

APPLICABILITY OF THE INTERNATIONAL ENVIRONMENTAL LAW PRINCIPLES TO THE SRI LANKAN ENVIRONMENTAL LAWS: SPECIAL REFERENCE TO PRINCIPLE OF POLLUTER PAYS AND INTER GENERATIONAL EQUITY.

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ABSTRACT

Sri Lanka is a tropical country gifted with abundant environmental resources. These resources have been used by the people of the country for their day to day needs from ancient times. However, with the rapid increase of the population, the usage of these resources has increased without any control. Most human activities have an environmental cost and ignorance of this has led to many environmental concerns. Protection of the environment is extremely important to preserve the natural resources not only for the needs of the present but also to meet the needs of future generation. International environmental principles have been evolved with this objective and these international principles are identified by many international instruments. Sri Lanka being a state party to many of those instruments, attempts to take different measures to meet the objectives of those instruments. However, we can see an error in the effective implementation of those principles at a domestic level. This has resulted negatively, in the protection of environmental resources of Sri Lanka. Against this backdrop, the main objective of this research is to evaluate the level of applicability of the polluter pays principle under the National Environmental Act 1980 (including amendments) of Sri Lanka. Also, the author wishes to assess how effectively the polluter pays principle will contribute to the promotion of the principle of inter-generational equity under the environmental laws of Sri Lanka. The desk research methodology is used in this research paper and secondary sources are used in this evaluation. The analysis of domestic laws and regulations shows that there are some attempts to achieve the objectives of the said international environmental principles, but there still is room to improve the domestic legislations accordingly. Giving effective interpretation to these international principles, eliminating political influences and strengthening the rule of law are a few recommendations the author wishes to make in order to achieve the said international standards and protect the environment of Sri Lanka.

Key words: Environmental protection, Polluter pays principle, Intergenerational equity, Sri Lankan Laws

01. INTRODUCTION

Environment is extremely important for any human to have healthy life as well as economic growth. According to the views of Sarath N. Silva (2009) “environmental law developed only during the last two decades and in the early part of the 20th century there was little concern with protecting the environment. Instead, natural resources were exploited in order to enhance the economic capacity of the people. The thinking has changed and we now know that if natural resources are not managed properly and if pollution is not controlled, the economic gains would be little use”². In that context, identifying the economic cost of the environmental harms and pollution is important. Most of the time the polluter will pay no charge during his period, however his ignorance will lead to a limitation of certain opportunities for the future generation. This is contrary to the popular sustainable development principle under international environmental law. According to the World Commission on Environment and Development sustainable development means ‘development that meets the need of the present without compromising the ability of the future generation to meet their own needs’. Basically, it emphasizes a ‘participatory, multi-stakeholder approach to policy making and implementation, mobilizing public and private resources for development and making use of the knowledge, skills and energy of all social groups concerned with the future of the planet and its people’³. In this regard, it focuses more on the rights of the future generation in use of the environment and its protection. Sustainability is very much about what kind of a legacy we want to leave for our children and grandchildren⁴. However, most of the time,

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² Silva, S.N., (2009) ‘Environmental Law: A Judicial Perspective’, Judges and Environmental Law, A Hand Book for the Sri Lankan Judiciary, Environmental Foundation Limited, p.10

³ UN, (2002), ‘Global Challenge Global Opportunity: Trends in Sustainable Development, Available online from http://www.un.org/esa/sustdev/publications/critical_trends_report_2002.pdf’ (accessed 2nd August 2017.)

⁴ UNEP, (2002), ‘General Environmental Principles’, A Hand Book for the Sri Lankan Judiciary, Environmental Foundation Limited

negative environmental impacts cannot be reversed due to its harmfulness. Therefore, calculating the harm at least important to preserve the environment for the use of future generation. In this scenario, it is appropriate to examine the polluter pays principle (hereinafter PPP) under international instruments. Its basic interpretation is that, the negative impact of the environmental harm needs to be borne by the person who pollutes the environment.

02. RESEARCH OBJECTIVE

Against this backdrop, the main objective of this research is to evaluate the level of applicability of the polluter pays principle under the National Environmental Act 1980 (including amendments) of Sri Lanka. Also, the author wishes to assess how effectively the polluter pays principle will contribute to the promotion of the principle of inter-generational equity under Sri Lankan environmental laws.

03. ANALYSIS OF INTERNATIONAL ENVIRONMENTAL LAW PRINCIPLES.

Under international environmental law there are two types of environmental law principles. Firstly, 'old principles' and the second set consists of the 'new principles'. New environmental law principles are more prominent due to their high recognition by international instruments. They include the principle of sustainable development, intergenerational equity, precautionary principle, polluter pays principle etc. International environmental principles are important to environment law in different ways. According to Kurukulasuriya and Robinson (2006), "They can indicate the essential characteristics of international environmental law and its institutions, provide guidance in interpreting legal norms, constitute fundamental norms and fill in gaps in positive law. Also, such principles and concepts appear in national constitutions and laws; and they are referred to, and influence, international and national jurisprudence"⁵.

These international environmental law principles are established by the international instruments. Basically the Stockholm Conference (1972) (the Conference on Human Environment) is the first and the Rio Conference (1992 the United Nations Conference on Environment and Development) the second most important. The Rio Declaration consists of a preamble and twenty-seven international environmental law principles that guide the international community in its efforts to achieve sustainable development⁶. Further, Principle 1 of the Stockholm Declaration (1972) says that, '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'. It ensures the right of even the unborn child. This is concerned with environmental protection and preservation. In this context, following the above-mentioned principles are important. Moreover, these international environmental law principles assist the local legislature and policy makers in drafting and amending the domestic laws, regulations and policies accordingly. In this context, the author would next focus more on the PPP and examine how the principle of intergenerational equity can be promoted through PPP.

04. THE PPP UNDER THE INTERNATIONAL ENVIRONMENTAL LAW.

This principle was identically identified by Principle 16 of the Rio Declaration; "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"⁷. It spells out that the person or the authority who is involved in polluting the environment should take responsibility for the cost of the harm. Therefore, States should take necessary steps in order to cover the cost from the polluter. This can be done by domestic legislations and by regulations. Shelbourn (1994) states that The PPP demands that the financial cost of preventing or remedying damage caused by pollution should lie with the undertakings which cause the pollution, or produce the goods which cause the pollution⁸. Under this principle damage to the environment needs to be calculated and based on the calculated cost liability needs to be imposed.

The case of *Cambridge Water Company v. Eastern Counties Leather* (1994)⁹ is a significant case to analyse the use of PPP. According to the facts of the case, the Cambridge Water Company sued Eastern Counties Leather for the £1 million it had been forced to spend on sinking another borehole following contamination of the original borehole by organic solvents which were traced to the defendants' tanning activities. The contaminations had resulted from spillage that ceased in 1976. The solvents proved to be persistent, and Cambridge Water has already removed over 5,000 liters of the solvent from the contaminated

⁵ Kurukulasuriya.L and Robinson., (2006) N.A, 'Training Manual on International Environmental Law', United Nations Environment Programme, Chapter 03, p.23

⁶ *Supra* 5

⁷ Rio Declaration, 1992, Principle 16

⁸ Shelbourn.C,(1994), 'Historic Pollution', Journal of Planning and Environmental Law, p. 703

⁹ [1994] 1 All ER 53

aquifer. Damages were sought per negligence and nuisance as in *Ryland v. Fletcher*¹⁰ (1868). The House of Lords held that liability for nuisance as in *Ryland v. Fletcher* should not be imposed where the damage suffered was not foreseeable, and drew back from imposing pure strict liability in the case.

An early version of the PPP was developed by the Organization for Economic Cooperation and Development (“OECD”) in the 1970s in an effort to ensure that companies would pay the full cost of complying with pollution control laws and were not subsidized by the State¹¹. Further, the PPP recently incorporated into the 2003 Protocol on Civil Liability and Compensation for Damage caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes and to the 1992 Convention on the Transboundary Effects of Industrial Accidents. In Article 3 paragraph 2 of the 1996 Protocol to the London Convention it is stated that the polluter should bear the cost of the pollution which he caused. In The 1990 International Convention on Oil Pollution Preparedness, Response and Cooperation (ICOPPRC), stated in its preamble is that the PPP is “a general principle of international environmental law¹²”. Under the 2001 Stockholm Convention on Persistent Organic Pollutants¹³ PPP has been accepted. The PPP was inserted further into the European Commission Treaty by the Single European Act 1978. According to that, ‘action by the community relating to the environment shall be based on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source, and that the polluter should pay. Environmental protection requirements shall be a component of the Community’s other policies’¹⁴. This interpretation was later changed by the 1992 version. This was amended and according to the new interpretation ‘Community policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Community. It shall be based on the precautionary principle and on the preventive action should be taken, that environmental damage should, as a priority be rectified at source and that the polluter should pay’¹⁵. Therefore, it appears that the implementation of the PPP needs to amalgamate with other international environmental principles as well. Specially, the preventive action and precautionary principle is of utmost important. Because preventing is the best mode to overcome environmental issues. Due to the gravity of the environmental harm, mere a fine might not sufficiently recover the actual loss. Consequently, the PPP needs to connect with the precautionary principle as well. Furthermore, it shows that the first step needs to be precaution and second step should be the PPP. Sometimes, we can use the PPP as a deterrent to pollution. Through the deterrence the polluters might be hesitates to harm the environment. Thus, it will simultaneously preserve the environment and environmental resources for the future generations. In that context, the principle of intergenerational equity may be easily protected.

Therefore, it is necessary to find what the principle of intergenerational equity is in international environmental law.

05. THE PPP TO PROMOTE INTERGENERATIONAL EQUITY.

According to the principle 3 of the Rio Declaration (1992) ‘the right to development must be fulfilled to equitably meet development and environmental needs of present and future generations’. This principle was accepted by a number of international instruments such as; the 1992 United Nations Framework Convention on Climate Change (UNFCCC) as referred to Article 3.(1) on intergenerational equity, as do the last preambular paragraph of the 1992 CBD, the 1992 United Nations Economic Commission for Europe Convention on the Protection and Use of Transboundary Watercourses and International Lakes, the 1994 Desertification Convention and the 2001 Stockholm Convention on Persistent Organic Pollutants (POP). Apart from those, the Brundtland Commission’s Report defined sustainable development as “development that meets the needs of the present without compromising the ability of future generations to meet their own needs”.

Further, Rio Principle 5 provides that “All States and all people shall cooperate in the essential task of eradicating poverty as an indispensable requirement for sustainable development, in order to decrease the disparities in standards of living and better meet the needs of the majority of the people of the world.” Also in paragraph 6 of the Copenhagen Declaration, the first sentence of which is reproduced above, refers in subsequent sentences to “equitable social development” and “social justice”. It is very clear that to establish social justice the future generations rights to use the environment needs to be protected. Then it is important to examine the word ‘equity’. In the United Nations Millennium Goals and Millennium Declaration¹⁶. Equity thus includes both “inter-generational equity” (the right of future generations to enjoy a fair level of the common patrimony) and “intergenerational equity” (the right of all people within the current generation to fair access to the current generation’s

¹⁰ [1868] L.R. 3 H.L. 330

¹¹ Kurukulasuriya.L and Robinson., (2006) N.A, ‘Training Manual on International Environmental Law’, United Nations Environment Programme, Chapter 03, p.26

¹² IMO,(1990)International Convention on Oil Pollution Preparedness, Response and Cooperation, para 7

¹³ See Preamble and para 7

¹⁴ Article 130r (2)of the Single European Act 1978

¹⁵ Article G (38) TEU)

¹⁶ Paragraph 6,11 & 21of the United Nations Millennium Goals and Millennium Declaration

entitlement to the Earth's natural resources). Next author wishes to examine the level of applicability of the above discussed standards within Sri Lankan environmental laws.

06. SRI LANKAN EXPERIENCE: REFERENCE TO LEGISLATIONS, REGULATIONS AND POLICIES.

According to the Article 27(14) of the 1978 Constitution of Sri Lanka, 'the state shall protect, preserve and improve the environment for the benefit of the community'. Additionally, in Article 28 (f) the citizens have a duty to protect nature and conserve its riches. Against this backdrop the states duty to the environment has been expressed under three avenues, such as, to protect, preserve and improve the environment for the benefit of the community. Therefore, the State should formulate relevant laws and regulations to fulfill its duties.

The National Environmental Act (hereinafter NEA) No 47 of 1980 of Sri Lanka is the central instrument which the legislature has created to fulfill the above mentioned constitutional duties. There are two amendments to the NEA in 1988 and in 2000. The significant feature of the Sri Lankan environmental law is that, it based on the command and control philosophy. The law envisages command and control in many areas. In other words, it mostly attempts to control by commands. When it comes to the control of pollution, it has been considered as a key area of the NEA. The NEA 'adopts three primary approaches to conservation and sustainability, they are; environmental protection, environmental quality and environmental assessment and the approval of projects'¹⁷.

First, we can focus on environment protection under the NEA. Part IV A relates to environment protection seeks to regulate the discharge of pollutants into the environment by means of Environmental Protection Licenses (NEA No 56 of 1988). According to the Section 23A (2) of the NEA (Amended by NEA No 53 of 2000), 'no person shall carry on any prescribed activity except- (a) under the authority of a license issued by the authority and (b) in accordance with such standards and other criteria as may be prescribed under the Act; here we can see a clear command rule. Further, Section 23A (3) of NEA states that, every person who carries on any prescribed activity in contravention of subsection of (2) of this section, shall be guilty of an offence and on conviction be liable to a fine not less than fifteen thousand rupees or to a term of imprisonment not less than one year or to both such fine and imprisonment. This section, just imposes a fine and an imprisonment without calculating the environmental harm. Therefore, the polluter is not actually liable for the real cost of harm which he or she committed. So, it is important to amend this provision to a state where fine based on the environmental harm.

Furthermore, Part IV B of the NEA discuss 'environmental quality'. Under, Section 23H (1) it is stated that; 'no person shall pollute any inland waters of Sri Lanka or Cause or permit to cause pollution in the inland waters of Sri Lanka so that the physical, chemical or biological condition of the waters is so changed as to make or reasonably expected to make those waters or any part of those waters unclean, noxious, poisonous, impure, detrimental to the health, welfare, safety or property of human beings, poisonous or harmful to animals, birds, wildlife, fish, plants, or other forms of life or detrimental to any beneficial use made of those waters' it discuss about the pollution of inland waters of Sri Lanka. Section 23H (3) it discusses about the penalty for pollution of inland waters in Sri Lanka. According to that, 'every person who contravenes the provisions of sub section (1) shall be guilty of an offence, and on conviction shall be-(a) liable to fine not less than fifteen thousand rupees and not exceeding one hundred and twenty thousand rupees, and thereafter in the event of the offence being continued to be committed, to a fine of seven hundred and forty rupees for each day on which the offence is so continued to be committed'. Here too we can see that without considering the cost of the harm polluters will get the same fine, therefore, there is no way to identify the actual cost of the harm. However, in this Section a significant element is included; that is the polluter can continue with the pollution but his fine will be imposed accordingly, yet it does not give any room for the calculation of the impact to the environment. Therefore, we can see the command and control rule rather than finding an avenue for precaution, or prevention. Also at the same time this provision gives a poor acceptance to the PPP.

Under the NEA, the Central Environmental Authority (hereinafter CEA) has been established to control and to administrate environmental issues in Sri Lanka. The establishment of the CEA is discussed under Part I of the NEA. The powers and functions of the CEA are discussed under Part II of the NEA and under the Section 10 (as amended by NEA No 56 of 1988). Accordingly, the CEA is authorized to use the powers of the Act and regulations (section 10(a) NEA). Also, they can undertake surveys and investigations as to the causes, nature, extent and prevention of pollution and to assist and co-operate with other persons or bodies carrying out similar surveys or investigations (Section 10(c) NEA). Under their powers and duties there are more about the powers on administration of environment issues. However, the calculation of environmental harms are poorly addressed under the Act.

Moreover, Section 7 of the NEA discusses the establishment of an Environmental Council and Section 7 (3) speaks about the functions of the Environmental Council, such as to advice the CEA on matters pertaining to its responsibilities, powers, duties

¹⁷ UNEP, (2002), 'General Environmental Principles', A Hand Book for the Sri Lankan Judiciary, Environmental Foundation Limited, p.77

and functions (section 7(3) NEA No 56 of 1988) and to advise the CEA on any matters referred to the Council by the CEA (Section 7(3) (b) NEA No 56 of 1988). Therefore, it plays a merely authorized advisory role, and no sufficient authority has been given even to the Environmental Council to calculate the environmental harms.

Apart from the NEA and statutory provisions, there are Gazette Notification Regulations established to protect the environment of Sri Lanka. These Regulations are established under the provisions of the NEA of Sri Lanka. Gazette No. 1534/18 National Environmental (Protection and Quality) Regulation (01.02.2008 dated) is important in this context. Under this Regulation the issue of Environmental Protection License (hereinafter EPL) for emission or disposal of waste and issue of license for the management of waste is discussed, but it poorly discusses the situation where an EPL holder breaches it harms the environment. It merely discusses about the cancellation of the license but does not focus on the impact to the environment and no provisions are to present to calculate the environmental harm occurred due the violation of the terms of the EPL. It is also important to analyze the Hazardous Waste Regulation¹⁸. Under this 924/13 Regulation, 'every application for a license under Regulation 17 shall be accompanied by a fee calculated on the following basis, collector-Rs. 250(first two years), storer- Rs. 10,000, Transporter- Rs. 2,000, Recycler Rs. 5,000, Disposer- Rs. 100,000 etc.'. However, similar to the previous Regulation the Regulation No. 924/13 gives no provision for calculating environmental harm. Under *Jayawardena v. Akmeemana Pradeshiya Saba and Four Others*¹⁹ (1998) the court focused more on the environmental harm but paid less attention on the calculation of environmental harm. In *Anura Lamahewa v. Habaraduwa Pradeshiya Sabha and two Others*²⁰ (1997), the local authority received a petition from the residents of the area that the petitioner's business was causing hardship and damage to their health. In the judgment, the court focused more on the validity of granting an EPL for the project by the local authority and poor consideration for the calculation of is an environmental harm. *V.D.S. Gunaratne v. Homagama Pradeshiya Sabha*²¹ (1998) is a similar case following the previous case.

Thus, under Sri Lankan law poor consideration is given to the PPP because no provisions are given in calculating the environmental harm. Calculating the environmental harm is a key element of the PPP.

Currently in Sri Lanka the judiciary has taken certain progressive steps to promote the PPP, with the command and control philosophy. Specially in the *Eppawala Phosphate Mining case* Justice Amarasinghe said '.....Today, environment protection, in light of the generally recognized 'PPP', can no longer be permitted to be externalized by economist merely because they find it too insignificant or too difficult to include it as a cost associated with human activity. The cost of environmental damage should, in my view, be borne by the party that causes such harm, rather than being allowed to fall on the general community to be paid through reduced environmental quality or increased taxation in order to mitigate the environmentally degrading effects of the project²². This view shows that Sri Lanka has a poor interest to follow the PPP. However, through judicial interpretations this has been considered. Also through the taxing systems this damage can recovered.

07. CONCLUSION AND RECOMMENDATIONS

The PPP has been recognized within the jurisdiction of the Supreme Court of India, which has held that 'along with the precautionary principle- the PPP is a part of customary international law'²³. The *M.C. Mehta v. Kamal Nath*²⁴ (1997) case extended the liability under this principle not only to compensate the victims of pollution but also to cover the cost of restoring the environmental degradation. This needs to be the current concern. Because restoring the environment to its natural position is of utmost importance otherwise rare environmental resources or rare plants, soil or biodiversity will be damaged severely. This will lead to no or poor access or benefit for the future generation. Therefore, to promote intergenerational equity the PPP plays a significant role. Also, we can't take the PPP as a separate principle to ensure environmental protection and preservation. It needs to relate to principles such as; sustainable development, and the precautionary principle. In Sri Lanka, the NEA identifies certain amounts of fines and other penalties but gives poor consideration to the calculation of the environmental damage, but through certain judicial interpretations this principle has obtained certain recognition.

Consequently, giving an effective and practice interpretation to these international principles, eliminating political influences, strengthening the rule of law, introducing a method and a mechanism to calculate the environmental damage, identifying a mechanism to compensate victims of the environmental harms, granting sufficient powers to the CEA in calculation of the

¹⁸ Gazette No. 924/13 of 23.05.1996

¹⁹ [1998] 1 Sri. L.R 316

²⁰ [1997] 4 Sri. L.R 55

²¹ [1998] 5 Sri. L.R 28

²² S.C(F/R).. Application No. 884/99

²³ Kurukulasuriya.L., (2003) 'The Role of the Judiciary in Promoting Environmental Governance and the Rule of Law', Global Environmental Governance: the Post Johannesburg Agenda, UNEP, p.12

²⁴ 1997 (1) SCC 388

harm, reducing statutory ambiguities in the main environmental legislations and Gazette notifications, and making awareness about such principles to the public are some recommendations that can be made based on above literature review.

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