An analysis of the legal responsibility of corporations towards industrial water pollution in Sri Lanka

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ABSTRACT

Water pollution resulting from industrial activities has emerged as one of the most pressing issues in contemporary Sri Lanka. It has profoundly impacted the environment and human lives, leading to a wide range of repercussions. This research aims to analyse the provisions within the corporate law in Sri Lanka that establish the responsibility for the environmental pollution caused by corporations. Specifically, it addresses the overarching question of whether the corporations in Sri Lanka bear legal responsibility for water pollution resulting from their activities. It also aims to provide brief examples from Canada, the UK, India, and Australia to illustrate key lessons for law reform. This research employs the black-letter approach of research and international and comparative research methodologies. The research reveals that corporate law in Sri Lanka lacks adequate provisions to hold corporations responsible for industrial water pollution. The research offers a guide for law makers for legal reform to ensure that corporations fulfil their responsibilities to both humans and the environment and fill a gap in the existing body of literature by addressing a matter that has received limited attention in the academic literature on Sri Lanka.

Keywords: industrial water pollution, corporate legal responsibility, environmental reporting, stakeholder approach to corporate accountability, directors' duties to stakeholders

INTRODUCTION

This research aims to assess the adequacy of legal responsibility imposed on corporations for water pollution resulting from their activities and to propose recommendations for legal reforms. This objective becomes particularly crucial in contemporary Sri Lanka where water pollution due to industrial activities has become a common occurrence. For instance, the Kelani River, considered to be the fourth-longest river on the island and the home to a substantial number of threatened species (Goonatilake et al., 2016, pp. 14–27) is under constant threat of being polluted due to human activities. Two major industrial zones, equipped with central waste treatment facilities, are situated along the banks of the Kelani River in Seethawaka and Biyagama. The area hosts approximately 2,840 industries, each with varying pollution potentials, all located along the Kelani River (Goonatilake et al., 2016, pp. 26, 29–30).

Research indicates that these industries release both treated and untreated wastewater into the river (Goonatilake et al., 2016, pp. 26, 29–30). Studies, such as the one conducted by Makumbura and others, which assessed the water quality of the Kelani River using nine key parameters, conclude that 'the surface quality [of the river water] gradually declined due to development and industrial activities' (Makubura et al., 2022, p. 147). One of the most controversial incidents related to Kelani River pollution occurred in 2015 when a prominent multinational beverage company discharged diesel oil into the river. This contamination rendered the primary water source for millions of Sri Lankans living in suburban Colombo entirely unsafe for consumption for several days (Konasinghe & Edirisinghe, 2020, pp. 60-61; Environmental Foundation Limited, 2015). Unfortunately, industrial water pollution is not limited to the Kelani River; it affects many rivers and many water sources throughout the country.

Research Problem

In light of the escalating levels of industrial water pollution in Sri Lanka, it is crucial to hold polluters responsible for the contamination stemming from their activities. This paper seeks to answer the overarching question of whether the law governing corporations in Sri Lanka imposes a legal responsibility on corporations for water pollution caused by their activities.

Methodology

The research is conducted using two methodological approaches: the black-letter approach and international and comparative research methodology. A Black-letter approach was used to carry out an in-depth analysis of the existing legal framework of corporate legal responsibility in Sri Lanka and its adequacy to make corporations accountable for water pollution caused by them. International and comparative analysis is used to determine the lessons that could be gleaned from the comparative jurisdictions of Canada, the UK, India, and Australia, which carry more comprehensive legislative provisions and legal mechanisms to enhance corporate accountability towards stakeholders. Both methodologies were utilized using legislation and judicial decisions as primary sources and books, journal articles, conference proceedings, theses, and internet resources as secondary sources.

The paper is structured into 4 main sections in the discussion to follow. In section two, the concept of the stakeholder approach to corporate accountability is elucidated, particularly in its connection to the issue of industrial water pollution. The third section conducts an in-depth

analysis of how the current legal framework in Sri Lanka addresses corporate accountability for industrial water pollution. Section four offers recommendations tailored for Sri Lanka, aiming to bolster corporate responsibility for activities that contribute to water pollution. The final section of the paper concludes.

LITERATURE REVIEW

Stakeholder Approach to Corporate Accountability

This research rejects the traditional notion that companies are only accountable and responsible towards their capital providers and adopts the broader view that companies shall be answerable to all parties connected with the company, whether internal or external.

It has long been accepted that since the shareholders own a company's equity, corporations have legal obligations to serve their interests and they acquire certain superior rights and privileges over other categories of interested parties. It is often perceived that any action taken by the management must ultimately be justified by 'whether it furthers the interests of the firm's shareholders?' (Shao, 2009, p. 6). The shareholder perspective is grounded in the principle of private property rights, which forms the bedrock of capitalism. The conventional belief is that private ownership is fundamental not only to economic efficiency but also to the maintenance of social order. The shareholder approach to property and corporation has found additional validation through the principles of free market, economic efficiency, and profit maximization (Gamble & Kelly, 2001, p. 110).

The stakeholder theory challenges the notion that shareholders hold a privileged position within a business enterprise. Instead, it advocates that corporations should fairly serve all groups or individuals with a vested interest in the corporation. This perspective was initially introduced by Freeman, who defined stakeholders as any group or individual capable of influencing or being influenced by the firm's objectives (Freeman, 1984). It was later extended to include the actions, decisions, policies, practices, or goals of the organization. In this research, this broader definition is employed to establish that industrial water pollution that negatively affects the environment and the public at large is a violation of the responsibility of the corporations towards its stakeholders.

While shareholder theory advocates the 'free market' doctrine, stakeholder theory contends that the issues of free riders, moral hazards, and monopolistic power inherent in the free market justify government intervention and promote corporate social responsibility (Shao, 2009, p. 7).

According to the stakeholder perspective, corporations cannot prioritize shareholder interests at the cost of other stakeholders, as such a practice is deemed both morally and economically inefficient (Alkhafaji, 1989). Therefore, this research posits that companies have both a moral duty and an economic interest in being accountable for their actions, particularly when those actions affect stakeholders, encompassing industrial water pollution's impact on the general community and the environment.

The stakeholder theory is discussed in three broad ways in the academic literature: descriptive, instrumental, and normative (Donaldson & Preston, 1995, pp. 69-71). Descriptive stakeholder theory is focused on providing a detailed description of distinct corporate characteristics and behaviours (Donaldson & Preston, 1995, p. 70; Jawahar & McLaughlin, 2001; Egels-Zandén & Sandberg, 2010). Instrumental stakeholder theory seeks to establish a link between stakeholder management and firm performance (Donaldson & Preston, 1995, p. 71; Egels-Zandén & Sandberg, 2010) Normative stakeholder theory primarily aims to offer guidance for corporate governance, specifically addressing how firms should be governed and to whom managers should be accountable (Donaldson & Preston, 1995, p. 71). The present research particularly focuses on the third approach to stakeholder theory. This approach involves interpreting data related to industrial wastewater generation and disposal in light of the overarching principle that companies/organizations must conduct their business in a manner that avoids any adverse impact on the various stakeholders associated with the company, including the general public and the environment. It, therefore, argues that the legal framework governing corporations should hold that companies are accountable for ensuring that no one, not even individuals remotely connected, is affected by the discharge of such wastewater.

In this context, the following section of the paper aims to investigate how the existing legal framework governing corporations in Sri Lanka acknowledges and establishes corporate accountability for industrial water pollution stemming from their operations.

Corporate Accountability for Industrial Water Pollution in Sri Lanka

Sri Lankan corporate law does not place direct and explicit obligations on corporations to be accountable for their actions that impact both people and the environment including industrial water pollution. Nonetheless, it is crucial to examine the current legislative provisions to determine if such a duty has, at the very least, been implicitly acknowledged. This analysis can be categorized under three main headings: the director's duties towards the stakeholders and

the environment, environmental reporting obligations of the corporations, and corporate social responsibility.

Director's Duties towards the Stakeholders and the Environment:

The main legislation governing corporations in Sri Lanka, the Companies Act, No. 7 of 2007 (hereinafter referred to as CASL) does not impose an express duty on the directors to take environmental or social concerns into account in their operations. Section 187 of the CASL imposes a duty on the directors to act in good faith and in the interest of the company. An emerging trend in many jurisdictions is to adopt a progressive interpretation of this duty and acknowledge that it encompasses all stakeholders of the company and concerns for the environment.

For instance, the *National Roads and Motorists' Association Ltd v Geeson* (2001) decided in Australia highlighted that, in specific situations, directors may have a 'public duty' to take actions or refrain from them for the greater benefit of the entire community, rather than exclusively prioritizing the interests of the company. Commenting on the case, Professor Robert Baxt has stated:

> The law of directors' duties may again be about to head down an 'uncharted road', where traditional principles such as acting in the best interests of the company and maximising profits for shareholders will be forced to interact with, and accommodate, contemporary considerations including corporate social responsibility (CSR), triple bottom line reporting and, certainly, sustainable development.
>
> (Baxt, 2002, pp. 445-447)

In the Canadian case of *Peoples Department Stores Inc. (Trustee of) v. Wise* (2004), the court ruled that when assessing whether directors are acting in the best interests of the corporation, it may be legally acceptable for the board of directors to consider various factors. These factors can include the interests of shareholders, employees, suppliers, creditors, consumers, governments, and the environment, depending on the specific circumstances of the case.

In the United Kingdom, section 172 of the UK Companies Act (2006) outlines directors' duties in acting in good faith for the benefit of the company. It specifies six factors that directors must consider, including the impact of company operations on the environment and the community.

In essence, this section makes it clear that directors are duty-bound to take into account and care for the environment when making business decisions.

The rationale behind this broadening of perspective is straightforward. If a company conducts its operations in a manner that goes against the interests of the general public and environmental protection, it may boost short-term profits. However, in the long term, it can lead to negative community backlash, legal actions, government investigations, and regulatory interventions, all of which can harm the company's reputation and result in financial losses. Such outcomes can ultimately diminish the company's profitability, sustainability, and long-term viability. Consequently, it can be logically deduced that business activities impacting the general public and the environment are detrimental to the company's interests. The situation remains the same when it comes to industrial water pollution. Water, being a fundamental necessity for communities and a vital component of the environment, places even greater responsibility on corporations when it comes to pollution of this resource.

CASL, however, does not explicitly specify to whom the duty of directors is owed, nor does it offer a precise definition of the term 'best interest of the company'. This ambiguity has yet to be conclusively addressed and resolved through judicial interpretation. Nevertheless, from a progressive standpoint, Sri Lanka can utilize section 187 of the CASL to establish a broader duty for directors to act in the interest of all stakeholders of the company and the environment following many lessons from jurisdictions around the world such as those cited above. Recognizing such an expanded scope of directors' duties ensures that their industrial activities, including industrial wastewater disposal, do not have harmful effects on the company's stakeholders and environmental well-being. Nevertheless, until this is explicitly defined by an authoritative legal source, whether through legislation or a judicial decision, there will always be an element of skepticism surrounding the scope of corporate accountability in Sri Lanka

Environmental Disclosure and Reporting:

On the other hand, the Sri Lankan legal framework does not impose an express duty on corporations to disclose their environmental impacts. Environmental reporting plays a crucial role in enhancing a company's accountability concerning industrial wastewater management and treatment. It helps preserve or restore the company's perceived legitimacy while enabling relevant authorities to assess the environmental impacts created by corporate entities through the production and discharge of industrial wastewater. This, in turn, mitigates environmental

risks and fulfills the companies' responsibilities towards society and future generations. Environmental reporting also empowers the broader community to monitor the corporation's activities affecting them and their water sources, identify risks, and exert pressure on the corporation to adhere to the highest possible standards for protecting water sources and the environment as a whole. All of these factors collectively contribute to the achievement of sustainable development.

Arguably, establishing a robust legal framework that compels corporate entities to adhere to environmental reporting standards would be a more effective approach to promoting good practices in environmental reporting by corporate entities. This stands in contrast to relying on a voluntary approach, where corporations have the discretion to disclose or abstain from disclosing their environmental implications (Deegan & Gordon, 1996; Cunningham & Gadenne, 2003)

Sri Lanka Accounting and Auditing Standards Act, No. 15 of 1995 (hereinafter referred to as SLAASA) deals with the Accounting Standards associated with financial reporting in Sri Lanka. The Act empowers the Institute of Chartered Accountants of Sri Lanka (hereinafter referred to as ICASL) to adopt Accounting Standards from time to time for the purpose of maintaining a uniform and high standard in the preparation and presentation of accounts of the business enterprises. In 2009, ICASL made the decision to fully converge with all pronouncements issued by the International Accounting Standards Board (hereinafter referred to as IASB), with some minor modifications, and to subsequently adopt all IASB pronouncements. Sri Lanka Accounting Standard (hereinafter referred to as LKAS) 1 aligns with International Accounting Standard (hereinafter referred to as IAS) 1 and encourages environmental reporting in paragraph 114 (d). Furthermore, IAS 8 and LKAS 8, which follow it, facilitate provisions for environmental-related costs. IAS 16 and LKAS 16 provide guidelines on the treatment of environmental expenditures related to property, plant, and equipment. However, Sri Lanka currently lacks an accounting standard that explicitly and exclusively addresses environmental reporting.

Under section 5 of SLAASA, the application of standards adopted by ICASL is limited to the business enterprises listed in Schedule I of the Act. In terms of section 6 of the Act, only these enterprises are legally obligated to comply with such standards. Hence, accounting standards that address environmental reporting may exclude companies not specified in Schedule 1 of SLAASA. While the counterargument to this stance, that larger corporations are typically the

major polluters, holds merit, the cumulative environmental impact of small-scale industries discharging wastewater must not be overlooked.

The Code of Best Practice on Corporate Governance (2017) which is a joint initiative between the Securities & Exchange Commission of Sri Lanka (hereinafter referred to as SEC) and the ICASL, in clause H.1.1, states that the annual reports of the companies listed in the SEC shall contain sufficient information on how environmental, social and governance risks are recognised, managed, measured and reported. Clause H.1.2, further compels listed companies to adopt an integrated approach with regard to environmental governance which takes into account pollution prevention, sustainable resource use, climate change, protection of the environment, biodiversity, and restoration of natural resources. Furthermore, it mandates sustainability reporting and underscores that an organization's environmental governance should embrace an integrated approach. This approach considers the direct and indirect economic, social, health, and environmental consequences of their decisions and activities. It encompasses aspects such as pollution prevention, sustainable resource utilization, climate change mitigation, environmental protection, biodiversity preservation, and national resource restoration. The Code of Best Practice offers a robust framework for environmental reporting, and it is obligatory for listed companies to adhere to these corporate governance rules. In contrast, companies not listed under the SEC do not have a mandatory requirement to comply with the code. Thus, the application of the Corporate Governance Code is limited and relies on the discretion of non-listed companies.

The primary limitation in the environmental reporting legal framework in Sri Lanka is the absence of explicit legal recognition of such reporting. Even the legislations that indirectly acknowledge environmental reporting are applicable only to specific categories of companies. This setup allows certain companies to entirely forego environmental reporting unless they voluntarily choose to engage in such reporting.

By contrast, the need for disclosing the environmental impacts of a company's operations is more explicitly recognized in other jurisdictions. For instance, in Australia, there are certain general reporting obligations on corporations that require them to disclose the environmental impacts of their activities. Corporations operating in Australia are currently required to provide information on environmental performance in their annual directors' report under section 299(1)(f) of the Corporations Act 2001 (Cth). The section provides that:

> If a company's operations are subject to any particular and significant environmental regulation under a law of the Commonwealth or of a State or Territory, the directors' report must give details of the company's performance in relation to environmental regulation.

This section mandates companies to disclose their engagement with environmental matters and their compliance with environmental regulations.

In the United Kingdom, section 415 of the Companies Act imposes an obligation on directors to prepare an annual director's report. According to sections 417(1) and 417(5)(b)(i), for quoted companies, this report must include a business review that covers various aspects, including environmental matters and their impact on the company's business. In terms of section 417(6)(b), the review may also include analysis using key performance indicators related to environmental and employee matters.

These examples from comparative jurisdictions, while they may have certain limitations, ensure that a company's engagement with the environment is disclosed to the wider community. This disclosure enables compliance monitoring, the ability to identify risks beforehand, and empowers stakeholders to exert pressure on corporations to refrain from actions that affect water sources or to take appropriate precautionary measures.

Corporate Social Responsibility

An explicit acknowledgment of corporate social responsibility (hereinafter referred to as CSR) is another compelling approach to ensure corporate accountability for industrial water pollution. It places an obligation on corporations to act ethically and responsibly towards the environment and the community. Furthermore, it encourages corporations to engage with a broad spectrum of stakeholders, including local communities and environmental organizations. This, in turn, motivates corporations to maintain transparency and accountability in their practices related to the generation, treatment, and discharge of industrial wastewater.

In addition to the discussed provisions that might indirectly establish a CSR expectation for companies, Sri Lankan law does not explicitly acknowledge a distinct CSR obligation for corporations. In contrast, India has legally mandated corporate social responsibility through Section 135 of India's Companies Act. Under this legislation, companies meeting certain financial criteria must establish a Corporate Social Responsibility Committee consisting of three or more directors. This committee has the responsibility to formulate and recommend a

CSR Policy, which specifies the activities to be carried out as per Schedule VII. These acts include, among other things,

> ensuring environmental sustainability, ecological balance, protection of flora and fauna, animal welfare, agroforestry, conservation of natural resources and maintaining quality of soil, air and water including contribution to the Clean Ganga Fund setup by the Central Government for rejuvenation of river Ganga. Companies Act of India (2013), Schedule VII, s iv.

The committee's responsibilities include crafting a CSR Policy that delineates activities addressing environmental and social matters, including those pertaining to water sources. By recommending funding for these endeavors and regularly overseeing the policy's execution, it guarantees that companies implement tangible measures to reduce the adverse effects of their operations on water sources. This legal mandate establishes a structure that fosters greater transparency and accountability among corporations concerning their involvement in industrial water pollution and other environmental concerns. Accordingly, this legal framework encourages corporations to contribute to the sustainability and protection of water sources.

It is clear from the discussion above that there is a notable gap in Sri Lanka's corporate legal framework that allows corporations to evade their responsibility for industrial water pollution. Given this context, it becomes essential to ascertain how the Sri Lankan law be reformed to address this salient gap. The next section of the paper focuses on this aspect and will lay down recommendations.

RECOMMENDATIONS

The Expansion of Directors Duties

It is imperative to hold company directors accountable for untreated wastewater discharge that affects the environment and the wider community. Following the lessons from the UK, as discussed in section 3.1. of this paper, CASL should be amended to explicitly impose an obligation on directors to consider the environmental impact of business operations and the long-term consequences of their decisions when acting in the company's best interests. This duty should be clearly defined in the company legislation, rather than relying on judicial interpretation or prolonged debates. The duty should specify that directors, when acting in good faith, must take into account factors such as the long-term consequences of their decisions and the impact of the company's operations on the community and the environment. This would

establish a clear and unequivocal obligation for directors to consider the environmental and social consequences in taking decisions related to industrial wastewater.

Nevertheless, a concern arises in this context: should the law allow directors to consider environmental concerns even when they are not directly related to promoting the company's success, or when such considerations do not yield direct benefits in terms of maximizing shareholder returns? Therefore, it is advisable to impose a duty on directors to give due consideration to environmental sustainability alongside the interests of the company. However, directors should be guided by the conscious understanding that industrial water pollution, which causes significant harm to the environment and human health, does not serve the best interests of the company in the long run.

Disclosing Environmental Impacts of Business Entities

Business entities should disclose the external impacts of their operations to both capital providers and all stakeholders. This disclosure is crucial for the sustainable management of industrial wastewater discharge practices, as it integrates long-term profitability with environmental responsibility (Khuntia, 2014).

Following the UK and Australian models, CASL could initially establish a duty for directors to compile an annual director's report for each financial year, a critical tool for informing stakeholders and assessing directorial performance. This report should provide a comprehensive analysis of key financial performance indicators, extending to include environmental and social considerations. In the case of publicly listed companies, their strategic reports must encompass environmental and social impacts, offering stakeholders a holistic understanding of the company's development, performance, and societal footprint. If a company's operations fall under the purview of environmental regulations, the director's report must meticulously outline the company's compliance with these environmental standards. Subsequently, the board of directors should grant approval to the director's report. Failure to adhere to these statutory reporting requirements should carry legal consequences, making directors liable to fines. Such penalties aim to incentivize companies to diligently meet their reporting obligations.

Secondly, it is recommended to impose a duty on all the companies incorporated under the Companies Act No 07 of 2007 to comply with the accounting standards in force for the time being. Accounting standards shall be further developed focusing more on Triple Bottom Line

Reporting which broadens a business's focus to include social and environmental considerations.

Encourage Social Responsibility of the Company

It is imperative to establish a clear legal framework that emphasizes a company's responsibility towards both the environment and society. Water pollution stands as one of the most pressing environmental challenges, significantly impacting the well-being of communities. Within the realm of CSR, companies hold moral obligations to mitigate water pollution and manage wastewater sustainably. Therefore, it is strongly recommended that the CASL explicitly incorporates CSR principles and mandates the formation of a CSR Committee within the Board of Directors following the lessons from India. The primary role of this committee would be to provide comprehensive guidelines for companies to follow when engaging in CSR activities. Subsequently, the Board of Directors should be obligated to approve the company's CSR policy, taking into consideration the recommendations put forth by the CSR committee, and disclose this policy within the director's report, as previously suggested. In instances where a company fails to allocate the prescribed CSR funds, the board must provide transparent reasons for this in their report. By enacting these provisions, the Companies Act in Sri Lanka can take a significant stride toward becoming one of the world's most progressive pieces of corporate social responsibility (CSR) legislation. This move represents a crucial step towards achieving sustainable development and fostering responsible business practices.

CONCLUSION

It is imperative to ensure that a country's corporate legal system imposes obligations on corporations to be accountable for their actions affecting water sources, such as industrial water pollution. Sri Lanka's current legal framework lacks such an express obligation. Valuable lessons can be drawn from the legal systems of the UK, Australia, India, and Canada in this regard. Therefore, it is necessary to amend the existing laws in Sri Lanka to establish broader corporate accountability in their activities related to industrial wastewater generation, management, and discharge. Such legal reforms are essential to prevent adverse impacts on the environment and the well-being of the country's residents, ultimately promoting sustainable development.

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