



Environmental Protection through Judicial Review: The Sri Lankan Experience

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Abstract

The world is facing many challenges and some of them directly relates to the survival of the mankind. The environment is degrading at rates never seen before and this is one such question that has created a discourse on the protection of the environment at a global level. For a small country like Sri Lanka with riches of environmental beauty and the bio-diversity, the degrading of its environment has causes serious concerns. One can argue that, this could be due to the lack of a justiciable right to a healthy environment meaning that no one as of a right can claim for a healthy environment. The fundamental rights chapter found in the 1978 Constitution of the Democratic Socialist republic of Sri Lanka does not have provisions to protect the environment under it and while the directive principles recognizes the importance of the environment and the corresponding duties of the citizens of the country to protect and safeguard it, it is however, not justiciable meaning not enforceable in a Court of law. In this backdrop, the mechanism of judicial review which strikes out arbitrary decisions of the governmental authorities have facilitated the lack of constitutional provisions regarding environmental protection. This paper examines how and to what extent the Sri Lankan Courts have been successful in achieving this target through the use of judicial review.

Key words: Environmental Law, Judicial Review, Fundamental Rights, Judicial Activism

Introduction

Environment is a major concern for all the countries in the world whether rich or poor, developed or underdeveloped. It has turned from the common heritage of the mankind to the common concern of mankind [Redclift & Woodgate, 1997]. Concerns lie in the destructions that are caused to the environment by the activities of people who are chasing the dreams of development at the cost of environment. It is axiomatic to point out that “mankind is the part of nature and life depends on the uninterrupted functioning of natural system which ensures the supply of energy and nutrients” which is essential for every life support system [Shastri, 2015]. Environmental law was initially considered as a part of the broader conception of public international law. With the evolution of time and the overwhelming concerns raised about the environmental issues in the domestic terrain the domestic realm of environmental law was developed. It was developed to both address and combat the environmental problems that were created and later faced by the countries all over the world. Environmental law consists of a body of complex interlocking rules, agreements and treaties that operate to regulate the interaction of human-

ity and the rest of the natural or physical environment. Its goal is to reduce the impact of human activity both on the natural environment and on humanity itself [Riddell, 2015]. Giving an adequate definition for the term environment or environmental law is a very difficult one [Leelakrishnan, 2007]. However, Einstein has once observed, ‘The environment is everything that is not me’. The definition provided by Einstein is given from a biocentric perspective where the environment is valued for its own sake and not for the only value it has for the mankind [Brennan & Lo, 2011]. It is also fascinating to see that, entities such as rivers have been given a separate legal personality in some countries. For an example, in New Zealand, the Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, under section 14(1) recognizes the Whanganui River as a separate legal personality. It provides that, “Te Awa Tupua is a legal person and has all the rights, powers, duties, and liabilities of a legal person”. Recently, rivers have been recognized as holding rights by a court ruling in Ecuador, India, New Zealand, and Colombia. These cases are the first judicial attempts to apply legislation that recognizes the rights of nature or to set precedence in recognizing such rights.



The recognition of the 'environment' as an emerging concern for the man kind and its existence, and that we have done so much harm to it, and that we need to act now to protect it came about in the 1960s after most of the development projects were shaping up to rebuild countries from the effects of the second world war. Rachel Carson's book 'the silent spring' arouse immense interest and controversy regarding the need of protecting the environment. With this arousal of interest, the global leaders had to come together and act in order to prevent further irrecoverable damage being caused to the environment [Carson, 1962]. One of the major events that happened was the adaptation of the Stockholm Declaration in 1972 which focused on the human environment, where for first time in history of human kind a universal declaration was created to address environmental issues that were prevalent in the globe at that time. Even in a context where the United Nations declaration on human rights omitted to give a special emphasis on the environment in its Articles, The United Nations Conference on the Human Environment or more commonly known 'Stockholm Declaration' directly address the environment and according to the Article 1 of the said Declaration, it declared 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 wellbeing, and he bears a solemn responsibility to protect and improve the environment for present and future generations'. The first principle itself entails the environmental principles of sustainable development and environmental protection [Bonilla, 2004].

The environmental protection from a Sri Lankan context has to be evaluated from its own laws and regulations. The first and foremost source of the law which is the constitution of the country does recognize the importance of the environment in its state directive policy whereby according to Article 27 (14) which declares the duty owed by the state to protect and enhance the environment. The directive policy is a guide for the government to adopt when it is taking decisions and accordingly there is a duty on the government to take environmental considerations into account when it is going to develop the country. Under Article 28 (f) there is a corresponding duty on every citizen to protect nature and conserve its riches. But this is never put into too much of a focus.

However, the fundamental rights chapter that gave the citizens of the country for the first time in its constitutional history what we call justiciable set of human rights in the form of fundamental rights under chapter 3 of the constitution does not recognize a right to a clean and healthy environment. Therefore, when a person is trying to invoke the fundamental rights jurisdiction of the Supreme Court he or she cannot make a claim for a breach of fundamental rights if that violation only refers to an environmental aspect that does not have a necessary connection to any of the other fundamental rights that have been recognized under the constitution. This is a big lacuna in the system as not even the fundamental right to life was recognized in the constitution and it was only after a purposive interpretation given in the judgment of "Sriyani Silva v Iddamalgoda" (2003) by Justice Bandaranayke that the right to life was fully established in a positive form where it was put in a negative form in the constitution by declaring that no one can take the life of another without a lawful authority under Article 13(4). This is of serious concern for a country like Sri Lanka because where the right to life is not recognized as a fundamental right would mean that unless the judiciary takes a very broad view or give an expansive interpretation to the existing set of fundamental rights, rights such as, right to a healthy and clean environment may never be realized.

In comparison to this, the Indian constitution which recognizes the right to life under a positive form under Article 21 of the constitution and therefore, according to Rosencranz the boundaries of the fundamental right to life and personal liberty guaranteed in Article 21 were expanded to include environmental protection. The court recognized several unarticulated liberties that were implied by Article 21. It is by using this method that the Supreme Court interpreted the right to life and personal liberty to include the right to a wholesome environment [Divan & Rosencranz, 2001]. Further, Abraham observes that the judiciary-led legal developments in India were achieved by resorting to the extraordinary powers of the Higher Courts [Abraham, 1999]. However, in absence of such provisions in the Sri Lankan Constitution there has to be some other measures that has to be made available for protecting the environment. The process of judicial review is one such mechanism where even in the absence of constitutional provisions a court

of law can intervene and aid in protecting of the environment when the jurisdiction of the court is invoked through the judicial review process. Judicial review is based on the premise of separation of powers, rule of law and constitutionalism. Judicial review is thus not only an integral part of the constitution but also a basic structure of the constitution. The process of judicial review is one way of making public bodies accountable to the courts and ensuring that they only act within the powers given to them by Parliament. Accordingly, judicial review addresses the legality, and not the merits, of a decision [Bell *et al.*, 2013]. Hence, when public bodies takes decisions that have serious repercussions on the environment, the judicial review of those decisions that do not stay within the legitimate boundaries of the authority which has been granted to such authorities, such decisions can be invalidated by the court and the case can be referred back to the authority who took the decision to reconsider that particular decision. Article 140 of the Sri Lankan Constitution sets out the provisions relating to judicial review. The provision states that, subject to the provisions of the Constitution, the Court of Appeal shall have full power and authority to inspect and examine the records of any Court of First Instance or tribunal or other institution and grant and issue, according to law, orders in the nature of writs of *certiorari*, prohibition, *procedendo*, *mandamus* and *quo warranto* against the judge of any Court of First Instance or tribunal or other institution or any other person. The Court of Appeal therefore has the power of judicial review over the decisions taken by governmental bodies below that. Environmental judicial review on the other hand is somewhat of a recent phenomenon, and it has its roots in the United Kingdom where there is now plenty of literature that has been written on the subject [Moules, 2011]. Environmental judicial review specifically deals with its own procedures and methods of reviewing decisions of public bodies those have direct consequences on the environment.

Sri Lanka as a developing country is making new strides towards development at a rapid speed and whether that development is sustainable or not remains to be questioned. While its constitution has given a set of fundamental rights for its citizens to enjoy and invoke when infringed or is in imminent threat of being infringed, the set of established fundamental rights lack the ability to bring in envi-

ronmental concerns or to positively assert a right to environment. In this context this research endeavors to find answers to following questions, namely, what is the existing law regarding environmental protection, how does the constitutional provisions helps to protect the environment, are the existing provisions sufficient to protect the environment, what is meant by environmental judicial review and whether it is a viable mechanism to protect the environment in the absence of positively obliging constitutional provisions to that effect. Therefore, this research has the main objectives of describing the existing law regarding environmental protection in Sri Lanka, examining the constitutional provisions relating to environmental protection, deducing the adequacy of the existing legal framework in protecting the environment, arguing for environmental judicial review as a method of protecting the environment and testing the viability of such a system in a Sri Lankan context as a mechanism for environmental protection.

Methods

This research is conducted using a qualitative method. The research uses primary legal sources such as constitutional provisions, legislative enactments and decided case law from both the Sri Lankan and foreign jurisdictions in order to accommodate a comparative study. As secondary legal sources this research uses writings of the highest authority in the field and other comments made on the subject by reputed scholars. Due to the constraint of available resources this research only uses quantitative techniques of research only in a complementary manner. This research is limited by the availability of empirical data on number of cases that are brought forward before the Court of Appeal and the Supreme Court referring to an environmental issue where the judicial review is invoked. Though, the research is done based on looking at the existing, constitutional, legislative provisions and judgments pronounced by both local and foreign jurisdictions, the existing legal discourse in the field of environmental judicial review itself would help to get rid of the disadvantage caused by the lack of empiricism in the article.

Results and Discussion

The Sri Lankan Legal system which considers Roman-Dutch Law as its common law is now departing its roots from these traditions to more En-

glish Law based statutory laws to cope with the modern structures of the local and international communities [Cooray, 2011]. When one looks at the existing legal framework on environmental protection, Sri Lanka does not certainly lack legislations, regulations or rules that are put in place for the protection of environment. In fact as with its legal system where due to a variety of common and personal laws which exist to make things complicate at times, environmental protection legislations which are many in numbers overlap and therefore create confusions as to the duties and responsibilities of relevant environmental departments and authorities. The earlier pieces of legislations such as Geological Survey and Mines Bureau Forest Ordinance No. 16 1907, Fauna and Flora Protection Ordinance No 2 of 1937, Ordinance for the Protection of Areas Subject to Damages from Floods No. 4 of 1924 and Land Development Ordinance No. 19 1935 and many others shared the common goal of protecting the environment. F

However, the main legislation relating to the environmental protection is the National Environmental Act No. 47 of 1980 (NEA) which has the main objectives of protection, management and enhancement of the environment, for the regulation, maintenance and control of the quality of the environment; for the prevention, abatement and control of pollution. The NEA uses the two protective mechanism to safeguard the environment from developmental activities. Firstly, the environmental protection licenses issued under the provisions of the Act and the Gazette Notification No. 1533/16 dated 25.01.2008 prescribes certain activities which will require an environmental protection license in order for a person to carry on with such an activity legally. This is aimed at safeguarding the environment from the excessive adverse impacts caused by small and medium scale activities. Secondly, the Environmental Impact Assessments or more commonly known EIA's are required to be carried out regarding major development projects in order to analyze the relative costs and benefits of a project.

In addition to these legislations there are several authorities and departments that are empowered to take necessary measures in protecting the environment and they include, department of wildlife conservation, meteorology department, national water supply and drainage board, marine pollution prevention authority and so many others. The Central Environmental Authority, commonly known

as the CEA is the main body that is empowered with protecting the environment and its vision is to make a clean and green environment [CEA, 2016]. The general overview of Sri Lanka's legislation asserts that a comprehensive legal and institutional infrastructure has been developed, including laws for controlling land, air and water pollution. However, it also acknowledges the widening gap between Sri Lanka's environmental goals and its achievements. This is put down to inadequate management skills, ill-defined project planning, poor law enforcement, confusing procedures, inadequate training and poor facilities [UNEP, 2002].

Sri Lankan environmental management and protection Policy originates from the country's supreme law which is the Constitution. The 1978 Constitution recognizes that the State shall protect, preserve and improve the environment for the benefit of the community according to Article 27(14) of the directive principles. However, it is clearly mentioned in chapter VI of the constitution which contains these directives that, 'the provisions of this Chapter [VI] do not confer or impose legal rights or obligations and are not enforceable in any court or tribunal. No question of inconsistency with such provisions shall be raised in any court or tribunal'. Hence, though the directives guide the governments in decision making it does not compel them to take these directives into consideration. It is clear from this fact that the constitution has failed to make justiciable the right to a clean and healthy environment. However, the Supreme Court as the protector of fundamental rights has on some occasions realized the importance of environment and the need of protecting the same.

Unlike other South Asian jurisdictions, where the right to clean environment has been carved out of right to life, in Sri Lanka the same has been done through the invocation of right to equality. The Supreme Court by referring to Article 12 of the Constitution, which is termed as the non-discrimination clause. In the case of "Wattegedera Wijebanda vs. Conservator general of forests and others" (2009) held that, 'even if environmental rights are not specifically alluded to under the fundamental rights chapter of the Constitution, the right to clean environment and the principles of equity with respect to the protection and preservation of the environment are inherent in a meaningful reading of Article 12(1) of the Constitution'. The *Public Trust* doctrine has come in the dis-

course of environmental protection and is a pinnacle doctrine for enforcing the duty of the state to protect the environment declared under Article 27(14) of the Constitution. The origins of *Public Trust* doctrine can be traced to Justinian's Institutes where it recognizes three things common to mankind i.e. air, running water and sea, (including the shores of the sea). These common property resources were held by the rulers in trusteeship for the free and unimpeded use of the general public ["Environmental Foundation...", 2010]. The public trust doctrine asserts that, those who hold public office must act as trustees of people regarding the management of environmental resources and protection. The doctrine of 'public trust', accords a great responsibility upon the government to preserve and protect the environment and its resources.

However, even with these constitutional and legislative instruments the data regarding the status of Sri Lanka's environment are not satisfactory [Foti, 2008]. Issues such as deforestation; soil erosion; wildlife populations threatened by poaching and urbanization; coastal degradation from mining activities and increased pollution; freshwater resources being polluted by industrial wastes and sewage runoff; waste disposal; air pollution in Colombo have significantly impacted the environment in an adverse manner [Foti, 2008]. The forest area of the country has decreased from nearly 23000 square kilometers in 1990 to 20500 square kilometers in 2015 according to officially recognized sources [Sri Lanka UN-REDD Programme, 2017]. Though Sri Lanka has better numbers when compared to other south Asian countries regarding air, soil, water and noise pollution, those numbers fall very short with that of the developed countries. Further, due to the politicized development projects that have taken place in the country, environmental concerns have come second and the damage to the environment caused by these projects have been somewhat ignored by the public at large.

Judicial review is a facet of the judicial power of the People, which in terms of Constitution is exercised ordinarily through the courts. The power of judicial review of administrative action is primarily vested in the Court of Appeal by Article 140 of the Constitution, which empowers that court to grant and issue "according to law" writs such as writs of *certiorari*, prohibition, *procedendo*, *man-*

damus and *quo warranto* against the judge of any court of first instance or tribunal or other institution or any other person [Marsoof, 2010]. The development of environmental judicial review is heavily influenced by considerations of political theory, such as the importance of economic access to justice, the value of public participation and transparency in public decision-making. The application of the familiar grounds for judicial review is therefore shaped by competing theories of environmental governance and justice, and it is necessary first to understand the context before considering the detail [Moules, 2011]. Recognition that environmental judicial review is distinctive prompts a more general enquiry into the nature of judicial review and administrative law.

Judicial Review can easily be invoked in cases relating to issuance of Environmental Protection License (EFL) and Environmental Impact Assessments (EIA). It will be seen that the courts have distinguished between the environmental impact assessment regime, which places great emphasis on the public right to participate (militating strongly against the courts exercising a discretion to refuse relief) and, on the other hand, the habitats regime, which does not include a participatory role for the public at the stage of carrying out an appropriate assessment (which militates in favor of refusing relief) [Moules, 2011]. Further it can be used in a Sri Lankan context to add additional thrust to the protection of the environment as judicial review is a discretionary remedy and that discretion is capable of being used for good effect in protecting the environment.

The importance of judicial review lies in the fact that it is only an extraordinary remedy and that no one as of right has a right of or to judicial review. Claimants for judicial review must first exhaust alternative remedies, and thus other routes of redress are relevant to deciding if judicial review will actually be available. Therefore, as mentioned earlier, in situations where there is a political or other outside interference with the decision-making process that may have adverse impacts on the environment judicial review acts as a last bastion of hope. The judicial review process therefore should be based on a rationality that is both appealing to the political and democratic ideologies.

To understand the dynamics of environmental judicial review it is important to find out the various parties who may bring claims and to explore

their motives for doing so. This is important because the identity of the parties to an environmental dispute influences judicial decisions on issues such as costs, standing and the award of discretionary remedies. Exploring the parties who are likely to bring an environmental judicial review claim also gives an insight into how effective the enforcement of environmental law actually is in practice [Moules, 2011]. Four major categories of environmental dispute may be identified: (i) disputes between the regulator and the regulated; (ii) disputes between a disappointed applicant and the decision maker; (iii) challenges by interest groups or individual members of the public; and (iv) challenges by commercial competitors.

Firstly, most environmental judicial review claims are disputes between environmental regulators and the industries that they regulate. Most of the times the regulators will want to make sure that the industries are following the minimum standards that are set by the governments and on the other hand the industries would want to show that they are following these minimum standards. When disputes arise between these parties judicial review can accommodate for a proportionate way to decide on the dispute and hence as its ultimate goal strive for environmental protection. Judicial review should not be thought as something which hinders development, instead judicial review should be considered as a sustainable development mechanism which can be used to both protect the environment and to advance the sustainable development of a country. In the case of “Dissanayake and others v Geological Survey and Mines Bureau and Others” (2011), the petitioner invoked the writ jurisdiction of the Court of Appeal seeking a *mandamus*. The question that arose before the court was a failure on the part of the conservator of forests to gazette the EIAR under Section 23 BB [4] of the National Environmental Act 47 of 1980. The court held that, the conservator of forests - was in breach of a statutory duty amounting to unfairness and an abuse of power when he did not comply with gazetting the project approved by the Technical Evaluation Committee (TEC). This case clearly illustrates that judicial review is pro-sustainable developmental.

Secondly, a large number of environmental disputes arise due to the number of activities affecting the environment that require some form of license or permission, inevitably there are large numbers of judicial review applications made by disappointed

applicants. However, the judiciary while respecting the individual rights must also consider about the public right to environment and hence be able to strike a fair balance between private and public rights. In the case of “Vishvanath vs Divisional secretary, Madhurawala and Others” (2006), the question that arose before the Court was suspension of a trade permit to operate a stone quarry for 2002. The Court decided that the suspension was justified on the ground that, the refusal to extend the petitioner’s authority was not arbitrary and was justified by the protests of (neighbours) affected parties and environmental considerations. However, it must be remembered that, even where disappointed applicants manage to persuade a court that the impugned decision was unlawful, judicial review does not guarantee a favourable decision. A successful judicial review claim can only result in the quashing of an unlawful decision which is resend to the decision-maker for redetermination on the correct legal basis. After redetermination, it is entirely possible for the decision-maker to affirm the decision given earlier [Moules, 2011].

Thirdly, an increasing number of environmental judicial review claims are brought by groups or individuals in the public interest. These claims are motivated by ideological concerns and are part of the wider phenomenon of green politics or environmentalism. Prominent and well-resourced pressure groups in the environmental field, such as, the Environmental Foundation Limited, Friends of the Earth Sri Lanka, Sri Lanka Wildlife Conservation Society and Center for Environmental Justice are some of the most well recognized ones. Many breaches of environmental law do not harm any individual in particular, and there is little incentive for ordinary members of the public to enforce environmental duties. In many cases an environmental pressure group with a particular concern for a given species or habitat is likely to be the only potential challenger [Moules, 2011]. Through the development of the concept of Public Interest Litigation or commonly known as PIL applications, the judiciary facilitates the access to justice for those of whom who are incapable of protecting their environmental rights by themselves. Especially in the case of fundamental rights, public interest litigation have paved the way for parties to intervene with fundamental rights issues with the broadening of the scope of *locus standi* which is used to filter in the cases to the Courts. In the case of “Environ-

mental Foundation Limited v Urban Development Authority of Sri Lanka” (2009), where the issue was related to handing over of the management and control of the 14 acre - “the Galle Face Green”, to E. A. P. Ltd and one of the questions that had to be decided was whether EFL had the *locus standi* for the case. The Court opined that, ‘the word “persons” as appearing in Article 12(1) [of the constitution] should not be restricted to “natural” persons but extended to all entities having legal personality recognized by law. The Court further opined that, the Petitioner has acted in the public interest and exposed acts on the part of the Urban Development Authority (UDA) that are clearly *ultra vires*. In the case of “Bulankulama v. Minister of Industrial Development” (2000), the Court held that, the individual petitioners have standing to pursue their rights in terms of Articles 17 and 126(1) of the Constitution. They are not disqualified on the alleged ground that it is a “public interest” litigation. The court is concerned with the rights of individual petitioners even though their rights are linked to the collective rights of the citizenry of Sri Lanka, rights they share with the people of Sri Lanka. The modern trend is for the judiciary to facilitate access to justice by such pressure groups in order to promote the effective enforcement of environmental law [Moules, 2011].

Fourthly, in contrast to challenges brought by pressure groups and ideologically motivated individuals, challenges by commercial competitors are entirely self-interested. Such challenges are usually brought against the decision to grant a valuable permission or license to a commercial rival. The claimant typically argues that the decision to grant permission or license to the rival company was unlawful because of a breach of environmental law, and consequently the decision should be quashed [Moules, 2011]. However, in the Sri Lanka context such instances or examples are far and few in between.

From the above case law it can be seen that the Courts of Law have made huge interventions when it comes to environmental protection through judicial review coupled with the fundamental rights. Thus it seems viable that judicial review is an appropriate mechanism for the protection of environment in the absence of a coherent legal framework for environmental protection and justiciable obligations imposed upon by the constitution on those who are responsible for the protection of the envi-

ronment. Concepts developed by the Courts, such as the public trust enables the Courts to impose upon the individuals the responsibility of protecting the environment which is not made justiciable under the constitution. Further, the broadening of the *locus standi* allows the less-capable and the under privileged people to gain access to justice through the medium of pressure groups and environmental conscious private organizations who can accommodate for the collective individual rights of the people. Further, as mentioned above, since judicial review is a discretionary process, that discretion could be freely used by the Courts to protect the vital interest of the environment.

But there is a fundamental problem under the concept political legitimacy, whereas unelected members, the judiciary, through the process of judicial review is capable of overruling the democratic authority of the government decision and policy making. The general criticism leveled at general judicial review can be leveled at environmental judicial review as well. Therefore, a country thriving for a sustainable developmental approach must have in its constitution, provisions for environmental protection and sustainable development. In 2017 the government of Sri Lanka introduced the Sustainable Development Act No 19 of 2017 which states in its preamble that, ‘[The Act] intends to design, develop and implement a National Policy and Strategy on Sustainable Development and facilitate all agencies responsible and to follow up and monitor the progress’.

Environmental judicial review claims are amongst the most factually complex judicial review proceedings. Frequently they involve voluminous factual, policy and technical material, often requiring a court to understand complicated scientific processes or modelling. There are significant practical and financial hurdles facing private persons contemplating civil litigation to enforce environmental law. A claimant will have to obtain funding for its own legal advice and representation, and in the event of defeat, it may face exposure to paying the legal costs of the victor. These costs are likely to be considerable and in many cases will prove a prohibitive financial burden. The democratic deficit in environmental law is heightened by the fact that at the domestic level many environmental decisions are delegated to independent agencies with only indirect and weak links to the electoral process. Delegation of this kind is justi-

fied by the need for technical and scientific expertise in environmental decision-making. The setting of environmental standards requires a balance to be struck between environmental protection and other social and economic objectives. It also requires the prioritization of competing environmental interests [Moules, 2011]. Therefore, when one considers these constraints in the judicial review process, still having a constitutional provision on environmental protection and sustainable development are of paramount importance and realizing this fact in the new draft constitutional committee report it was suggested that such right be recognised as a fundamental right.

Conclusion

The growth of the importance regarding environmental judicial review is evident from both the cases filled and the plethora of scholarly work available in the field. In the absence of a proper legislative mechanism to protect the environment, judicial review must be considered as an important mechanism in protecting the same. It enables a wider range of issues to be entertained by a wider pool of interest groups and stakeholders. Due to its discretionary nature, it can also be used in a rather flexible manner to advance the axioms of environmental protection and the right to environment.

Judicial review, as a discretionary remedy has the strength of being able to take each case upon their relevant merits. It enables to draw the line between development and environmental protection. This is made possible with the discretion afforded to the judges who can weigh in the respective cost and benefits of a given development project and then to analyze the suitability and the viability of such a project. Judges can make an independent decision with the aid of the expertise without having any prejudices. When used in a proper manner it helps to resolve conflicts that gives rise to environmental pollution to be decided in favour of neither of the claimant/defendant nor the institution but the environment.

Judicial review through the development of concepts such as the public trust and public interest litigation made it an obligation on the policy and decision makers to take environmental considerations in to consideration in a situation where under the directive principles of the constitution authorities are merely guided but not made obliged to take in to consideration the environmental aspects.

However, when one considers the political legitimacy of a Court in overruling the decisions made by a much more democratic institution than it, it becomes evident that judicial review in environmental protection can only be made available till necessary constitutional amendments are made to recognise the environment and protection thereof are both fundamental rights and duties made justiciable by the constitution itself.

Therefore, it becomes paramount that, while having judicial review as the last bastion of hope where every other mechanism fails to adequately protect the environment, the protection and the maintenance of the environment should come from a supreme force of law, which in most of the instances is the constitution. In considering this, judicial review itself should advocate for the constitutional recognition of right to a clean and health environment.

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