

# Balancing Right to Environment and Right to Development using the Public Trust Doctrine: Special Reference to Sustainable Development in Sri Lanka

U.A.H.H. Udagearachchi

Department of Law, University of Peradeniya, Sri Lanka

[uahimali@yahoo.com](mailto:uahimali@yahoo.com)

**Abstract** – Public Trust Doctrine (PTD) is one of major legal concepts that is emphasized by many environmentalists during the last few decades. The meaning of this doctrine is that, the legal title is vested in the state and the equitable title in the public. Thus the state is responsible as the trustee to manage the property in the interest of the public. On the other hand states are responsible for the protection of human rights. Every human being is entitled to right to development. But when states launch development programs they have to consider about the environmental sustainability under the millennium development goals defined by the United Nations and recognized by all states in the world. The Millennium Development Goals (MDGs) are the world's time-bound and quantified targets for addressing extreme poverty in its many dimensions. In this backdrop the research problem is how to balance right to development and right to environment in the discourse of sustainable development through the application of the Doctrine of Public Trust. The main objective of the study is to analyze the relationship between the Public Trust Doctrine and balancing right to the environment and right to development. As methodology, the qualitative approach of research is utilized to gather and analyze information throughout the research. Under this author has done a comprehensive literature review of textbooks, journal articles, various reports and internet resources in the area of study. Specially, the study is dealing with the balancing between the right to environment and the right to development. Finally, the study would suggest the ways and means of promoting development projects protecting environment in accordance to the Public Trust Doctrine ensuring right to development.

**Key Words:** Environmental Sustainability, Public Trust Doctrine, Right to the Environment and Right to Development

## I. INTRODUCTION

Public Trust Doctrine (PTD) which has its origin in Roman Law means that the government is the trustee of all natural resources which are by nature meant for public use and enjoyment. This is an eternally valid doctrine

which many environmentalists developed in the discourse of sustainable development. It asserts a public interest in protection of natural resources. This doctrine covers all ecologically important wetlands, forests, fresh water courses and areas identified as natural heritage. Those natural resources are incapable of private ownership and are commonly owned for the benefit of everyone (Takacs, 2008). There are two conceptions of the PTD as narrower concept and wider concept. According to the narrower concept the legal title is vested in the State and the equitable title in the public and the state is responsible as trustee to manage the property in the interest of the public. In the wider environmental sense, the concept of Public Trust expresses the idea that the present generation holds the natural resources in trust for future generations. However, the doctrine emphasizes that the powers vested in public authorities are not absolute or unfettered, but is held in trust for the public, to be exercised for the purpose for which they have been conferred.

In this background, the objective of this study is to evaluate the role of the judiciary in promoting PTD in the context of sustainable development and protecting human rights, particularly right to environment and right to development. In order to achieve this objective, the researcher seeks to look at the pattern of judicial decisions, its commitment to uphold international norms on human rights and environment.

## II. METHODOLOGY

This research adopts a qualitative approach with comparative study design. In doing so primary sources viz. Statutes, case law and secondary sources viz. Books, Journals, Articles were analyzed where it is necessary. Further the research has used the comparative research method as a cross-judicial study, analysis, identification and explanation of similarities and differences of the Sri Lankan law with international guidelines and selected jurisdictions; namely, the India and United State in order to achieve the objective of the research.

### A. Environmental Sustainability

Sustainable development is a main concept which developed rapidly during past few decades. As one of the Millennium Development Goals introduced by the United Nations, it has been followed by every state. In 1987, the Brundtland Commission published its report, *Our Common Future*, in an effort to link the issue of economic development and environment sustainability. This report provided the definition of sustainable development as “development that meets the needs and aspirations of the present without comprising the ability of future generations to meet their own needs” (UN General Assembly, 1987). This concept has been further described in the Stockholm Declaration of United Nations on the Human Environment 1972 by stating “The natural resources of the earth, including the air, water, land, flora and fauna and especially representative samples of natural system, must be safeguarded for the benefit of present and future generations through careful planning or management, as appropriate...” and Principle 4 of the Rio Declaration by mentioning as “in order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it. There are three dimensions of Sustainable development as “economic, environmental and social” or “ecology, economy and equity”. The overall goal of sustainable development is the long-term stability of the economy and environment and this is only achievable through the integration and acknowledgement of economic, environmental and social concerns throughout the decision making process. The case of *Hungary v. Slovakia* (1997) is the first time that the International Court of Justice made a ruling on the principle of sustainable development.

### B. Application of Public Trust Doctrine in USA and India

The Doctrine of Public Trust is highly used in the United States of America (USA). For instance navigable waters and underlying river beds are considered to be held in trust exclusively for the public and for public benefit (Scanlan, Melissa, 2004). The case of *Illinois Central Railroad v. Illinois* (1892) considered as a landmark case of the application of PTD in America. Subsequent courts in the USA have continued to rely on this doctrine and held that certain natural resources must be held by the state in trust for the people.

The most authoritative scholarship in this regard is the law review article written by Joseph Sax, titled, *The Public Trust Doctrine in Natural Resources Law: Effective Judicial*

intervention, in the Michigan Law Review in 1970. Courts in the USA, India and South Africa have relied on the academic arguments made in that article, in applying the doctrine of public trust within their own jurisdictions. Alexandra Klass writing about the contemporary use of the PTD in the USA, echoes Sax in saying that the primary responsibility under that doctrine vests with the legislature and the Court should only perform a gap filling function.

India is another significant country which actively applies the PTD in her environmental issues. In India, the higher jurisprudence of Article 21 of the Constitution, right to life, has extended to include the right to a healthy environment and the right to livelihood. The third aspect of the right to life is the application of public trust doctrine to protect and preserve public land. Accepting PTD as a part of common law, the Indian Courts applied this doctrine in three cases which are *M.C. Mehta v Kamal Nath* (1997), *Th. Majra v Indian Oil Corporation* (1999) and *M.I. Buliders v Radhey Shyam Sahu* (1999). The applicability of the PTD to natural resources was expressly recognized by the Supreme Court in the case of *M.C. Mehta v Kamal Nath*. From these cases the Indian Supreme Court interpreted right to life in the Indian Constitution to include a corresponding duty of the state to apply the PTD. Thus the Doctrine of Public Trust has grown from Article 21 (“No person shall be deprived of his life or personal liberty except according to procedure established by law”) of the Constitution of India. The Indian Supreme Court while applying this Doctrine considered the American stand on Doctrine of Public Trust. According to the opinion of the Court, the doctrine was always a part of the Indian jurisprudence and could be used for the protection of particular natural resources for public use.

However, when consider about the recent cases such as *Intellectuals Forum, Thirpathi v. State of AP and Others* (2006) and *Karnataka Industrial Areas Development Board v. C. Kenchappa and Others* (2006) it could be argued that the Indian Supreme Court has sought to further develop its jurisprudence with regard to PTD.

In this way it is obvious that India and USA are two important countries that highly recognized the PTD in their countries. Through this doctrine they are aimed to balance the development in the state and the protection of human rights of citizens in the state.

### C. Application of PTD in Sri Lanka

The constitution of Sri Lanka does not expressly recognize the PTD. Concerning on governing legislation relating to the right to environment and the right to development, the absence of explicit recognition is a substantial

weakness. Implicit recognition is provided by the Article 27(14) of the Constitution, “the state shall protect, preserve and improve the environment for the benefit of the community”. A corresponding Fundamental Duty is reposed on every person in Sri Lanka ‘to protect nature and conserve its riches’ (Article 28(f)).

The Principle of Sustainable Development was recognized by the judges for the first time Bulankulama v The Secretary, Ministry of Industrial Development (the Eppawala case). Also, it was the first case that pronounces the nexus between Article 3 of the Constitution and the PTD. As for Amarasighe J, in that it affirms that People are the ultimate sovereign and those holders of powers of government are only temporary bearers of those powers. Therefore, such powers can only be exercised to further the interest of the people.

Also in the case of Watte Gedara Wijebanda v. Conservator General of Forests and Others (2007) Thilakawardane J. reaffirm of the nexus between PTD, sustainable development and inter-generational equity and held that the state has an obligation to comply with those principles in all decisions it takes in relation to natural resources.

The Public Trust Doctrine was developed as an effective tool of general application for citizens to obtain a judicial intervention to protect their interests. The trusteeship of natural resources has been extended by the Supreme Court to the trusteeship of national resources as well. In the case of Environmental Foundation Limited v Urban Development Authority (the Galle Face Green case) (2005) the Supreme Court gave an order to prevent commercial exploitation of Galle Face Green articulating the Doctrine of Public Trust. Also in the case of Fernando v Sri Lanka Broadcasting Corporation (SLBC) (1996) the Court held that, air waves are a limited resources and that the state or any other actor “operating them” must do so “subject to a correspondingly greater obligation to be sensitive to the rights and interests of the public”.

Sugathapala Mendis and Others v. C.B. Kumarathunga and others (Waters Edge) (2009) case is another leading case which developed the PTD in Sri Lanka.

#### D. Right to Environment and Right to Development

Right to environment and the right to development are rights that subjected to frequent debate. Mostly third world countries face difficulties when balancing these two rights. As to the Universal Declaration of Human Rights (UDHR) which is recognized by all states in the world, “everyone has the right to a standard of living adequate for the health and well-being” (1948). In this sense Special Rapporteur of United Nations has argued that ‘standard of living’ necessitates a healthy environment and therefore

the right to a healthy environment is a part of international customary law. ‘Standard of living’ and health have been linked with environmental standards by the Committee on Economic, Social and Cultural Rights. Apart from the UDHR, the principle 1 of the Stockholm Declaration “Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of 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. Thus every human being is entitled to environment by means of the taking benefits and protecting it.

Right to development is a group right and it is limited to the extent that it cannot be pursued at all costs. Article 55 of the UN Charter has ensured the right to development by declaring “the United Nations shall promote: (a) higher standards of living, full employment, and conditions of economic and social progress and development; (b) solutions of international economic, social, health, and related problems’. Also the Declaration on the Right to Development (1986) has mentioned that “by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development in which all human rights and fundamental freedom can be fully realized”. While these statutes ensured the right to development, the Vienna Declaration on Human Rights (1993) states that ‘the right to development should be fulfilled so as to meet equitably the developmental and environmental needs of present and future generations.

The link between development and the environmental protection was made clear by the Stockholm Declaration, which stated that “in the developing countries most of the environmental problems are caused by underdevelopment”. Therefore, economic development, social development and environmental protection are interdependent and mutually reinforcing components of sustainable development. The link between human rights and the environment was one of the key issues at the Johannesburg World Summit on Sustainable Development in 2002.

#### E. Balancing right to development and right to environment

In balancing the right to development and right to environment, both rights are crucial and integrated. Therefore, looking at the possibility of using PTD as a balancing approach is very significant. The State is responsible for the protection of all human rights that are accepted universally. In this regard, governments have to play a vital role when they are launching development projects. No one has the power to violate right to

These two rights are reflecting the indivisibility and interdependency of rights. These entire things should be activated on the basis of the PTD. Every state has a responsibility to make decisions considering about the public and environmental sustainability.

When compared to above mentioned jurisdictions, it is observed that the application of the PTD in Sri Lanka is not progressive than India. Due to judicial activism in India, they have acquired a greater position. The real outcome of the PTD does not occur since it depends on the judge's personality. If the judge is innovative he or she analyzes the issues in depth and but if the judge is conservative no such active implementation of this doctrine. On the other hand, there is no continuous application in Sri Lanka. When compared to India there is no strong interference of lawyers and citizens regarding these issues. The awareness of citizens regarding these issues proceeds in a lower level. All these things caused for the less application of this doctrine in Sri Lanka.

#### V. CONCLUSION

Based on the comparative study of selected jurisdictions, it can be recommended that it is essential to increase the judicial activism in Sri Lanka. Before delivering the judgment, the Judge should hold an in depth analysis objectively considering new developments of other jurisdictions. Then it is necessary to implement certain new rules in accordance with international standards. Also, it is important starting continuous application of this doctrine. Especially lawyers and civilians have to play a major role under these circumstances by participating actively in the judicial process. Constitutional reform is both useful and necessary for the future development of the PTD. But until such reforms come to pass, the Supreme Court has to develop a progressive and creative jurisprudence in this area that would promote good governance and strength the credibility of the court. In this paper I recommended it is necessary to hold awareness programs for all classes of the community regarding these legal issues. Also, it has to be creating effective remedies for such violations under the rule of law. Not only creating effective remedies but also informing those things to the public and implementation of those remedies are necessary to protect environment and human rights under the PTD.

#### LIST OF REFERENCE

Bjayant, *Notion of Doctrine of Public Trust in India*, 2013

David Takacs, *The Public Trust Doctrine, Environmental Human Rights, and the Future of Private Property*, (2008), 16 New York University Environmental Law Journal 711

Authority S.C. (F/R) Supreme Court Minutes 28<sup>th</sup> November 2005

Fernando v Sri Lanka Broadcasting Corporation (SLBC) (1996) 1 SLR 157

Hungary v. Slovakia (1997) I.C.J. 7

Illinois Central Railroad v. Illinois 146 US 387 (1892)

Intellectuals Forum, Thripathi v. State of AP and Others (2006) AIR SC 1350

International Institute for Sustainable Development & United Nations Environment Programme. (2014). *Trade and Green Economy: A Handbook*. 3<sup>rd</sup> ed. Geneva: International Institute for Sustainable Development

Joseph L. Sax, *The Public Trust Doctrine in Natural Resources law: Effective Judicial Intervention*, Michigan Law review, Vol. 68, 471, January 1970

Judges & Environmental Law; A Handbook for the Sri Lankan Judiciary, Environmental Foundation Limited, Sri Lanka; 2009

Kameri-Mbote P., *The use of the Public Trust Doctrine in Environmental Law*, 3/2 Law, Environment and Development Journal, 2007

Kappor T., *Public trust Doctrine*; <http://www.legalserviceindia.com/articles/ptdoc.htm>

Karnataka Industrial Areas Development Board v. C. Kenchappa and Others (2006) AIR SC 2546

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

M.I. Buliders v Radhey Shyam Sahu (1999) AIR SC 2468

Scanlan, Melissa Kwaterski, *The Evolution of the Public Trust Doctrine and the Degradation of Trust Resources: Courts, trustee and Political Power in Wisconsin*, (2004), Vol 27, Ecology Law Quarterly 135

Sugathapala Mendis and Others v. C.B. Kumarathunga and others (Waters Edge) S.C. (F/R) No. 352/2007, Supreme Court Minutes 7<sup>th</sup> August 2009

Takacs D., *"The Public Trust Doctrine, Environmental Human Rights and the Future of Private Property"*, N.Y.U. Environmental Law Journal, Vol 16, 2008

Th. Majra v Indian Oil Corporation (1999) AIR J&K 81

United Nations Conference on the Human Environment (1992), *Rio Declaration on Environment and Development*, Rio de Janeiro, Brazil: United Nations

United Nations General Assembly (1987), *Report of the World Commission on Environment and Development: Our Common Future*, Oslo, Norway: United Nations General Assembly, Development and International Co-operation: Environment

Watte Gedara Wijebanda v. Conservator General of Forests and Others S.C. Application No. 118/2004, Supreme Court Minutes 5<sup>th</sup> April 2007