

The Application of Public Trust Doctrine as a Mechanism to Ensure Environmental Protection by Means of Law: A Comparative Analysis between Sri Lankan and Indian Legal Context

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Abstract— World community is nowadays largely focused on the process of achieving sustainable development. In this process the public trust doctrine (PTD) is the most promising legal norm upon which the citizens can rely to realize their right to a sound environment. The main idea behind this doctrine is that the government as the trustee of the natural resources must manage them in the sole interest of its citizens. Thus in order to achieve sustainable development and inter-generational equity the public trust doctrine provides the legal foundation which imposes accountability upon the government of maintaining the environment in the interest of the public. The PTD appears in International treaties as well as in domestic laws. India is a country where the Public Trust Doctrine was highly applied in deciding environmental issues. Therefore, the main objective of this research is to analyze how Sri Lankan legal jurisdiction applies this doctrine as a tool to guarantee environment protection and sustainable development with special attention to the application of this doctrine in Indian law. This research focuses on the problem of whether the public trust doctrine can be applied as an effective mechanism for ensuring the protection of the environment ultimately realizing sustainable development. As India has developed public trust doctrine as an effective mechanism to ensure the realization of the right to a sound environment, in Sri Lanka this is an area which requires further developments. The researcher intends to adopt qualitative research methodology to conduct this research. The researcher will examine the necessary conventions, treaties, journals, relevant domestic laws as primary sources and books, journal articles will be used as secondary sources.

Keywords-Public Trust Doctrine, Sri Lanka, India

I. INTRODUCTION

The rapid development of the technology, growing population, industrialization, expansion of new sources of energy etc. have led to a threat of losing the balance of the eco system of the world. This has led to variety of environmental issues such as deforestation, pollution,

loss of bio diversity, global warming, climate changes etc. Thus world community now largely focused on the achieving balance between economic development and environmental protection. In the last decades a large number of international conventions, declarations, protocols and other legal instruments have been introduced which are largely focused on achieving sustainable development, Inter-generational equity and they address wide range of environmental issues. Apart from the conventions and other legal instruments, The United Nations Conference on the Human Environment (Stockholm 1972), The World Charter For Nature drawn up by World Conservation Union, The World Commission on Environmental Development, The United Nations Conference on Environment and Development, The World Summit of Sustainable Development are some of the great examples which shows the positive approach of the world community in protecting the environment.

The importance of environmental protection was emphasized by the Justice Weeramanthri in the case concerning the Gabcikovo- Nagymaros project, Hungary v Slovakia(1997) where he stated that “..... After the early formulations of the concept of the development, it has been recognized that development cannot be pursued to such a point as to result in substantial damage to the environment within which it is to occur. Therefore development can be prosecuted in harmony with the reasonable demands of environmental protection. Whether development is sustainable by reason of its impacts on the environment will, of course, to be questioned to be answered in the context of the particular situation involved....”

In order to achieve sustainable development and inter-generational equity, the public trust doctrine is the most promising legal norm which imposes accountability upon the government to manage the environment for the sole interest of the citizens. The public Trust Doctrine has its roots in both Roman law and English common law.

The Roman emperor Justinian in his Justinian code pronounced that "By the law of nature these things are common to mankind--the air, running water, the sea, and consequently the shores of the sea. No one, therefore, is forbidden to approach the seashore" Thus it highlights these recourses cannot be held for private ownership, but commonly dedicated for the benefits of the public.

In English common law The Public Trust Doctrine was developed through the concept of the equity. In the early case *Gann v Free Fishers of Whitstable*(1865) it was upheld the Public Trust Doctrine by the House of Lords stating that "...the bed of all navigable rivers here the tide flows, and all estuaries or arms of the sea, is by law vested in the crown. But this ownership of the crown is for the benefit of the subject..."

Present, The United Nations also has accepted the Public Trust Doctrine through its conventions and declarations. Principle 2 of the Rio Declaration provides that States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

The Stockholm Declaration of United Nations on Human Environment also emphasises the Public Trust Doctrine and principle of Inter- generational Equity. It provides that "The natural resources of the earth including air, water, land, flora and fauna and especially representative samples of natural system, must be safeguarded for the benefit of present and future..." Further the World Heritage Convention and Treaty on Plant Genetic Resources for Food and Agriculture also includes the notion of trusteeship for beneficiaries.

This Doctrine gained its acceptance in International Environmental law in *Hungary v Slovakia* case (1997) when Weeramanthri J. Pronounced that "...the natural recourses are not individually, but collectively, owed and a principle of their use is that they should be used for the maximum use of the people. There should be no waste and there should be maximization of the use of plant and animal species, while preserving their regenerative powers. The purpose of the development is the betterment of the condition of the people....".

II. THE APPLICATION OF THE PUBLIC TRUST DOCTRINE IN INDIAN JURISDICTION.

Before adopting Public Trust Doctrine in India, it was applied in settling environmental issues within the United States legal frame work. In the case *Illinois Central Railway Co. v. Illinois* (1892) it concerns the legislature granting estate lands underlying the Lake Michigan to a private company. The Supreme Court of the United States held that navigable waterways were to be held in trust for the benefit of the entire population. Through this judgement the US Supreme court has attempted to protect the natural recourses highlighting the fact that the state does not have power to grant waterways to private companies, but such water recourses are meant for public use.

After the judgement of this case there was a tendency of adopting state legislations concerning the protection and preserving the environment incorporating with the public trust doctrine. In United States the Public Trust Doctrine is incorporated in most of the statutes relating to water resources management in most of the states including California, Minnesota, Wisconsin, Texas, Vermont etc. For an example Texas water code 2009 sec. 11.0235 provides that waters of the state are held in trust for the public and the right to use the state water may be appropriated only as expressly authorized by law.

Following the decisions hold by the United States, India uphold the Public Trust Doctrine in environmental issues for the first time in the case *Mc. Mehetha v Kamal Nath*(1997). In this case it dealt with a private company building a club encroaching the substantial forest land. The regulations were made and the lease was entered when the Nath was the Minister of the Environment and Forest who also had the direct links with the private company. As a result of the encroachment there had been swelling of the Beas river and change in the course of the river. Kuldip Singh J. Delivering the judgement and applying the Public Trust Doctrine stated "... The ancient Roman Empire developed a legal theory known as the Doctrine of the public trust. It was founded on the idea that certain common properties such as rivers, seashore, forest and air were held by the government in trusteeship for the free and unimpeded use of the general public..... under the English common law, however, the sovereign could own these recourses but ownership was limited in nature; the crown could not grant these properties to private owners if the effect was to interfere with the public interests in navigation and

fishing....” Further court stated that “ ... our legal system-based on the English common law- includes the public trust doctrine as part of its jurisprudence. The state is the trustee of all natural resources which are by nature meant for public use and enjoyment. Public at large is the beneficiary of seashore, running waters, air, forests and ecologically fragile lands. The state as a trustee is under a legal duty to protect the natural resources. The resources meant for public use cannot be converted in to private ownership....” More over in delivering the judgement court cited several US judgements including the famous *Mono lake case (1983)* which stated that the public trust is more than an affirmation of the state power to use public property for public purposes. Court held that lease should be cancelled and awarded compensation for the damages caused to the environment.

Thus in this case court used PTD as a mechanism to protect the natural resources emphasizing that it is paramount obligation of a state to protect its natural resources for the benefit of its citizens. More over this case points out that although the state is the trustee of the natural resources, the powers vested upon the state is subjected to the interest of its citizens. And also by awarding the compensation it invokes the polluter pays principle. The court had the power to grant such compensation because through the PTD it has imposed an obligation upon the state to protect its natural resources. This is a landmark case in Indian environmental law where Supreme Court of the India adopted public trust doctrine for the first time in India in environmental matters.

Following the judgement in the Kamal Nath case, in the case *Th. Majra Singh v Indian oil corporation (1998)* it affirmed that the Public Trust Doctrine has become a part of the Indian legal system. In this case petitioner objected locating a plant for filling cylinders with petroleum gas. Court decided that the doctrine is incorporated with the article 21 of the Indian Constitution which deals with the protection of life and personal liberty. It was stated in this case that, there can be no dispute that the state is under an obligation to see that forest, lakes, wild life and environment are duly protected.

In the case *M.I Builders v Radhey Shyam Sahu (1997)* it challenged the decision of the Lucknow Nagar Mahapalika permitting a private company to build a

underground shopping complex in a historical park. The builder was also given permission to lease out the shops in the complex according to its own terms and conditions. Court decided that it deprived the citizens their amenity of the old historical park. It was observed by the court that handing over the land of immense value to a private company for the construction is a violation of the public trust doctrine since maintenance of the park was a public purpose due to its historical and environmental importance. Further it was held that construction was led to depriving citizen's right to a quality life guaranteed by the constitution. It is important to note that court applied the Public Trust Doctrine alone with the article 21 of the Constitution and give effect to it as a part of right to safe and healthy environment.

There are recent cases reported in India which applied this doctrine and further developed Indian jurisdiction relating to Public Trust Doctrine.

In the case *Intellectuals forum, Thirupathi v State of AP and others (2006)* the petitioner challenged the alienation of tank bed lands for housing purposes. The petitioners asserted that it amounts to violation of the Public Trust Doctrine and indicates the failure of the authorities to protect the environment. In this case court recognizing the Public Trust Doctrine stated that “... When the state holds the resource that is freely available for the use of the public, it provides a high degree of judicial scrutiny upon any action of the government, no matter how consistent with the existing legislations, that attempts to restrict such free use. To properly scrutinize such actions of the government the court must make distinction between the government's general obligation to act for the public benefit and the special more demanding obligation which it may have as a trustee of certain public resources....” This case highlights that sovereign holds in trust for common good where the public has the right to protection of the natural resources. Thus citizens are entitled to use PTD as a tool to protect the natural resources for their interest and to impose an obligation upon the government to protect the natural resources.

In another recent case ie. *Karnataka Industrial Areas Development Board v c. Kenchappa and others (2006)* similar view was adopted. The petitioner was affected by the acquisition of lands of different villages, filed a writ petition under Article 226 of the Constitution of India with a prayer that the appellant Karnataka Industrial Areas Development Board be directed to refrain from

converting the lands of the respondents for any industrial or other purposes and to retain the lands for use by the respondents for grazing their cattle. In this case it was observed that experience of the recent past has led to the realization of the deadly effects of development on ecosystem and the entire world is facing a serious problem of environmental degradation due to indiscriminate development. The court held that the Public Trust Doctrine requires that the reasonable balance is struck between the development and the protection of the environment.

The basis of this decision is that these resources are so inherently common in their nature that their permanent assignment to exclusive, private ownership is inappropriate. Further this judgement reflects how PTD underline achieving the sustainable development by protecting natural resources.

In addition in most of the states in India including, Kerala, Tamilnadu, Rajasthan they have passed legislations relating to environmental protection incorporating with the Doctrine of Public Trust. For an example in the case *Perumatty Grama Panchayat v. State of Kerala (2003)* it was upheld the Public Trust Doctrine.

Therefore it is clear that in India The Public Trust Doctrine has applied by the Indian courts in deciding environmental matters and thereby it is firmly located within the laws and principles relating to environmental law.

III. THE APPLICATION OF THE PUBLIC TRUST DOCTRINE IN SRI LANKAN JURISDICTION.

When considering about the evolution of Public Trust Doctrine in Sri Lanka it runs in to the period when arhat Mahinda arrived in Sri Lanka and preached to king Dewanapiyathissa that even birds and animals have a right to live and remembered that he is only the guardian of the land.

The constitution of Sri Lanka by article 27(14) provides that the state shall protect, preserve and improve the environment for the benefit of the community. Furthermore article 28(f) it imposes a responsibility upon every person in Sri Lanka to protect nature and conserve its riches. Even though these are state directive principles and does not have a binding effect one, cannot simply ignore this since they are included in the fundamental law of the country, the constitution.

Bulankula v Secretary, Ministry of Industrial Development (2000) is a significant case with regard to application of Public Trust Doctrine in environmental matters in Sri Lanka. In this case petitioners filed the case challenging the Phosphate mining in Eppawala stating that their Fundamental rights are violated. The Government entered in to an agreement with a US company for mining of the said phosphate and export. There was a widespread concern that such mining would bring negative environmental impacts. In this case Amarasingha J pointed out the connection between article 3 of the constitution and Public Trust Doctrine. He stated that "... the constitution declares that the sovereignty is in the people and is inalienable. Being representative democracy the powers of the people are exercised through persons who are a time being entrusted with certain functions...." In this case (*Bulankulama case*) the natural environment is protected by virtue of the PTD underlying the fact that it is immoral and illegal for private parties to arrogate natural resources which provided by the nature and what is necessary for humans health and happiness. By this agreement even though the economical benefits may gain, on the other hand villagers right to sound environment will be violated. Therefore this judgement can be considered as a very progressive judgement where court used PTD as a tool to protect natural resources and impose an obligation upon the state to protect such resources.

Further Citing the decision of the Weeramanthri J. In *Hungary v Slovakia* he Amarasingha J established that the state is the guardian who is required to exercise the power in the trust.

Furthermore, he extended the Public Trust Doctrine to a broader sense through the idea of shared responsibility. The idea of shared responsibility is significant because it imposes responsibility upon all the organs of the government to protect the environment as well as responsibility is vested upon all the people to protect the environment.

In the case *Wattegedara Wijebanda v Conservator General of Forest and Others (2004)* the petitioner was a person who was subjected to refusal for granting a permit for mining of quarry in close to a national reserve. In this case Shiranee Tilakawardana J stated referred to the judgment in the *Bulankulama case* and stated that public trust doctrine requires all the organs of the state

to ensure that all the natural resources are protected and preserved for public benefit. More over it was stated that state must consider the principles of sustainable development, inter- generational equity, Public Trust Doctrine in making any decision relating to natural resources.

In the case *Environmental Foundation Ltd. V Urban Development Authority of Sri Lanka and Others (2004) – Galle face Green case*, there had been an attempt made by Urban Development Authority to lease out the Galle face green to a commercial entertainment company . The petitioner who was a registered environmental NGO made a request for further information and it was refused by the UDA. In this case a one of the issues addressed by the court was whether UDA had the authority to leaseout the Galle face green. Here it was considered the fact that Galle Face Green has been open to the public, established and maintained as a public utility for the past 150 years. Court stated that”.... The Galle Face Green should be maintained as a public utility in continuance of the dedication made by Sir Henry Ward and necessary resources for this purpose should be made available by the government of Sri Lanka, being the successor to the colonial governor who made the dedication....”.Therefore court held that the agreement is ultra vires and no force or avail in law. Further it was held that Galle Face Green should be maintained as a public utility. This judgement also articulates the Public Trust Doctrine.If the commercial entertainment company was build, then the general public has to pay money to enter in to Galle face green and also environment of the gall face green will also be polluted due to commercial activities. Therefore by invoking PTD in this case court has prevented such violation of natural recourses by private entities.

In *SugathapalaMendis and Others v C.B Kumarathunga and Others (2007)* the petition was filed challenging the transfer of a land of the state dedicated for public use to a private golf course. The court observed the importance of protecting bio diversity rich areas and pointed out that the government should protect environment for the benefit of the citizens and to avoid inconveniences and disasters.If this private Golf course was constructed the ordinary people will not be able to access the area for which they had the access earlier. The construction can also cause damages to the environment. Therefore court very correctly used PTD and protected the natural

resources in the area as well as recognized the environmental justice.

Further in 2003 when Supreme Court determined the water resources’ bill court made an order against the privatization of the water resources. In this case court held that since water resources amounts to natural heritage of people , the law which deals with privatisation of water resources’ required special majority in the parliament and approval of the people at a referendum.

IV.CONCLUSIVE REMARKS.

The Public Trust Doctrine has its roots both in Roman law and English common law. PTD can be effectively used in the cases concerning the environmental matters.

When analysing the case laws it is evident that state is not the owner of the natural resources, but the trustee of them, who is obliged to protect, preserve and improve them for the benefit of the public. Thus state is bound to protect the natural resources for the interest of the people and generations yet to come. It also stresses the importance of striking balance between development and environmental protection.

Countries like US and India has developed this doctrine through the case laws indeciding environmental matters and has used this doctrine as an effective tool to safe guard the people’s right to sound environment, right to life and right to health. Most of the recent cases reported in Sri Lanka concerning environmental matters indicate that the Public Trust Doctrine is part of the Sri Lankan law and has expanded this doctrine as to include the idea of the shared responsibility by the case laws. The Public Trust Doctrine has become a significant plat form to ensure the environmental justice today.

Though the developments are needed the state must take necessary care to ensure that such developments are not against the environment and rights of the people. Though there are instances where Sri Lankan courts have effectively upheld the Public Trust Doctrine it is recommended that in deciding environmental matters judges have a significant and active role to play in order to interpret the doctrine to realize the rights of the people. As it is most correctly stated by the Justice Bhagawathi in Global Judges Symposium on sustainable Development and the Role of Law, judges should create laws. In developing environmental law judges have to keep in mind the balance which has to be achieved within human rights which also consists with right to development and environmental protection.

And also it is suggested that the law making bodies and law implementing bodies should have the idea in mind that they are the trustee of the natural resources for which the citizens are the beneficiaries. Not only that, but also every citizen of a country has a responsibility to protect and preserve the environment in order to safeguard the rights of the generations yet unborn.

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