

The Application of the Strong Precautionary Principle: Suggestions for Sri Lanka

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Abstract: *The precautionary principle is a widely accepted and applied principle in Environmental Law. Academic literature recognizes two formulations of the precautionary principle: strong and weak. This research seeks to defend the strong precautionary principle based on Earth jurisprudence and to lay down suggestions to change the judicial attitude in Sri Lanka in the application of the precautionary principle while comparing the Sri Lankan judicial stance in this regard with that of India. The research is carried out using the black letter approach and the international and comparative research methodologies. This research would provide a guide to ensure that the precautionary principle is best utilized against human activities affecting the environment in Sri Lanka. It would also contribute to filling a long-felt lacuna in the existing literature on an in-depth discussion on the application of the precautionary principle in Sri Lanka.*

Keywords: *The precautionary principle, earth jurisprudence, strong version of the precautionary principle*

1. Introduction

The precautionary principle is based on the argument that it is better to foresee and assess environmental damage and take measures to prevent or mitigate it. Thus, the precautionary principle stands against letting environmental damage take place and seeking measures to remedy the damage. Academic literature

recognizes two formulations of the precautionary principle: strong and weak. The strong formulation of the principle demands that precautionary measures must be adopted even where it cannot be shown that the activities are likely to produce significant harm and requires the proponent of an activity to bear the burden of proving that the proposed activity is environmentally benign. The strong precautionary principle is neither well-received nor well-favoured in the academic literature. This research seeks to defend the strong precautionary principle in light of the Earth jurisprudence and to lay down suggestions to change the judicial attitude in the application of the precautionary principle in Sri Lanka while comparing the Sri Lankan judicial stance in this regard with that of India.

2. Methodology

This research is carried out using a combination of two methodological approaches: the black letter approach and the international and comparative research methodology. The research selected India to make comparisons with Sri Lanka since the Indian judiciary has always been a pioneer in the adoption, application, and development of innovative legal approaches for the protection of the environment.

STRONG PRECAUTIONARY PRINCIPLE

The best method to explain the strong precautionary principle is to make a contrast between the recognition of the precautionary

principle in the Rio Declaration (1992) and the Wingspread Declaration (1998). According to Rio Declaration, '[i]n order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation'. Accordingly, regulation cannot be denied solely on the basis of a lack of decisive evidence of the harm (Sunstein 2003, p. 1012). However, in order to be qualified as a harm worth precautionary measures, it must be either serious or irreversible.

By contrast, Wingspread Declaration holds, '[w]hen an activity raises threats of harm to human health or the environment, precautionary measures should be taken even if some cause and effect relationships are not fully established scientifically. In this context, the proponent of an activity, rather than the public, should bear the burden of proof.'

Accordingly, while Rio Declaration stipulates precautionary action where there are 'threats of serious or irreversible damage', Wingspread Declaration emphasizes two things: (1) precautionary measures must be adopted even where it cannot be shown that the activities sought to be undertaken are likely to produce significant harms. (2) the proponent of an activity, rather than the regulatory authorities, should bear the burden of proving that his activities are environmentally benign. Sunstein adds further and holds that under this approach, regulation is required even where the costs of such regulatory measures are high (Sunstein 2003, p. 1018).

The formulation of the principle adopted in the Rio Declaration is termed the 'weak precautionary principle' while the Wingspread

approach is widely recognized to be the 'strong precautionary principle'.

CRITICISMS AGAINST STRONG PRECAUTIONARY PRINCIPLE

The strong precautionary principle has been the target of widespread academic criticism. Sachs holds that it 'has become a punching bag for many scholars of risk regulation' (Sachs 2011, p. 1304).

Arguably, the strongest criticism against the principle is raised by Sunstein who holds that '[t]aken in the strong form, the precautionary principle should be rejected, not because it leads in bad directions, but because it leads in no direction at all' (Sunstein 2003, p. 1003). He holds that it is paralyzing, inflexible, and extreme (Sachs 2011, p. 1285) because 'it forbids all courses of action, including inaction' (Sunstein 2002, p.17). He refers to several concrete problems: regulation of arsenic, genetically modified food, nuclear power, threats to marine mammals due to military exercises, and greenhouse gases and holds that in none of these problems, the risk is close to zero. Accordingly, if under the strong precautionary principle the burden is imposed on the project proponent to prove that his actions are environmentally benign, he will never be able to meet it (Sunstein 2002, p. 17-20). He perceives, therefore, strong precautionary principle as eliminating 'technologies and strategies that make human lives easier, more convenient, healthier, and longer' (Sunstein 2008, p. 25).

His view is shared by several other scholars. For instance, Miller and Conko (2000) hold that '[i]n practice, the precautionary principle establishes a lopsided decisionmaking process that is inherently biased against change and therefore against innovation'. Hansson holds that the principle has been accused in academic literature 'as stifling innovation by

imposing unreasonable demands on the safety of new technologies' (Hansson 2020, 245).

DEFENDING STRONG PRECAUTIONARY PRINCIPLE

This research relies on the theory of Earth jurisprudence in defending the strong precautionary principle. The core principle of the theory of Earth jurisprudence is accepting human beings only as a part of the wider Earth community (Cullinan 2011, 13). Cullinan further holds that 'one of the primary causes of environmental destruction is the fact that our governance systems are designed to perpetuate human domination of nature instead of fostering mutually beneficial relationships between humans and the other members of the community' (Cullinan 2011, 13).

The criticisms against the strong precautionary principle carry two interesting characteristics. First, they perceive the precautionary principle, specially, the strong formulation of it, as imposing a restriction on the developments, innovations, and initiatives which could bring benefits to human beings at the expense of potentially drastic impacts on beings other than humans. Accordingly, this criticism is another extension of the anthropocentric ideas often reflected in Western legal philosophies and must therefore be outright rejected due to two reasons. First, as believed in Earth jurisprudence, man is not the only being that matters in the Earth community. Second, science has proven that man's survival is dependent on the survival of nature (Odum 1963; Odum 2004; Lovelock 1995; Ruse 2013). Thus, the strong precautionary principle is not depriving man of growth, rather it ensures it by guaranteeing the safety of Earth, on which his growth depends unconditionally. Therefore, it is only logical to take precautionary measures if there

are threats of harm to humans or the environment regardless of their gravity.

Second, many of the criticisms against the strong precautionary principle revolve around the argument that the strong formulation of the precautionary principle requires the project proponent to prove 'zero risk' or 'absolute safety' for an activity to proceed (Sachs 2011, p. 1305). However, the strong precautionary principle does not necessarily suggest such an extreme and perhaps even impossible standard to be met. The authors of this paper build two arguments in this regard. First, it is only just and rational that the onus of proof is attached to the risk creator: the project proponent to establish that his project is not harmful to the environment rather than imposing it on the regulator to prove that the proposed project is harmful to the environment. Second, the project proponent need not establish that his activity has no risk, but rather he must establish that the activity proposed by him takes the maximum precautions necessary to maintain the integrity, balance, and health of the environment and all its beings rather than just the man.

JUDICIAL STANCE IN SRI LANKA

At the outset, the judicial recognition and application of the precautionary principle in Sri Lanka reveal that Sri Lanka follows the Rio approach of the weak precautionary principle. In *Bulankulama v Secretary, Ministry of Industrial Development (Eppawela Case)* (2000), honourable justice Amerasinghe cited Principle 15 of the Rio Declaration and held '[t]he precautionary principle...in my view, ought to be acted upon by the 4th respondent. Therefore if ever pollution is discerned, uncertainty as to whether the assimilative capacity has been reached should not prevent measures being insisted upon to reduce such pollution from reaching the environment.'

A similar approach was followed in *Ravindra Gunawardena Kariyawasam v Central Environmental Authority and others (Chunnakam Power Plant Case)* (2019), where honourable Jayawardena J held,

The precautionary principle comes into play where not only the likelihood of harm, but also its nature and extent, may all be uncertain. These principles are based on common sense dictates that a society should seek to avoid environmental damage which may result from proposed projects, by exercising care, foresight and forward planning. Simply put, that, as the old adage says, 'It is better to be safe than sorry' The approach that States should be guided by the 'Precautionary Principle' where there is an element of uncertainty with regard to the environmental harm that may be caused by a proposed project is highlighted in Principle 15 of the Rio Declaration.

However, while the court relied on the Rio Declaration, in both instances court did not have a particular emphasis that the harm must be serious. The court rather emphasized the need of adopting precautionary measures in the face of uncertainty about the nature and extent of the harm. The court nevertheless had no discussion on who must bear the onus of proof. Thus, the Sri Lankan judicial stance seems to be a confused version of the two ends of the precautionary principle. However, the reference made to principle 15 of the Rio Declaration in justifying the adoption of the precautionary principle implies that the court intended to adopt the weak version embodied therein.

JUDICIAL STANCE IN INDIA

As far as India is considered, the judicial approach carries the characteristics of both the weak and strong versions of the precautionary principle. In *Vellore Citizens Welfare Forum* (1996), the court recognized that the onus of proof is on the actor or the

developer/industrialist to show that his action is environmentally benign but emphasized the necessity of adopting precautionary measures only where there are threats of serious and irreversible damage. This approach was reaffirmed in the *MC Mehta v Union of India (Taj Trapezium Matter)* case (1997).

A very progressive approach in this regard was followed in *Andhra Pradesh Pollution Control Board v MV Nayadu* (1999). In the case, the court while referring to Rio Declaration, looked beyond Rio definition of the precautionary principle and held:

The principle of precaution involves the anticipation of environmental harm and taking measures to avoid it or to choose the least environmentally harmful activity. It is based on scientific uncertainty. Environmental protection should not only aim at protecting health, property and economic interest but also protect the environment for its own sake. Precautionary duties must not only be triggered by the suspicion of concrete danger but also by (justified) concern or risk potential. However, at the same time, the court noted that the precautionary principle is still evolving and 'the consequences of its application in any potential situation will be influenced by the circumstances of each case'. The court also observed that 'the new concept which places the burden of proof on the developer or industrialist who is proposing to alter the status quo has also become part of the environmental law [in India]'.

This case was cited and followed in a number of subsequent cases including *Jhammanlal Gautam v Ministry Of Environment Forest* (2021), *Mukesh Kumar Aggarwal v Cpcb & Ors* (2021) and *PG Najpande v Another vs Chief Secretary* (2020).

3. Recommendation and Conclusion

This research holds that the strong precautionary principle can challenge its criticisms since it is the version of the precautionary principle that recognizes man's true position in the wider Earth community. While the Indian judiciary has incorporated at least vaguely some elements of the strong precautionary principle, Sri Lankan judiciary is still reliant on and upholds the weak formulation of the precautionary principle embodied in the Rio Declaration. This research suggests that the judiciary can recognize and apply the strong precautionary principle in environmental litigation in Sri Lanka placing man in the correct position where he must be. This would particularly be meaningful since it is the judiciary in Sri Lanka which pioneered the environmental movement and played a versatile role in protecting the environment of the country over and above the other two branches of the government in the two decades following 2000.

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