

A Weapon Against Domination: Polluter Pay Principle

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Abstract: The problem of environmental degradation is a universal one. It cannot be resolved by one country alone. There are certain liability principles that are acceptable in every country. One such principle is the 'Polluter Pay Principle'. In the following article the discussion of this principle is looked into in detail and goes into explore the Indian judiciary's role in successfully adopting it to curb the problem. The Indian judiciary gave weight age to the polluter pay principle to the extent and beyond the Strict Liability Principle available under the common law. The paper further discusses the growth of the principle in India in relation to the Oleum Gas Leak case and other factors that forced the adoption of a strict policy in the name of absolute liability. The judgment of the case was ground breaking and set a new path in the way of the judiciary

I. INTRODUCTION

With every passing day, the degradation of the environment is becoming shoddier. Although the problem has been recognized internationally, it has led to the question of who is to be held responsible for such degradation. Since it is a problem of a very large magnitude, it is impossible for one to determine an easy four step process. A number of liability principles have been established that can be classified in the following ways:

1. **Equity Principles**- The equity principles of environmental liability purport that human beings are not the only rightful user of the resources available to us, such resources are divided amongst and shared with other living creatures such as plant and animal life (intra-generational equity). The current generation of human beings are also accountable to the coming era, they are to use the resources in a sustainable manner so as to avoid the depletion of such natural resources (inter- generational equity). The concept of sustainable development is also based on this equitable use of resources, it emphasizes the need to look beyond the selfish interest and pave a path of development along with conservation of such resources.
2. **Common but Differentiated Responsibility** – This principle of liability recognizes that the problem of environment is a global threat and it can only be curbed with a common step in that direction. However, the contribution towards that common step may differ from one another. In the Rio summit, it was stated that, “In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development

in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.”¹

3. **Public Trust Doctrine-** This doctrine simply provides the state is entrusted with the responsibility of protection of the natural resources, it therefore falls under the state’s duty to ensure that a healthy living environment is available to all the persons living under it. The Indian judiciary first introduced this doctrine in the case of *M.C.Mehta v. Kamal Nath*². The Supreme Court pointed out that this is based on the English doctrine that states that the natural resources are for general use and they are protected by the state.
4. **Polluter Pay Principle-** One of the most recognized principles of liability is the Polluter Pay Principle (PPP). It is simple in its nature and approach and uses the same principle of liability used in the criminal law that is, whoever causes the harm is the one liable to make up for it. The Polluter Pay Principle as the name suggests in itself provides that if any industry causes pollution or degradation of environment or to any person or property, then in such case the liability of such person arises. The concept of Polluter Pay was first introduced by the Organization for Economic Cooperation and Development in the year 1972. It further shaped in the year 1992 under the Principle 16 of the Rio Declaration. The principle laid down that If environmental costs are not internalized (or if state subsidies are given to polluting industries or if preventive measures are paid by the state) this could lead to distortion of international trade and investment. Thus, due application of the principle also protects economic interests. (but: no excessive application of principle, which may again lead to distortions.)³ From the time of its inception by the OECD, the Polluter Pay Principle has gained recognition internationally. Many countries have laid out an interpretation of the principle by themselves that are adapted and applicable as the law of the land. The Indian Judiciary has on various instances made use of the liability principle and brought it in the domain of the Indian Law.

II. INDIAN INTERPRETATION

The Indian Judiciary first recognized the need of a liability principle following the Bhopal Gas Tragedy. The Polluter Pays principle made an important impact in the famous MC Mehta Oleum Gas Leak case. In this judgment, the Supreme Court laid down the rule of absolute liability which essentially states that a person would be wholly responsible for any mishap caused by their “hazardous or inherently dangerous” enterprise, which in this case was a chlorine plant. The apex court noted that the polluter’s liability would

¹ A CISDL Brief, *The Principle of Common But Differentiated Responsibilities: Origins and Scope*, available at http://cisdl.org/public/docs/news/brief_common.pdf (visited on 22nd April, 2018)

² (1997)1 SCC 388

³ EU Environment Law; Principles of Polluter Pay available at http://ec.europa.eu/environment/legal/law/pdf/principles/2%20Polluter%20Pays%20Principle_revised.pdf,

depend on their ability to pay – thus using the principle to both clean up the environmental damage and to punish the polluter.⁴ The tragedy of this magnitude was the first of its kind to occur in India. However interestingly enough the principle of absolute liability was laid down in the case of *M.C. Mehta The Oleum Gas Leak* had led to the a great travesty and a large loss to life. *M.C. Mehta v. Union of India*⁵ originated in the aftermath of oleum gas leak from Shriram Food and Fertilisers Ltd. complex at Delhi. This gas leak occurred soon after the infamous Bhopal gas leak and created a lot of panic in Delhi. J. Bhagwati was of the opinion that a precedent had to be set for the Bhopal Gas Tragedy. Therefore, in this landmark judgement doctrine was developed. The court commented that,

“We must also deal with one other question which was seriously debated before us and that question is as to what is the measure of liability of an enterprise which is engaged in a hazardous or inherently dangerous industry, if by reason of an accident occurring in such industry, persons die or are injured. Does the rule in Rylands v. Fletcher apply or is there any other principle on which the liability can be determined? The rule in Rylands v. Fletcher was evolved in the year 1866 and it provides that a person who for his own purposes being on to his land and collects and keeps there anything likely to do mischief if it escapes must keep it at his peril and, if he fails to do so, is prima facie liable for the damage which is the natural consequence of its escape. The liability under this rule is strict and it is no defense that the thing escaped without that person's willful act, default or neglect or even that he had no knowledge of its existence. This rule laid down a principle of liability that if a person who brings on to his land and collects and keeps there anything likely to do harm and such thing escapes and does damage to another, he is liable to compensate for the damage caused. Of course, this rule applies only to non-natural user of the land and it does not apply to things naturally on the land or where the escape is due to an act of God and an act of a stranger or the default of the person injured or where the thing which escapes is present by the consent of the person injured or in certain cases where there is statutory authority”⁶

The Indian judiciary gave weight age to the polluter pay principle to the extent and beyond the Strict Liability Principle available under the common law. The main differences between the two is that the former recognizes certain exceptions whereas the latter holds an absolute liability of anyone carrying on any hazardous activity regardless of whether if the pollution so caused has been by the fault of such person or not.

III. GROWTH OF THE POLLUTER PAY PRINCIPLE

The liability arising out the polluter pay is a fairly board one. It does not simple concern itself to the loss of a particular kind. The polluter pays principle is simply the idea that we should pay the total social cost

⁴ About the Polluter Pay Principle available at <https://www.thequint.com/news/india/know-the-polluter-pays-principle-who-pays-and-how-much>

⁵ 1987 SCR (1) 819

⁶ Id, page 34

including the environmental costs. This requires some authority or government agency to calculate our external costs and make sure that we pay the full social cost. A simple example is a tax on petrol. When consuming petrol, we create pollution. The polluter pays principle is a way of 'internalising the externality'. It makes the firm/consumer pay the total social cost, rather than just the private cost.

- Principle 16: "National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that **the polluter should, in principle, bear the cost of pollution**, with due regard to the public interest and without distorting international trade and investment."

M.C MEHTA V. UNION OF INDIA (OLEUM GAS)

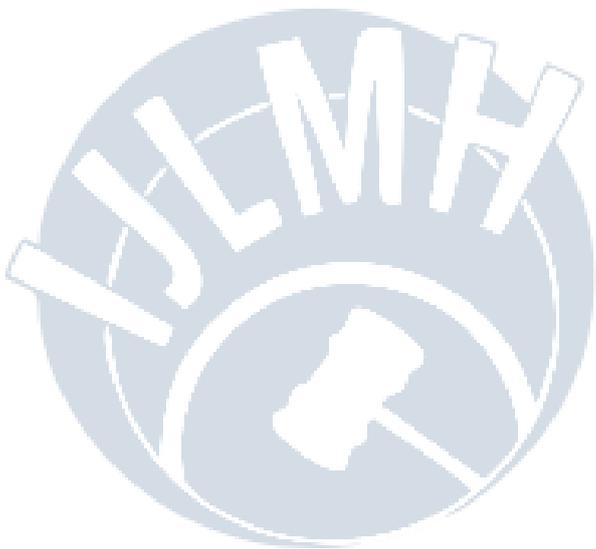
In this case the court affirmed the principle of absolute liability as stated in the Oleum Gas Leak case and extended it. The court laid down, "The polluter pays principle demands that the financial costs of preventing or reducing the damage caused by pollution should lie in the undertakings which cause the pollution or produce the goods that cause the pollution." The judgment of the above case on the polluter pays principle and the justification for invoking it was refined by another Bench in 1996, in the case of Vellore Citizens Welfare Forum v. Union of India.⁷ In these cases the use of the polluter pays principle has been justified via the constitutional mandate,⁸ statutory provisions ⁹ and international customary law.⁷ The petitioner, Shri M.C.Mehta filed this Writ Petition in the year 1985 under Article 32 of the Constitution of India, and sought directions from the Hon'ble Court that various units of Shriram Industries were hazardous to the community therefore directed to be closed. After hearing the arguments, the three judges Bench passed the judgment on 17.2.1986, permitted the Shriram Food and Fertilisers Industries (hereinafter referred to as SFFI) to restart its power plant and also plants for manufacture of caustic chlorine including its by-products and recovery plants like soap, glycerin and technical hard oil subject to certain conditions given in the three judges Bench judgment. The only point in dispute related whether the units of SFFI should be directed to be removed from the place where they were presently situated and relocated in another place where there would not be much human habitation so that these would not be any real danger to the health and safety of the people is to be decided.

The legal framework in 1985 was inadequate to conduct a fair trial of Union Carbide and its CEO Warren Anderson. The U.C.C paid a settlement amount of 470 million dollars to the victims, considering it as its moral obligation. No criminal or civil proceedings were initiated against the notorious Multinational Union Carbide. The decision of Bhopal Gas Tragedy still considered a black chapter in the judicial history of India.

⁷ Shuva Mandal, The Polluter Principle Pay available at <https://www.nls.ac.in/students/SBR/issues/vol10/1011.pdf>(visited on 23rd April, 2018)

IV. DIFFICULTIES IN IMPOSING THE PRINCIPLE

There are a number of problems that impose a great challenge in imposing the liability principle. The first and foremost is that, pollution cannot be measured. There are no quantifiable parameters that can be accurately taken note of. There are limits that are permissible. However, one cannot comprehend the degradation of environment entirely with these limits. Another major problem that exists is that most of the pollution that is done by factories are owned by MNCs or big corporate names. The problem of jurisdiction may sometimes arise. However, it is the problem of these corporate that believe that they are above the law and can evade justice.



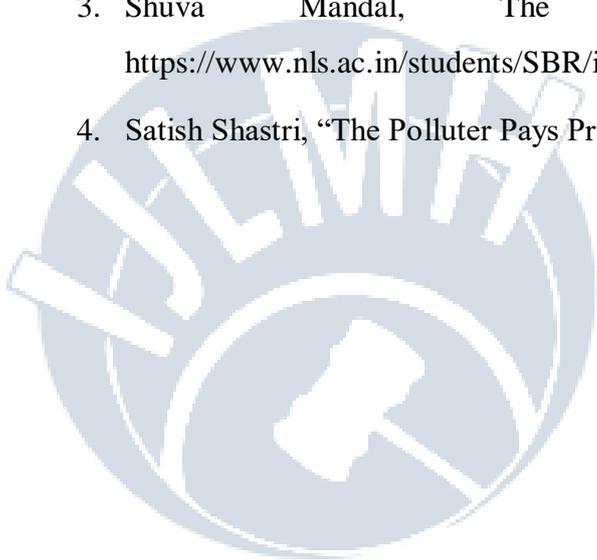
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