

Polluter Pays Principle As The Key Element To Environmental Law

Ashmita Barthakur

DOI: 10.29322/IJSRP.11.03.2021.p11137
<http://dx.doi.org/10.29322/IJSRP.11.03.2021.p11137>

Abstract- Environmental law is one amongst the rapidest developing facets of law. It is generally agreed upon that those that cause harm or damage should be paying in a method or another for such harm. Such harm may be to the society or to our surroundings or to our body at an intimate level. Due to lack of sanctions in environmental law, it became very difficult to keep an eye on the hazardous activities. This required the initiation of a penalty to punish the folks that caused damage or harm to the environment. This gave ascent to what we all know today as the 'Polluter Pays Principle'. This principle implies that the value of pollution should be paid polluter and not by the authorities. This principle is taken into account to be the foremost adequate environmental strategy and has been constituted in numerous international and regional agreements regarding pollution. This conception of Polluter pays has been breathing even prior to the Organization for Economic Co-operation and Development (OECD) approved it as a recognized precept of environmental law.

Index Terms- Environmental law, pollution, polluter pays principle.

I. INTRODUCTION

Most people comply with this undeniable fact that those that cause harm or damage to the environment should pay, in a method or so for such harm. Such harm may be to the society or to our surroundings or to our body at an intimate aspect. Environmental law is one amongst the rapidest developing facets of law. This has surface mainly because because of the increasing carnage of the environment by human beings along with the increasing concern for preservation of the environment. Numerous laws have been legislated both domestically as well as internationally, forbidding various practices that sabotage the environment or certain methods to administer activities that conceivably harm the environment at an intimate level. Therefore, to form a balance between the environment preservation and development the theory of Sustainable Development was brought in. However, due to lack of sanctions in environmental law, it became very difficult to keep an eye on the hazardous activities. This required the initiation of a penalty to punish the folks that caused damage or harm to the environment. This gave ascent to what we all know today as the 'Polluter Pays Principle'. This principle is one of the most important principles of contemporary environmental law. Basically, the principle implies that the value of pollution should

be paid polluter and not by the authorities.¹ This principle is taken into account to be the foremost adequate environmental strategy and has been constituted in numerous international and regional agreements regarding pollution. This conception of Polluter pays has been breathing even prior to the Organization for Economic Co-operation and Development (OECD) approved it as a recognized precept of environmental law. Nevertheless, the devil lies in comprehending the concept, pros and cons and challenges of the Polluter Pays Principle. Hence, this research paper will endeavour at clearing the air concerning five concepts namely,

1. The meaning and definition of pollution
2. Background, history and the meaning of Polluter Pays Principle.
3. This principle and its acceptance in Indian law
4. Role of the market-based instruments on this principle
5. Conclusion with the benefits and downsides of this principle

II. RESEARCH OBJECTIVE

The aim of this research paper is to explore the application, pros and cons of the Polluter Pays Principle as well as viewing the embodiment of the principle in the realm of the Indian environment.

III. WHAT IS POLLUTION?

When certain acts are carried out unchecked that disturbs the peace of nature, Pollution is said to be occurred. Pollution, is commonly described as, 'the introduction by man, directly or indirectly, of substances or energy into the environment resulting in deleterious effects of such a nature as to jeopardize human health, cause harm to living resources and ecosystems, and interfere or impair with facilities and other legitimate benefits of the environment'.²

The Water (prevention and control) Act, 1974, in terms of regional legislation defines pollution as 'such contamination of water or such alteration of the physical, chemical or biological properties of water or such discharge of any sewage or trade effluent or of the other liquid, gaseous or solid substance into

¹ Gregory Wetstone & Armin Rosencranz, Transboundary Air Pollution: The Search For An International Response, 8 Harv Envtl. L. Rev.89, 97 (1984).

² OECD, Recommendations C (74) 224 (1974)

water, directly or indirectly, as may, or is probably going to contrive a nuisance or responsible to render such water hazardous and injurious to health'.³

According to The Environment (Protection) Act, 1986, pollution is not the presence of an environmental pollutant within the environment and thus, it defines pollution as 'any solid or liquid or gaseous substance which is present in such concentration as could also be, or tend to be harmful to the environment'. Other statutes like the Air (Prevention and Control of Pollution) Act 1981, have comparable definitions of pollution. Thus, it is clear from these regional and international definitions that the stress is on the idea that pollution must have an inclination to cause hurt or must in real cause harm. Thus radically, pollution is a breach as under common law. If the invasion is so titular that it doesn't cause any harm, it will generally be tolerated. Therefore, as the definition of pollution is often understood, for the pollutant to lead to or cause pollution there has to be some resultant harm or threat of the harm.

IV. BACKGROUND OF THE POLLUTER PAYS PRINCIPLE

The concept of Polluter Pays Principle falls under the parasol of absolute liability. The principle of absolute liability is enforced irrespective of whether or not the person took legitimate care and it makes that person responsible to compensate for the ones who suffered on basis of his immanently perilous activity.⁴

The first persons to discuss about this concept were A.V. Kneese and J H Dales. They discussed about the means and methods, especially commercial to dwindle pollution during the 1960s.⁵

In 1968, J H Dales proposed tradable discharge permits, that was considered to be the most effective commercial instruments for diminishing pollution.⁶ Furthermore, the Polluter Pays Principle was indicated at by the Committee of Ministers of the Council of Europe promulgated a Draft Declaration of Principles on Air pollution control. Article 6 of this Declaration states that 'The cost incurred in protecting or subsidizing pollution must be borne by whosoever causes the pollution. This does not avert support from Public Authorities.'⁷

A seminar was held in Paris in 1971 by the Organization for Economic Co-operation and Development on environmental commerce in which the polluter pays principle was the elementary topic of conversation. This was the primary instance of the polluter pays principle being conversed on a global forum. On May 26, 1972, the Organization for Economic Co-operation and Development officially endorsed the Polluter Pays Principle as the 'Guiding Principle Concerning the Global Economic

Facets of Environmental Policies'. The proposal clearly lays out the mode of the principle describing: 'The principle to be applied for assigning costs for prevention of pollution and control measures to boost deliberate use of deficient environmental assets and to refrain distortions in global investment and trade is the Polluter Pays Principle.'

This principle implies that the polluter should be liable to bear with the costs of completing the above-mentioned measures pronounced by public authorities to confirm that the environment is in an appropriate state. In other words, the expenses of these measures must be reflecting within the expenses of goods and services which instigates pollution in production and utilization. Such measures shall not be guided by subsidies that might cause significant distortions in global investment and trade.

V. THE PRINCIPLE AS AN ASPECT OF CUSTOMARY INTERNATIONAL LAW

There was a rise in the public interests concerning environmental issues which eventuated to compel the Governments and other organizations to propose rules and regulations in favour of protecting the environment and this happened in the 1970s, after the Organization for Economic Co-operation and Development recommendations.

This gave a rise to numerous international level conferences and discussions where the nations united to find the keys to environmental deterioration. The polluter pays principle was the first principle to be incorporated in Principles 21 and 22 of Stockholm Declaration, 1972⁸ and consequently various other documents, like Rio Declaration⁹ in its Principle 15 administered for the application of this principle. In the landmark decision of the Case Concerning the Continental Shelf¹⁰ between Libya and Malta, the International Court of Justice determined as to when a specific provision or rule accomplished the cachet of being a part of the traditional jurisprudence. The court held that the availability in question shall have state practice i.e., general and consistent behaviour is states as compliments the availability in question and opinion juris i.e., an instinctive constraint, a sense on behalf of a state that it is compelled to the catering in question. The court within the same paragraph, further goes on to mention those multilateral conventions also play a crucial role in defining and developing rules of customary jurisprudence. The basic precept that a State shall assure payment of adequate and prompt compensation for harmful activities can be etched back as early as the Trail Smelter Arbitration case between Canada and the United States. Since then, various treaties, substantial decisions and comprehensive national law and practice which have developed giving abundant weight to claims for atonement in regards of trans-frontier damage and pollution. Some critics regard this as a traditional law obligation. However, this principle has not received a similar degree of attention and support bestowed over the years to the principle of protective

³ Water (Prevention and Control) Act, 1974, No. 6, Acts of Parliament, 1974

(India) Art. 2(e).

⁴ M.C. Mehta v. Union of India, (1987) 1 SCC 395.

⁵ ALLEN. V. KNEESE THE ECONOMICS OF REGIONAL WATER QUALITY MANAGEMENT, 35-119 (1964).

⁶ J. H. DALES, POLLUTION, PROPERTY AND PRICES, 93-97 (University of Toronto Press) (1968).

⁷ Council of Europe, Council of Ministers, Declaration of Principles on Air Pollution Control, Res. (68) 4 (1968).

⁸ Report of the U.N. Conference on the Human Environment, from the U.N. Conference in Stockholm, Sweden (Stockholm, 16 June 1972), U.N. Doc. A/CONF.48/14).

⁹ United Nations Rio Declaration on Environment and Development (13 June 1992).

¹⁰ Continental Shelf (Libya. v. Mal.), Judgment, 1985 I. C.J. Rep 13, 27 (3 June)

action or the attention recently bestowed to the precautionary principle, even though its use is now being obsessed in other regional agreements. The strong challenges of certain countries to the further growth of this principle, particularly for peaceful international relations are clear from the compromise prose endorsed by Principle 16 of Rio Declaration, which states that:

‘National jurisdiction shall endeavour to advance the internationalization of environmental expenses and also the use of commercial instruments, taking under consideration the approach that the polluter shall in principle deal with the expenses of pollution with due relevance to the general public interests and without deceiving international investment and trade.’

All in all, the developing acknowledgement of the polluter pays principle is an indication that it is not very long when it will become a part of customary jurisprudence.

VI. ROLE OF POLLUTER PAYS PRINCIPLE IN INDIA

Although this principle has been in force since the 1960s, this principle was proposed late in Indian law in 1996 in the Indian Council for Enviro- Legal vs Union of India case.¹¹ It was in this case the court declared the concept of absolute liability as stated in the M.C. Mehta vs Union of India, also referred to as the Oleum Gas Leak case¹² elongated it. The court declared that: ‘The polluter pays principle demands that the economical expenses of preventing or fixing damage induced by pollution shall lie with the ventures that cause the pollution or produce the products that cause the damage. Under this principle, the government authorities are not liable to meet the expenses concerned in either the prohibition of such pollution, or in bringing out restorative action as the consequences of this would be to shift the monetary burden of the damage to the taxpayer.’ Further, this principle was re- asserted in 1996, in Vellore Citizens Welfare Forum vs Union of India.¹³ The polluter pays principle has been legitimized through the constitutional sanction in these cases, under Article 21 and Article 47 of the Indian Constitution, judicial provisions¹⁴ and international traditional law.

VII. THE ROLE OF MARKET BASED INSTRUMENTS IN SHAPING THIS PRINCIPLE

The implementation and application of this principle should include a framework to protect against its potentially dangerous effects while reducing uncertainties about its commercial impact. This principle is closely tied to policies that are grouped under ‘market based’ or ‘economic instruments’. These instruments are later divided into two classes, taxes and tradable permits. The taxation approach is the most direct. The tax would be paid either within the kind of an emission fee or an excise tax on the sales of product that are related to pollution.

¹¹(1996) 3 SCC 212 at 215

¹²M.C. Mehta v. Union of India, (1987) 1 SCC 395.

¹³(1996) 5 SCC 647.

¹⁴Air (Prevention and Control of Pollution) Act 1981, No. 14, Acts of Parliament, 1981 (India), Water (Prevention and Control) Act, 1974, No. 6, Acts of Parliament, 1974 (India), Environment (Protection) Act, 1986, No. 29, Acts of Parliament, 1986 (India).

The tradable permits approach would first have the government establish an overall reasonable level of emissions for an industry and would then distribute permits for that level of emissions to companies in the industry. The companies could then sell or buy these emission permits on the basis of their needs to exude the pollutant and their capabilities to search out pollution abatement methods.

Economists have stated four reasons to question the growth of this principle:¹⁵

1. The application of the principle in urban areas where the economic sector is dominated by medium, small and tiny enterprises operating in an exceedingly highly competitive market is risky as any higher costs from emission or other effluent pack up charge might adversely affect their competitiveness in reference to large firms that are capable of affording the installation of necessary equipment.

2. while the polluter pays principle doesn't prohibit the polluter from passing on the extra costs that he might incur in terms of increased costs, thereby increasing price of his product, the truth in developing nations might not always be this manner. These nations which rely heavily on exports of primary commodities that demand within the international market is elastic may find that the prices are entirely borne by the producers within the style of damage to human health, property and ecosystems.

3. Representing a bigger objection to the inclusion of polluter pays principle in Indian law is that the consequences it'll have within the realm of the common property resource. the appliance of the principle will result in the appropriation of rights by wealthy landlords to the disadvantage of the little land owners, if curbs are imposed on the way within which a resource are often used, during this instance land.

4. The Court has not controlled the very fact that the amount of charges to be imposed on the polluter are extremely difficult to estimate and so will create to difficulties. The implementation of the polluter pays principle has significant economic consequences, especially within the Third World where trade is administrated in commodities that are the products of pollution intensive industries to stop the potential economic harm, the principle must be implemented via Market Based Instruments. One mechanism suggested by Attilio Bissio, who could be a principal in Atro Associates, a house specializing within the development and evaluation of petroleum refining and petrochemical processes, and Sharon Boots who was an engineering advisor and program manager at Exxon's Corporate research lab, to attain the aforementioned object is an environmental assurance bond.¹⁶ This bond would act as a contractual guarantee that the principal would act in an environmentally friendly manner and would be charged a gift accurate estimate of the most future environmental damage.

However, as there are two sides to every coin, there are arguments against such bonds. One, it would favour large firms that would afford to handle the monetary liabilities of activities

¹⁵KIRIT S. PARIKH, The Polluter-Pays and User-Pays Principles for Developing Countries: Merits, Drawbacks and Feasibility, in FAIR PRINCIPLES FOR SUSTAINABLE DEVELOPMENT: ESSAYS ON ENVIRONMENTAL POLICY AND DEVELOPING COUNTRIES 81 (Edward Dommen ed. 1993)

¹⁶ ATTILIO BISSIO & SHARON BOOTS, ENCYCLOPAEDIA OF ENERGY AND THE ENVIRONMENT 685 (The Wiley 1997) (1995).

potentially degrading the environment. Moreover, this may prevent firms that can't handle the fiscal burden from passing on the value of the environmental degradation to the general public.¹⁷

VIII. CONCLUSION

The polluter pays principle has had a protracted journey. From being an idea propounded within the 1960s to being internationally discussed in 1971 to being an element of varied international agreements since the Declaration of the global organization Conference on the Human Environment in 1972 to its strong affirmation during the UN Conference on Environment and Development in 1992. Enforcement of any law requires strict sanctions to make sure that the law is being complied with. Thus, laws regarding protection of environment were difficult to enforce because the defaulters didn't fear any punishment or penalty. This gave birth to the concept of the polluter pays principle. The clear advantages of this principle are as states above that it helps in enforcing the environmental laws and makes sure that development does the harm the environment beyond the required limit. Thus, the polluter pays principle goes hand in hand with the concept of Sustainable Development. One amongst the disadvantages of the polluter pays principle is that there's no gradation mechanism prescribed so the polluter pays principle may also have a deterrent effect on the industries. Additionally, to evaluating the price of reparation of the destruction caused, the potential and size of the industry must even be considered in order that the penalty are often determined in keeping with that. As discussed before, larger industries wouldn't face any trouble on passing on the value of environmental damage to the general public. In summary of the observations on market instruments, three aspects must be determined by the International Courts and Conferences at the international level and by regional courts at the domestic level. These are:

1. Development of scientific methods to see the potential costs of uncertainty with relevance environmental damage.
2. to regulate incentives so the relevant parties pay the price of this uncertainty.
3. to supply enough incentives to scale back the adverse effects of high-risk activity. As mentioned before, the polluter pays principle is an extension of the strict or absolute liability principle because it doesn't take into consideration due diligence before the doubtless harmful act. Since it's part of strict liability, governments, firms and other factions whose activities might adversely affect the environment are going to be forced to be a notch more careful in conducting tests just like the Environmental Impact Assessment (EIA) before undertaking such activities. Therefore, in terms of feasibility, the polluter pays principle promises to assist within the fight against environmental degradation and preventing the continuing environmental crisis.

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¹⁷ Robert Costanza, Three General Policies to Achieve Sustainability, 7.