JUDICIAL ATTITUDE TOWARDS POLLUTER PAYS PRINCIPLE THROUGH ENVIRONMENT PROTECTION AND MANAGEMENT

Dr. Gopabandhu Nayak,
Affiliation: Berhampur University, Berhampur
postal address: Gopabandhu Nayak, C/o. Kedar Charan Patro, Gajanana Bihar
At/Po. Ambapua, nearby Reserve Police Ground, P.S. Gopalpur,
Berhampur, Dist. Ganjam, Odisha

1. Abstract (not longer than 300 words)
The problem of environment protection and its management have taken a serious turn in the present era. Industrialisation, Urbanisation, population explosion, poverty, over-exploitation of resources, depletion of traditional resources of energy and raw materials and the research for new sources of energy and raw materials, are some of the factors have contributed to environmental deterioration. The polluter pays principle has the benefit of making individual polluters make the economic choice of reducing pollution due to cost internalisation. Effective monitoring and control are necessary in order to avoid the pollution. The growing rate of environmental pollution in India, the function of the polluter pays principle needs to be immediate change in the line of preventive mode. Most of the Indian polluter pays principle laws would require restructuring in view of the fact that India is a party to many international environmental treaties. A minimum of 2 years rigorous imprisonment should have been mandatorily provided for offences of environmental pollution. Section 2 of the Environment (Protection) Act, 1986, shows a total lack of understanding of the modern concept of environmental pollution and the factors that lead to the imbalance of the ecosystem.

Keywords (7 words or less): Polluter Pay Principle, Environment, Protection, Management.
1. Introduction

The problem of environmental pollution is not new in its origin. It is as old as the emergence of Homo sapiens on the Planet and it was realised in the times of Plato 2500 years ago. The “Polluter Pays Principle” is one of the fundamental principles of modern environmental policies, both nationally and internationally. In simple terms it means that the cost of pollution abatement should be paid by the polluters and not by their governments. This cost is added by the polluter to the production cost of the goods and is passed on to the consumer. The PPP is considered to be the most efficient economic instrument in modern environmental policies and is used as such in the OECD member states. The PPP is included in a number of regional and international agreements on pollution. Its idea however, remained in economic circles since 1920s.

The problem of environment protection and its management have taken a serious turn in the present era. Today, society's interaction with the nature is so extensive that environment question has assumed proportions affecting all humanity. Industrialisation, Urbanisation, population explosion, poverty, over-exploitation of resources, depletion of traditional resources of energy and raw materials and the research for new sources of energy and raw materials, are some of the factors have contributed to environmental deterioration the world over. The scientific and technological progress of man has invested him with immense power over nature; it has also resulted in the unthinking use of the power, encroaching endlessly on nature. The protection of environment is a global issue and it is not an isolated problem of any area or nation. The problem of environmental pollution in an increasingly small world concerns all countries irrespective of their size, level of development or ideology. Notwithstanding political division of the world into national units, the oceanic world is interconnected whole; and winds that blow over the countries are also one.

1.1 Comparative application of Polluter Pay Principle in other Countries

Indian and UK environmental laws are aimed at the object of mitigating and controlling environmental problems. The comparative study has found strong justification for India to adapt and integrated approach to pollution prevention in the manner of the UK

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Environmental Protection Act, 1990 along with the regime of the IPPC. In this transplantation India would be indirectly benefiting from the EC laws as they get internalized in the UK Laws.

India should enhance the penal provisions in the environmental laws so that they may act as deterrence to willful violators. Indian Forest Act should be restricted to meet the aim of the National Forest Policy, 1988 and Principles of sustainable development of forests as enjoined under the UK Forestry Act, 1967. The State Pollution Control Boards are functional in the state capitals only and the Central Pollution Control Boards in the national capital at Delhi.

They should either be restructured on the lines of the environment agency of England or officials of the forest department in India may be charged with the power and responsibility of pollution control at the local level.

Australia on the other hand does not overtly apply the principle and is industry (or taxpayer) centric. Thus India should think in the line of UK for rehabilitation of contaminated land using the taxation system, and applying a strict interpretation of the Polluter Pay Principle. In Australia waste is very broadly defined to include any discarded, rejected, unwanted, surplus or abandoned substance, whether or not it is intended to be reprocessed, re-used or re-cycled. With respect to the rehabilitation of contaminated land using the taxation system, the UK applies a strict interpretation of the PPP, it also focuses on the activity that gives rise to the pollution.

1.2 Judicial attitude in approaching Polluter Pay Principle in specific instances

The Supreme Court in *M.C. Mehta v. Kamal Nath* observed that ‘Polluter Pays’ Principle has been recognized as fundamental objective of Government’s environmental policy to prevent and control pollution. The court in this case observed that the calculation of environmental damages should be on the basis of claim put forward by the party, but it should be on the basis of examination of the situation by the court, keeping in view the factors such as deterrent nature of the award.

The court in the instant case observed that a person who is guilty of causing pollution, has to pay damages for restoration of environment and ecology. The Supreme Court took notice of the pollution of the river Beas by the discharge of untreated effluent from the motel owned by Kamal Nath. The court, *inter alia* directed

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5. (2000) 4 SCC 213
that the motel shall not discharge untreated effluent in the river and that the Himachal
Pradesh Pollution Control Board shall inspect the control devices and treatment plant
set up in the Motel. After considering the reply of the motel management, the Court
applied the ‘polluter pays principle’ and imposed exemplary damages of ten lakhs
rupees on the Motel.

In another case in the matter of Saloni Ailawadi vs. Union of India\(^6\) and others
dated 16.11.2018 regarding pollution caused by Volkswagen India Pvt. Ltd. The
National Green Tribunal imposed a fine of Rs. 500 crores on Volkswagen for
emission Scandal globally and money to be applied for cleaning environment.

1.3 Calculation of Polluter Pay Principle

The polluter pays principle involves the idea we pay the total social cost
including the environmental costs. It requires some authority or government agency
to calculate our external costs and including social cost. A simple example is a tax on
petrol.

1.4 The Environment protection funds

The Vellore Citizens Welfare Forum v. Union of India\(^7\) the court ordered for
imposing a fine of Rs.10,000/- on each tannery of the area. He fine had to be paid to
the collector of the district. The court proposed the fine plus the compensation amount
so recovered from the polluters be deposited under the head ‘Environment Protection
Fund’. This fund could be utilized for compensating the affected persons identified by
the ‘authority’ and also for ‘restoring the damaged environment’.

The authority created by the government was directed by the court to frame a
scheme for reversing the damage caused to the ecology and environment by pollution
in the State of Tamil Nadu. Such scheme is proposed to be implemented by the state
governments with the assistance of the Central Government. The expenditure for such
schemes shall be met out of the ‘Environment Protection Fund’ and if need finances
could be provided by the State and the Central government. To monitor the
implementation of comprehensive directions by the authority and the government, the
Supreme Court suggested the constituting of a special bench ‘Green Bench’, which in

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\(^{6}\) (2019) SCC online NGT 69

\(^{7}\) AIR 1996 SC 2715 at 2726
future will deal with environmental issues. Thus, it was really a landmark judgment in the history of environmental management in India.

There are certain methods and manner in which first a polluter is someone who directly or indirectly damages the environment or who creates conditions relating to such damage.

Second, a large number of poor households, informal sector firms and subsistence farmers cannot bear any additional charges for energy or for waste disposal.

Third, small and medium-size firms from the formal sector may serve the home market. However it is difficult to pass on higher costs to the domestic end-users of their products.

Fourth, exporters in developing countries usually cannot shift the burden of cost internalization to foreign customers due to elastic demand.

Lastly, many environmental problems in developing countries are caused by an overexploitation of common poll resources. Access to these common pool resources could be limited in some cases through assigning, private property rights.

1.5 Global concerns for environmental crisis

The global concerns for environmental crisis have led the evolution and remarkable growth of international environmental law. Like international human rights law, discipline of international environmental law is one of the most important phenomena in post Stockholm Conference (1972) period. World Commission on Environment and Development (1986) also legally supported PPP through sustainable development principle 10. Later international documents like the 1992 Rio declaration: principle 16, Agenda 21 and the World Summit on Sustainable Development (WSSD) i.e. Johannesburg Plan of Implementation reiterated the same principle. Some of the salient principles of "Sustainable Development", as culled-out from Brundtland Report include PPP.

The United Nations Economic Commission for Europe, during a panel discussion in 1971, concluded that the total environmental expenditure required for improvement of the environment was overestimated. The current Fourth Action Programme makes it clear that

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'the cost of preventing and eliminating nuisance must in principle be borne by the polluter', and the PPP has now been incorporated into the European Community Treaty as part of the new Articles on the environment.

1.6 Environmental policies and Laws in India

Environment, being an inter-related discipline, policies and laws are needed to safeguard and protect natural environment. The Government of India has taken systematic and sustained efforts to tackle major environmental problems of this country. One of the efforts is to formulate comprehensive 'Policy framework’ to enable the government to have a holistic view of all environmental issues and to formulate "Environmental Plan” for the country.


The formulation of above policy statements has fulfilled a long standing demand of devising a clear and precise national policy on environmental protection and management. A few of the policy directives have been formulated into legislations. The main legislations on environmental protection are: The Indian Fisheries Act, 1897; The Indian Forest Act, 1927; The River Boards Act, 1956; The Water (Prevention and Control of Pollution) Act, 1974; The Water Cess (Prevention and Control of Pollution) Act, 1977; The Environment (Protection) Act, 1986; The Mines and Minerals (Regulation and Development) Act, 1957; The Atomic Energy Act, 1962; The Air (Prevention and Control of Pollution) Act, 1981; The Environment (Protection) Act, 1986; The Public Liability Insurance Act, 1991 and The Environment Tribunal Act, 1995. Apart from statutes, the remedy for environmental harm is available in law of tort under the categories of negligence nuisance, trespass and strict liability.
1.7 Role and Status of Indian Judiciary

The role of judiciary depends on the very nature of political system adopted by a particular country. This is the reason that role of judiciary varies in liberal democracy, communist system and countries having dictatorship. The role of judiciary has been important in liberal democracies like India. The Constitution of India in fact took inspiration from US Constitution and therefore adopted similar concept of judicial review. In India, in view of legislative and executive indifferences or failures, the role of judiciary has been crucial in shaping the environmental laws and policies. The role of the Indian Supreme Court may be explained quoting the views of Professor S.P. Sathe and Professor Upendra Baxi two leading academics have extensively written on the role of judiciary in India.

Under the constitutional scheme the legal status of Article 51(A)-(g) and 48-A is enabling in nature and not legally binding but the provisions have often been interpreted by the Indian courts as legally binding. Moreover, these provisions have been used by the courts to justify and develop a legally binding fundamental right to environment as part of right to life under Article 21. Under Article 32 of the Constitution of India in a PIL regarding the liability of an enterprise which is engaged in a hazardous or inherently dangerous industry, the Court observed: “We are of the view that an enterprise which is engaged in a hazardous or inherently dangerous industry which poses a potential threat to the health and safety of the persons working in the factory and residing in the surrounding areas owes an absolute and non delegable duty to the community to ensure that no harm results to any one on account of hazardous or inherently dangerous nature of the activity.”

1.8 Polluter pays principle

The first major reference to the polluter pays principle appeared in 1972 in the Organisation for Economic Co-operation and Development Guiding Principles concerning international economic aspects of environmental policies. The PPP as a guiding principle across countries became necessary because some countries faced complaints by national firms about rising costs and a loss of international competitiveness following a national implementation of the PPP within the their borders.10

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10 Concept of Polluter Pay Principle (PPP) , https://www.researchgate.net/
In Sardar Sarovar Dam\textsuperscript{11} majority judgment referred the Nayudu and Vellore Cases and approved the construction of a mega dam and found it compatible with the concept of sustainable development. The court refused to apply the precautionary principle in this matter by distinguishing the dam with the hazardous industries.

The Polluter Pay Principle (PPP) by the judiciary can be seen from the judgement delivered by the Supreme Court of India in writ petition no. 657 of 1995. The Supreme Court held that "The PPP means that absolute liability of harm to the environment extends not only to compensate the victims of pollution, but also to the cost, of restoring environmental degradation. Remediation of damaged environment is a part of the process of sustainable development".

The Supreme Court for the first time applied the polluter pays principle explicitly in \textit{Indian Council for Enviro-Legal Action v. Union of India}\textsuperscript{12} in which the Court held that the polluting industries are absolutely liable to compensate for the harm caused by them to the villagers in the affected area, to the soil and to the underground water and hence they are bound to take all necessary measures to remove sludge and other pollutants lying in the affected areas. The Supreme Court further directed the Central Government to determine the amount required for carrying out the remedial cost of the environment in consultations with appropriate ministry, utilising its power under Section 3 and Section 5 of the Environment (Protection) Act of 1986.

The \textit{Vellore Citizens Welfare Forum v. Union of India}\textsuperscript{13}, the Supreme Court declare that the Polluter Pays Principle has been held to be a sound principle and directed the Central Government to constitute an authority under Section 3(3) of the Environment (Protection) Act, 1986 with the power to compute the compensation applying polluter pays principle under two heads namely for reversing the ecology and for payment to individual victims. It further ordered imposition of pollution fine of Rs. 10,000/- from each of the polluting tenancy Industries. The fine so recovered from polluter had to be deposited under a separate head Environment Protection Fund. The Supreme Court ordered creation of Environment Protection fund in this case and directed the fund to be utilized for compensating the affected persons as identified by authorities and also for restoring the damaged environment.

\textsuperscript{11} \textit{Narmada Bachao Andolan v. Union of India} (2000)\textsuperscript{7} SCALE 34, 91-92. (pares 119-121) (AIR 2000 SC 3751).
\textsuperscript{12} AIR 1996 SC 1446.
\textsuperscript{13} AIR 1996 SC 2715.
In another case *Karnataka industrial Area Development Board v. C. Kenchappa*\(^\text{14}\) the Apex Court observed. “The polluter pays principles demands that the financial costs of preventing or remedying damage caused by pollution should lie with the undertakings which cause the pollution or produce the goods which cause the pollution. Under the principle, it is not the role of Government to meet the costs involved in the prevention of such damage or in carrying out remedial action, because the effect of this would be to shift the financial burden of the pollution incident to the tax-payers.”

### 1.9 Role of National Green Tribunal

The polluter pays principle through the principle has been recognised and enacted in recent legislations also namely the Public Liability Insurance Act. 1991 and the National Environment Tribunal Act. 1995. These statutes have created Environment Relief Fund for restoration of environment. But the public liability insurance Act 1991 deals with the third party insurance to pay nominal damages through administrative agency and the National Environmental Tribunal Act 1995 has neither been notified for its implementation nor the tribunal established in the country. However, in 2010, the National Green Tribunal Act has been enacted which provides for establishment of National Green Tribunal—a special fast-track court for speedy disposal of environment-related civil cases. Its object is to provide for the establishment of a National Green Tribunal for the effective and expeditious disposal of cases relating to environmental protection and conservation of forests and other natural resources including enforcement of any legal right relating to environment and giving relief and compensation for damages to persons and property and for matters connected therewith or incidental thereto.\(^\text{15}\) The Act empowers the Government of India to notify the Establishment of the Tribunal by the Central Government to exercise the jurisdiction, powers and authority conferred on such Tribunal by or under this Act.\(^\text{16}\) Accordingly The National Green Tribunal has been established on 18.10.2010 under the National Green Tribunal Act 2010 for effective and expeditious disposal of cases relating to environmental protection and conservation of forests and other natural resources including enforcement of any legal right relating to environment and giving relief and compensation for damages to persons and property.

\(^{14}\) AIR 2006 SC 2038.

\(^{15}\) *The National Green Tribunal Act 2010*, Preamble.

\(^{16}\) *The National Green Tribunal Act, 2010*, s 3.
1.10 Law relating to the polluter pays principle

It requires the polluter to bear the expense of preventing, controlling, and cleaning up pollution. Its main goals are cost allocation and cost internalization. The polluter pays principle, as an element of the modern approaches of environmental protection. The Indian government enacted legislation for environment protection, water pollution, air pollution and wildlife conservation. It not only includes the concept of sustainable development but also air and water pollution, preservation of our forests and wildlife, noise pollution and even the protection of our ancient monuments, which are undergoing severe stress due to urbanization and consequent environmental pollution.\footnote{Hinch Lal Tiwari v. Kamala Devi, (2001) 6 SCC 496: “[T]he material resources of the community like forests, tanks, ponds, hillock, mountain etc. are nature’s bounty. They maintain delicate ecological balance. They need to be protected for a proper and healthy environment which enables people to enjoy a quality life which is the essence of the guaranteed right under Article 21 of the Constitution.”}

The Environment (Protection) Act, 1986 is a landmark legislation which provides for single focus in the country for protection of environment and aims at plugging the loopholes in existing legislation. The legislation and its Rules clearly incorporated the polluter pays principle and imposed civil liability for non-compliance. It provides mainly for pollution control, with stringent penalties for violations. The Act also provides for criminal punishment for non-compliance with environmental standards.\footnote{Environment Protection Act, 1986, s 15.} The major urban environmental ills like noise, traffic, slums and congestion are conspicuously absent from the Act and no provisions have been made for their control. Further, the Act focuses on environmental pollution and hazardous substance alone, as source of environment degradation. The Act is drafted with the misconceived contention that protection and improvement of environment. Pollution is misconceived as to be environmental quality deterioration caused by discharge of pollutants. Environmental pollution as given in the Act though subject to certain limitations is wide and comprehensive in its scope at least for the legal regulation of industrial pollution and hazardous substances. The Act prescribes the penalties for offences under the Act – a prison term of up to 5 years or a fine of up to Rs. 1 lakh, or both.

Environment Impact Assessment (EIA) is essential that consequences of projects, plans or policies at different levels be assessed before they are executed. It examines consequences and predicts future changes in the environment. Approval of projects without a proper impact study is a danger that throws environmental management out of gear. It is often

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17. Hinch Lal Tiwari v. Kamala Devi, (2001) 6 SCC 496: “[T]he material resources of the community like forests, tanks, ponds, hillock, mountain etc. are nature’s bounty. They maintain delicate ecological balance. They need to be protected for a proper and healthy environment which enables people to enjoy a quality life which is the essence of the guaranteed right under Article 21 of the Constitution.”

alleged that location of industrial projects in India is often decided on parochial, regional and political considerations.

1.11 Aim and Purpose of Public Liability Insurance Act, 1991

The growth of hazardous industries, risks from accidents processes and operations, not only to the persons employed in such undertakings but also to the public may be in vicinity, have increased. The workers and employees of hazardous installations are protected under separate laws; members of the public are not assured of any relief. It aims at providing for public liability insurance for the purpose of providing immediate relief to persons affected by accident occurring while handling any hazardous substance or matters connected therewith or incidental thereto. The most important reason for enactment of this Act is due to the Bhopal Gas leak disaster. This Act has been enacted subsequent to the Bhopal Gas leak disaster where MIC leaked from the plant of Union Carbide India Ltd. and caused the death of over 3000 persons and serious injuries to a large number of others.¹⁹

1.12 Policy statements and Legislative Measures

The Union Government adopted a “National Conservation Strategy and Policy Statement on Environment and Development”. The NCS proceeds to recognize the enormous dimensions of the environmental problems facing India and declares strategies for action in various spheres such as agriculture, forestry, industrial development, mining and tourism. To achieve the goal, the statement adopts fundamental guiding principles, namely: (i) Prevention of pollution at source; (ii) Adoption of the best available technology; (iii) Polluter pays principles; and (iv) Public participation in decision-making.²⁰


nuisance (Criminal Procedure Code 1973, Sections. 133-44), and (iii) a civil action by Advocate General or by two or more members of the public with the permission of the court, for a declaration, an injunction or both (Civil Procedure Code 1908, Sect. 91) are adopted.

1.13 Conclusion

Over last a few decades, exploitation of earth and degradation of environment have gone up at an alarming rate. As those actions have not been in favor of protecting this earth, it is seen from that the natural disasters striking us more often in the form of flash floods, tsunamis and cyclones. Besides these natural disasters, the world is facing many severe environmental problems like air pollution, water pollution, noise pollution, global warming, acid rain, urban sprawl, waste disposal, ozone layer depletion, climate change and many more. The environmental problems have questioned the modernity, existence and survival of man and other forms of life. Environmental problems make us vulnerable to disasters and tragedies, now and in the future. Thus protection of environment from current environmental problems has become a matter of deep global concern in recent years and requires urgent attention. Indian policymakers and the judiciary are looking for solutions to India’s environmental problems. One such measure was the application of the polluter pays principle in Indian environmental law and many creative interpretations of the same by the Indian judiciary. The higher Judiciary in its new role played a crucial role in protecting the environment through public interest litigation covering various aspects of environmental degradation under Article 32 and Article 226 of the Constitution of India. The judiciary has made efforts in preserving India’s natural environment by insisting upon implementation of the laws and where the laws were found insufficient to deal with a particular situation, leading concepts such as sustainable development, precautionary principle, polluter pay principles etc. into Indian law to achieve this end. Under the principle, the costs of pollution prevention and control should be included in the price of goods in the marketplace. A complete change in our jurisprudential perspective is required to protect the environment and get over the exploitative mentality. The Supreme Court is to be expected to monitor and find solutions to all the environmental problems of the country. Provisions of polluter pays principles in environmental laws need substantial restructuring, as they have not been able to mitigate environmental problems. The preventative aspect of the polluter pays principle would be the most preferable way of dealing with pollution. Effective monitoring and control are necessary in order to avoid the pollution. In addition to State Board and Central Board to ensure the Act is effective in protecting the pollution, NGOs and the
government must take additional steps to ensure the Act is effective in protecting the polluter pay principle. Polluter pays principle legislations should have a simultaneous legal literacy and sensitisation plan. Laws remain paper tigers rather than being the instruments of social change. The Government of India should come out with some more stringent penal provisions for the protection of the environment.

The following suggestions are made for the polluter pays principle

1. Provisions of polluter pays principles in environmental laws need substantial restructuring, as they have not been able to mitigate environmental problems, which on the contrary are increasing.
2. India should enhance the penal provisions in the polluter pays principle laws so that they may act as deterrence to willful violators.
3. Most of the Indian polluter pays principle laws would require restructuring in view of the fact that India is a party to many international environmental treaties.
4. The organizational structure of the pollution control boards in India would also require considerable re-thinking. As of now the State Pollution Control Boards are functional in the state capitals only and the Central Pollution Control Board in the national capital at Delhi.
5. The polluter pays principle as a cost allocation principle for domestic environments still requires interpretation with respect to the use of environmental subsidies in different economic sectors.
6. Member countries continue to collaborate and work closely together in striving for uniform observance of the Polluter-Pays Principle, and therefore that as a general rule they should not assist the polluters in bearing the costs of pollution control whether by means of subsidies, tax advantages or other measures.
7. The preventative aspect of the polluter pays principle would be the most preferable way of dealing with pollution. Effective monitoring and control are necessary in order to avoid the pollution.
8. In addition to State Board and Central Board to ensure the Act is effective in protecting the pollution, NGOs and the government must take additional steps to ensure the Act is effective in protecting the same. These steps include providing publicity and education regarding the environmental laws; monitoring and amending the Act as needed; and interpreting the Act pursuant to international treaty obligations.
9. Polluter pays principle legislations should have a simultaneous legal literacy and sensitisation plan. Laws remain paper tigers rather than being the instruments of social change.

10. Further NGOs and the government must carefully monitor the enforcement of the Act and work together to dismantle the patriarchal mindset that threatens to make the Act ineffective.

11. A polluter should be taxed by the pragmatic judgments so that the polluter think twice before degradating environment and disturbing the ecological balance.

12. Apart from the above, for the proper allocation of the financial cost of preventing and remedying the degraded environment to the person who has been responsible for disturbing the ecological balance by application of polluter pay principle so that the government is not to meet the cost involved in either prevention of such damage or in carrying out remedial measures because the effort would be to fox the responsibility on the tax payers; the victim of the damaged environment are not made to suffer harm and pay for it themselves for no fault of their own; the degraded environment is not to be left unattended because the effort would be to fix cost on future generation.