APPLICABILITY OF THE DEFENCE OF ACT OF GOD IN ENVIRONMENTAL DAMAGE : A CRITICAL APPRAISAL

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Abstract - Occurrences over which man has no control are referred to as 'Acts of God.' Some natural events that we experience today are very serious and recurrent. Flood or drought happens each year causing severe damage to the environment. Modern climatic patterns and the way that it brings loss and damage to people and the environment is not per se unforeseeable. However, not only individuals but also authorities ignore liability using the title as a defence, under the civil liability regime that governs recovery of damages for environmental damage.

In this backdrop, this study examines whether the defendants who are handling environmental aspects within their purview, could ignore their legal duty simply because they shift the responsibility by labelling it as Acts of God. It is observed that modern jurisdictions have a limited approach towards this defence and apply strict liability against the defendants for environmental damage, if it is a non-delegable duty and a foreseeable damage. This is a qualitative study which is designed to compare selected jurisdictions with Sri Lankan law in the area of research. The study is based on the primary and secondary data, for its comparative analysis.

Key words: natural events, acts of god, strict liability

I. INTRODUCTION

An environment that is generally compassionate to its animations is called 'Mother Nature' in so far as it provides beings with air, shelter and food. The responsibility of mankind is to secure the basics that mother nature provides for their survival, and as such, gives an undertaking in return. The undertaking is in legal regimes that operate worldwide, regionally and domestically. The occurrences of natural events and the effect of it on the world could be seen as ubiquitous. It is questioned whether the underlying cause for this effect is solely the behaviour of the people or other factors. It is uncontested that some natural events injure people and damage property. The reason is that such occurrences are uncontrollable. The controllability of the effect of natural occurrences would be a criterion for environmental liability, even though occurrences cannot be prevented, if they can be targeted to specific actions of humans.

In this background, it is imperative to examine the environmental hazards which are locally and annually experienced. Environmental damage occurs owing to severe rain and droughts inter alia. The climatic pattern of Sri Lanka is predictable, it is well known in which period heavy showers and droughts occur. The areas which are affected by extreme weather conditions are also identified and marked in maps. Further, the consequences of environmental hazards are not unknown as deaths of people and animals, personal injuries, loss of property of individuals and State, plus environmental displacement are reported every year.

Several statutory bodies have been established to administer to matters pertaining to disaster situations in Sri Lanka. They are statutorily obligatory to planning, managing, rebuilding and post- monitoring environmental damage. Also, they are liable for their own torts and torts of their employees as undermentioned duties are non-delegable.

As found in the Constitution of Sri Lanka of 1978, environmental protection is a shared responsibility of all. It is true that the authorities should not be blamed all the time for mismanaging the situation, but the citizens also have a responsibility to work towards environmental protection. By understanding and acknowledging the threat humans

face, communities should get together and march forward to protect the environment by themselves on a small scale and to get the duties of the public authorities done if they are inefficient and ignore their legal duty.

This study examines the possibility of applying the defence of ''Acts of god" to exclude liability for environmental damage by the authorities and the rationale behind the defence.

II. ENVIRONMNETAL DAMAGE

Environmental damage is very special. Environmental damage may affect the right to life and other rights relating to peaceful living on the earth. Diverse types of definitions for 'environmental damage' can be found in different jurisdictions. Sands explains that 'environmental damage' only includes fauna, flora and related factors, material assets like cultural heritage, the landscape and environmental amenity and interrelationship between them, other than the people and their property. It specifically focuses on the damage to bio-diversity. One recent example from the European Community Directive on Environmental Liability 2004 can be brought under this category. Therein, the damage to bio-diversity and damages in the form of contamination of sites are brought into one as 'environmental damage', but, this has been clearly distinguished from 'traditional damage'. Nonetheless, the Directive covers traditional damage by itself when the damage occurs by a dangerous or hazardous activity even though it is not considered under the definition of 'environmental damage'. In this context, the European Union regime avoids including 'persons and property damage' into the definition of 'environmental damage'. This approach, however, signals uncertainty in the application of international law since a narrow definition would exclude some aspects of environmental damage for instance, traditional damage, which is the damage to persons and property. 'Environmental damage' is broadly defined in relation to Antarctic environment in a 1988 Convention on the Regulation of Antarctic Mineral Resource Activities. It is stated that,

Any impact on the living or non- living components of that environment or those eco system, including harm to atmospheric, marine or terrestrial life, beyond that which is negligible or which has been assessed and judged to be acceptable pursuant to (the) Convention.

This definition has taken living and non-living things into consideration for environmental purposes which include the damage to persons and property. Principle 7 of the Stockholm Declaration also provides for personal damages in view of human health. This is known as the 'Declaration of the United Nations Conference on the Human Environment and it proclaims that,

Man is both creature and moulder of his environment… Both aspects of man's environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights-even the right to life itself.

Further, in the light of the competing interests of human beings and nature, principle 13 of the Rio Declaration in 1992 states,

States shall develop national law regarding liability and compensation for the victims of pollution and other environmental damage.

Pollution victims are included in the regime, but it is not certain whether it comes under the meaning of 'environmental damage'. However, both are within the scope of the liability regime. Thus, the modern environmental regimes include both bio-diversity and persons and property damage in the definition of environmental damage.

It is also important to analyze the modern tendency of the invocation of human rights to seek redress for environmental harms in international law. Dr. Atapattu has stated that there is a call for a distinct right to a healthy environment and the invocation of human rights machinery to seek redress for environmental harms. She further noted the absence of a specific international machinery to redress environmental harms has led to this development. The civil and political rights such as the right to life, the right to privacy and the right to equality make precedence in developing the application of this right.

According to this study, it can be argued that the modern tendency is to define the term, 'damage' in order to gain maximum implementation and benefit for the victims of environmental damage.

III. ENVIRONMENTAL LIABILITY

Environmental liability could be observed in two ways. Firstly, in view of State responsibility and secondly, the responsibility of the non -state actors. In the former, State's responsibility for environmental protection arises when

the States are in breach of any international law. However, State's liability for environmental damage is concerned with variation to State's responsibility in the modern world. This approach concerns environmental damage apart from law breaking since the result is reciprocal in the sense that the action affects human and natural environment. Environmental liability can be imposed through common practice. It is stated that,

Living law which is daily observed by members of the community, and compliance with which is so axiomatic that it is taken for granted, is not deprived of the character of law by the extraneous test and standard of reduction to writing. Writing is of course useful for establishing certainty, but when a duty such as to protect the environment is so well accepted that all citizens act upon it, that duty is part of the legal system in question…

State's liability is conceptually much deeper and stronger than the concept of State's responsibility in the context of environmental damage in international law. Apart from the responsibility of the State to abide by the international law it has a duty to make laws in par with international law in each scenario. For the execution of such duties the State has empowered its branches of administration. Apart from any ministry or governmental body it may include any statutory body and or local authority. The liability of the latter (non-State actors) is very much interested to consider as no specific rule is applied. This includes private parties and individuals.

A, Basis of Liability:

Modern international environmental law bases its environmental liability on the gravity of the harm and the nature of the activity. Generally, non-dangerous and non-prohibited activities which damage any environmental element are fault based while dangerous and hazardous activities that are prohibited by law are non-fault based. The activities that are dangerous and hazardous but neither prohibited nor permitted expressly by law are either fault or non-fault based. Activities that are dangerous and hazardous, though the law permits them, are non-fault based. The activities that are ultra-hazardous in nature where the liability is non-fault based represent absolute liability.

In the local jurisdictions, environmental liability is founded on different principles. The principles of liability which had been derived through English common law has become the common law of many of the Common Wealth countries. For single occurrences which bring hazardous results entail strict liability under Rylands v Fletcher rule, while continuing acts are dealt with law of nuisance in the English law. Law of nuisance is also a part of strict liability. However, in considering the present applicability of the law of nuisance (this refers to the intervening acts that violate plaintiff's property rights) there are doubts as to whether the damage was foreseeable by the defendant. Therefore, it is not certain whether all the nuisances are subject to strict liability in the present context.

In fact, the modern environmental law principles of international law have also been derived through these common law principles. Therefore, it is worthy to study the rule of Rylands v Fletcher and the impact of it in protecting the environment.

B. The Rylands v Fletcher Rule

In the Rylands v. Fletcher case, the defendants employed independent contractors to construct a reservoir in their land. This land was separated from the plaintiff's colliery by the intervening land. Beneath the site of the reservoir there were some disused shafts connecting their land with the plaintiff's mine across the intervening land. The independent contractors were negligent in failing to discover this. Water from the reservoir burst through the shafts and the plaintiff's mine was flooded. It was held that the defendants were liable, despite the absence of fault in themselves. Delivering his judgment in the Court of Exchequer Chamber, Blackburn J. has stated;

…We think that true rule is, that the person who, for his own purposes, brings on his land collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril; and if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape.

In fact, the issue of this case was whether a property damage that is caused to the plaintiff's mine could be recovered from the defendants who were not the real wrongdoers. In the House of Lords, depending on the old laws on trespass, Lord Cranworth held that the defendants were strictly liable. Lord Cairns affirmed the judgment of the Court of Exchequer Chamber, by quoting the above passage and held that in this case, water that was accumulated in a large quantity, was a 'non -natural use' of the land. Analyzing the above decisions of the House of Lords, 'Waite' indicated that there are two approaches to the rule. Thus, he states;

…There is no single rule in Rylands v Fletcher, but rather two rules. The wide rule is that enunciated by Blackburn J and followed by Lord Cranworth in the House of Lords. The narrow rule, relied on by Lord Cairns LC, is a species of nuisance liability arising between neighbours for the escape of something not naturally on the defendant's land which adversely affects the claimant's enjoyment of his land.

Lord Cranworth had taken the broader view of the Rylands rule to apply strict liability on the defendants who had not done any wilful harm to the plaintiff on their part. This broader view follows the concern of the damage that can occur in the affairs of activities apart from the fault. On the other hand, Lord Cairns has taken the narrower view because he based himself on the fact that damage occurred due to the non-natural use of land. In fact, Lord Cairns does not bother about the intention of the defendant but, cares only about the nature of the activity that caused the damage. Therefore, the threshold for the liability was a non-natural use. In that sense Lord Cairns' view might be narrow as suggested by 'Waite'. Lord Cairns seems to have believed that his view is sufficient to decide the case but did not hesitate to accept that the same result could be arrived at on the original rule of Mr. J. Blackburn.

Nonetheless, the defendant is held fully accountable for all damages resulting from the escape of the substance even if he had taken due care to prevent its escape since the 'something is at his peril'. In this case, the standard of proof of the defendant's fault is less as the plaintiff has only to show that the defendant's action caused the damage. It is observed that the decision in this case paved the way to make different viewpoints on the accidents that result in damage from handling dangerous activities in the English common law. Despite the views, the decision in the Rylands v. Fletcher case, therefore has undoubtedly made an indelible impression in the English common law history because, it has set more a liability rule as against the law of negligence. This rule does not consider the fault or the blameworthiness of the doer. The standard of proof is less and it creates a victim oriented liability regime in tort law. This rule made the master liable for such occurrences even though the true doers are not his real employees. It ensures the financial assurance of a particular victim of a dangerous activity. Therefore, it shows justice and fair play of the common law. The negligence was found on the part of the independent contractors who had undertaken the contract for the building of the reservoir.

It covers single occasions, which are significant in the effect they have on the human and physical environment, for instance, bursting of reservoirs and the spread of fire. Some may argue that this case only deals with property damage and has no validity in environmental cases, however, if the House applied strict liability on this individual property damage depending on Blackburn J's rule, then the sanction would be confirmed if the environmental impacts of the building of a reservoir were concerned. Therefore, this rule can be used much more effectively for environmental cases in addition to individual property damage.

It has a few defences. Acts of god, statutory authority, act of a third party and statutory authority are considered against the application of the Rylands rule. These defences may limit the ambit of strict liability.

C. 'Acts of God': the defence

An Act of God is applicable in a case in two ways. Firstly, in a case based on strict liability, an Act of God is applied as a defence, excluding liability. It is a ground of justification rather than a defence. However, the outcome is that the defendant is immune from liability. Secondly, a natural event is a novus causa which diminishes liability, disconnecting the chain of causation in negligence.

An Act of God is defined in common law, as an overwhelming event caused exclusively by natural forces whose effects could not possibly be prevented. It is also indicated that in modern jurisdictions, an Act of God is often broadened by statute to include all-natural phenomena whose effect could not be prevented by the exercise of reasonable care and foresight. Such an act cannot be avoided by having due care or diligence. There is observed a strict divide between humans and nature in this interpretation.

Force majeure is also used to mean the same however; the legal use of it differentiates from the meaning of an Act of God. Force majeure has a wider application as it not only includes natural forces but also includes other causes which may not be related to nature and can be connected to human agency directly and indirectly, but on whom the humans involved in the accident do not have any control or the incident that eventuated was inevitable and which cannot be controlled. It is understood that the scope of Force majeure is broader in application than an Act of God.

In Aloysius Silva v Upali Silva the Court of Appeal of Sri Lanka held that the appellant is liable for the consequences of his act in damming up and storing the dirty water on his land regardless of whether he is guilty of negligence or not. Interestingly, the defence taken by the appellant was that he constructed tanks and trenches on his land to prevent the escape of water but, owing to the heavy rainfall experienced in November 1973, the water overflowed causing the damage, which was not in his control. In other words, to raise the defence of an Act of God. However, the court correctly said that this argument is not valid as the water is dirty water accumulated by the appellant by artificial contrivances built by him on his land. It is not surface rain water flowing naturally from his land into the field below. It is dammed water allowed to overflow into the field and comes within the principle of Rylands rule. The approach taken by the court in this case is significant to the incidents where humans have intervened the natural causes of events. The court stated that the defence is not applied in a case like this.

In examining the applicability of the defence in strict liability cases, it is observed that the authorities as well as private individuals are trying to be immune from liability. Even though Sri Lankan case law authorities are not evident to prove the use of the law, English law has decided that an act of God is a valid defence to the rule in Rylands v Fletcher. In Nichols v Marsland the court stated that,

Now the jury have distinctly found, not only that there was no negligence in the construction or the maintenance of the reservoirs, but that the flood was so great that it could not reasonably have been anticipated, although, if it had been anticipated, the effect might have been prevented; and this seems to us in substance a finding that the escape of the water was owing to the act of God. However great the flood had been, if it had not been greater than floods that had happened before and might be expected to occur again, the defendant might not have made out that she was free from fault; but we think she ought not to be held liable because she did not prevent the effect of an extraordinary act of nature, which she could not anticipate."

In this case, the defendant diverted a natural stream on his land to create ornamental lakes. Exceptionally heavy rain caused the artificial lakes and waterways to become flooded and damage adjoining land. The court decided not to impose liability under Rylands v Fletcher as the cause of the flood was an Act of God.

The traditional approach to the applicability of the defence shows us the strong delineation between human acts and nature. However, the court was of the view that depending on foreseeability there is a likelihood of making a defendant liable under the rule.

The traditional way of application of the defence has been criticised by the academia in the current context. In the absence of insurance for covering policies on floods and droughts this line of thinking is important. Fraley has suggested a shift of the legal doctrines across these areas considering that developments have taken place in disciplines such as the food and drug law, wilderness protection and patents. Seeing the corporeal as "imprinted by history", the Author says that,

…These concepts connote passive and receptive forms of nature as a space for human action. Drawing on this traditional way of speaking even recent work in the field of geography describes events from "flood and forest fires to animal attacks and crop diseases" as "non-human interventions" despite the fact that there is scientific evidence that ties the frequency and origins of all of these events to human actions. Because we have not substantially developed a new understanding of "nature" and "human" as integrated, we easily fall back to the old dichotomy. Other fields such as law, which draw upon social science for their theoretical bearings, follow suit.

The argument has been a reality in the face of climatic transformation and occurrence of floods and droughts within the region. It is scientifically proven that human acts sufficiently link to severe floods in the cities in the rainy season. Thus, 'severe rains beyond memory' have become an annual occurrence.

Further, the emphasis made by the Indian Supreme Court with regard to the enterprise's liability in the case of M.C. Mehta v Union of India is worthy to note in this connection. Stating the inappropriateness of the applicability of an outdated principle to a modern scenario the court emphasised that, they cannot allow their judicial thinking to be restrained by referring to the law as it prevails in England and they should be prepared to receive light from whatever source it comes but, the court has to build their own jurisprudence and they cannot countenance an argument that merely because the law of England does not recognise the rule or exceptions to the rule. Thus, the court held that the enterprises are strictly and absolutely liable for the damages caused by toxic escapes despite the fact that they are at fault or

not, therefore does not subject to any exception. Indian courts followed the newly established practise thereafter in several important environmental cases.

Consequently, a notable deviation from the applicability of Rylands v Fletcher rule which is prevailing in the English law is observed in the modern common law countries.

III. CONCLUSION

This paper maintained the argument that environmental damage is special, therefore it warrants a strict legal approach, specially, when humans intervene artificially into natural causes. The authorities have a special obligation to be extra careful and implement a precautionary method to minimise the damage, if extreme weather conditions are recurrent and foreseeable; therefore, the effectiveness of the rule of Rylands v Fletcher was examined. In this, it is observed that because of the wide application of the defence of Acts of God, the strictness of the rule has reduced. As a result, the competent authorities do not take their duties seriously. An Act of God is not a blanket immunity for the defendants who disregard environmental safety. A major reason for the wider application of the defence is the separation of human acts from nature. Nature is only a stage for performing human acts. This is correctly acknowledged by the courts in the cases of Silva v Silva and Mehta v Union of India. The approach taken by the courts must necessarily be the rule of thumb against environmental degradation. The world has experienced severe climatic change owing to human behaviour. In this sense, separating humans and nature is useless. Thus, it is timely to consider the applicability of the defence of Acts of God in the context of modern environmental deprivation.