitful results had been achieved despite Court's efforts, Supreme Court directed that, 'issues relating to enforcement of provisions of the statutes concerning environment and its preservation arising out of discharge of industrial effluents into river Ganga to be transferred to the National Green Tribunal' and passed a detailed order.[3] Thus, the entire matter in relation to polluting the river Ganga became the subject matter before the NGT as it had the mandate, the capacity of supervision as well as the necessary expertise[4] to handle the matters in an efficient manner. Thereafter, the matter was taken up as the Original Application No. 200 of 2014[5] in the NGT and was heard together with several other applications[6] pertaining to the same issue.

2.2 Matters for Determination

The fact that the NGT consisted of expert members as well as judicial officers allowed the Tribunal to consider the scientific data gathered during the stakeholder consultative process,[7] and the joint inspections which were ordered by the Tribunal.[8] During these, the Tribunal identified the two main sources of pollution as industrial pollution and sewage (domestic) discharge. In addition to the high levels of pollutants from above sources, the diversion and extraction of groundwater reduces the flow of the river

3 *M. C. Mehta v. Union of India,* Writ Petition (Civil) No. 3727/1985 Order dated 29.10.2014, 13.

4 The panel of 6 Judges consisted of 3 expert members in addition to the 3 judicial members.

5 *M. C. Mehta v. Union of India* (2017) O.A. No. 200/2014 (NGT).

6 *Anil Kumar Singhal v. Union of India & Ors* O.A. No. 501/ 2014; *Society for Protection of Environment & Biodiversity & Anr v. Union of India & Ors* O.A. No. 146/2015; *Confederation of Delhi Industries & CEPT Societies v. D.P.C.C. & Ors* Appeal No 63/2015; *J.K. Srivastava v. Central Pollution Control Board & Ors* O.A. No. 127/2017; *Swami Gyan Swarop Sanand v. Ministry of Home Affairs & Ors* O.A. No.133/2017.

7 *M.C. Mehta* (n 5) 41.

8 ibid, para 18.

which brings oxygen levels down.[9] The herculean task at the hands of the Tribunal was to examine each strand of the large web of factors that contributed to the mass pollution of the river.

2.3 Observations of the Tribunal

The Tribunal discovered that the quality of the effluents that mix with the river Ganga or its tributaries directly violate the prescribed parameters to a large extent.[10] They also discovered that the majority of the Sewage Treatments Plants[11] (hereinafter referred to as STPs) which were installed are incapable of treating these toxic substances. In addition to these, Tribunal identified certain industries that grossly polluted the river, such as sugar, distilleries, textile, paper, electroplating, slaughterhouses, and more importantly leather tanning industries which did not conform to the prescribed norms and conditions of consent granted by the State Pollution Control Boards.[12]

One other observation was that there was a lack of definite data collected by the local authorities and other stakeholders.[13] To rectify this, the Tribunal directed these parties to provide an update on the extent of pollution load on river Ganga, presently as well as in the past.

The Tribunal also observed that there was a need for a quantitative and qualitative analysis with regard to various drains. Therefore, in this judgement the Tribunal has exhaustively dealt with each of the 86 drains which join river Ganga and its tributaries.[14]

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9 ibid, para 2.

10 Particularly, Faecal Coliform, which is one of the main pollutants, and even heavy metals like iron, copper, manganese, zinc, etc. See, P. K. Rai, A. Mishra and B. D. Tripathi, 'Heavy Metal and Microbial Pollution of The River Ganga: A Case Study of Water Quality at Varanasi' (2010) 13 Aquatic Ecosystem Health & Management 352.

11 *M.C. Mehta* (n 5) 354.

12 ibid 13.

13 ibid 181.

14 The tribunal discusses in extensive detail *inter alia,* the origin of each drain, the nature of effluents carried in the drain, the city/local authority bodies in control of the drains, the average flow, the action taken by the relevant authorities to bring down the pollution levels and specific directions in respect of each of these 86 drains. *M.C. Mehta* (n 5) para 76 – 127.

Thereafter, attention was paid to the demarcation of flood plains, [15] dumping of municipal solid waste, bio-medical waste, and e-waste into the waters of the river.[16] The introduction of the novel features such as the Zero Liquid Discharge,[17] Continuous Emission Monitoring System[18] and the Online Monitoring System were reflective of the Tribunal's effort to innovate modern solutions to the pollution problem.

The Tribunal also identified the weaknesses in supervisory control by executing bodies, regulatory authorities, and statutory boards. This problem was amplified by the lack of coordination between Central and State Agencies which hindered the broad objective of cleaning the river Ganga.[19] Another problem highlighted by the Tribunal were failure on the part of the industries to perform their obligations and inconsistency in policy decisions.[20]

Considering the above factors, the Tribunal issued multiple directions which can be divided into two different but interlinked segments. The first would relate to generic directions, while the second category was project-centric.

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15 *M.C. Mehta* (n 5) para 142, The tribunal recognised the importance of categorising the floodplains in to different zones namely, No Development Zone, Regulated Zone and a Free Zone for development.

16 ibid, para 143. The tribunal directed that there shall be a prohibition of disposing of municipal solid waste, e-waste and bio medical waste on the floodplains or in river Ganga or its tributaries falling in segment B of Phase I.

17 Zero Liquid Discharge (ZLD) is a technological concept where the entire industrial wastewater output is reused, after appropriate treatment, without discharging a single drop into any river. See, Aisha Abdelhamid and Jake Richardson, 'India Uses Zero Liquid Discharge to Clean Ganges River' (The Inspired Economist, 2015) <https://inspiredeconomist.com/2015/01/14/india-uses-zld-ganges-river/> accessed 24 July 2021.

18 CEMS is a real time air and water pollution monitoring system that comprises sampling, conditioning, and analytical components designed to provide direct measurements of pollution by analysing samples of water. See, 'Continuous Emission Monitoring System (CEMS)' (*Cseindia.org*) <https://www.cseindia.org/continuous-emission-monitoring-system-cems-6595> accessed 25 July 2021.

19 *M.C. Mehta* (n 5) para 150.

20 ibid, para 181.

3. DIRECTIONS ISSUED

The generic orders were in relation to the effective and systematic implementation of the directions that were already dealt with in the operative part of the judgement. Special attention was given to the responsibility of the State Government and public authorities to ensure that directions relating to all the drains,[21] and submissions of project plans/ detailed project reports[22] to be implemented within the timeframe specified. The Tribunal further provided that any entity or person who violates any of the directions contained in this judgement shall be liable to pay environmental compensation of Rs. 50,000/- for each breach or default.[23] Furthermore several committees were appointed to perform the directed functions and report to the Tribunal.[24]

Apart from these general directions the Tribunal also made several specific directions relating to environmental flow,[25] demarcation of flood plains,[26] zero liquid discharge, continuous emission monitoring system (CEMS) and online monitoring system,[27] directions with regard to UPPCB/ CPCB[28] and directions with regard to individual drains joining river Ganga or its tributaries.

4. ANALYSIS

4.1 Reasoning of the Judiciary

When issuing these directions, the broad objective of the Tribunal has been to not limit existing practices for planning but to look for a way ahead with

21 ibid 462.

22 ibid 463.

23 ibid 465.

24 Supervisory Committee (to oversee effective implementation of projects under the judgement) and Implementation Committee (to submit action plan reports to the Tribunal).

25 *M.C. Mehta* (n 5) para 182.2.

26 ibid, para 182.3.

27 ibid, para 182.4.

28 ibid, para 182.5.

a new perspective, which is 'technically feasible, economically viable, and practically executable with tested modern technology, appropriate technical inputs from the stakeholders'.[29]

In upholding this objective, the Tribunal has integrated various principles of International Environmental Law in its judgement.

The Tribunal made express reference to how the Polluter Pays Principle and the Precautionary Principle must be read into the Principle of Sustainable Development. This recognised that in the furtherance of sustainable development, i.e. to strike a balance between ecological impact and development, all other principles of law can be used for its support.

The polluter pays principle is a recurring theme of the judgement as the Tribunal held that the industries that have caused pollution must be held liable and were directed to endure the cost of precautionary and restorative measures. The Tribunal also highlighted the State's utmost responsibility of preserving the environment by referring to the public trust doctrine which recognised that the State is a trustee of all the natural resources.

The principles of intergenerational equity and precautionary principle have been well upheld in the judgement which has reiterated how the Ganga is a holy entity that needs to be preserved for future generations and issued directions to ensure any future attempt at polluting the river is pre-emptively prohibited.

4.2 Ecological and Sociological Impact

The effective restoration of Ganga under the directives issued is bound to have vast ecological impacts. The high level of pollution of the river poses a threat to human as well as aquatic life. Ganga supports a rich fauna and flora, including the endangered Ganga River dolphin (*Platanista gangetica*) and at least nine other species of aquatic mammals.[30] Therefore it is of utmost importance that the River Ganga protection plan is executed properly to minimise the ecological damage.

29 ibid 447.

30 ibid 8.

In addition to its ecological impact, the pollution in the river affects the Indian society at large.

An analysis of the Ganges water in 2006 and 2007 showed significant associations between water-borne/enteric disease and the use of the river for bathing, laundry, washing, eating, cleaning utensils, and brushing teeth.[31] Furthermore the prominence given to the safeguarding of the river which can be seen in the forefront of many election campaigns[32] and civil society upheavals shows that the River Ganga has become an epicentre of society and politics of the nation at large.

5. CONCLUSION

Based on the above analysis, some fundamental qualities are observed throughout the decision. One such feature is the vigour of judicial activism exemplified by the tireless efforts of the judiciary towards the objective of protecting the sacred river. Public participation is one other feature of the judgement which demonstrates transparency and integrity. The bio-centric approach taken towards the issues regardless of economic and development goals is also noteworthy.

It must be well kept in mind that, despite all the exemplary aspects of the judgement, these directions issued must be properly enforced and closely monitored to ensure that Ganga and her tributaries continue to run unpolluted in the generations to come.

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31 Steve Hamner, Anshuman Tripathi, Rajesh Kumar Mishra, Nik Bouskill, Susan C Broadaway, Barry H Pyle, Timothy E Ford, 'The Role of Water Use Patterns and Sewage Pollution in Incidence of Water-Borne/Enteric Diseases Along the Ganges River in Varanasi, India' (2006) 16 International Journal of Environmental Health Research 113.

32 Some examples are The Ganges Action Plan (GAP) (launched by Rajiv Gandhi, the then Prime Minister of India, in June 1986) Establishment of National River Ganga Basin Authority, 2010 Government clean-up campaign, Namami Gange Programme (which allocated ₹2,037 crore for effective abatement of pollution, conservation, and rejuvenation of the Ganges.), Ganga Manthan (which was a national conference held to discuss issues and possible solutions for cleaning the river.) etc.

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Lalit Miglani v. State of Uttarakhand and Others Writ Petition (PIL) No. 140 of 2015

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Swami Gyan Swarop Sanand v. Ministry of Home Affairs & Ors O.A. No.133/2017

ADVOCATE PADAM BAHADUR SHRESTHA

v.

THE OFFICE OF THE PRIME MINISTER AND COUNCIL OF MINISTERS, SINGHADURBAR, KATHMANDU AND OTHERS

SUPREME COURT OF NEPAL

10210, NKP, Part 61, Vol. 3

BEFORE

Om Prakash Mishra CJ.

Tej Bahadur K.C.J.

COUNSEL

Senior Advocate Dr. Amber Prasad Pant and Advocates Padam Bahadur Shreshtha, Shatkon Shrestha, Sulochana Dhital, Binshu Kumar Thokar, Harischandra Subedi, Abhishek Adhikari, Bhuwan Prasad Wagle, Raju Phuyal, Shanta Panta Prasad Pant for the Petitioner.

Government Joint-Attorney Sanjeev Raj Regmi for the Respondents.

DECIDED ON

2018 (10th Day of Month of Poush of the Year 2075 BS)

JUDGEMENT OF

Om Prakash Mishra CJ.

MATERIAL FACTS

The Petitioner, Advocate Padam Bahadur Shrestha, had filed an application before the concerned authority to formulate a separate law dealing with issues of climate change. However, the authorities failed to respond to the said application; thus, the Petitioner filed an application before the Supreme Court seeking the issuance of the writ of mandamus or any other appropriate order to protect the interests of all the flora, fauna, and biodiversity.

The Petitioner claimed that the enactment of a Climate Change Act is an immediate need and demanded effective implementation of the Climate Change Policy 2010, the National Adaptation Programme of Action 2010 and the National Framework for Local Adaptation Plan for Action 2011 all over the nation. The Petitioner also argued that such enactment should be in conformity with the aim of mitigating any further damage caused due to climate change and setting the restoration process in motion to avoid further impact on health, agriculture, physical infrastructure, and various other sectors.

MATTERS FOR DETERMINATION

(a) The Environment Protection Act 1997 does not encompass climate adaptation and mitigation; therefore, whether there is a necessity to draft and enact a separate law dealing with issues related to climate change.

(b) Until the enactment of such a separate Act, whether the formulation of plans, policies and programs mentioned in Climate Change Policy 2011 should be facilitated immediately.

(c) Whether to order the active implementation of plans and policies outlined in National Adaptation Program of Action 2010, Climate Change Policy 2011 and National Framework for Local Adaptation Plan for Action 2011 in all seven provinces through establishing local committees.

(d) Whether to mandate formulating an effective implementation plan for adaptation and mitigation to protect the effects of climate change on the lives and livelihood of people in the absence of such a plan subject to exceptions.

(e) Whether to issue an interim order to immediately formulate an Act and implementation plan to combat climate change of both national and international laws and policies.

RELEVANT AREAS OF THE LAW

Articles 16, 30, 35, and 36 of the Constitution - Environmental Protection Act 1997 - Solid Waste Management Act 2068 - National Park and Wildlife Conservation Act 1973 - National Nature Conservation Fund Act 1983 - International Convention like Convention on Biological Diversity 1992 - UN Framework Convention on Climate Change - Convention on International Trade in Endangered Species of Wild Fauna and Flora 1993 - Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal 1989 - Convention on Wetlands of International Importance especially as Waterfowl Habitat 1971 - Paris Agreement on Climate Change 2015 - Climate Change Policy 2011.

PROPOSITIONS OF LAW ESTABLISHED IN THE DECISION

The Supreme Court established the proposition that climate change mitigation and adaptation by protecting the environment is the responsibility of the State according to the principle of *parens patriae.*

DECISION OF THE COURT

The decision was in favour of the Petitioner. The Supreme Court issued a Writ of Mandamus based on the following reasoning.

Considering the opposing arguments of the parties to the case, the Court admitted that the matter of climate change and the threat posed by pollution are directly linked to the wellbeing of citizens who are guaranteed the right

to a clean environment and conservation under the Constitution; thus, the Supreme Court accepted that the application was of public concern.

Moreover, the Supreme Court stated the fact that Nepal, being a signatory to International Conventions, emphasised the state's obligation to formulate climate change-related laws, which meet international standards.

With regard to the main question of the application, the Supreme Court mandated a completely new law which would include the rules for mitigation as well as adaptation measures ensuring environmental justice while taking measures for maintaining a clean environment with environmental conservation and regulating production.

AUTHORITIES REFERRED TO IN THE JUDGEMENT

Climate Change Policy 2011

Convention on Biological Diversity 1992

Convention on International Trade in Endangered Species of Wild Fauna and Flora 1993

Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal 1989

Convention on Wetlands of International Importance especially as Waterfowl Habitat 1971

Environmental Protection Act, 1997

National Nature Conservation Fund Act, 1983

National Park and Wildlife Conservation Act, 1973

Paris Agreement on Climate Change 2015

Solid Waste Management Act, 2068

The Constitution of Nepal, 2015

UN Framework Convention on Climate Change 1992

ADVOCATE PADAM BAHADUR SHRESTHA

v.

THE OFFICE OF THE PRIME MINISTER AND COUNCIL OF MINISTERS, SINGHADURBAR, KATHMANDU AND OTHERS

Decision no. 10210, NKP, Part 61, Vol. 3 (2018)

Selvaraj Puwanitha*

ABSTRACT

This case review analyses the decision of the Supreme Court of Nepal in the Advocate Padam Bahadur Shrestha v. The Office of the Prime Minister and Council of Ministers, Singhadurbar, Kathmandu and others. This is a landmark judgement on Environmental Law where the Court delivered its judgement analysing both the provisions of domestic and International Law related to the issue of climate change. The Court also borrowed the principle of 'parens patriae' and applied it to the concept of 'Climate Justice' to emphasise the obligation of State authorities to protect the vulnerable sector's right to equality and right to dignity. The review also attempts to analyse the post-effects of the judgement in order to address the effects of not enacting a Climate Change Act as ordered by the Supreme Court of Nepal in its decision.

KEYWORDS: climate change, parens patriae, climate justice, state obligation

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1. INTRODUCTION

The issue of environmental conservation has shifted from being a contemporary subject to an obligation for all.[1] The emerging concept of 'Climate Justice' insists on a shift from the discourse on greenhouse gases and melting ice caps into a civil rights movement with the people and communities who are most vulnerable to climate impacts at its heart.[2] The judgement plays a major role in absorbing the said concept into the domestic law in Nepal by emphasising the principle of parens patriae. The principle of parens patriae allows a state to bring an action on behalf of its citizens who are unable to care for themselves in order to protect its quasi-sovereign interests in wellbeing of its citizens,[3] which also includes the rights related to the environment. Although the judgement was not drawing any scholarly debates on the two concepts discussed above, the pronouncement logically connected the said two concepts to arrive at its rationale. Briefly explaining, as the concept of climate justice places people at its centre and focuses on rights, opportunities and fairness[4] especially, over the poor and vulnerable, as they are known to be the first to suffer, the principle of parens patriae not only emphasises the obligation of the state to protect the vulnerable in order to preserve equality but also the right to dignity of the people. Having said that, the judgement not only highlighted the duty of the concerned authorities, as they are given the power in trust on behalf of the people but also gave way for international concepts to play a role in the domestic legal sphere. The reception of the said concepts also developed and extended the understanding of climate justice and environmental law domestically.

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1 Mahaseth Harsh, and Pranjal Risal. 'Intervention by the Court' (2021) <- http://dspace.jgu.edu.in:8080/jspui/bitstream/10739/4428/1/-Bhubaneswar--The-Statesman-07th-January-2021-page-11.pdf> accessed 25 May 2021.

2 'Climate Justice' (*UN Sustainable Development Goals*, 31 May 2019) <https://www.un.org/sustainabledevelopment/blog/2019/05/climate-justice/> accessed 24 June 2021.

3 Jack Ratliff, 'Parens Patriae: An Overview' (2000) 74 Tul L Rev 1847.

4 Henry Shue, *Climate Justice: Vulnerability and Protection* (First edition, Oxford University Press 2014) 342.

2. LEGAL AND FACTUAL BACKGROUND

The Petitioner, Advocate Padam Bahadur Shrestha, filed an application before the concerned authority requesting them to enact a discrete law dealing with issues of climate change. However, the authorities failed to enact an Act on Climate Change; thus, the Petitioner filed an application before the Supreme Court of Nepal seeking the issuance of a Writ of Mandamus or any other appropriate orders.[5]

The Petitioner highlighted the alarming rise of Nepal's average temperature, which has increased up to 0.07^0C annually, referring to the causes of such an increase. Focusing on the subjective need of Nepal, the Petitioner highlighted the fact that there is an increased risk of glacial lake outburst floods due to the possibility of melting of snow [6] and climate change, melting glaciers, and avalanches have rendered the population in the Himalayan region the most vulnerable.[7] As an initiative to conserve the environment, specifically Nepal's indigenous agricultural practices in the Himalayan and upper hilly region, the Respondents have adopted the Nepal Climate Change Policy in 2011.[8] However, the Petitioner alleged that those objectives are yet to be fulfilled and although the Respondents formulated the National Adaptation Program of Action in 2010, National Framework for Local Adaptation Plan for Action in 2011, and Climate Change Policy in 2011 focusing on policies related to forest and biodiversity, climate disasters, etc., due to failure of full implementation, each Nepali continues to be a victim to the effects of climate change.[9] Moreover, the Petitioner also argued that these attitudes of the authorities suppressed the enjoyment

5 *Advocate Padam Bahadur Shrestha v. The Office of The Prime Minister and Council Of Ministers, Singhadurbar, Kathmandu And Others,* Decision no. 10210, NKP, Part 61, Vol. 3 (2018) 3.

6 ibid 5.

7 ibid.

8 The policy provides measures to combat climate change through sustainable social and economic development activities, implementation of national adaptation policy by merging it with development agenda, investment in green energy generation, making the management of natural resources climate friendly, and drafting national strategy for carbon trade within 2012 AD.

9 *Advocate* (n 5) 4.

of the right to live with dignity guaranteed under Article 16 and the right to a clean environment under Article 30 of the Constitution.

Similarly, the Petitioner pointed out to what extent the climate change policy adequately addresses the two internationally accredited principles of climate change mitigation and adoption.[10] Thus, it is to be noted that the Petitioner's submission has not only drawn support from the domestic laws and policies but also from international agreements and conventions to which Nepal is a signatory. This approach led the Court to witness the wider picture of the Constitutional rights coupled with the obligation to adhere the ratified conventions under the concept of parens patriae.

Therefore, the Petitioner claimed that the enactment of a Climate Change Act is an immediate need and demanded effective implementation of the Climate Change Policy - 2010, the National Adaptation Programme of Action - 2010 and the National Framework for Local Adaptation Plan for Action - 2011 all over the nation. The Petitioner also argued that such enactment should be ratified with the aim of mitigating any further damage caused by the effects of climate change, and set the restoration process in motion to avoid further impact on health, agriculture, physical infrastructure, and various other sectors.[11]

Consequently, the Respondents' arguments were placed before the Court in the following order. The Department of Environment argued that the existing policies and programs are adequate for the effective implementation of climate adaptation and mitigation. It also argued that a uniform application of such policies and programs is problematic. In contrast, it supports the implementation of the same on the basis of vulnerability and intimate disasters in different areas.[12] The Ministry of Law, Justice and Parliamentary Affairs promised to initiate mitigative

10 United Nations Framework Convention Climate Change (adopted 9 May 1992, entered into force 21 March 1994) A/RES/48/189; Kyoto Protocol to the United Nations Framework Convention on Climate Change (adopted 11 December 1997); Paris Agreement to the United Nations Framework Convention on Climate Change (adopted 12 December 2015) TIAS 16-1104.

11 *Advocate* (n 5) 4-6, 10.

12 ibid 7.

measures only if a new draft is received from any authority. Whereas the office of the Prime Minister and the Council of Ministers referred to Article 30 of the Constitution and reiterated that the right to a clean environment is a fundamental right of every citizen. The Agricultural Development Ministry denied the allegation by presenting its contributions towards the plans,[13] projects[14] and awareness programs.[15] On the other hand, the Ministry of Home Affairs jotted down the existing laws that have been drafted and implemented so far.[16] On the whole, the Respondents placed their justification that the subject of exclusive legislative competence is with the Parliament of Nepal; thus, they were not to be imposed of the liability.[17] Moreover, the Respondents denied jurisdiction by submitting that the present petition was liable to be quashed for not being reasonable.

3. ANALYSIS

The main determinations before the Court were whether a separate law dealing with climate change is to be drafted; despite such law whether there is a need to formulate and implement plans, policies and programs in this regard; and whether there is a need for uniform application of policies.[18]

Considering the opposing arguments of the parties to the case, the Supreme Court acknowledged the importance to embrace the principles of sustainable development and allied principles of intergenerational and intergenerational equity. The Court also emphasised that the concerned

13 The Agriculture Development Strategy 2072 (Nepal).

14 Installing small irrigation systems, drip irrigation systems, rainwater collection reservoir, plastic pond constructions, providing subsidies on water boring equipment and maintenance and storage purposes and four year long pilot projects in Argakhachi, Kapilvsatu, Siraha and Udayapur between 2015 and 2018.

15 Climate change awareness and advice is provided to farmers through the financial aid of the World Bank and under this Ministry's direction in 25 districts through mobile phones.

16 The Environment Protection Act 1997 (Nepal); Environment Protection Rules 1997 (Nepal); Solid Waste Management Act 2068 (Nepal), National Park and Wildlife Conservation Act 1973 (Nepal), National Nature Conservation Fund Act 1983 (Nepal).

17 ibid 8.

18 *Advocate* (n 5) 6.

authorities should embrace the principle of climate justice while carrying out any activity relating to climate change. Also, the Court admitted that the matter of climate change and the threat posed by pollution is directly connected to the wellbeing of citizens who are guaranteed the right to a clean environment and conservation under the Constitution of Nepal; thus, the Supreme Court accepted that the application was of public concern.[19]

Moreover, the Court also explained the possibility of balanced coexistence of environmental justice, and reduction in destruction of environment and exploitation of natural resources due to anthropogenic causes by stating that,

> It is necessary to do a moral, balanced, and responsible usage of the ecological resources that sustain humans and lives of other species. In order to maintain the cleanliness of water, air, land and food, the human activities that have the potential of having adverse impact on these resources.[20]

The Supreme Court acknowledged the fact that Nepal, being a signatory to International Conventions has the obligation to enact climate change related laws, which are parallel to international standards.[21] The Court's effort to remind the governmental 'authorities' and the 'agencies' that the obligations under the international law is not directory but mandatory should be appreciated.

With regard to the main question of the application, the Supreme Court mandated a completely new law which would include the rules for

19 ibid 11.

20 ibid 11.

21 ibid 12, UN Convention on Biological Diversity (adopted 29 December 1993, entered into force 10 June 1992) 1760 UNTS 69; United Nations Framework Convention Climate Change (adopted 9 May 1992, entered into force 21 March 1994) A/RES/48/189; The Convention on the Control of Transboundary Movement of Hazardous Wastes and Their Disposal (adopted 22 March 1989) 1673 UNTS 126; The Convention on International Trade in Endangered Species of Wild Fauna and Flora (adopted 2 to 13 March 1992); Convention on Wetlands of International Importance especially Waterfowl Habitat. Ramsar (adopted 2 February 1971) as amended by the Protocol of 3 December 1982 and Paris Agreement to the United Nations Framework Convention on Climate Change (adopted 12 December 2015) TIAS 16-1104.

mitigation and adaptation measures to ensure environmental justice while taking measures to maintain a clean environment with environmental conservation and regulating production.[22] The Court also believed that by enacting such national law, it will also facilitate on effectuating the commitments under the Paris Agreement on Climate Change - 2015. Similarly, according to Article 51 (g) of the Constitution, the State has an obligation to adopt policies with regard to conservation and promotion of natural resources in an eco-friendly and sustainable manner, develop clean and renewable energy, increase awareness about the cleanliness of the environment, reduce the impact on the environment from industrial and physical development and adopt ways to prevent or reduce the adverse impact on the environment and biodiversity where there is potential harm and mitigate the risk of natural disasters. Additionally, issues of mitigation of change and adaptation directly concerns and is related to the right to life, right to have nutritious food, and right to clean environment guaranteed under the Constitution of Nepal. Having said that, the Supreme Court established the proposition that climate change mitigation and adaptation by protecting the environment is the responsibility of the state according to the principle of parens patriae.

It is also important to note that the judgement does not focus only on climate change but also on the direct and indirect causes of such climate

22 ibid12-13, Promotes clean and renewable energy especially in the climatically vulnerable areas through provisions in the national law, stipulates social and economic development and has provisions of livelihood accordingly, addresses the areas. • Legal provision for adaptation and mitigation, promotion of sustainable development and for plantation of multi-beneficial trees in barren land, landslide prone regions, and slope land, • Make special legal provision for promotion and development of low carbon emitting technology, technology that utilises clean and renewable energy, reduce the consumption of fossil fuel consumption for the purpose of climate change mitigation, and includes provisions for forest conservation and expansion and addresses the usage of forest area the type of energy in vulnerable areas, • Make arrangements of legal and technological mechanisms, • Make legal arrangements to ensure ecological justice and environmental justice to the future generation ,• Make arrangements for scientific and legal instruments for calculating compensation, • To regulate the activities that affect the ecology and to maintain healthy and clean environment, make legal provisions and in policy highlighting the Climate Change Duties of public and private organisations'

change as well as the living and non-living victims of such causes. This approach of the Courts led the reader to imagine the broader picture of people who are adversely affected due to climate change in light of the two concepts which were discussed above in detail – climate justice and the principle of parens patriae. Thus, it can be said that the judgement has not only contributed to the interpretation of national and international law but also to the jurisprudence of Environmental Law in Nepal.

According to statistics, over the past 25 years, Nepal's court system has passed many verdicts, but a follow-up study of 213 decisions[23] showed that orders directed to various government ministries and agencies for actions were blatantly ignored and never implemented.[24] The current decision is not an exception to the rule as Nepal has not drafted a Climate Change Act so far. However, it is to be noted that as a result of the decision, Nepal has enacted the first-ever law which specifies legal provisions addressing climate change - the Environment Protection Act 2019 (EPA). Although it is an umbrella legislation, the preamble to the Act specifies that it intends to protect the fundamental right of every citizen to live in a clean and healthy environment, ensure that compensation will be paid for the victims by the relevant pollutant parties and integrate prevailing laws to face challenges of climate change. Sections 23-28 of the Act specifically refer to climate change, such as publishing reports on adverse effects,[25] adoption of plans in three-level governments,[26] identifying and planning to decrease the

23 Of those, 92 were issued to the Home Ministry which took no action on the orders. This investigation used the right to information provisions to take a closer look at court documents on 33 of the cases categorised by the Judicial Execution Directorate (JED) and found many examples of the government paying no attention at all to the Supreme Court decisions.

24 Ekal Silwal, 'Public Disinterest Litigations over the past 25 years, Nepal's Governments have blatantly ignored Court Decisions, especially on public interest petitions' (Nepali Times, 16 June 2020) <https://www.nepalitimes.com/here-now/public-disinterest-litigations/> accessed 25 May 2021.

25 The Environment Protection Act 2019 (Nepal), s 23.

26 ibid s 24.

emission of greenhouse gases,[27] risk management,[28] technical standards,[29] and carbon trading.[30] Section 44 of the Forest Act 2019[31] also provides a provision on environmental service management for climate change.

In reference to the policy initiatives, Nepal released a Climate Change Policy in August 2019[32] targeting seven goals to achieve, including the establishment of a Climate Change Centre, initiation of climate change adaptation, formulation of a carbon trade strategy, formulation of strategy on low carbon economic development strategy, and implementation of an economic assessment of loss and damage in key development sectors from carbon change. The Climate Change in Fifteenth National Plan of Nepal aims to mitigate the adverse effects of climate change according to Paris Agreement[33] and enhance adaptive capacity.

4. CONCLUSION

In essence, although the Supreme Court of Nepal ordered the concerned authorities to formulate a separate law pertaining to climate change, in reality, it is still a dream. However, the judgement has played a major role in initiating Acts and policies concerning the said issue in Nepal. However, the existing laws and policies are of an umbrella in nature, and will not accommodate the urge and the need emphasised in the judgement. Moreover, the attempt of the Court to relate the concept of parens patriae with the concept of climate justice has contributed to the development of the domestic environmental jurisprudence of Nepal. However, the

27 ibid s25.

28 ibid s 26.

29 ibid s 27.

30 ibid s 29.

31 The Forest Act 2019, s 44(a): management of profit which is received from adaptation of climate change, carbon stock and reduction of emission of greenhouse gases. 44(b)" management of profit which is received from adaptation of climate change, carbon stock and reduction of emission of greenhouse gases. Excluding forest sector.44 (c): management of profit which is received from hydro, water irrigation and tourism industry.

32 Replacing the Climate Change Policy in 2011.

33 Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104.

development in light of fundamental rights expressly will not suffice to help the vulnerable communities. Thus, it can be concluded that in reality, the implementation of judgements by taking positive action is the only way to achieve climate justice.

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Climate Change Policy in August 2019

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The Convention on the Control of Transboundary Movement of Hazardous Wastes and Their Disposal (adopted 22 March 1989) 1673 UNTS 126

UN Convention on Biological Diversity (adopted 29 December 1993, entered into force 10 June 1992) 1760 UNTS 69

United Nations Framework Convention Climate Change (adopted 9 May 1992, entered into force 21 March 1994)

United Nations Framework Convention Climate Change (adopted 9 May 1992, entered into force 21 March 1994) A/RES/48/189

ASHGAR LEGHARI

v.

FEDERATION OF PAKISTAN

LAHORE HIGH COURT OF PAKISTAN

W. P. No. 25501/2015

BEFORE

Syed Mansoor Ali Shah J.

COUNSEL

M/s Mansoor Usman Awan, Shehzeen Abdullah and Hussain Ibraheem Muhammad, Advocates for the Petitioners.

Mr. Nasar Ahmad, Deputy Attorney General for Pakistan,

Ms. Hina Hafeezullah Ishaq, Assistant Attorney General for Pakistan,

Dr. Parvez Hassan, Chairman, Climate Change Commission,

Ms. Saima A. Khawaja, Advocate/Member, Climate Change Commission,

Dr. Muhammad Javed, Director Irrigation Department, Government of the Punjab,

Dr. Qazi Tallat M. Siddiqui, Deputy Energy Advisor (Civil)/DS(W), Ministry of Water Resources, Islamabad,

Mr. M. Irfan Tariq, D.G. Ministry of Climate Change, Islamabad,

Nisar Ahmad, Director (PDM-II), Ministry of Inter Provincial Coordination, Cabinet Block, Islamabad for the Respondents.

DECIDED ON

01.25.2018

JUDGEMENT OF

Syed Mansoor Ali Shah J.

MATERIAL FACTS

A public interest litigation action challenging the Federal Government of Pakistan and Regional Government of Punjab for their inaction, delay, and lack of seriousness in addressing climate change.

MATTER FOR DETERMINATION

Whether the inaction, delay, and lack of seriousness of the Federal Government of Pakistan and the Regional Government of Punjab in addressing climate change in Pakistan, particularly in executing the National Climate Change Policy (2010) and the Framework for Implementation of Climate Change Policy (2014-2030) curtailed the fundamental rights of the Petitioner guaranteed under Article 9 (right to life including the right to a healthy and clean environment) and Article 14 (right to human dignity) in the Constitution of Pakistan. In addition, the Petitioner referred to the Constitutional principles of social and economic justice and international environmental principles of the doctrine of public trust, sustainable development, precautionary principle and intergenerational equity.

RELEVANT AREAS OF THE LAW

National Climate Change Policy (2010) - Pakistan Climate Change Act, 2017 - The Constitution of the Islamic Republic of Pakistan 1973 - The Framework for Implementation of Climate Change Policy (2014-2030) - United Nations Framework Convention on Climate Change 1994 - United Nations Paris Agreement 2015

PROPOSITIONS OF LAW ESTABLISHED IN THE DECISION

The Court held that climate change is a crucial challenge of our time and has created a dramatic alteration in our planet's climate system.

The Court stated that the jurisprudence of Pakistan has expanded from environmental justice to climate justice and this case has been instrumental in rendering a new dimension to the jurisprudence on environmental justice in Pakistan. The Honourable Judge demonstrated that climate change moves beyond the concept of environmental justice while incorporating a vast body of novel components such as building approval, industrial licenses, technology, infrastructural work, human resource, human, climate trafficking, disaster preparedness, climate migration etc.

The Court regarded that, in a rather complex global problem such as climate change, the identity of the polluter is not clearly ascertainable and falls outside the jurisdiction of Pakistan. Hence, the Court held that out of two available remedies i.e., adaptation and mitigation, the most appropriate remedy for a developing state like Pakistan is adaptation.

The Court held that 'water is life and water is a human right'. In view of that, the Court upheld that all people should have access to clean and affordable water and that climate justice and water justice go hand in hand which are rooted in Articles 9 and 14 of the Constitution, underlined in the Constitutional value of social and economic justice.

DECISION OF THE COURT

In order to implement the National Climate Change Policy (2010) and the Framework for Implementation of Climate Change Policy (2014-2030) the Federal Government of Pakistan was directed to formulate the National Water Policy and duly execute the Climate Change Act, 2017 while giving effect to the letter and the spirit of the Act.

The Court held that the due implementation of the Framework for Implementation of Climate Change Policy (2014-2030) and Climate Change

Act, 2017 is crucial for the sustainable development and the protection of the fundamental rights of the people of Pakistan, which is enshrined in Articles 9 and 14 of the Constitution.

The Court upheld the significance of the Judges shifting from environmental justice to climate change justice, by continuing to ground decisions on the fundamental rights doctrine with a novel and specific alignment to climate change rather than general environmental issues.

The Court accepted the views of the Climate Change Commission and dissolved the Commission, constituting the Standing Committee on Climate Change to ensure continuous effective and due implementation of the Policy and the Framework.

The Court, without disposing of the petition, treated this application as a rolling review or a continuing mandamus and consigned it to the record enabling the Standing Committee to apply for the due enforcement of fundamental rights applications in the context of climate change. In the event that such applications are made, they are to be revived and fixed before a Green Bench as per the Case Management Plan.

AUTHORITIES REFERRED TO IN THE JUDGEMENT

Ms. Imrana Tiwana and Others v. Province of Punjab and Others, (2015) W.P. No.7955/2015

Ms. Shehla Zia v. WAPDA, PLD (1994) SC 693

National Climate Change Policy (2010)

The Constitution of the Islamic Republic of Pakistan 1973

The Framework for Implementation of Climate Change Policy (2014 - 2030)

ASHGAR LEGHARI

v.

FEDERATION OF PAKISTAN

W. P. No.25501/2015

H.M.D.D.A. Dilushi Senavirathna*

ABSTRACT

This review analyses the decision of the High Court of Lahore in the case of *Ashgar Leghari v. Federation of Pakistan*, which was filed against the Regional Government of Punjab and the Federal Government of Pakistan for their inaction, delay, and lack of seriousness in addressing climate change in Pakistan. The Plaintiff contended that the failure of the Government to implement the National Climate Change Policy (2010) and the Framework for Implementation of Climate Change Policy (2014-2030) has infringed his Constitutional rights guaranteed under Articles 9 and 14 which are respectively, his right to life, which includes the right to a healthy and clean environment and the right to human dignity. The Court commented that the jurisprudence of Pakistan has now moved on to climate justice from environmental justice. In its decision, inter alia the Court accepted the position of the Climate Change Commission and held that the Government should formulate the National Water Policy and ensure the prompt execution of the Climate Change Act, 2017. In order to ensure the effective implementation of the Policy and the Framework, the Court established the Standing Committee on Climate Change as the link between the Court and the Executive.

KEYWORDS – climate change, National Climate Change Policy (2010), Framework for Implementation of Climate Change Policy (2014 - 2030), right to life, right to a healthy and clean environment, climate justice.

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1. INTRODUCTION

Pakistan is one of the lowest emitters of greenhouse gas in the world and makes a minimal contribution to total global greenhouse gas emission.[1] Yet, Pakistan is rated as one of the most vulnerable countries with a high susceptibility towards adverse impacts of climate change.[2] Over the past few years, Pakistan has become a climate change victim and suffered from disruptive climate patterns, which resulted in heavy floods and droughts.[3] In 2016, Pakistan ratified the Paris Agreement on Climate Change,[4] which is a legally binding framework for globally coordinated efforts to limit the impact and urgent threat of climate change.[5] The Paris Agreement supports climate change litigation by which the litigants are allowed to bring a conflict of interest into a Court of Law and challenge, either to advance or delay climate change action.[6] Hence, the case of *Ashgar Leghari v. Federation of Pakistan*[7] embarks as a landmark initiative in climate change litigation in Pakistan.

2. FACTUAL AND LEGAL BACKGROUND

2.1 Chronology

Asghar Leghari, a law student with a farming family background in Lahore[8] filed a fundamental rights application in the Lahore High Court, Pakistan

1 Hannah Ritchie and Max Roser, 'CO_2 And Greenhouse Gas Emissions' (*Our World in Data*, 2021) <https://ourworldindata.org/co2/country/pakistan> accessed 31 June 2021.

2 Syed Abubakar, 'Pakistan 5Th Most Vulnerable Country to Climate Change, Reveals Germanwatch Report' (DAWN.COM, 2021) <https://www.dawn.com/news/1520402> accessed 27 June 2021.

3 ibid.

4 Paris Agreement Under the United Nations Framework Convention on Climate Change (adopted 12 December 2015) (Paris Climate Agreement).

5 (Unfccc.int, 2021) <https://unfccc.int/node/61134> accessed 24 June 2021.

6 'Isipedia' (Isipedia.org, 2021) <https://www.isipedia.org/story/climate-litigation-or-how-to-litigate-the-climate-emergency/> accessed 30 June 2021.

7 W.P. No. 25501/2015.

8 Esmeralda Colombo, 'Enforcing International Climate Change Law in Domestic Courts: A New Trend of Cases for Boosting Principle 10 of the Rio Declaration?' (2017) 35 UCLA Journal of Environmental Law and Policy.

by way of a public interest action claiming that the Federation of Pakistan had curtailed his fundamental rights by failing to address the adverse impacts of climate change. The Petitioner submitted that the escalating issue of climate change has become a critical threat to water security, food security and energy security in Pakistan and that it would deprive him of his livelihood, ultimately infringing his fundamental rights.

In order to tackle the adverse impacts of climate change, the Government of Pakistan[9] has enacted the National Climate Change Policy (2010)[10] and the Framework for Implementation of Climate Change Policy (2014-2030).[11] The Petitioner argued that the Ministry of Climate Change and other relevant Ministries and Departments have failed to effectively implement the Policy and the Framework.

In light of the Constitutional principles of social and economic justice, the Petitioner has based his application on Article 9 of the Constitution of Pakistan which guarantees right to life including the right to a healthy and clean environment[12] and Article 14 which guarantees the right to human dignity.[13] The Petitioner also referred to the international environmental principles like the doctrine of public trust, sustainable development, precautionary principle and intergenerational equity.

3. RELIEFS GRANTED

Firstly, the Court regarded the Policy and the Framework as two integral documents and ordered the GOP to implement the Framework successfully, formulate the National Water Policy and ensure that the Climate Change Act, 2017[14] is actualised and given effect in letter and spirit.

9 Hereinafter referred to as the GOP.

10 Hereinafter referred to as the Policy.

11 Hereinafter referred to as the Framework.

12 The Constitution of the Islamic Republic of Pakistan 1973, art 9.

13 ibid, art 14.

14 Pakistan Climate Change Act, 2017.

Secondly, the Court constituted the Standing Committee on Climate Change to ensure the continuation of the effective and due implementation of the Policy and the Framework.

Thirdly, the Court ruled that due implementation of the Framework and the Act is crucial for the sustainable development and the protection of the fundamental rights of the people of Pakistan, enshrined in Articles 9 and 14 of the Constitution. The Court urged the need to base the decisions in fundamental rights applications, with a novel and specific alignment to climate change rather than focusing on typical environmental issues leading to a shift from environmental justice to climate justice.

Lastly, without disposing the petition the Court treated this application as a rolling review[15]or a continuing mandamus[16] and consigned it to the record enabling the Standing Committee to apply for the due enforcement of the fundamental rights applications in the context of climate change. In event when such applications are made, they are to be revived and fixed before a Green Bench[17] as per the Case Management Plan.

4. ANALYSIS

4.1 The National Climate Change Policy (2010) and the Framework for Implementation of Climate Change Policy (2014-2030)

The primary purpose of the Policy is to ensure that climate change is mainstreamed in the economically and socially vulnerable sectors in

15 The concept of rolling judicial review allows the Court to consider a case as the claim and circumstances progress, providing a degree of procedural flexibility, which may not otherwise be available.

16 Continuing mandamus is a relief given by a court of law through a series of ongoing orders over a long period of time, directing an authority to do its duty or fulfill an obligation in general public interest, as and when a need arises over the duration a case lies with the court, with the court choosing not to dispose the case off in finality.

17 'Environmental Justice: Green Benches Constituted All Over Pakistan, AJK | The Express Tribune' (The Express Tribune, 2021) <https://tribune.com.pk/story/378089/environmental-justice-green-benches-constituted-all-over-pakistan-ajk/> accessed 17 July 2021.

Pakistan. In order to successfully execute the Policy, the Federal GOP has enacted the Framework with four-time frames.[18]

As per the decision, in both Policy and the Framework, **adaptation** is rendered as the focal point of addressing climate change in Pakistan. In the Framework, appropriate adaptation actions in different sectors including water, agriculture, forestry, coastal areas, biodiversity, health and other vulnerable ecosystems have been specified. Meanwhile, the **mitigation efforts** in appropriate sectors such as energy, forestry, transport, industries, urban planning, agriculture and livestock have also been highlighted in the Framework.

While commenting on the Policy and the Framework Honourable Justice Ali Shah has equalized the Framework to a living document and as a synergistic complement to future planning in Pakistan.[19]

4.2 Fundamental Rights of the Citizens of Pakistan

In a stimulating approach, the Court has declared that in light of the Constitutional principles of democracy, equality, social, economic and political justice, Articles 9 and 14 of the Constitution of Pakistan[20] include the international environmental principles of sustainable development, precautionary principle, environmental impact assessment, inter and intra generational equity and the public trust doctrine within their purview and commitment.

Thus, the Court has invoked its fundamental rights jurisdiction while acknowledging that this application requires the protection of fundamental rights of the citizens of Pakistan including the vulnerable and weak segments of the society who are unable to approach the Court.'[21]

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18 Priority Actions (PA): within 2-years, Short term Actions (SA): within 5-years, Medium term Actions (MA): within 10 years and the Long term Actions (LA): within 20-years.

19 *Ashgar Leghari v. Federation of Pakistan,* W.P. No. 25501/2015, 7.

20 The Constitution of the Islamic Republic of Pakistan 1973, art 9, art 14.

21 *Ashgar* (n 19) 10.

The Judge further stated that environmental protection has become the centre stage for constitutional rights in Pakistan and highlighted that this jurisprudential approach of the Courts should be fashioned to meet the needs of the urgent and overpowering concern of climate change in the scheme of Constitutional rights.

4.3 Climate Change Commission

Subsequent to the discovery that the GOP has failed to substantially implement the Policy and the Framework, identifying the significance of urgent implantation the Court has by the order dated 14.09.2015 established the Climate Change Commission[22] to effectively execute the Policy and the Framework. The Chairman of the Commission submitted its Supplemental Report on Implementation of Priority Action on 21.01.2018 in which it was presented that 66.11% of the priority items of the Framework have been successfully implemented due to the efforts taken by the Commission.[23] This effective implementation resulted in the GOP promulgating the Climate Change Act, 2017[24] and establishing the Pakistan Climate Change Authority under the Act.

Honourable Justice Ali Shah accepted the submission of the Chairman on the future responsibility of the GOP in implementing the Framework. The Judge dissolved the Commission after admiring the remarkable public and pro bono contribution made towards the findings of the case.

4.4 Standing Committee on Climate Change

The Standing Committee on Climate Change is another significant ruling of this case. The Court constituted the Standing Committee to act as a link between the Court and the Executive as well as to render assistance to the Government and Agencies in order to ensure successful implementation and continuation of the Policy and the Framework. The goal of constituting this Committee was to facilitate the work between

22 Hereinafter referred to as the Commission.

23 *Ashgar* (n 19) 21.

24 Pakistan Climate Change Act, 2017.

the Court and the Federal Government, Ministry of Climate Change, Provincial Government, Planning and Development Department and the Council of Common Interest.[25]

The Committee consists of six members including the Chairperson who is a climate expert and five other members from various institutions such as the Ministry of Climate Change, Planning and Development Department, National Program Director, Advocates and Environmentalists.

The Federal and Provincial Government as well as the Council of Common Interest are mandated to engage, entertain and consider the suggestions and proposals of the Committee.

4.5 Environmental Justice

It is stated in the judgment, that Pakistan has a well-established environmental jurisprudence, which has paved the way in safeguarding and promoting international environmental law principles within its jurisdiction in light of the Constitutional values, and the fundamental rights enshrined in the Constitution of Pakistan. It is the national and provincial environmental laws, fundamental rights and the principles of environmental laws, which have taken the precedent in such application, which resulted in penalties and shifting, or stoppage of pollution industries based on the precautionary principle and the Environmental Impact Assessment. In order to strengthen his position, the Judge cited decisions of *Ms. Imrana Tiwana and Others v. Province of Punjab and Others*[26] and *Ms. Shehla Zia v. WAPDA*.[27]

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25 *Ashgar* (n 19) 25.

26 W.P. No.7955/2015, The Constitution of Pakistan does not contain provisions on fundamental rights or principles of state policy explicitly targeting the protection of the environment. Yet the Supreme Court of Pakistan has traditionally found interesting and novel ways to extend constitutional protection to the environment. Nonetheless, the judgement broaches many important issues related to the structure and configuration of environmental laws in Pakistan and their enforcement in light of the Eighteenth Amendment, and merit analysis.

27 PLD 1994 SC 693, this landmark case expanded the fundamental rights to life and dignity by interpreting these rights to encompass the right to a healthy environment. This decision is particularly significant as there are no specific provisions in the Pakistani Constitution regarding environmental protection. In relation to environmental law in Pakistan, it is

4.6 Climate Justice

This decision established a persuasive authority on climate justice in the jurisprudence of Pakistan. The Court pronounced that the notion of climate justice is broader than the notion of environmental justice. The Court emphasised that climate justice is linked with human rights and adopting a human-centred approach as opposed to environmental justice which safeguards the rights of the most vulnerable communities while sharing both burden and the benefits of climate change equitably and fairly. Thus, the Judge has held as follows,

> The instant case adds a new dimension to the rich jurisprudence on environmental justice in our country. Climate change has moved the debate from a linear local environmental issue to a more complex global problem. In the context of climate change the identity of the polluter is not clearly ascertainable and by and larger falls outside the national jurisdiction.[28]

In view of the above, the Court demonstrated that in order to overcome climate change challenges, two remedies are available i.e., **adaptation** or **mitigation**. Since the developing countries including Pakistan are predicted to bear the effects of climate change, adaptation is viewed as the key remedy available to Pakistan. It is indicated in the judgement that mitigation has to be addressed with environmental justice while adaptation has to be addressed through climate justice. Climate adaptation involved many stakeholders and thus, the notion of climate justice moved beyond the construct of environmental justice. As per Honourable Justice Ali Shah, climate justice promotes new dimensions such as health security, food security, energy security, water security, human displacement, human trafficking and disaster management.

Accordingly, this approach of the Court demonstrates that not only the Executive, the Judicial branch of the Government is also capable

important that the case establishes the application of the precautionary principle where there is a threat to environmental rights.

28 *Ashgar* (n 19) 22.

of contributing toward mainstreaming climate adaptation and resilient programs through creative constructions.[29]

4.7 Water Justice

It is articulated in the decision that similar to climate justice, its sub concept of water justice is also rooted in Articles 9 and 14 of the Constitution of Pakistan.[30] Based on the Constitutional principle of social and economic justice it is further stated that water is a human right and all people should have access to clean and affordable water.

5. CONCLUSION

The decision of Honourable Justice Ali Shah has become a legacy in climate change law and an epitome of climate change lawsuits across the globe. The decision compelled the executive authorities to take actions to ensure the relevant Policies and Frameworks are successfully executed. It is notable that the Court recognised climate change as a global problem and provided the GOP and its citizens with material knowledge on climate change threats and effects. The Judge in his decision interpreted the fundamental rights in the Constitution with a wide array of international environmental law principles thus indirectly applying international law to his decision. This case will undoubtedly mark a milestone in the climate change litigation in Asia and may become a legitimate precedent for other Courts in South Asia.

29 Brian Preston, 'The Role of the Courts in Facilitating Climate Change Adaptation' [2016] The Asia-Pacific Centre for Environmental Law Climate Change Adaptation Platform (2016).

30 Ashgar (n 19) 22.

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"There are some principles of traditional legal systems that can be woven into the fabric of modern environmental law. They are specially pertinent to the concept of sustainable development which was well recognized in those systems. Moreover, several of these systems .... show a concern that these acts of human interference with the course of nature should always be conducted with due regard to the protection of the environment. In the context of environmental wisdom generally, there is much to be derived from ancient civilizations and traditional legal systems in Asia, the Middle East, Africa, Europe, the Americas, the Pacific, and Australia - in fact, the whole world. This is a rich source which modern environmental law has left largely untapped.

[For instance], the ancient irrigation-based civilization of Sri Lanka is a system which, while recognizing the need for development and vigorously implementing schemes to this end, at the same time specifically articulated the need for environmental protection and ensured that the technology it employed paid due regard to environmental considerations. This concern for the environment was reflected not only in its literature and its technology, but also in its legal system.

The concept of reconciling the needs of development with the protection of the environment is thus not new. Millennia ago, these concerns were noted, and their twin demands well reconciled in a manner so meaningful as to carry a message to our age…Sustainable development is not merely a principle of modern international law. It is one of the most ancient of ideas in the human heritage. Fortified by the rich insights that can be gained from millennia of human experience, it has an important part to play in the service of international law."

Seperate Opinion of Judge Weeramantry in Gabcíkovo-Nagymaros Project Case
(Hungary/Slovakia) [1997] ICJ Reports 78, 94 – 95, 107

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