Balancing Economic Development and Environmental Protection

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The twentieth century saw tremendous strides made by man in the spheres of technology and industry which accompanied by decades of neglect by man towards his natural surroundings. As a result the Modern Society has now realized that the nature is going against them if we continue to act in the same manner and therefore it is necessary to protect the nature around them. Otherwise the nature will not protect the society in future. Thus the law incorporated this “new value” of environmental conservation.

I think it appropriate to highlight that concepts such as environmental rule of law and environmental justice have played a major role in dealing with and balancing the tension between economic development and environmental protection. The elevation of environmental rights as human rights norms have contributed in no small measure towards the recognition by the judiciary as one of several ways to deal with this rivalry between economic development and environmental protection and in this process I would like to focus today on the contribution of the Sri Lankan judiciary towards this noble objective.

The integration of environmental protection and economic development is reflected in the principle of sustainable development. Therefore all economic development should be environmentally sustainable over the long term. This balancing exercise involves requires the collection and dissemination of environmental information, and the conduct of environmental impact assessments.

The integration of environment and economic development has re-opened the debate over ‘The right to development’ after the New International Economic Order in the mid 1970’s was opposed by some large industrial countries.
Principle 4 of the Reo Declaration that ‘environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it”, is the foundational on which the structure of sustainable development is based.

The integration of environmental considerations affects international trade and economic development. Balancing economic development with environmental protection necessarily involves the conservation of natural resources despite the right to development being a real need. We know that it is imperative that the utilization of land, water and other natural resources, be done so as to preserve our finite resources for future generations.

In this regard the Judiciary plays a crucial role in safeguarding the Rule of Law and promoting global and national sustainability through the application, interpretation and enforcement of environmental law.

With the realization of the need to protect the environment by the Modern Society, the legislatures has now gone to the extent of enshrining these requirements into their constitutions and thereby make sure that greater responsibility by the respective governments to protect the environment.

Under the “Directive Principles of State Policy” in Chapter VI of the Constitutions of the Democratic Socialist Republic of Sri Lanka, State is required to “protect, preserve and improve the environment for the benefit of the community” [Article 27 (14) ] A corresponding Fundamental duty is reposed on every citizens “to protect nature and conserve its riches” [Article 28 (f)]. The above directive principles and fundamental duties “do not confer or impose legal rights or obligations and are not enforceable in any Court of Law or tribunal”

Sri Lankan green jurisprudence is an outcome of a proactive Court of Appeal which I preside and the apex Court Supreme Court.
Even the Magistrate’s Court has been vested with criminal jurisdiction to sanction offenders.

I must say that both these superior Courts police the actions of the executive and in their respective jurisdictions have expanded the constitutional rights (rights to equality and directive principles etc) to include environmental protection.

The Court of Appeal exercises judicial review by issuing prerogative writs such as certiorari, prohibition and mandamus, whereas the Supreme Court is vested with jurisdiction to declare a particular executive or administrative action as an infringement of fundamental rights. The creation and usage of public interest litigation also allows the rules of *locus standi* to be used by those claiming either ‘representative standing’ or ‘citizen standing’.

In the above context it is observed that the courts are mindful of its fundamental duty to preserve and enhance the natural environment making maximum use of the operative legal regime. The opportunity may not come in the form of ready-made cases ideally fit into the legal requirement but the courts have observed that it is the duty of the Judge to nudge the relevant authorities into action when there is glaring example of pollution within their jurisdiction.

*Hettiarachchige Don Chrishan Priyadarshana V. Geological Survey and Mines Bureau SCFR 81/04* is a situation where a mechanized sand miner came before court alleging that he was discriminated against by the refusal of license where as others had been granted such license. The court after hearing all the parties interim orders were issued prohibiting the Geological Survey and Mines Bureau from issuing new sand mining licenses or extending licenses already issued, while subsequent interim orders were issued on police officers to take steps to prevent unlicensed sand mining.

It is important to note that the said orders restricted mechanized sand mining which damaged the river banks badly, but it did not prevent the traditional methods of sand mining without using heavy machinery.
Question of unequal treatment of persons who are affected, or a violation of the right to equal protection of the law, and thus constitute an infringement of Article 12 (1) was applied in the case of *Bulankulama V. Secretary, Ministry of Industrial Development 2000 (3) Sri LR 243 popularly known as Eppawala Phosphate mining case* where the Petitioners were denied the right to participate in the Environmental Impact Assessment process prescribed by the National Environmental Act.

The apex Court quoted a citation made by the then Vice President of the ICJ, Judge C.G. Weeramantry in the famous decision between Hungary and Slovakia. Judge Weeramantry alluded in the ICJ decision to a sermon preached by Arahat Mahinda to King DevanampiyaTissa around 223 B.C-

“O great King, the birds of the air and the beasts have as equal a right to live and move about in any part of the land as thou. The land belongs to the people and all living beings; thou art only guardian of it.”

The principle of guardianship enunciated in the sermon illustrates the expectation of good governance of natural resources from a king. The sermon had an influence in the development of jurisprudence relating to good governance of natural resources in Sri Lanka.

During the said case it was transpired that the Government and Freeport Mac Moran of USA and it affiliate IMCO Agrico had initialed the final draft of the Mineral Investment Agreement and subsidiary document in respect of a deposit of phosphate rock at Eppawala in the Anuradhapura District. The proposed agreement granted the company the sole and exclusive right,

(a) to search and explores phosphate and other minerals in the area

(b) to conduct test or pilot operations at any location within the contract area

(c) to develop and mine under Mining Licenses any phosphate deposits (including associated minerals) found in the exploration area.

The Supreme Court conclude,
a. The proposed agreement does not provide for an environmental impact as required by the National Environmental Act but provides for a feasibility and environmental study by an international consultant following exploration for phosphate deposits. There is no decision of a competent national authority as required by international norms but only an assurance that applicable law will be followed. Legal rights of the people are mere paper rights; the proposed agreement is biased in favour of the Company and in the event of disagreement lead to arbitration, and the liability is placed on Sarabhumy, a small local Company.

b. (i). Project proposal and exploration plan are not approved by a project approving agency such as the Central Environmental Authority in terms of the relevant regulations. Environmental impact assessment must first be done to the satisfaction of the Central Environmental Authority with notice to the public to enable public comments and representations. If the project is approved it has to be published in the Gazette.

(ii). The aforesaid statutory provisions have not been complied with but an attempt is made to contract out of an obligation to comply with the law. The procedure adopted including confidentiality of the proposed assessment is calculated to extinguish public protests. The proposed agreement substitutes the Secretary of the Ministry who is not a project approving agency in terms of the National Environmental Act. It also places the burden on the Government to assist the Company in obtaining the requisite licenses from the relevant Government Authority; and judicial review is replaced by arbitration.

And held,

In the circumstances, there is an imminent infringement of the Petitioners’ fundamental rights under Article 14(1) g, 14(1) h and 12(1) of the Constitution,
Amarasinghe J observed,

“Human beings are at the Centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature (Principle 1, Rio De Janeiro Declaration). 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. (Principle 4, Rio De Janeiro Declaration), in my view the proposed agreement must be considered in the light of the foregoing principles”

The case of Dissnayake V. Gamini Jayawickrame Perera Minister of Irrigation and Water Management SCFR 329/2002 was a case that involved the competing needs for water on the part of farmers. The court, conscious of the water needs of both sectors, encouraged the parties to formulate a scheme that would look to the interest of both. An agreement was reached amongst the different parties and the terms of settlement illustrate the detail that often required in judgments on economic rights.

Even though the “directive principles and fundamental duties enshrined in the constitution [27 (14)] and [28(f)] “do not confer or impose legal rights or obligations, in the case of Sugathapala Medis V. Chandrika Bandaranayake Kumaratunge SCFR 352/2007 it was observed by the Supreme Court that 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.”

In the case of Environment Foundation Limited V. Land Commissioner 1993 (2) Sri LR 41. The decision by the Land Commissioner and the Minister of Lands to allocate 50 Acres of state land adjacent to the Kandalama Tank to construct a 150 roomed 4 star Tourist Hotel was challenged before Court of Appeal considering the environment sensitivity of the area. Even though initial interim orders were allowed, court further observed that the 3rd Respondent being a private party does not come under writ jurisdiction.
However the Action filed by the Petitioners influenced the parties to adopt environment friendly methods in the construction which resulted the construction of an environment friendly Hotel adjacent to the Kandalama Tank.

The case of *Marbok MDF Lanka (Pvt) Lid V. Central Environmental Authority and Others CA/Writ/421/2014* is a writ application filed before the Court of Appeal by a “so called violator”

In the said case the Petitioner who is a Board of Investment approved Foreign Investor complained before the Court of Appeal that they are facing difficulties in continuing with it operations since the Central Environmental Authority has refused issuing Environment Protection License through its agent Board of Investment of Sri Lanka since a public Nuisance case is filed by the Local Police is pending before the Magistrates Court.

The main purpose of supporting interim relief by the Petitioner in the said case was for the uninterrupted supply of Urea which was used as a bonding agent for the Petitioner to continue with its operations.

The said action filed before the Magistrates Court under section 98(1) of the Criminal Procedure Code was based on some complaints received by the police regarding observing some saw dust particles emitted from the Petitioner Factory by some neighbors including the chief priest of a Temple.

Considering all the matters placed by the parties including several reports filed in the Magistrates Court proceedings which are favourable to the Petitioner the Court of Appeal made the following order granting interim relief.

“"We decide to grant interim relief as prayed in paragraph (h) (iv) of the prayer directing the 2nd and/or the 3rd Respondents to permit the Petitioner to clear imports of Urea to be used as raw material”

Subject to following condition
a). This interim order is valid for a period of 3 months only and it is subject to renewal

b). 1\textsuperscript{st} and 2\textsuperscript{nd} Respondents are directed to work with the Petitioner and make sure that the Air, Water, Sound pollution levels are within Central Environmental Authority standards.

It is important to note at this stage that the said writ application was settled in court within few months thereafter since the 1\textsuperscript{st} Respondent had issued the Environment Protection License to the Petitioner, after working closely for few months on the directions of court.

If we admit that we are only renting our place form Mother Nature, and that all development must necessarily be viewed from its known and likely impacts on the earth and its resources. No amount of money can undo irreversible environmental destruction…..

The environmental rule of law becomes a global concept that all countries take cognizance of whenever they undertake development. It cannot be gainsaid that sometimes a development project can wipe out and liquidate a nation in just a matter of minutes. If holocausts and human degradation could be averted in the future through the empirical application of environmental rule of law, the day would not be far off when we would have lived our lives to the full and transmitted that heritage to the generations ahead.

Thank You.