

# POLLUTER PAYS PRINCIPLE AND ITS DEVELOPMENT AND COMPENSATORY FORM

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*“If anyone intentionally spoils the water of another ..... Let him not only pay damages, but purify the stream or cistern which contains the water <sup>[1]</sup>.”*

**-Plato**

## ABSTRACT

Ever since industrial revolution took place, climate change and its consequences have become inevitable truth. In the beginning due to abundance of natural resources human race never understood that these resources could be endangered in future. Now when it is well established that Pollution is deteriorating both quality and quantity of natural resource and environment, we are trying to develop various theories and mechanism to stop the pollution or to clean the environment. Through this article an attempt has been made to trace the development and compensatory form of such a legal principle i.e. Polluter Pays Principle with the help of some Indian and an international case.

**Keywords:** Climate Change, Natural Resources, Polluter Pays Principle, Environmental Costs, Economic Instruments

## INTRODUCTION

Polluter Pays Principle means that “polluter should bear the cost of pollution as the polluter is responsible for pollution<sup>[2]</sup>” (*Singh 2013:127*). This principle has its historical genesis in above written celebrated quotation of Greek philosopher PLATO. But in modern world it finds its implication in new ways. This principle imposes a duty on the industrial settlement to bear the cost for prevention or remedy of damages for polluting the environment. “Under it, the role of government is not to bear the costs for prevention or carrying out remedial process, because if that is done government will be burdened to spend money on a problem which is a fault of a profit making settlement and taxed money of people at large will be misused and they lose both money and health due to pollution<sup>[3]</sup>” (*Singh 2013:127*).

“*The Organization for Economic Co-operation and Development*” (OECD) introduced the “polluter pays principle in 1972 in a recommendation as one of the guiding principles concerning international economic aspect of environmental policies”<sup>[4]</sup> (*OECD Recommendation 1972*). “The polluter pays principle initially was a principle of economic policy stating that the polluter is responsible for the cost of pollution prevention and control measures. This principle aimed at internalization of the cost of pollution prevention and cost measures and the cost of these measures should be reflected in the market price of product<sup>[5]</sup>” (*OECD Recommendation and also by Lindhout and Broek 2014*).

As Grossman extensively describes, the OECD broadened the principle from internalization of pollution prevention and control cost to a higher level of environmental costs also covering for instance liability payments and including specific taxation possibilities<sup>[6]</sup> (*M.R.Grossman 2007*). The pollution prevention and control cost is an interpretation of the principle in a strict sense while environmental cost is an interpretation in broad sense. In effect over the years the view and nature of polluter pays principle has been changed from being a economic principle to a principle to protect the environment by imposing duty upon polluter to pay more than just cost for causing pollution and its prevention and control but now it also take account of other cost or measure like liability payments, green taxes and cost relating to non compliance with permits<sup>[7]</sup> (*Lindhout and Broek*).

*United Nations Conference on Environment and Development 1992* i.e. *Rio Declaration* in its **principle 16** also emphasizes on polluter pays principle as “National authorities should endeavor to promote the internalization of environmental costs and the use of economic

instrument, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest without distorting international trade and investment” (UNCED 1992). It means “There is contortion of international trade and investment if any state will support the environment polluting industries. Thus due application of polluter pays principle will help in both protections of environmental and economic interests”<sup>[8]</sup> (European Commission).

## DEVELOPMENT OF POLLUTER PAYS PRINCIPLE IN INDIA

The story of INDIAN environmental jurisprudence starts from Stockholm Conference 1972<sup>[9]</sup> (UNCHE 1972) which was attended by then Prime Minister Mrs. Indira Gandhi. It was only after Stockholm Conference, in Constitution of India under 42<sup>nd</sup> amendment 1976; three major amendments were done regarding environment. Article 48A was inserted in Directive Principles of State Policy according to which state shall endeavor to protect and improve the environment and to safeguard the forest and wildlife of country. Article 51 A(g) is inserted which imposes liability upon every citizen of India to protect and improve the natural environment including forest, lakes, rivers and wildlife. Entries 19 & 20 were omitted from State list and inserted as entry 17A i.e. forest and entry 17B i.e. protection of wild animals and birds. These amendments empowered the state to make rules, regulations or to enact any Act for environmental protection but nothing was done.

There are three major cases or we can say it as trigger events which accelerated the environmental jurisprudence in India, these cases are *Bhopal Gas Tragedy*<sup>[10]</sup>, *Oleum Gas Leak case*<sup>[11]</sup> and *Bichhri Village industrial pollution case*<sup>[12]</sup>. It was only Bhopal Gas Tragedy that leads to enactment of THE ENVIRONMENT (PROTECTION) ACT 1986. The Supreme Court of India has contributed immensely in the evolution of environmental principles of nation. The three cases mentioned above are fascinating example of active Indian judiciary where when Bhopal Gas Tragedy was happened there was no legislation relating to environmental protection leading to enactment of THE ENVIRONMENT (PROTECTION) ACT 1986 at next level in Oleum Gas Leak case Supreme Court has propounded the theory of ‘Absolute Liability’ to overcome from a century old theory of ‘Strict Liability’ pronounced in *Rylands v. Fletcher*<sup>[13]</sup> (1868 L.R. 3 H.L.330) which is nowadays followed by whole world to *Bichhri Village case* where polluter pays principle is used as an overarching principle.

Now we will study all these three cases one by one to trace the development of environment law in India from no enactment to need of Polluter Pays Principle.

## **BHOPAL GAS TRAGEDY**

On the midnight & early morning of 2<sup>nd</sup> & 3<sup>rd</sup> December 1984 one of greatest industrial disaster took place in Bhopal, the capital city of Madhya Pradesh. This was caused by the leakage of Methyl Isocyanate and other toxic gases from a pesticides plant, set up by Union Carbide India Limited (UCIL). UCIL was a subsidiary of Union Carbide Corporation (UCC) a multinational company registered in U.S.A.

The calamity was such that it resulted into the death of at least 3,000 people and seriously injuring approximately 6 lakh, permanently affecting their eyes, respiratory system, and causing scores of other complications, even foetuses of pregnant women were also damaged.

Now started the legal implication for compensation, after a long run legal battle in lower court of Bhopal then High Court of Madhya Pradesh and finally in Supreme Court. The Supreme Court in its order on 14<sup>th</sup> February 1989 directed UCC to pay a compensation of 470 million U.S. dollars

or its equivalent nearly Rs.750 Crore. Supreme Court based its judgment on its own pronounced rule of “Absolute Liability” in *M.C.MEHTA v. UNION OF INDIA*<sup>[14]</sup>(*A.I.R. 1987 S.C.1086*). To validate the amount of compensation Supreme Court held that: -

“The basic consideration motivating the conclusion of the settlement was the compelling need for urgent relief. Considerations of excellence and niceties of legal principles were greatly over-shadowed by the pressing problems of very survival for a large number of victims. The instant case is one where damages are sought on behalf of the victims of a mass disaster, and having regard to the complexities and the legal question involved, any person with an unbiased vision would not miss the time consuming prospect for the course of the litigation in its sojourn through the various courts.” So it becomes necessary for the court to come out with a mechanism of overall settlement. Under which both the parties finally agreed on an amount of 470 million US Dollar.

Again said that “life is priceless and it can’t be quantified” but it is necessary to compensate the victim and their family. Then court gives a chart that how it feel that such amount is just

and equitable. Chart for Compensation given by The Supreme Court of India <sup>[15]</sup> (*Bhopal Gas Tragedy Judgment*)

	Class	No. of cases	Compensation per head in Rupees	Amount of Compensation (in crores)
1	Fatal cases	3000	Rs. 1-3 Lakh	70
2	Permanent total or partial disability	30,000	Rs. 50,000-2 Lakh	250
3	Temporary total or partial disability	20,000	Rs. 25,000-1 Lakh	100
4	Utmost sever injury		Upto 4 lakh	80
5	Facilities for expert medical attention and rehabilitation			25
6	Claim for minor injuries, personal belongings, loss of livestock's etc.			225
	Total			750

What we can find interesting in this judgment is court talk about everything but was silent about the environmental degradation caused by this tragedy even neither any study was conducted for it.

### **OLEUM GAS LEAK CASE <sup>[16]</sup>**

On December 4, 1985, a major leakage of oleum gas took place from one of the units of Shriram Foods and Fertilizer Industry (SFFI) and due to this leakage a lot of hue & cry was there in public at large even it caused a death. A PIL was filed by Mr. M.C. Mehta in the Supreme Court where it was heard by a bench of 3 Judges which referred the case to larger bench of 5 Judges. The relief asked under the PIL was firstly to close the SFFI plants and



secondly to compensate the victims as their right to life being the fundamental right was infringed.

Supreme Court in its verdict held that SFFI plants were not to be closed but for their operation they have to comply with the safety measures prescribed by the expert committee. On point of compensation it was held that since SFFI doesn't come under the definition of State under article 12 of the constitution hence it cannot be held liable for infringing fundamental rights hence not liable to pay compensation. What eventually we believe is that no relief is given under this case but very interestingly Supreme Court has propounded "The Principle of Absolute Liability" under this rule if a wrong has been done by a person whether negligently, intentionally or even non-intentionally he should be held liable for the wrong. So this rule replaces the century old rule of Strict Liability.

After laying down the rule of absolute liability court directed the petitioner to file another petition in appropriate court within 2 months to claim compensation for the victims of gas leak. The Court in its judgment specifically held: - that "if any industrial settlement is engaged in a hazardous industry which causes or have the potential to cause environmental pollution or threat to the health and safety to the workers of factory and residents of its surrounding areas then such enterprise have an absolute liability towards the community to ensure that no harm will be caused due to such activity. In a condition if harm is caused due to hazardous activity then that enterprise will be absolutely liable to compensate for such harm"<sup>[17]</sup> (*M.C. Mehta v. U.O.I. 1987*).

Having these developments we can see that a ground is created for the Polluter Pays Principle, and that's the thing what happened in very next case.

## **BICHHRI VILLAGE INDUSTRIAL POLLUTION CASE<sup>18</sup>**

In Udaipur district of Rajasthan there is small village called Bichhri. To the north of the village there was a major industrial chemical establishment, and in a single complex various factories/units are situated. Silver Chemicals and Jyoti Chemicals Ltd. were producing H acid. The complex is located in the limit of the village.

The emerging from H acid production is of very deadly nature and it produces large amount of toxic sludge for production of small amount of H acid. What happened in Bichhri is untreated

toxic water waste flowed freely on the ground and the untreated toxic sludge is thrown in the open around the complex, these toxic substance get absorb by the earth polluting the aquifers and subterranean water supply. Gradually water of wells and streams has turn dark and dirty rendering it unfit to be used by both human and animals. A great panic condition was there as it leads to death, disease, and disaster in the village and subsequently villagers virtually turn to revolt. District administration immediately ordered to close the H acid producing units.

A PIL was filed by Indian Council for Enviro-Legal Action in Supreme Court. A constitutional bench was constituted for hearing and after going through all the reports and evidences court held:- that “Once the principle of absolute liability is held to be the law of the land, it follows in the light of findings recorded Respondents are absolutely liable to compensate the villagers for the harm caused to them. And as The Polluter Pays Principle being the part of basic environmental law of land Respondents are bound to take all necessary measures to remove the sludge and other pollutant in the affected area and also to pay the coast of the remedial measures required to restore the soil and underground water sources. The amount of compensation was left to be decided by the central government.”

So the resultant of this case was Polluter Pays Principle is accepted as the part of environmental law of the land. There is still a question mark on the part that how compensation is to be calculated because we do not have any methodology to calculate the compensation, for this I will take an international case to find out the methodology.

## **EXXON VALDEZ OIL SPILL CASE**

The Exxon Valdez Oil Spill took place in Prince William Sound off the coast of Alaska on March 24, 1989. The oil tanker of Exxon was bound to long beach California but it struck Prince William Sound’s Bligh Reef due to which there was spill of 11 to 38 US million gallon of crude oil.

“The Exxon Corporation came forward and took the responsibility of oil leak and parted damages it into two heads:

- (1) The cost of cleaning up of the spilled oil, and
- (2) Compensation for the damage caused to the local ecology.

Approximately \$ 2.1 billion was spent for clean-up efforts and \$303 million to compensate fishermen whose livelihood was affected”<sup>[19]</sup> (*Exxon Mobil oil spill case*).

“Litigation on environmental damage was settled with Exxon for paying \$900 million over 10 years. After various appeals, the U.S. District Court for the State of Alaska awarded punitive damage to the plaintiff \$4.5 billion”<sup>[20]</sup> (*Exxon Mobil Oil spill case*). “Later on an appeal to the Supreme Court the amount was cut down from \$4.5 billion to \$2.5 billion giving the reason that even the \$2.5 billion punitive damage was excessive based on Maritime Law and held that punitive damage should not be more than \$507 million in compensatory damage which were already paid”<sup>[21]</sup> (*Exxon Shipping v. Baker*).

What appears from the judgment is even though polluter pays principle was applied but firstly Exxon has self-taken the responsibility and due to lack of any specific method for calculating the compensation for environmental damage and compensation amount was restricted by the maritime law.

## **HOW TO EVALUATE ENVIRONMENTAL DAMAGE IN MONETARY TERMS**

It is a quite difficult task and was never think off before the *Exxon Mobil Case*. The question arose only after this case that how economic damage from a spill like this or from any industrial caused harm could be calculated where substantial economic and environmental harm is caused.

To compute the damage from oil spill a federal agency The National Oceanic and Atmospheric Administration i.e. NOAA, it convened a panel of independent economic experts to evaluate the contingent value method for determining lost passive use or non-use values. NOAA panel committee has laid down its report on 15<sup>th</sup> January 1993.

“The committee made clear that it had several concerns about the valuation techniques. Among those concerned techniques panel listed following three:

1. The tendency for contingent valuation willingness to pay estimates to seem unreasonably large;
2. The difficulty in assuring the respondent and absorbed the issue in the survey; and



3. The difficulty in assuring that respondent are responding to the specific issue in the survey rather than reflecting general warm feeling about public known as warm glow effect<sup>[22]</sup>(NOAA Panel Report,1993).

NOAA panel report has approved the use of contingent valuation for estimating passive-use and non-use values. So basic concept upon which compensation could be calculated is non-use value under contingent valuation.

**Nonuse value or Passive-use:** “This value arises when the resource is not actually used up or consumed while experiencing it. This type of value reflects the common observation that people are more than willing to pay for improving or preserving the resource that they will never use. One type of nonuse value is bequest value. Bequest value is the willingness to pay to ensure a resource is available for coming generation<sup>[23]</sup>(Kurtilla John V.).

**Contingent Valuation:** “This one is the most direct approach of valuation. In this method question asked to the respondent is what value they would place on an environmental change or to preserve the resource in its present state. The contingent valuation creates a hypothetical market and checks the willingness to pay question contingent on the existence of market or not”.

## CONCLUSION

Polluter Pays Principle started its journey being an economic theory but becomes a well-established principle of environmental law jurisprudence. Meanwhile under its development with the passage of time it was unable to become a strict compensatory principle due to lack of fix method to calculate the compensation. Though many attempts have been made to find out a method but environment being of very sensitive and subjective nature its damage can-not be calculated on a fix parameter. Even in recent Indian Case **SAMEER MEHTA V. UNION OF INDIA**, NGT ordered DELTA GROUP to pay compensation of a lump-sum amount of Rs. 100 Crore for polluting the environment but this amount was not very well calculated amount.

INDIA even being the developing nation but the forerunner and prominent towards its international promises on environmental concerns, has always taken proper steps for

environment protection. Accepting Polluter Pays Principle as the law of land shows how much we are concern about environmental protection.

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