

National Environment Tribunal, Sustainable Development and Access to Justice in Kenya

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NATIONAL ENVIRONMENT TRIBUNAL, SUSTAINABLE DEVELOPMENT AND ACCESS TO JUSTICE IN KENYA

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Abstract

The paper discusses the role played by the National Environment Tribunal (NET) in promoting access to justice and enhancing the principles of sustainable development in Kenya. The paper also discusses establishment of the National Environment Tribunal and its jurisdiction. It further analyses the role played by NET towards environmental protection and conservation in Kenya and promotion of human rights. The paper also highlights some of the challenges facing the tribunal and proposes recommendations towards enhancing the effectiveness of the tribunal.

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1. INTRODUCTION

Tribunals are an integral component of the justice system in Kenya and play an important role in reducing pressure on courts and facilitating expeditious access to justice.¹ They have the potential to facilitate faster management of disputes and deal with specialised matters under different statutes.² The Constitution recognises tribunals as part of subordinate courts in the judicial hierarchy.³ Constitutional recognition of tribunals as part of the judiciary demonstrates their importance in the administration of justice in Kenya. Under the previous constitutional dispensation, tribunals were under the respective ministries.⁴ This posed several challenges such as undermining the independence of tribunals. Consequently, under the new constitutional dispensation, the judiciary is undertaking measures towards integrating tribunals as part of the judiciary. The purpose of transitioning tribunals is to delink them from the executive and integrate them into the judiciary in order to enhance their independence.⁵ With independence, tribunals are able to discharge their mandate in facilitating the administration of justice and enhancing access to justice by reducing pressure on courts.

The National Environment Tribunal (NET) is established under the Environmental Management and Co-Ordination Act (EMCA).⁶ The jurisdiction of the Tribunal is set out under section 125 of the Act. The Tribunal hears and determines appeals concerning: *grant of a licence or permit or refusal to grant a licence or permit; imposition of any condition, limitation or restriction on a licence; revocation, suspension or variation of a licence;*

¹ Muigua.K., Tribunals within the Justice System in Kenya: Integrating Alternative Dispute Resolution in Conflict Management, available at <http://kmco.co.ke/wp-content/uploads/2019/05/Presentation-Tribunals-within-the-Justice-System-in-Kenya-Integrating-Alternative-Dispute-Resolution-in-Conflict-Management-Kariuki-Muigua-23rd-May-2019.pdf> (Accessed on 27/02/2020)

² Ibid

³ Constitution of Kenya, 2010, Article 169 (1) (d), Government Printer, Nairobi

⁴ The Judiciary of Kenya, *State of the Judiciary and the Administration of Justice Annual Report, 2017 – 2018*, March 2019, Available at <https://www.judiciary.go.ke/wp-content/uploads/sojar20172018.pdf> p. 66, Accessed on 09/03/2020

⁵ Ibid

⁶ Environmental Management and Co-Ordination Act, No. 8 of 1999, S 125, Government Printer, Nairobi

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*the amount of money required to be paid as fee under the Act or imposition against the person of an environmental restoration order or environmental improvement order by the Authority under the Act or its regulations (emphasis added).*⁷ The Act requires appeals to be lodged with the Tribunal within sixty days of the occurrence of the event which a person is dissatisfied with.⁸ In addition, the jurisdiction of the Tribunal extends to appeals against decisions of the Director General of the National Environment Management Authority (NEMA), the Authority, committees of the Authority or its agents.⁹ In interpreting NET's jurisdiction, the Environment and Land Court in *Simba Corporation Limited v Director General, National Environment Management Authority (NEMA) & Another*¹⁰, held that:

'In the jurisprudence interpreting the two categories of appeals filed to the NET under Sections 129 (1) and (2) the NET and the superior courts of record have held that the framework in Sections 129 (1) and 129 (2) relate to two different categories of appeals: the framework in Section 129 (1) relates to an appeal by a person who was a party to a decision or determination made by NEMA within the framework of EMCA; and Section 129 (2) provides a framework for an appeal by a person who was not a party to a decision or determination made by NEMA within the framework of EMCA.'

Upon hearing an appeal, the Tribunal may: *confirm, set aside or vary the order or decision in question, exercise any of the powers that could have been exercised by the Authority; make orders as to costs and those necessary to enhance the principles of sustainable development; make orders maintaining the status quo of any matter or activity which is the subject of an appeal until the appeal is determined or review its orders upon application by a party (emphasis added).*¹¹ This provision demonstrates that the jurisdiction of the tribunal is wide and it enjoys

⁷ Ibid, S 129 (1)

⁸ Ibid

⁹ Ibid, S 129 (2)

¹⁰ *Simba Corporation Limited v Director General, National Environment Management Authority (NEMA) & Another* ELC Civil Appeal No. 100 of 2015, (2017) eKLR

¹¹ EMCA, S 129 (3)

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important powers of enhancing the principles of sustainable development in Kenya. The tribunal can upon hearing an appeal, exercise powers that would ordinarily be done by the National Environment Management Authority (NEMA) such as grant of an Environmental Impact Assessment (EIA) Licence and environmental restoration orders.¹²

2. NET AND SUSTAINABLE DEVELOPMENT

Courts and tribunals in exercising judicial authority are mandated to be guided by several principles which include the protection and promotion of the purpose and principles of the Constitution.¹³ Among these principles is sustainable development.¹⁴ Sustainable development has been defined as that which meets the needs of the present generation without compromising the ability of future generations to meet their own needs.¹⁵ EMCA defines sustainable development as development that meets the needs of the present generation without compromising the ability of future generations to meet their needs by maintaining the carrying capacity of the supporting ecosystems.¹⁶ It has further been pointed out that sustainable development seeks to address *intra generational equity*; which is equity among present generations and *inter-generational equity*; which is equity between generations.¹⁷ In the case concerning the *Gabcikovo-Nagymoros Project*, it was opined that sustainable development reaffirms the need for both development and environmental protection, and that neither can be neglected at the expense of the other.¹⁸ It reconciles the human rights to development and protection

¹² Ibid

¹³ Constitution of Kenya, 2010, Article 159 (2)

¹⁴ Ibid, Article 10 (2) (d)

¹⁵ Report of the World Commission on Environment and Development: Our Common Future, available at <https://sustainabledevelopment.un.org/content/documents/5987our-common-future.pdf> (Accessed on 09/03/2020)

¹⁶ EMCA, S 2

¹⁷ Weiss, E.B., "In Fairness to Future Generations and Sustainable Development" *American University International Law Review*, Vol. 8, 1992.

¹⁸ *Hungary v Slovakia*, 1997 WL 1168556 (I.C.J-1997)

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of the environment by ensuring that the right to development resonates with the reasonable demands of environmental protection.¹⁹

In Kenya, courts are key actors in the sustainable development discourse in terms of developing environmental jurisprudence geared towards environmental protection and conservation.²⁰ The Constitution of Kenya, 2010 enshrines both the human rights to development and environmental protection.²¹ Consequently, it obligates the state to ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits.²² This position was succinctly captured in the case of *Patrick Musimba vs National Land Commission & 4 Others* (2016) eKLR, where the Court stated as follows:-

“...the State under Article 69 of the Constitution is enjoined to ensure sustainable development. (See also the preamble to the Constitution). The State is also to ensure that every person has a right to a clean and health environment. However, physical development must also be allowed to foster to ensure that the other guaranteed rights and freedoms are also achieved. Such physical development must however be undertaken within a Constitutional and Statutory framework to ensure that the environment thrives and survives. It is for such reason that the Constitution provides for public participation in the management, protection and conservation of the environment. It is for the same reason too that the Environmental Management and Coordination Act (“the EMCA”) has laid out certain statutory safeguards to be observed when a person or the State initiates any physical development.”²³

The Constitution further provides a framework for enforcement of environmental rights through an application to court which may make any order, or give any directions, it

¹⁹ Ibid

²⁰ Muigua.K., Wamukoya.D & Kariuki.F., ‘Natural Resources and Environmental Justice in Kenya’ Glenwood Publishers Ltd, 2015; See also the case of *Peter K. Waweru v Republic* (2006) eKLR

²¹ Constitution of Kenya, 2010, Chapter Four on Bill of Rights, Articles 42 and 43, Government Printer, Nairobi

²² Ibid, Article 69 (1) (a)

²³ *Patrick Musimba vs National Land Commission & 4 Others*, Petition No. 613 of 2014, (2016) eKLR

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considers appropriate to prevent, stop or discontinue any act or omission that is harmful to the environment; to compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment; or to provide compensation for any victim of a violation of the right to a clean and healthy environment.²⁴

NET plays a central role in the sustainable development discourse in Kenya. Under EMCA, upon any appeal, the Tribunal may grant several remedies including *orders to enhance the principles of sustainable development* (emphasis added).²⁵ In discharging this mandate, NET has on several occasions issued orders such as revocation of Environmental Impact Assessment (EIA) Licenses and subsequent cancellation of projects which do not adhere to sustainable development principles including public participation. In *Save Lamu & 5 others v National Environmental Management Authority (NEMA) & Another*, the Tribunal while setting aside the decision by the National Environment Management Authority (NEMA) to issue an EIA Licence held as follows:

*'The purpose of the Environment Impact Assessment (EIA) process is to assist a country in attaining sustainable development when commissioning projects. The United Nations has set Sustainable Development Goals (SDGs), which are an urgent call for action by all countries recognizing that ending poverty and other deprivations must go hand-in-hand with strategies that improve health and education, reduce inequality, and spur economic growth – all while tackling climate change and working to preserve our oceans and forests. (emphasis added)'*²⁶

Further, in *Narok County Council & another vs National Environment Management Authority & another*,²⁷ the Tribunal quashed the decision of NEMA to approve

²⁴ Ibid, Article 70

²⁵ EMCA, S 129 (3) (c)

²⁶ *Save Lamu & 5 others v National Environmental Management Authority (NEMA) & Another*, Tribunal Appeal No. NET 196 of 2016, (2019) eKLR

²⁷ *Narok County Council & another vs National Environment Management Authority & another*, Tribunal Referral NET 07/2006, (2006) eKLR

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development activities on several parcels of land in Narok County. It further, directed the proponent to prepare a full Environmental Impact Assessment study report in accordance with EMCA and its Regulations, and stop any development activities on the project site until the report was approved by NEMA.

These examples illustrate the central role played by NET in fostering sustainable development in Kenya. When environmental management institutions fail to discharge their obligations in accordance to the law, the tribunal has acted by issuing orders aimed at enhancing sustainable development and promoting environmental conservation in Kenya.

3. NET AND ACCESS TO ENVIRONMENTAL JUSTICE

Access to justice has been described as a situation where people in need of legal redress find effective solutions from justice systems that are accessible, affordable, comprehensible to ordinary people, and which dispense justice fairly, speedily and without discrimination, fear or favour and offer a greater role for alternative dispute resolution.²⁸ It has also been used to refer to judicial and administrative remedies and procedures available to a person who is aggrieved or likely to be aggrieved by an issue.²⁹ The Constitution enshrines the right of access to justice.³⁰ Access to justice is also one of the pillars of the Agenda 2030 on Sustainable Development Goals (SDGs). SDG Goal 16 seeks to *'promote peaceful and inclusive societies for sustainable development,*

²⁸ Ladan. M., 'Access to Justice as a Human Right under the ECOWAS Community Law' available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2336105 (Accessed on 11/03/2020)

²⁹ Muigua.K., Wamukoya.D & Kariuki.F., 'Natural Resources and Environmental Justice in Kenya', Op Cit, page 59

³⁰ Article 48 of the Constitution of Kenya, 2010 provides that the State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.

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*provide access to justice for all and build effective, accountable and inclusive institutions at all levels (emphasis added).'*³¹

Access to justice has an environmental dimension. Environmental justice is associated with two elements of justice which are: *procedural justice* and *distributive justice*. Procedural environmental justice is concerned with environmental decision making and encompasses the concept of participation.³² Distributive environmental justice acknowledges the right of every person to a clean and healthy environment.³³

NET facilitates both distributive and procedural justice by providing a framework through which the right to a clean and healthy environment can be enforced. Through some of its decisions, the Tribunal has ensured that the state's obligations in respect of the environment enshrined under the Constitution have been undertaken.³⁴ These include *public participation, environmental impact assessment and environmental audits* (emphasis added).³⁵ The tribunal further promotes access to justice by providing an avenue through which persons who are aggrieved by some of the decisions of NEMA can seek recourse.³⁶

³¹ UNDP, Sustainable Development Goals, 2015, available at <https://www.undp.org/content/undp/en/home/sustainable-development-goals.html> (accessed on 13/03/2020)

³² Muigua.K., Wamukoya.D & Kariuki.F., 'Natural Resources and Environmental Justice in Kenya', Op Cit, page 30

³³ Constitution of Kenya, 2010, Article 42, provides that 'Every person has the right to a clean and healthy environment, which includes the right to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69; and to have obligations relating to the environment fulfilled under Article 70. The right to a clean and healthy environment is a justiciable right which is enforceable under article 70 of the Constitution. Under article 70 (3) of the Constitution and section 3 (4) of EMCA, there is no requirement of *locus standi* in enforcement of the right to a clean and healthy environment.

³⁴ See for example the cases of *Save Lamu & 5 others v National Environmental Management Authority (NEMA) & Another, Tribunal Appeal No. NET 196 of 2016, (2019) eKLR, Op Cit*

³⁵ Constitution of Kenya, 2010, Article 69 (1) (d) (f), See also EMCA, s 57A on strategic environmental assessment on environmental audits.

³⁶ EMCA, S 129 (1)

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NET is thus an integral tribunal in Kenya. It is supposed to enhance the principle of sustainable development enshrined under the Constitution. It should further promote the right of access to justice stipulated under article 48 of the Constitution.

4. CHALLENGES

In discharge of its mandate, the National Environment Tribunal has been faced with certain challenges that threaten to undermine its efficiency. Some of these challenges include:

a. Jurisdiction

Despite the wide mandate granted to the National Environment Tribunal under the Constitution and EMCA, courts have often adopted a narrow interpretation of its jurisdiction. In *Republic v National Environmental Tribunal & 2 others ex-parte Athi Water Services Board*,³⁷ the court held that:

'It is therefore clear that a Tribunal's power must be conferred by the Statute establishing it which statute must necessarily set out its powers expressly since such Tribunals have no inherent powers. Unless its powers are expressly donated by the parent statute, it cannot purport to exercise any powers not conferred on it expressly.'

Further, in *Republic vs National Environmental Tribunal & 3 Others Ex-Parte Overlook Management Ltd and Silvers and Camping Site Limited*,³⁸ the court held that:

".....the powers of the Respondent Tribunal are not unrestricted. The Tribunal's powers to entertain appeals are limited to decisions made under powers given to NEMA (Authority) or to NEMA's Director General or Committee of NEMA... This is about where the jurisdiction of the

³⁷*Republic v National Environmental Tribunal & 2 others ex-parte Athi Water Services Board*, (2015) Eklr.

³⁸*Republic vs National Environmental Tribunal & 3 Others Ex-Parte Overlook Management Ltd and Silvers and Camping Site Limited*, Miscellaneous Application Number 391 of 2006.

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Respondent Tribunal ends...On the other hand, the High Court has both an original and appellate jurisdiction commencing from the provisions of Section 3(3) of the Act which for the purposes of emphasis I set out again."

This restricted interpretation of NET's jurisdiction has seen some of its decisions being overturned by the High Court through judicial review or the Environment and Land Court on Appeal. However, with the 2015 amendments, EMCA was aligned with the new constitution with consequently saw the jurisdiction of NET being enhanced. Under EMCA, the Tribunal can *inter alia* exercise any of the powers which could have been exercised by NEMA and *make any orders to enhance the principles of sustainable development* (emphasis added).³⁹ These are wide powers which make the Tribunal a vital component of the sustainable development and environmental justice discourse in Kenya. The jurisdiction of the tribunal needs to be broadly interpreted and upheld in order to enable it discharge its functions effectively.

b. Capacity

The Tribunal is composed of persons appointed under section 125 (1) of EMCA. Its staff is derived from either the judiciary or the Ministry of Environment and Forestry. This poses a challenge when it comes to supervision as well as the appraisal of staff.⁴⁰ This coupled with other problems facing tribunals in Kenya including budgetary constraints and inadequate space may hinder the operational capacity of the National Environment Tribunal. Data from the judiciary shows that there were a number pending cases before the Tribunal at the end of the Financial Year 2018/2019.⁴¹ It is important to address these capacity constraints in order to enhance the capacity of the National Environment Tribunal to promote access to environmental justice in Kenya.

³⁹ EMCA, S 129 (3)

⁴⁰ Judiciary, 'State of the Judiciary and the Administration of Justice Annual Report: 2018/2019' available at <https://www.judiciary.go.ke/resources/reports/> (accessed on 12/03/2020)

⁴¹ Ibid

5. WAY FORWARD

a. Capacity Building

There is need for continued development of skills and competency of members of the Tribunal in environmental matters. With emerging environmental issues such as climate change, the role of NET in promoting sustainable development becomes more critical. It is thus important for members of the tribunal to be equipped with relevant skills on such areas to enhance their capacity in handling environmental matters. There is also need for appraisal of the Tribunal's staff seconded from the judiciary and the ministry in order to further promote competence at the tribunal.

b. Upholding NET's Jurisdiction

The foregoing discussion has demonstrated some of the jurisdictional pitfalls faced by the Tribunal. Some of its decisions have been subject of appeals to the Environment and Land Court and judicial review proceedings before the High Court. These courts have often not fully appreciated the Tribunal's jurisdiction as demonstrated by the above decisions. There is need for recognition of the importance of tribunal as part of the justice system and its role in easing pressure from the courts, promoting sustainable development and ensuring access to environmental justice is realised.

c. Public Awareness

Despite the important role being played by NET in Kenya, there is limited public awareness on its existence and operations. There is a limited number of cases being lodged in the Tribunal with many being filed in courts.⁴² NET can assist in enhancing sustainable development and environmental conservation in Kenya.⁴³ There is need for public awareness on the role of NET due its importance. Through this, many of the cases currently being filed at the Environment and Land Court will end up in the

⁴² Judiciary, 'State of the Judiciary and the Administration of Justice Annual Report: 2017/2018' available at <https://www.judiciary.go.ke/resources/reports/> (accessed on 12/03/2020)

⁴³ Under section 129 (3) (c) of EMCA, upon any appeal, the Tribunal may make such other orders to enhance sustainable development.

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tribunal which will enable it to further develop environmental jurisprudence in Kenya and enhance the principles of sustainable development.

d. Integrating the Use of Alternative Dispute Resolution in Case Management

The Constitution mandates courts and tribunals to promote alternative forms of dispute resolution in exercising judicial authority.⁴⁴ Alternative Dispute Resolution (ADR) mechanisms refer to the set of mechanisms that are utilised to manage disputes without resort to the often costly adversarial litigation.⁴⁵ These mechanisms include negotiation, mediation, arbitration and Traditional Dispute Resolution (TDR) mechanisms. Some of these mechanisms have been hailed for their advantages which include expeditious dispute resolution, flexibility, cost effectiveness and addressing the root causes of conflicts.⁴⁶

It has been asserted that increased application of ADR can lead to faster dispensation of cases, particularly in tribunals.⁴⁷ However, these mechanisms have also been criticised for their shortcomings such as the inability to grant urgent remedies such as injunctions, power imbalances and enforceability of decisions.⁴⁸ Due to the important role played by NET in promoting environmental conservation and enhancing sustainable development, application of ADR would lean towards a mechanism that can guarantee enforceability of decisions, grant interim remedies necessary for environmental conservation while promoting other principles such as expediency. However, not all matters filed before the Tribunal may be suitable for ADR. This calls for a case to case analysis of matters before the tribunal to determine the most appropriate mechanism

⁴⁴ Constitution of Kenya, 2010, Article 159 (2) (c)

⁴⁵ Muigua.K., *Alternative Dispute Resolution and Access to Justice in Kenya*, Glenwood Publishers Limited, 2015

⁴⁶ *Ibid*

⁴⁷ Muigua.K., *Tribunals within the Justice System in Kenya: Integrating Alternative Dispute Resolution in Conflict Management*, Op Cit

⁴⁸ See generally Owen Fiss, "Against Settlement", 93 *Yale Law Journal* 1073(1984)

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for their disposal depending on the facts and issues in dispute.⁴⁹ There may be need for an enabling legal and institutional framework to entrench the use of ADR mechanisms within the justice system which includes tribunals. Adoption of the ideals of the Alternative Dispute Resolution policy can go a long way towards achieving this aim.⁵⁰

e. Promotion of Human Rights

The right to clean and healthy environment is a fundamental right and a prerequisite for full enjoyment of all the other rights.⁵¹ This right is interwoven with the realisation and enjoyment of other fundamental rights such as the right clean water, housing, food and health.⁵² In the absence of a clean and healthy environment, it is difficult to enjoy the other human rights. To this extent, the right to a clean and healthy environment has been equated to the right to life.⁵³ Thus, while promoting the right to a clean and healthy environment, NET is also fostering other human rights including the right to health, clean water, food and housing. NET should never forget its role a promoter of human rights and should actively uphold the same.

⁴⁹ Muigua.K., *Tribunals within the Justice System in Kenya: Integrating Alternative Dispute Resolution in Conflict Management*, Op Cit

⁵⁰ See the Alternative Dispute Resolution Policy (Zero Draft), available at https://www.ncia.or.ke/wp-content/uploads/2019/08/ZERO-DRAFT-NATIONAL-ADR-POLICY_P.pdf (accessed on 12/03/2020).

The formulation of an ADR policy is ongoing. This is against the backdrop of important international developments such as the coming into force of the Singapore Convention on International Settlement Agreements Resulting from Mediation and the UNCITRAL Model Law on Mediation and Conciliation.

⁵¹ Muigua.K., 'Reconceptualising the Right to Clean and Healthy Environment in Kenya' available at <http://kmco.co.ke/wp-content/uploads/2018/08/RIGHT-TO-CLEAN-AND-HEALTHY-ENVIRONMENT-IN-KENYA.docx-7th-september-2015.pdf> (Accessed on 14/03/2020)

⁵² Ibid

⁵³ See the Indian case of *K. Ramakrishnan and Others Versus State of Kerala and Others*(smoking case), AIR 1999 Ker 385

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6. CONCLUSION

Tribunals in Kenya have been critical in facilitating access to justice. The National Environment Tribunal however plays a more important role of enhancing the principles of sustainable development and promoting human rights. Its jurisdiction therefore flows from the Constitution which enshrines sustainable development as a principle of governance.⁵⁴ However, NET's jurisdiction has on several instances been narrowly interpreted thus posing a threat to its role. This coupled with other problems such as its capacity and limited funding are hindrances to the effectiveness of the tribunal. There is an urgent need to deal with these challenges. Creating an ideal environment that will enable NET to enhance sustainable development, promote human rights and enable access to justice is an imperative whose time has come.

⁵⁴ Constitution of Kenya, 2010, Article 10 (2) (d) 'National values and principles of governance include sustainable development'

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See the Indian case of *K. Ramakrishnan and Others Versus State of Kerala and Others* (smoking case), AIR 1999 Ker 385

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