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POLLUTER PAY PRINCIPLE – GUARDIAN OF THE ENVIRONMENT

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Abstract

What if one nation through its activity starts degrading the environment of its adjacent nation in some or the other way? Will that nation be held responsible for its acts? The answer to this question is provided through the concept of 'Polluter Pays Principle', prevalent in the area of environment law. With the advent of industrial revolution and setting up of industries, the condition of environment has drastically degraded. Degrading environment is no more restricted to boundaries of a nation, as it is capable of harming it for other nations too and hence, ultimately keeping the global environment at stake. Also, the absence of sanctions and penalties from the scope of environment law makes it difficult to keep a check on the harm being caused to environment. According to the polluter pays principle, it is generally accepted at the international and regional level that the polluter should be made responsible and should pay and not the authorities. Existence of this principle is key to curbing the environmental degradation as it includes in its ambit the idea of penalties for the polluter. This paper aims at discussing the importance of polluter pays principle along with its position in India. It also includes the limitations of the principle.

Keywords: Environment, Protection, Compensation, Pollution, Development, Penalty.

Chapter 1: Introduction

In December, 1984, when the worst industrial accident by the escape of 45 tons of dangerous gas methyl isocyanate from the Union Carbide's pesticide plant occurred, it resulted into death of thousands of people in the neighbourhood and panic in Bhopal.¹²⁷⁴ Despite the existence of the *Polluter Pays Principle*, no compensation was levied on the multinational companies for damaging the environment.¹²⁷⁵

The *Polluter Pays Principle* states that one who pollutes should be held liable for bearing the costs of managing it in order to prevent damage to environment or human health and also to restore the environment to its original state.¹²⁷⁶ It was first introduced in 1972 by the

Organization for Economic Cooperation and Development (OECD), under which responsibility has been levied on the polluter for pollution as well as environmental damage.¹²⁷⁷ After that, guidelines for sustainable development was laid down by the Rio Declaration. This made sure that environmental protection and development goes hand in hand.

The scope of environmental law could not adequately include sanctions and penalties for its degradation and therefore, keeping a watch on the harm and hazard being caused to the environment was difficult. The *Polluter Pays Principle* came to the rescue as it required paying for the pollution by the one who pollutes. The regional and international agreements regarding pollution thereafter, included this principle under its ambit. This principle existed

¹²⁷⁴ The Editors of Encyclopaedia Britannica, *Bhopal Disaster industrial accident, Bhopal, India [1984]*, BRITANNICA (January 5, 2023), <https://www.britannica.com/topic/Union-Carbide-Corporation>.

¹²⁷⁵ Staff Reporter, *Bhopal gas tragedy: No compensation for environmental damages so far*, FREE PRESS JOURNAL (June 05, 2022), <https://www.freepressjournal.in/bhopal/bhopal-gas-tragedy-no-compensation-for-environmental-damages-so-far>.

¹²⁷⁶ *What is the polluter pays principle?*, THE LONDON SCHOOL OF ECONOMICS AND POLITICAL SCIENCE (July 18, 2022),

<https://www.lse.ac.uk/granthaminstitute/explainers/what-is-the-polluter-pays-principle/>.

¹²⁷⁷ Rupin Chopra, *Polluter Pays Principle*, MONDAQ (November 10, 2017), <https://www.mondaq.com/india/clean-air-pollution/645232/polluter-pays-principle>.

even before the existence of the Organization for Economic Co-operation and Development (OCED), which gave it approval.

The concept of Polluter Pays Principle lies under the ambit of absolute liability, which makes a person liable irrespective of due care and hence, makes him liable to compensate for his dangerous acts. J.H. Dales and A.V. Kneese were the firsts to discuss this concept by examining the methods and means to end pollution in the 1960s.¹²⁷⁸ The Draft Declaration by the Committee of Ministers of the Council of Europe indicated the polluter pays principle under its Article 6 as it stated that “the cost incurred in protecting or subsidizing pollution must be borne by whosoever causes the pollution”.¹²⁷⁹ In 1971, the primary topic of conversation in the seminar by the Organization for Economic Co-operation and Development was the polluter pays principle, where it was discussed at the global level. And in 1972, this principle was validated as the ‘guiding principle’.

This principle makes sure that the environment remains in appropriate state however, not much support and attention has been received by this principle as was given to the principle of preventive action and precautionary principle. Some nations in view of international relations have objected to this principle.¹²⁸⁰

This paper deals with analysing the concept of polluter pays principle, understanding its position in India and also, discussing its limitations.

Chapter 2: What is Polluter Pays Principle?

The principle was originated in the year 1972 by the Organization for Economic Co-operation and Development (OCED) in which the responsibility of polluting the environment was placed on the polluter.¹²⁸¹ In simple terms, it can

be understood as the polluter being liable for polluting it and compensating for the harm caused to human health or to restore the environment to its original state. This principle can be considered to have set up the foundation for sustainable development guided by environmental policy. The idea behind this principle is to see both facets of production i.e., economic efficiency or benefits and harms imposed on environment. This helps in keeping a check on the level of pollution by production.

The Polluter Pays Principle has become the guiding light to sustainable development. It helps us to understand what the real cost of things are.¹²⁸² Even though this principle holds much importance in environmental law, it has not been signed as the main environmental policy guideline by most of the developing countries.

Trail Smelter Case

The smelter plant set up in Canada was emitting hazardous fumes which was damaging the forest trees, crops yield, plant life and soil across the border in United States. When the matter was raised in the court, the Canadian govt. was ordered to pay \$78,000 as compensation to the United States for the harm caused between 1932 to 1937 to Washington.

It was observed in this case that the state has the liberty to contaminate its own land but cannot breach the sovereignty of another state by crossing of pollution through international borders. In reference to Principle 22 of the Stockholm Principles, which states that “States shall co-operate to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such States to areas beyond their

¹²⁷⁸ Ashmita Barthakur, *Polluter Pays Principle as the Key Element to Environmental Law*. 11 IJSRP 274, 275 (2017).

¹²⁷⁹ Ashmita Barthakur, *Polluter Pays Principle as the Key Element to Environmental Law*. 11 IJSRP 274, 275 (2017).

¹²⁸⁰ Siddhant Nanodkar, *Polluter Pays Principle: Essential Element of Environmental Law and Policy*, 1 IJLMH 1, 4 (2018).

¹²⁸¹ Abhishek Gaur, *Circular system of resource recovery and reverse logistics approach: key to zero waste and zero landfill*, SCIENCE DIRECT (2022),

<https://www.sciencedirect.com/topics/earth-and-planetary-sciences/polluter-pays-principle>.

¹²⁸² Jeff Surtees, *Important Concepts in Environmental Law – “Polluter Pays”*, LAWNOW (March 5, 2019), <https://www.lawnow.org/important-concepts-in-environmental-law-polluter-pays/>.

jurisdiction,¹²⁸³ the court addressed two ideas i.e., that state is responsible to avoid any transboundary harm and the polluter pay principle.

Chapter 3: Polluter Pays Principle in India

The idea of this principle traced from cost internalization and cost allocation i.e., the polluter, rather than the authorities are made liable to compensate for polluting the environment and the measures for such compensation are provided by the authorities itself.¹²⁸⁴ This is done to secure the acceptable state of environment and to compensate the victims of such pollution.

The Indian judiciary was responsible for making this principle a part of the environmental law, after which, it acquired a statutory recognition through the National Green Tribunal Act, 2010. The apex court applied this principle for the first time in the case of *Indian Council for Enviro-Legal Action v. Union of India*,¹²⁸⁵ in which dumping of untreated wastewater from chemical industries created adverse environmental health impact of soil and water pollution in villages of Rajasthan. The court held that a person is responsible to indemnify the victim for the harm as soon as any dangerous or hazardous activity is carried out by him irrespective of the fact that due care was observed by him. Through this case, polluter was made liable to make the loss to environment good.

The concept of absolute liability was discussed in the case of *M.C. Mehta v. Union of India*,¹²⁸⁶ on which the said principle is based. The principle was again acknowledged in the case of *Vellore Citizens Welfare Forum v. Union of India*,¹²⁸⁷ where it was held that polluter pays principle forms an intrinsic part of the environmental

laws of India.¹²⁸⁸ Legitimation of this principle happened through the constitutional sanctions in these cases under Article 21 and Article 47 of the Constitution of India, international traditional law and judicial provisions.¹²⁸⁹

Further, the application of this principle to cases registered in the tribunals or organisation was demanded by the court in the case of *A.P. Pollution Control Board v. Prof. M.V. Nayudu (Retd.) and Ors.*¹²⁹⁰

Article 21 of the Constitution, which provides for life and personal liberty, also includes in its ambit community participation as pollution is an inevitable part of industrialisation.¹²⁹¹ Therefore, the Constitution of India includes right to community participation in order to protect the environment. In India, tribunals can apply this principle while passing any award, order or decision under Section 20 of the National Green Tribunal Act in order to maintain a balanced development while protecting the environment.

Chapter 4: Criticism of the Principle

- The main focus of Polluter Pays Principle is on industrial pollution, whereas, air pollution due to emission by vehicles is a more pertinent issue as it is the largest contributor to air pollution. In case of other kind of pollutions like water and soil, it can be minimised and treated by good management, but treatment of polluted air is nearly impractical. Also, there is no mention in this principle as to who should be made liable for air pollution due to vehicular emission, whether it should be the manufacturer or the owner, the liability is not clear.
- The idea behind this principle is to make the polluter pay for the pollution caused and not to collect funds. This may lead to

¹²⁸³ Shristi Sahu, *The concept of polluter pays and its potential in India*, BLOG IPLEADERS (July 20, 2020), <https://blog.ipleaders.in/the-concept-of-polluter-pays-and-its-potential-in-india/>.

¹²⁸⁴ Harshita Singhal and Sujith Koonan, *Polluter Pays Principle in India – Assessing Conceptual Boundaries and Implementation Issues*, 7(2) RGNUL STUDENT RESEARCH REVIEW 33, 35 (2021).

¹²⁸⁵ *Indian Council for Enviro-Legal Action v. Union of India* (1996) 3 SCC 212.

¹²⁸⁶ *M.C. Mehta v. Union of India*, (1987) SCC 395.

¹²⁸⁷ *Vellore Citizens Welfare Forum v. Union of India*, (1996) 5 SCC 647.

¹²⁸⁸ Shristi Sahu, *The concept of polluter pays and its potential in India*, BLOG IPLEADERS (July 20, 2020), <https://blog.ipleaders.in/the-concept-of-polluter-pays-and-its-potential-in-india/>.

¹²⁸⁹ Ashmita Barthakur, *Polluter Pays Principle as the Key Element to Environmental Law*, 11 IJSRP 274, 276 (2017).

¹²⁹⁰ *A.P. Pollution Control Board v. Prof. M.V. Nayudu (Retd.) and Ors*, 1999 (2) SCC 718.

¹²⁹¹ INDIA CONST. art 21.

emergence of 'right to pollute' for those who have the resources and are willing to pay for the pollution caused by them. This approach may not serve the purpose for which the principle was created.

- The damages to environment are not capable of being measured or calculated in terms of money with precision. Therefore, the approach of 'approximation' and 'guess work' is undertaken for calculating the compensation under this principle.

Conclusion

From the origination of polluter pays principle in 1960s, it has been internationally discussed in 1971 and has become a part of international agreements in 1972. The defaulters of environmental law did not fear to break it because there was no sanction or penalty attached to the violation, which was then solved by the polluter pays principle. This states that the polluter shall be liable to compensate for the pollution and not the authorities. It helped in balancing the right to development with the need of environmental protection. The idea of sustainable development is also supported by this principle.

Even though the principle holds a lot of importance, it has some limitations like it does not put limelight to the air pollution by the vehicle emission, the one having the means to pay will assert their 'right to pollution' and there is no scientific way to calculate the amount of compensation by measuring the harm caused to environment. These issues need special attention and should be dealt with to achieve the goal of environmental protection.

