

Let He Who Pollutes-Pay the Price: An Analysis of the Application of the Polluter-Pays Principle in Sri Lanka, India and International Law

YP Wijerathna¹ and AA Edirisinghe^{2#}

¹Lecturer, Faculty of Law General Sir John Kotelawala Defence University, Sri Lanka

²Lecturer, Faculty of Law General Sir John Kotelawala Defence University, Sri Lanka

#Corresponding author; <aadirisinghe@gmail.com>

Abstract — The Polluter-Pays principle is a well-established principle in environmental law that is embedded in several celebrated international declarations, international standard setting documents and in national law of many states. Even though the judiciary in jurisdictions like India often engages in progressive interpretation of environmental law concepts and principles, such progressive approaches have rarely been adopted by the judiciary of Sri Lanka. In this context, focusing on two key judgements of *Bulankulama* and *Ravindra Gunawardena Kariyawasam*, this research intends to analyse the application of the polluter-pays principle in Sri Lanka and explore how it can be further developed through judicial interpretation. Special reference is made to international and Indian case law to draw examples of the interpretation of the polluter-pays principle. In addition, this paper also highlights the challenges for meaningful application of the principle. This is a qualitative research conducted based on International legal instruments, national and foreign case law, academic writing and international standard setting documents.

Keywords: Polluter-Pays Principle, Progressive Interpretation, Environmental Protection.

I. INTRODUCTION

If anyone intentionally spoils the water of another.... let him not only pay damages but purify the stream or cistern which contains the water

- Plato

The inherent need of humans for consumption was historically limited to the needs for basic survival. Overtime, the consumption and economies grew to be complex and particularly following the industrial revolution, these needs of the industrialized humanity multiplied. Human activities, economy and environment are intrinsically connected. However, in past, the interdependency of the economy and the environment was often neglected, and the environment was viewed only as a source that limitlessly generate resources to be

exploited for production. It was possible for companies to discharge pollutants to the environment while others bear the cost of the damage caused. Economists call the pollution resulted by this process as an 'externality' since this cost is external to the company accounts as well as to the company's market transactions (Beder, 2007).

Polluter-Pays principle (hereinafter referred to as PPP) becomes significant in this context and it dictates that "whoever is responsible for damage to the environment should bear the costs associated with it" (The United Nations Environmental Programme, 1996). This prevents involuntary wealth redistribution that takes place when one party benefits at the expense of the others (Maniruzzaman et al, 2010) and the principle directly appeals to the sense of justice and fairness.

While the PPP is considered as a well-established principle in environmental law, the principle itself does not define the pollution, the appropriate standard to establish liability or the extent to which the polluter needs to pay. These salient aspects are left out for the judiciary to decide and interpret. Even though the judiciary in jurisdictions like India often engages in progressive interpretation of environmental law concepts and principles, such progressive approaches have rarely been adopted by the judiciary of Sri Lanka. This research, therefore, seeks to answer the question whether the PPP is applied in Sri Lanka in line with the international standards. The objective of this research is to critically analyze the application of the PPP in Sri Lanka and explore how it can be further developed through judicial interpretation drawing lessons from India and International Law.

I. METHODOLOGY

This research was carried out using the black letter approach of research, using primary sources such as International Conventions, Declarations, national and international legislation and case law; and secondary

sources such as international standard setting documents, reports issued by international and national environmental agencies, texts of academic authority and existing research studies.

III. THE POLLUTER-PAYS PRINCIPLE IN INTERNATIONAL LAW

At the international level, the PPP was first expressly referred to in a Council Recommendation on Guiding Principles Concerning the International Economic Aspects of Environmental Policies of the Organization for Economic Co-operation and Development (OECD) in 1972. The recommendation imposed a duty upon the polluter to bear the expenses of carrying out the measures decided by public authorities to ensure that the environment is in an acceptable state. The principle was then incorporated into the Stockholm Declaration in 1972 in combination with the principles governing state responsibility. The recognition of the PPP in the Rio Declaration on Environment and Development in 1992 aligns more with the OECD approach and aims at internalising environmental costs while upholding the duty of the polluter to bear the costs of pollution, with due regard to the public interest and without distorting international trade and investment. The PPP has since been recognised as a general principle of international environmental law in a number of international legal instruments.

The customary international law status of the PPP is still sceptical. Nevertheless, in his dissenting judgement in *the Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons case* (1996), Judge Weeramantry held in clear terms that;

The environmental law principles including the polluter pays do not depend for their validity on treaty provisions. It is a part of customary international law. They are part of the sine qua non for human survival'.

The nature and the extent of the harm, the cost of which shall be borne by the polluter, remain extremely significant, yet open to interpretation in international law. According to Bowman and Boyle (2012), there is a little practical significance in the notion that the polluter must pay unless it can be established precisely for what he must pay and exactly how much it will cost him. These are questions that international law not yet appear to have answered with certainty. The earlier definitions of environmental damage were considerably restricted. *Trail Smelter Arbitration case* (1939) which considered the liability of Canada for the transboundary damage caused by a smelter situated in Trail, British Columbia, confined the definition of damage to the loss of property as

opposed to the impact on the environment and community as a whole. The subsequent definitions have however broadened the range to include harm to living resources or ecosystems, interference with amenities and other legitimate uses of the environment or the sea. The OECD has suggested the following as a general definition of pollution:

The introduction by humankind, directly or indirectly, of substances or energy into the environment resulting in deleterious effects of such a nature as to endanger human health, harm living resources and eco-systems, impair amenities or interfere with other legitimate uses of the environment' (Recommendation for the Implementation of a Regime of Equal Right of Access and Non-Discrimination in Relation to Trans-frontier Pollution 1977)

In *Costa Rica v Nicaragua* (2018), the International Court of Justice held that;

The environmental damage shall be approached from the perspective of **the ecosystem as a whole, by adopting an overall assessment of the impairment or loss of environmental goods and services prior to recovery.** damage to the environment, and the consequent impairment or loss of the ability of the environment to provide goods and services, is compensable under international law.

The appropriate standard to establish liability in environmental pollution cases also remains inconclusive in international law. It is sometimes argued that the appropriate standard for the conduct of states in this field is the strict liability. However, it is doubtful whether international law has in fact accepted this as a general principle. In *Trail Smelter Arbitration case* (1939), Canada's responsibility was accepted from the beginning, the case focusing upon the compensation due and the terms of the future operation of the smelter. In *Gut Dam arbitration case* (1969), the tribunal awarded a lump sum payment to the US, without considering whether Canada had been in any way negligent or at fault with regard to the construction of the dam. However, the strict theory was not accepted in the *Corfu Channel case* (1941). In the recent case of *Costa Rica v Nicaragua* (2018), the court held 'ultimately, it is for the Court to decide whether there is a sufficient causal nexus between the wrongful act and the injury suffered'.

The question what the polluter should pay, has been answered to include both the cost of compensating the victims and the cost of restoring the environment. In *Costa Rica v Nicaragua* (2018), it was held that;

The environmental damage shall be valued from the perspective of the ecosystem as a whole.

Nicaragua must compensate Costa Rica **for material damage, including environmental harm.**

In *Standley Case* (1999), the court combined the PPP and proportionality principle and held that the polluters are only responsible for the pollution and, they caused they do not have to pay for eliminating and preventing pollution to which they do not contribute.

It is clear from the above discussion that the international law, while not conclusive, is more inclined to give a broader interpretation and an application to the PPP. The next part of the paper seeks to analyse whether this broader definition and application of the PPP has been adopted and upheld in the domestic context of Sri Lanka.

III. THE POLLUTER-PAYS PRINCIPLE IN SRI LANKA

The PPP was recognized and applied in two significant judicial decisions in Sri Lanka. In the first decision, *Bulankulama v Secretary, Ministry of Industrial Development* (2000), the Supreme Court applied the PPP against a decision taken by the government to enter into a lease agreement with a foreign company in respect of a phosphate mine situated in Eppawala area of Sri Lanka. In the case, Honourable Justice Amarasinghe emphasized on the inadequacy of the protection afforded in the proposed agreement with regard to the repairment of environmental damage and held:

Today, environmental protection, in the light of the generally recognized polluter-pays principle... can no longer be permitted to be externalized by economists merely because they find it too insignificant or too difficult to include it as a cost associated with human activity. **The costs of environmental damage should, in my view, be borne by the party that causes such harm, rather than being allowed to fall on the general community to be paid through reduced environmental quality or increased taxation** in order to mitigate the environmentally degrading effects of a project.

The judgement recognized the significance of internalising the costs of environmental damage and emphasized that costs of such damage shall be borne by the polluter. While the *Bulankulama* decision has been a giant step forward in applying the PPP in Sri Lankan law, it neither went into depth analysing the scope and extent of the PPP nor provided a clear interpretation to the 'environmental damage/harm'.

In the second case, *Ravindra Gunawardena Kariyawasam v Central Environmental Authority and*

Others (2019), the honourable justice Prasanna Jayawardena stated that;

I direct the 8th respondent to pay compensation in a sum of Rs.20 million **to offset at least a part of the substantial loss, harm and damage caused to the residents of the Chunnakam area** by the contamination of groundwater in the Chunnakam area and of soil in the vicinity of the 8th respondent's thermal power station.

As emphasized earlier, the PPP is not considered successfully embraced when part of the cost of pollution is imposed on the community as a whole. Following the appointment of a panel to monitor the due distribution of compensation, the honourable justice Prasanna Jayawardena further dictates that

...[t]he members of panel and the institutions they represent shall be collectively and individually responsible for distributing this sum of Rs. 20 million among persons who reside within a 1.5 kilometre radius of the 8th respondent's thermal power station and whose wells have been contaminated with Oil and Grease and/or BTEX, **in order to assist those persons to clean and rehabilitate their wells.**

Hence, it seems that the focus is on cleaning the contaminated wells. This leads to a question whether, the responsibility imposed is adequate. Whether it ensures that it will be safe to use the ground water in the area in the future for human consumption or agriculture is problematic.

In certain jurisdictions, for instance, in Finland, the Environmental Protection Act includes a liability rule that requires the polluter to pay for restoration of soil or groundwater to a condition that will not harm health or the environment (Nordberg, 2006). In *Ravindra Gunawardena Kariyawasam* (2019), the honourable judge should have made a stronger emphasis on restoration of the polluted groundwater. Researchers opine that the judge should have taken expert opinion on the measures to be taken and the cost associated with remedying the harm that had been done over the years.

The next part analyses the application of the PPP in India and seeks to ascertain the lessons that can be used to enhance the effectiveness of the application of the PPP in Sri Lanka.

IV. POLLUTER PAYS PRINCIPLE IN INDIA

The judiciary in India has recognized the PPP as a part of the environmental law in India (*Vellore Citizens' Welfare Forum vs. Union of India, 1996*). The definition of pollution

and what the polluter shall pay is broadly and conclusively interpreted in the Indian context. In *Vellore Citizens' Welfare Forum v Union of India* (1996), the apex court of India held that;

Polluter Pays Principle extends **not only to compensate the victims of the pollution but also the cost of restoring the environmental degradation**. Remediation of the damaged environment is part of the process of 'Sustainable Development' and as such the polluter is liable to pay the cost to the individual sufferers as well as the cost of reversing the damaged ecology”.

The same approach was adopted in *Indian Council for Enviro-Legal Action v Union of India* (1996) and *MC Mehta v Kamal Nath* (1997) cases. In *Sludge* case (1996) which was filed for the purpose of prohibiting and remedying the pollution caused by several chemical industrial plants in Bichhri village, Rajasthan, India, the court imposed the responsibility for the pollution on the pollution causing industry. In doing so the court held:

The polluter-pays principle 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 either 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 taxpayer.**

Thus, the interpretation of the PPP in India not only internalises the cost of pollution but also upholds the twofold ends of the principle recognized in the international law; restoration of the environment and compensating the victims

In deciding what the polluter should pay, Indian judiciary has adopted the position that the amount of compensation shall be equivalent to what is lost. In *Deepak Nitrite Limited v State of Gujarat* (2004), the court emphasized that the compensation should not go down below this equivalent. In *MC Mehta v Union of India* (1987), the court took another step forward and established that the compensation should correspond to the magnitude and capacity of the polluting industry. The court thus attempted to impose deterrence on large scale industries.

One of the most significant innovations of the Indian judiciary in making industries liable for the pollution that they caused is the invention of the absolute liability principle which rejected exemptions to the strict liability in hazardous or inherently dangerous activities. This was

accepted in clear terms in *MC Mehta v Union of India* (1987) which held that;

A person who caused an accident in the operation of hazardous or inherently dangerous activity is **strictly and absolutely liable to compensate** all those who are affected by the accident and **such liability is not subject to any of the exceptions which operate vis-a-vis the tortious principle of strict liability** under the rule in *Ryland v Fletcher*.

The case extended the principle to those who got damaged within the premises of the industry as well as outside the industry and with respect of both natural and non-natural usages of the land.

In *Vellore Citizens Welfare Forum* (1996) case, referring to the *Sludge case*, the court held:

The ‘polluter pays’ principle as interpreted by this Court means that the **absolute liability for harm to the environment extends not only to compensate the victims of pollution but also the cost of restoring the environmental degradation**. Remediation of the damaged environment is part of the process of "Sustainable Development" and as such polluter is liable to pay the cost to the individual sufferers as well as the cost of reversing the damaged ecology.

In *MC Mehta v Kamal Nath* (1997), similar to *Vellore Citizens* (1996) case, the Court interpreted the PPP to mean absolute liability not only to compensate the victim but also to restore the environmental degradation.

The judicial effort in India to make industries liable for the pollution caused by them is extremely commendable. It has not only widely interpreted ‘pollution’ and ‘damage’ but also opted to create new legal dimensions in the establishment of the liability. Comparatively, even though the PPP and the necessity of internalizing the environmental damage caused by industrialists have been recognized in Sri Lanka, the scope of this recognition is not broad like in India. The importance attached to and the judicial emphasis placed upon the PPP in Sri Lanka setting are comparatively minimal. While *Ravindra Gunawardena Kariyawasam* case that was decided in 2019 positively fills a large vacuum existed in the environmental litigation in Sri Lanka since 2008, through the award of the highest ever compensation in a Fundamental Rights (FR) case against ground water pollution, Sri Lankan judiciary still has a large role to play in the quest for environmental protection. It is undisputed that the judicial activism is extremely important in making vastly changing and evolving industries accountable towards the environment. According to Weeramantry (2005)

It is beyond the competence of the legislature to anticipate every factual situation giving rise to environmental considerations, and consequently it

is the judiciary that would have to handle such situations when they arise for the first time. All these factors leave a significant area for the appropriate exercise of judicial discretion.

IV. OTHER CHALLENGES FOR MEANINGFUL APPLICATION OF THE POLLUTER-PAYS PRINCIPLE

Inability of the individual victims to sue the polluter due to reasons such as the lack of means is one of the challenges that arise when attempting to make the polluter liable for the environmental harm committed. Further, there can be instances where the polluter is not identified or the polluter is insolvent. In such contexts, it is not possible to provide immediate compensation to victims of environmental harm.

To overcome these challenges, judiciary of several developing jurisdictions like India, Malaysia, Taiwan etc. , supported by legislative interventions, have opted to expand the PPP by imposing an obligation on the state to compensate the victims. These regimes hold local governments primarily or jointly-and-severally liable for environmental damage and enable them to act in subrogation against the polluters. This almost subverts the logic of the principle by suggesting that the primary goal is to provide prompt compensation to the victims of environmental harm, and only secondarily to transfer the loss through subrogation on the responsible parties (Luppi et al., 2012).

In many instances in India, the Supreme Court played a role to order municipal authorities formulate a mechanism to clean the damage and compensate the victims while offering the option for the municipal authority to recover the costs later from the responsible parties. Furthermore, even in instances where successful action has been brought, the court has made the government liable to pay any residual shortfalls (Luppi et al., 2012). It is noteworthy that in the Bhopal Gas Tragedy, after five years of litigation, an out-of court settlement was reached between the polluting company and the Government of India. The Supreme Court held that if the settlement fund that had been negotiated was exhausted, the Government of India should make good the deficiency for all the past, present and future claims arising from the gas leak. (Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985. *Union Carbide Corporation v. Union of India*, A.I.R. 1990 S.C. 273).

However, in Sri Lanka most of these issues remain widely neglected. For instance, in *Ravindra Gunawardena Kariyawasam v Central Environmental Authority and Others* (2019), the judiciary has disregarded the possibility of any claims that can arise in future in relation to this particular environmental harm and the payment of any residual shortfalls.

V. CONCLUSION AND RECOMMENDATIONS

Companies, local and international, are subjected to public scrutiny now than ever before and as a result, these entities are pressured to engage in activities such as corporate environmental reporting through which they disclose their environmental activities to various stakeholders.

However, the majority of companies which are particularly based on developing countries are still profit driven than purpose-driven and rarely attempt to genuinely fulfil the corporate social responsibility. Change of corporate culture cannot happen overnight. Sri Lanka does not have strong corporate laws in place that calls for companies to take the responsibility for environmental activities seriously. The Code of Best Practice on Corporate Governance in Sri Lanka (2017) includes certain requirements on environmental reporting and requires companies to consider direct and indirect economic, social, health and environmental implications of their decisions and activities. Nevertheless, this Code operates on a voluntary basis. It is also noteworthy that recent research suggests that even the listed companies demonstrate lethargy in compliance with requirements such as environmental reporting (Arupplola and Perera, 2013).

Furthermore, it is important to address the challenges in application of the PPP. Ensuring prompt payment of compensation for the victims of the environmental harm can be delayed due to many reasons. However, judiciary in many developing countries have addressed these issues successfully through progressive interpretation .

In this context, it is submitted that the Sri Lankan judiciary can opt to play a stronger role in effectively applying the PPP. The court has the ability to emphasize the significance of companies being highly considerate to the consequences of their business activities. Progressive interpretation of the PPP through judicial decisions, undoubtedly will create a deterrent effect for corporations and encourage companies to respect also a cluster of other environmental law principles such as the precautionary principle, sustainable development, inter-generational equity and intra-generational equity. Companies will attempt to conduct a rigorous risk assessment of their environmental related operations and utilize the best possible measures to prevent any possible environmental harm. Above all, strong implementation of the PPP will make the companies understand that this earth is not a bottomless pit for waste disposal and for limitless exploitation, but rather the source of life all

beings. Further, Sri Lankan judiciary should explore the possibility to expand the PPP to overcome any challenges that arises when making attempts to meaningfully apply it, following the approach of India and a number of other developing countries.

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