

POLLUTER PAYS PRINCIPLE AS A PRINCIPLE OF SUSTAINABLE DEVELOPMENT: A STUDY IN INDIAN SCENARIO

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ABSTRACT

The growing consciousness about the environment have led to a lot of debates and studies across the globe on the aspect of environment deterioration and solutions to protect the environment for future generations. One principle that has been commonly used to affix liability on the polluters of the environment is the principle of polluter pays. It has been used as a common principle to impose penalty upon the polluters of environment which generally includes the compensation to be provided to the victims of environmental degradation as well as the costs to restore the biodiversity of the concerned place.

In the present paper, the author traces the history of the principle and examines its significance especially in the Indian context. The principle of polluter pays and the precautionary principle have been made a part of Indian environmental jurisprudence by the honorable courts through a number of cases. In this paper, the application of the principle by the Indian judiciary and the National Green Tribunal has been discussed along with the limitations of the principle in affixing liability. The issues in the implementation of the principle have also been discussed along with the possible suggestions to improve its applicability.

POLLUTER PAYS PRINCIPLE AS A PRINCIPLE OF SUSTAINABLE DEVELOPMENT

Introduction:

Protection of Environment is one of the most burning topics in India and other countries as well. As the consciousness towards the environment grew, various conferences have been held at the international level discussing this need of protection of environment. The concept of ‘Sustainable Development’ was developed as an attempt to strike balance between the need for development and environmental protection. It implied the use of environmental resources in such a manner that resources are not exhausted for future generations.

If damage is caused to the environment, it is natural that the entity causing such damage must pay for it. The first attempt should be to minimise the damage to the environment. However, if the harm to environment is caused, there must be a penalty to pay for the damages to restore the biodiversity of the place. This penalty must be incurred by the person causing such pollution. This is recognised by the ‘Principle of Polluter Pays’.

The Principle of Polluter Pays basically holds the polluter liable for the pollution caused to the environment. The polluter shall have to pay for the compensation of the victims of pollution as well as for the restoration of biodiversity of the place which has been subjected to environmental degradation.ⁱ Thus, those who produce pollution must bear the cost of managing it and damage to human health or the environment.ⁱⁱ

History and Development:

Historically, the principle was applied as an economic instrument to allocate costs of pollution prevention and control. Kneese and J.H. Dales were the early environmental economists to articulate the Polluter Pays Principle. In 1968, Dales posited ‘tradable discharge permits’ as the best economics instruments for curbing pollution. Moreover, in 1968 the Draft Declaration of Principles on Air Pollution Controlⁱⁱⁱ, issued by the Committee of Ministers of the Council of Europe, also, inter alia, suggested the application of the polluter pays principle.^{iv}

The principle was mentioned at the international level for the first time in the 1972 recommendation by the OECD Council on Guiding Principles concerning International Economic Aspects of Environmental Policies, where it stated:^v “The principle to be used for allocating costs of pollution prevention and control measures to encourage rational use of scarce environmental resources and to avoid distortions in international trade and investment is the so-called Polluter-Pays Principle”. It underlined on the need for removal of subsidies which would have the effect of allowing the polluters escape from bearing the cost of pollution they caused and then those costs must be reflected in the prices of goods and services.^{vi}

The emission from factories that damages the environment is ‘social damage’ and the cost of such damage is ‘social cost’ which is not paid by the polluter but by the society as a whole. For example,^{vii} Factories discharge their waste in water bodies, instead of processing it and the cost of waste disposal is borne by the society as a whole. The problem was that this cost was external to the private cost of the polluter and is thus ‘external cost’ (effect of this cost is ‘externalities’). Since the polluter does not pay these costs, it is not reflected in the product price. The potential solutions to this problem of externality became the basis of polluter pays. This requires polluter to internalize the external cost, that is, to add the cost of pollution abatement to the cost of production.^{viii} The premise on which this is based is that once the polluters are bound to internalize the costs, they will try and cut down the overall cost and thus will attempt to reduce pollution.^{ix}

In the Rio Declaration^x, Principle 16 also affirmed the polluter pays principle. Principle 16 stated^{xi}: “National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that polluter should, in principle, bear the cost of pollution...”

Thus, the principle of polluter pays imposes liability on the polluter to compensate for damage caused to the biodiversity and restore it to the original state.

POLLUTER PAYS PRINCIPLE IN INDIA

Introduction

After the Stockholm Declaration of 1972, India also enacted a wide range of laws for the protection of environment such as Water (Prevention and Control of Pollution) Act, 1974, the Forest (Conservation) Act, 1980, the Air (Prevention and Control of Pollution) Act, 1981, the Environment (Protection) Act, 1986. However, the principle has been incorporated in the Indian environmental jurisprudence through the various judgements of supreme Court and also by the National Green Tribunal (NGT).

Indian Judiciary and Polluter Pays

The glimpse of the principle could be seen in the case of **M.C Mehta v. Union of India**^{xii}, wherein the Court directed the polluters to pay a pollution fine which would be used to restore the living conditions and local environment of the affected place.^{xiii}

In **Indian Council for Enviro-Legal Action v. Union of India**^{xiv} the principle was invoked for the first time. The writ petition that was filed highlighted the woes of people living around chemical industry plants. The petition related to village Bichhri in Udaipur Rajasthan. The Court extending the rule of absolute liability held the respondents liable and ordered them to compensate for the harm caused by them to villagers in the affected area, the soil and to the underground water.

It is noteworthy that the order passed was not complied by the polluter industry. Interlocutory applications were filed to keep the compliance at bay. Aggrieved by the situation the matter was brought to the court again in 2011^{xv}. The Court was shocked to learn that the final order was unimplemented after 15 years and dismissed the interim applications with remedial costs imposed along with the compound interest. It was ordered that in case of amount remaining unpaid for two months the same shall be recovered as arrears of land revenue.^{xvi}

In **Vellore Citizens Welfare Forum v. Union of India**^{xvii}, the Supreme Court declared the polluter pays principle as a part of environmental jurisprudence in India. The Court in this case ordered the tanneries which were polluting the water to pay compensation

not only to the persons affected by the pollution but also to compensate for the cost of restoration of environmental damage.^{xviii}

The Court in this case referring to Article 21 of the constitution of India and articles 47, 48A and 51(g) along with certain environmental legislations^{xix} came to the conclusion that polluter pays principle is part of the environmental law of the country.

The Court clarified that the polluter pays principle implies absolute liability for harm to environment extends not only to compensate the victims of pollution but also to the cost of restoring the environmental degradation. Remediation of the damaged environment is part of sustainable development process.^{xx}

M.C. Mehta v. Kamal Nath and Ors.^{xxi} In this case a newspaper published an article that a private company Span Motels Pvt. Ltd. Had floated an ambitious project Span Club. The company was also the owner of Span Resorts. Mr. Kamal Nath, the then Minister of Environment and Forest, had a direct connection with Span Motels Pvt. Ltd. The company had built a motel on the bank of River Beas which was leased by the Government of India.

The Span Motels had also encroached upon an additional area besides the leasehold area which was also leased out to them. The use of earthmovers and bulldozers was causing environmental havoc in the river Beas. The course of the river was disrupted and its flow was diverted as a safeguard for the Motel against water calamities. It was brought to the notice of the court that Mr. Kamal Nath had played a vital role in regularizing the land encroachment done by the Motel.^{xxii}

The Court in this case applied the Public Trust doctrine and Polluter pays principle. The Court awarded not only damages for environmental degradation and its restoration but also exemplary damages for constructing on the river bed.

There have been several other cases^{xxiii} in which the court has recognised and applied the principle of polluter pays.

NGT and Polluter Pays

With the enactment of the National Green Tribunal Act, 2010, the National Green

Tribunal was established^{xxiv} to deal with the disputes relating to environment. The Polluter Pays Principle finds its place as a guiding principle in the Act. The Act provides that the Tribunal while passing any decision or award apply the principles of sustainable development, the precautionary principle and the principle of polluter pays.^{xxv} The relief that the tribunal may award under the Act includes relief and compensation to the victims of pollution, restitution of property damaged and restitution of the environment for such area as Tribunal deems fit.^{xxvi}

Cases: In **Hindustan Coca Cola Beverages Pvt. Ltd. V. West Bengal Pollution Control Board**^{xxvii}, the principle of polluter pays was strictly applied a bottling and beverage giant and NGT ordered that the cost of abatement of pollution must be borne by the concerned ‘polluting industry’. The tribunal directed that the cost of damage and restoration to be given to the WBPCB which would then carry out the restoration measures.^{xxviii}

In **Perma Nand Khatana v. State of Himanchal Pradesh**^{xxix}, the Tribunal was faced with the issue of air and noise pollution at the Rohtang Pass glacier in Shimla due to entry of vehicles on Himalayan roads. The NGT, in this case, imposed a fee on each vehicle to be contributed to the ‘Green Tax fund’. This case marked the widening of scope of ‘Who should Pay’ as instead of fixing the liability on a particular industry, the Tribunal shifted the responsibility upon the consumers of that industry.^{xxx}

Calculation of Compensation: To calculate the amount of compensation, the NGT has in some cases relied on guesswork. In **Samir Mehta v. Union of India**^{xxxi}, where the respondent companies were held liable for oil spill and pollution due to sinking of ship, the NGT found it troublesome to calculate the amount of damages and observed that the damage caused by such pollution can’t be measured in terms of money with exactitude and precision. This has to be done on the basis of hypothesizing or guesswork as is necessary.^{xxxii}

In **Gurpreet Singh Bagga v. Ministry of Environment and Forests and Ors**^{xxxiii}, the NGT was forced to resort to the principle of guesswork as both governments of State of U.P and Haryana did not place any report on record which could define the damage caused on the bank of river Yamuna and the amount required for restoration of the

biodiversity of the place. Applying the principle of guesswork, the Tribunal observed that it is impossible to determine such liability with precision and exactitude but this, per se, would afford no ground to absolve the polluter. An amount of 50 crores was imposed on respondents conducting extraction of minerals and 2.5 crores on each of illegal stone crushing plants.^{xxxiv}

In some cases^{xxxv}, where the payment was made contingent on the size of the project by NGT, fine imposed was 5 percent of the cost of the project. They were quoted as initial amount of deposit made by the polluting industries. The 5 percent of project cost has been set as a benchmark by relying on the judgement of **Goa Foundation vs. Union of India and Ors**^{xxxvi}. The amount is indicated as ‘initial amount’ and the NGT had set up expert committees to review the situation further and the reports of these committees become the basis for the final amount.^{xxxvii}

ISSUES IN IMPLEMENTATION OF POLLUTER PAYS PRINCIPLE IN INDIA

(i). The Principle of Polluter Pays may be inconsistent with the theory of inter-generational equity. The theory implies that we, the human species, hold the natural environment of our planet in common with all the members of our species: Past generations, Present generation and Future generations. As the members of the present generation, we hold the Earth in trust for future generations and simultaneously, we, as the beneficiaries, are entitled to use and benefit from it.^{xxxviii}

The Apex Court of India has included this principle of intergenerational equity in **Enviro- legal Action v. Union of India**^{xxxix}, wherein it observed that Parliament has enacted legislations against pollution “to protect and preserve the environment and save it for future generations”.

In the application of principle of inter-generational equity, an inconsistency with polluter pays is possible. Environmental damage, loss of biodiversity are almost irreversible losses. It is almost impossible to gimmick the biodiversity of a place once it is destroyed.

Therefore, by granting monetary compensation, generally, we do not account for the costs of degradation which is burdened upon future generations, which compromises the principle of inter- generational equity. It is another debate that whether pecuniary damages can restore the environmental damage at all.

In the absence of strict enforcement mechanisms to complement environmental legislations, the Polluter pays principle can only reduce the award to an operational cost within the revenue model of most of the polluting industries.^{x1}

(ii). The principle has been criticised in its application against the government bodies. When the liability upon municipal authorities or boards is fixed for their complicity in an act or omission causing pollution, the compensation/damages they pay is essentially borne by the Exchequer and therefore is funded by the taxes of citizens.

It is thus necessary that NGT imposes personal liability, in cases where it is practicable, on the guilty officers of the government are complicit in causing/allowing acts of pollution.^{xli}

(iii). In certain cases, the fines that are ordered by NGT are not implemented or the implementation is unreasonably delayed due to administrative recklessness.

(iii). There is no clear-cut mechanism to monitor the process of execution of payments. There is no systematic process to ensure that payments ordered by the courts are paid and utilized.^{xlii} There is no system to monitor payments into the Environmental Relief Fund (ERF).^{xliii}

(iv). There is no clear-cut criterion for calculation of compensation costs. As discussed above, the NGT had to rely on guess-work and hypothesis to decide the compensation amount, in certain cases. Absence of such criteria has created a void in the scheme of Indian environmental jurisprudence. Orders passed without such criteria are arbitrary, to say the least.

(v). The sufficiency of fines imposed is also a question that can be debated. If the fine imposed is a very small percentage of the turnover of the polluter company, it will not serve as a deterrent.

Other limitations

(i). Ambiguity exists in certain cases as to who shall be considered the Polluter. For example, In a case of compensation for industrial pollution, the polluting industry shall pay the compensation. However, who shall pay in case of air pollution caused by vehicular emission? The owner of the vehicle or the manufacturer.

In a developing country with huge population like India, a polluter could be a chain of people or a number of industries. An order by NGT that whoever dumps waste in river Yamuna would be fined Rs. 50,000 could not be implemented due to large number of polluters which made the identification unmanageable.^{xliv}

(ii). It is an issue that a large number of poor households and informal sector firms find it difficult to bear additional charges for energy or waste disposal.^{xlv}

Suggestions:

(i). The principle must not be restricted to compensation to the victims of environmental tragedy. Restoration of ecology must be taken into account while calculating the compensation amount.

(ii). There should be a systematic process to monitor that the compensation amount has been paid in pursuance of an order and consequently the payment made by way of compensation is properly utilized for restoration of ecology.

(iii). Some parameters have to be laid down to calculate the amount of compensation to be paid by the polluter. The size of the project, the benefit incurred by not following the required norms (For example, Instead of processing the waste discharging it in a river), the annual turnover of the polluter must all be considered. Reliance should be placed on experts at various stages of compensation process. All the stakeholders must be considered.

(iv). Extending the jurisdiction to the NGT to impose criminal liability in specific cases where the intent to pollute, or continuing to pollute with the knowledge of pollution along with its likely effects is clearly proved, may be considered.

(v). The amount decided to be paid by way compensation must be such that it has a

deterrent effect. It must not be too less as compared to the turnover of the polluting company. The principle is ‘polluter must pay’ and not ‘polluter can pollute as long as he can pay’

CONCLUSION

It is clear that the Polluter Pays Principle as a principle of Sustainable Development has come a long way and is a part of Indian environmental jurisprudence. The principle has been a part of various Supreme Court judgements and has also received statutory recognition under the National Green Tribunal Act, 2010 as guiding principle, along with the Precautionary Principle. However, it has to be conceded that principle, though recognised both internationally and domestically, has not been properly applied in India. The principle was incorporated as a part of Indian environmental jurisprudence through various judgements of the honourable Supreme Court. The NGT has also employed the principle in various cases as discussed in the project. However, the application of the principle seems weak in cases involving State complicity in causing pollution.

The application of the principle is also surrounded with certain loopholes like there is no scientific method to award compensation to victims of environmental degradation or what cost shall be payable for the damage to the environment. Also, in certain cases, it becomes difficult to identify an entity on whom the liability can be fixed. The Courts have found ways around these issues in some cases however it could be better resolved if the existing environmental legislations are amended to include provisions relating to polluter pays and laying down some guidelines through which the abovementioned issues could be resolved or a new legislation is passed to resolve the issue.

Lastly, it is upon the Courts to apply the principle effectively and pass compensatory orders that have deterrent effect otherwise, considering the susceptibility of our country’s resources to climate change and a number of species being extinct or endangered, it will be tough to preserve the biodiversity for future generations.

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