IMPACT OF ESTABLISHING SPECIALIZED ENVIRONMENTAL TRIBUNALS: LESSONS FOR SRI LANKA

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Abstract

The judiciary plays a unique and distinct role in the environmental enforcement chain by bringing about a judicious balance between ecological interest and economical interest. Thus, as a modification of International Environmental Law, for an enhanced environmental adjudication, Environmental courts and tribunals (ECTs) were introduced and now this has become a dynamic substitution to the general courts, for providing better access to environmental justice. There has been an exponential growth in ECTs irrespective of the nature of the country. But in Sri Lanka, still environmental adjudication is done through regular courts. So the problem is whether that environmental adjudication is effective under ordinary courts or whether Sri Lanka requires a separate judicial body for environmental adjudication.

Accordingly, the objectives of this article are to discuss whether Sri Lanka has an authentic requirement of a separate judicial body for environmental adjudication, to analyze the drawbacks of existing Environmental adjudication in Sri Lanka and to propose an ideal model and code of best practice for Sri Lanka. For this purpose, this study examines Environmental Tribunals, function in India and Pakistan. This article follows a qualitative legal research methodology based on both primary and secondary sources.

Introduction

Since the era of *Hominid Primates,* 25 million years ago up to *Homo sapiens* today, the relationship between man and the environment is tightly woven

with each other. Various religious teachings of the great teachers, such as Lord Buddha, Prophet Muhammad, and Christ all have told that the resources of the Earth belong to the Earth and that man is only the trustee of those resources and that he should be very careful in handling such resources. Correspondingly the environmental rule of law requires adherence to environmental laws and emphasizes the need to establish strong and effective frameworks of justice, governance, and law for environmental sustainability. Based on this pledge there should be a healthy relationship between all living beings on the planet and a careful appropriation of its resources particularly by human kind. However, at present, this constancy has changed due to the involvement of human activities which destroy the environment and ultimately initiated a dispute.

Environmental disputes have an impressive history and it's not something novel. For an example famous cases such as the *Pacific Fur Seal case (1893)*[1] the *Trail Smelter case (1941)*[2] and the *Lac Lanoux case* (*1957*)[3] can be considered. In fact, in all these well-known cases, the main reason why a dispute came in to exist was due to the clash between economic interest and ecological interest. The Judiciary is the crucial partner in bringing about a judicious balance between these two interests and in promoting a culture of compliance with legal norms and standards. Therefore, there is a very crucial necessity of striking a balance between these two competing interests.

Concept of ECTs

However, with the passage of time, the number of environmental disputes has drastically increased and the dissatisfaction of the general court system due to numerous reasons was emphasized. Therefore, as a dynamic alternative to the general courts, for providing better access to environmental justice, judicial courts

[1] Which concerned a dispute between the United Kingdom and the United States as to the circumstances in which the United States could interfere with British fishing activities on the high seas.

[2] Which was between United States and Canada, concerned the trans boundary pollution by sulphur deposits originating from Canada onto United States territory.

[3] Which was between France and Spain concerning the circumstances in which one State made lawfully use of shared international waters.

and administrative tribunals which are known as Environmental Courts and Tribunals (ECTs) that specialize in adjudicating environmental, resource development, land use, and similar litigation[4] became a worldwide phenomenon and one of the most dramatic developments[5] in modern environmental law.

Simply, Environmental Courts and Tribunals (ECTs) are "public bodies or officials in the judicial or administrative branch of government, specializing in adjudicating environmental, resource development, Land use and related disputes[6]. The starting point for the development of ECTs came about with the 1972 UN Conference on the Human Environment in Stockholm. Then the first environmental courts and tribunals were created in Japan, Denmark, Ireland and in a Canadian province (Ontario) as a response. However, it is not until the 1992 UN Conference on Environment and Development in Rio de Janeiro that the real booming ECT development occurred. The main stimulus behind the global exponential increase of ECTs was the Principle 10 of the Rio Declaration[7].

The rationale for special ECTs is that because many environmental issues are assumed to be highly complex and technical, they require specialized institutions for evaluation of claims and evidence.[8] Starting from only a handful

[4] George (Rock) Pring and Catherine (Kitty) Pring, '‘ Environmental Courts and Tribunals ’' (*University of Denver Environmental Courts and Tribunals Study*, 2016) <http://www.law.du.edu/documents/ect-study/Encyclopedia-Chapter-on-ECTs-2016.pdf> accessed 19 September 2019.

[5] George (Rock) Pring and Catherine (Kitty) Pring, 'The future of environmental dispute resolution' (*Denver Journal Of International Law & Policy*, 10 January 2013) <http://www.law.du.edu/documents/ect-study/Pring-Macro-FINAL-3-15-12.pdf> accessed 20 September 2019.

[6] George (Rock) Pring and Catherine (Kitty) Pring, '‘ Environmental Courts and Tribunals ’' (*University of Denver Environmental Courts and Tribunals Study*, 2016) <http://www.law.du.edu/documents/ect-study/Encyclopedia-Chapter-on-ECTs-2016.pdf> accessed 15September 2019.

[7] Rio Declaration on Environment and Development 1992, United Nations ,Principle10 ; http://www.jus.uio.no/lm/environmental.development.rio.declaration.1992/portrait.a4.pdf *Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities and the opportunity to participate in decision---making processes. States shall facilitate and encourage public awareness and participation by making in formation widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.*

[8]Benjamin Richardson and Jona Razzaque, 'Public Participation in Environmental Decision-making' (9 December 2005) <http://s3.amazonaws.com/academia.edu.docu

in 2000, there are now more than 1,200 environmental courts and tribunals (ECTs)[9] flourishing in many countries in all types of legal systems by 2016. It clearly shows that the role of the judiciary in environmental adjudication continues to not only to grow in importance but an institution to further expand and be strengthened in the future.

In a world of diminishing resources with the exponential population growth and rapid development, escalating environmental disputes are common phenomena. Hence Sri Lanka has proven to be **no exception** to this global trend. Typical environmental disputes in Sri Lanka are like trespass, nuisance and toxic tort cases between private parties, environmental cost recovery cases, and environmental enforcement proceedings.

In such instance the immediate step followed is filing a complaint at the police station or directly informing the Central Environmental Authority, by the victimized party himself or by a third party like a Non-governmental Organization (NGO). However, ultimately in seek of justice this case is heard before an available ordinary court which could be the Magistrate Court or the Court of Appeal or the Supreme. However, due to common obstacles in those ordinary courts, such as being long delays, huge case backlogs, poor case management, lack of environmental expertise, narrow definitions of plaintiff standing, lack of consistent decisions, intimidation, and corruption; justice, which the parties deserve is denied or delayed which makes affected parties and the environment itself suffer to a point beyond repair during that period.

But in other developing countries like India, Pakistan, and Bangladesh and as well as developed countries like Australia, New Zealand, United States, they have a separate specialized judicial body, namely the Environmental Court or Environmental Tribunal, which offers a pragmatic solution to the environmental legal disputes (which

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ments/6979284/07_ch06.pdfopenelement.pdf?AWSAccessKeyId=AKIAJ56TQJRTWSMTNPEA&Expires=1477714600&Signature=Oz%2F99%2B5fxAmgJKFhrp5lbMYcymc%3D&responsecontentdisposition=inline%3B%20filename%3DPublic_participation_in_environmental_de.pdf> accessed 21 September 2019.

[9] George (Rock) Pring and Catherine (Kitty) Pring, '‘ Environmental Courts and Tribunals ’' (*University of Denver Environmental Courts and Tribunals Study*, 2016) <http://www.law.du.edu/documents/ect-study/Encyclopedia-Chapter-on-ECTs-2016.pdf> accessed 19 September 2019.

includes claims from administrative matters, such as planning permission, to serious prosecutions involving environmental contamination) under environmental adjudication.

Environmental law principles and legal concepts relevant for ECTs

Environmental governance and Environmental rule of law are vital concepts regarding ECTs. People's rights of access to information, access to public participation and access to justice in environmental matters are considered as the "3 Pillars" of the environmental rule of law[10]. The third pillar "access to justice" as articulated in Principle 10 of the Rio Declaration is now seen as the primary driver of ECTs. Further, in the development of ECTs, there is a growing body of international environmental law principles. These are the international precepts that are emerging as guidelines in treaties, decisions and scholarship, but may not yet be viewed as enforceable "hard law."[11] These principles are Sustainable Development, Integration and Interdependence; Inter-Generational and Intra-Generational Equity; Responsibility for Trans boundary Harm; Transparency, Public Participation and Access to Information and Remedies; Cooperation, and Common but Differentiated Responsibilities; Precautionary Principle; Prevention; Polluter Pays Principle; Access and Benefit Sharing regarding Natural Resources; Common Heritage and Common Concern of Humankind; Good Governance

How ECTs differ from other courts?

An ECT is different from the general courts because it specializes in environmental cases and has adjudicators trained in environmental law. They are specialized simply for the reason to provide a pragmatic solution to the environmental legal disputes in relation to complex environmental issues. Environmental courts (ECs) range from fully developed, independent judicial branch bodies with highly trained staffs and large budgets

[10] George Pring and Catherine Pring, 'Environmental Courts & Tribunals A Guide for Policy Makers' (2016) <http://www.unep.org/environmentalgovernance/Portals/8/publications/environmental-courts-tribunals.pdf> accessed 25 September 2019.

[11] ibid.

all the way to simple. Environmental tribunals (ETs) range of complex administrative-branch bodies chaired by ex-Supreme Court justices with law judges and science-economics-engineering PhDs, to local community land use planning boards with no law judges[12]. Unlike other courts, ECTs have very comprehensive powers, including civil, criminal and administrative law powers combined. Also, some have jurisdiction over the country's full range of both environmental and land use planning/development laws, while others are limited to one such as the adequacy of environmental impact assessments (EIAs).

Current environmental law status of Sri Lanka

Sri Lanka being a developing country in the South Asian region often encounters environmental disputes such as issues arising due to pollution, environmental administration and violation of environmental laws etc. Constitution of Sri Lanka contains two references to the environment. First, under the 'Directive Principles of State Policy' in Chapter VI, the State is required to 'protect, preserve and improve the environment for the benefit of the community[13]. Secondly, under the section on 'fundamental duties' in the same chapter, it is the duty of every person in Sri Lanka 'to protect nature and conserve its riches'[14]. Thus, there is a shared responsibility between the state and the community to ensure environmental protection. These Directive Principles have today been linked to the 'public trust' principle and should guide state functionaries, from lowest to highest, in how they exercise their powers[15]. Also environment related issues are declared within the ambit of fundamental rights, under **Article 12 (1)**[16] and in some cases under **Article 14**[17].. The Supreme Court

[12] ibid.

[13] Article 27(14) of the Constitution of Sri Lanka. These Directive Principles are supposed to 'guide Parliament, the President and the Cabinet of Ministers in the enactment of laws and the governance of Sri Lanka under Article 27(1) of the Constitution of Sri Lanka.

[14] Article 28(f) of the Constitution of Sri Lanka.

[15] Per Justice Tilakawardane in *Sugathapala Mendis v Chandrika Bandaranaike Kumaratunga* S.C.F.R. 352/2007, S.C. Minutes of 01.10.2008 (the Water's Edge case).

[16] All persons are equal before the law and are entitled to the equal protection of the law.

[17] In the *Environmental Foundation Ltd., v. Urban Development Authority of Sri Lanka* S.C.F.R. 47/2004 (Galle Face Green case) already referred to, the Environmental Foundation

has also allowed environmental organizations to intervene in environment-related cases filed by private parties[18]. The writ jurisdiction conferred by Article 140 of the Constitution is one of the principal safeguards against excess and abuse of executive power. It is linked to the 'public trust' doctrine[19]. **Chapter IX of the Code of Criminal Procedure Act under Section 98 (1)**[20] Public Nuisances empowers a Magistrate to make orders. An action for public nuisance is criminal in nature and not a 'sui generis' action. Hence there is a right of appeal to the High Court of the relevant province under Chapter XXVIII of the Code of Criminal Procedure[21]. The National Environmental Act[22] (NEA) is the most important piece of substantive legislation which has extensive provisions on pollution control, regulation of development activities and preparation of management plans for the protection of the environment[23]. The Environmental Protection License (EPL) and the Environmental Impact Assessment (EIA) are two important tools introduced by the NEA to integrate environmental protection in the

Limited invoked Article 12(1) along with Articles 14(1)(a) and 14(1)(g).

[18] Al Haj M.T.M. Ashik v R.P.S. Bandula, OIC Weligama, (the Noise pollutioncase) S.C.F.R. No. 38/2005, S.C. Minutes of 09.11.2007. Reported in 'Some Significant Environmental Judgments in Sri Lanka', pub. Environmental Foundation Limited at p.1the Environmental Foundation Limited which was not a party to this case, which involved a dispute between two groups wanting to use loudspeakers, was permitted to intervene as amicus curiae on behalf of the public.

[19] '*Powers vested in public authorities are not absolute and unfettered but are held in trust for the public, to be exercised for the purposes for which they have been conferred, and that their exercise is subject to judicial review by reference to those purposes' ;* Fernando, J. in Heather Therese Mundy v Central Environmental Authority S.C. Appeal 58/2003, S.C. Minutes 20.01.2004.

[20]Section 98 (1) Code of Criminal Procedure Act No. 15 of 1979 (as amended).

any unlawful obstruction or nuisance in any public way, harbour, lake, river or channel; any trade or occupation or the keeping of any goods or merchandise that is injurious to the health or physical comfort of the community; the construction of any building or the disposal of any substance that is likely to cause conflagration or explosion; any building or tree that is in such condition that it is likely to fall and injure passers by;any tank, well or excavation adjacent to any public way or place which may be a danger to the public.

[21] Sections 316 – 330 of the Code of Criminal Procedure and Fernando v Cooray, [1991] 1 Sri L.R. 281; (1999) 6 S.A.E.L.R 31.

[22] Act No. 47 of 1980 (as amended).

[23] Bakary Kante, 'Judges & Environmental Law A Handbook for the Sri Lankan Judiciary' (2009) <http://www.unep.org/delc/Portals/119/publications/judges-environmental-law-sri-lankan-judiciary.pdf> accessed 1 October 2019.

economic development process. Further, the Coast Conservation Act[24], Fauna and Flora Protection Act[25], Forest Ordinance contain provisions to ensure that environmental concerns are considered during development activities.

Therefore, often calling cases before ordinary courts could either be a public Nuisance case, breach of a Fundamental Right case, Violation of an EIA or EPL and any other violations of aforementioned acts and ordinances. However, unlike other ordinary matters such as land disputes, divorce matters that ordinary courts often encounter, environmental matters are more sensitive. Simply the result cannot be seen right at that moment and perhaps results might be more severe than the action.

Violations of environmental laws often result in damage to health and property. Therefore, affected persons need to be compensated and the wrongful actions should be halted; Sometimes the law expressly provides for enforcement of the 'polluter pays' principle by which the polluter is made to bear the cost of environmental restoration. But in reality, it is hard to achieve these motives due to many problems.

The first problem is the long delays that occur in general courts. General court dockets in Sri Lanka are overloaded, and it may take years for a filed case to be heard. Time is money and delays are costly. Hence, for citizens, public interest groups and lawyers these delays mean environmental damage which is irreversible.

The second problem with general courts is that they frequently present more than a temporal delay. People's access to justice can be restricted by complicated filing procedures, lack of knowledge about the courts[26], limited understanding about the issue and how to challenge it, substantial physical distance between the location of the controversy and the location of the court, minimal to no institutionalized procedures for public participation, narrow court standing requirements etc.

Lack of scientific and technical expertise limits the competence of the general jurisdiction court, which generally must rely on the testimony of

[24] Act No. 57 of 1981 (as amended).

[25] Act No. 2 of 1937 (as amended).

the parties' expert witnesses for information. Most general court judges and juries do not have the expertise to evaluate expert testimony or to predict probable outcomes, a crucial gap given the complex issues that can arise in environmental cases.

Lack of technical competence or interest may even result in a judge's unwillingness to set a complicated case for hearing.

So due to these drawbacks come across before general courts (as stated by legal practitioners and the legal experts), environmental justice and the rule of environmental law are not being delivered to citizens in a way that is accessible, fair, fast, and affordable.

Ideal model for Sri Lanka: TRIBUNAL or COURT?

There are many different models of ECTs around the world. ECTs can be either courts or tribunals both reflecting the social, economic and environmental characteristics of the country. Some are free standing and independent, while others are captives inside the agency whose decisions, they review[27].

Courts are required to be comprised of judges who usually come from a legal background. Hence Law-trained judges are the typical decision makers. The proceedings are presided over by a judge or a magistrate and have a strict code of procedure. Therefore, Judges have to comply with court rules and the processes of the adversary system.

Unlike courts, tribunals deal with more specialized matters. Thus, they provide specialized adjudications. Due to this narrow focus, it makes easier to adjudicate on specific matters in an efficient and expert manner. Unlike a judge, a specialist or an expert in the subject matter in which the tribunal adjudicates can involve in decision making. Tribunals are created via legislation and have much more flexibility in their structure and functioning, both with regard to procedure and evidence. Therefore, members can play a more active role in the proceedings. Also, tribunal members may adopt an inquisitorial role and use more creative means to help the parties achieve justice. Due to the informal and consequently fewer

[27] George Pring and Catherine Pring, 'Environmental Courts & Tribunals A Guide for Policy Makers' (2016) <http://www.unep.org/environmentalgovernance/Portals/8/publications/environmental-courts-tribunals.pdf> accessed 2 October 2019.

intimidating proceedings, it reduces the cost and duration of the litigation.

Therefore, when deciding whether an Environmental Court (EC) or a Tribunal (ET)is to be established, a practitioner will be better suited with a tribunal being established. Because generally an environmental issue combines both law and science. because unlike a court, a tribunal can be given all civil, criminal and administrative jurisdictional powers since it focuses on one category. Further, in contrast to courts which are bound by the previous decisions, tribunals generally assess each matter on its individual merits.

The UN Environment ECT study has identified 3 different types of environmental tribunals (ETs), based on their decision-making independence[28]: (1) Operationally Independent ET (separate, fully or largely independent environmental tribunal which are not under the control of another government agency, department, or ministry) ; (2) Decisional Independent ET (under another agency's supervision, but not the one whose decisions they review) and (3) Captive ET (within the control of the agency whose decisions they review). This study emphasizes that from the 3 types of tribunals aforementioned ET of Sri Lanka should not be an independent tribunal which becomes isolated from the public and stakeholders, but better to have an Independent ET which is under another agency's supervision, but not the one whose decisions they review.

Even India and Pakistan have ETs and both are independent ETs. India initially, used the Supreme Court as the access point for parties to voice their environmental concerns via public interest litigation, and recently restructured the process towards an independent National Green Tribunal with a two-tiered system[29]. The National Green Tribunal Act of 2010, recently enacted in India led to the establishment of the National Green

[28] George Pring and Catherine Pring, 'Environmental Courts & Tribunals A Guide for Policy Makers' (2016) <http://www.unep.org/environmentalgovernance/Portals/8/publications/environmental-courts-tribunals.pdf> accessed 5 October 2019.

[29] Ria Guidone, 'Environmental Court Tribunals , An introduction to national experiences, lessons learned and good practice example' <http://foreversabah.org/wp-content/uploads/2016/06/Environmental-Courts-Tribunals-Legal-Innovation-Working-Paper-No.1-2016.pdf> accessed 4 October 2019.

Tribunal. The Pakistan Environmental Protection Act PEPA introduced a separate, comprehensive judicial institutional framework[30], including environmental tribunals and environmental magistrates in Pakistan.

How the environmental tribunal of Sri Lanka be proposed?

Regardless of the model chosen; what matters is the best practice of it. The best practices can be divided into two categories depending on the stage of planning, design-stage and operating-stage. Design best practices should be considered during the planning and creation stage of the ECT; operating ones can be assessed after the ECT is implemented. Operating best practices include both procedural and substantive, that promote access to justice and the rule of law[31]. This ET can educate the public, stakeholders, government officials, attorneys, NGOs and academia fully about the structure of the ET and its process soo that it will help people understand the importance and ways of using it effectively. For this purpose, techniques like an interactive website with FAQs, forms and potentially online filing for complainants, printed materials that cover the FAQs in all relevant languages, posting online notices of hearings and written decisions can be used. If the ET is user friendly and service oriented, this will increase access to justice. Therefore, features such as accessibility for the physically disabled, special support systems for the blind and deaf and translation services free of charge can be provided. There should be a proper case management service for moving a case from filing through adjudication. This will help to improve the efficiency, reduce costs and to promote access to justice.

Further, in order to promote maximum reliability and efficiency, it is a best practice to have rules and procedures for "managing" expert testimony and evidence. Thus, multiple methods of expert witness techniques can be used. "Justice delayed is justice denied" and "Only the rich can afford court" are two common themes in all judicial reform[32].

[30] Also adopted by the Punjab Act and the Balochistan Act.

[31] ibid.

[32] ibid.

Therefore, having a procedure to control and lower costs in time and money is a best practice. Permitting self-representation without lawyers, consolidating similar complaints into one adjudication process and setting reasonable or no court fees for the litigants are a few techniques which can be used for this. Therefore, if the proposed Environmental Tribunal can be supplemented with these best practices of both stages, it will ensure a better environmental justice in Sri Lanka.