

For Reincarnation: An Analysis of the Application of the Polluter Pays Principle for Environmental Restoration in Sri Lanka

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Abstract - In May 2021, the Singaporean container ship 'MV Xpress Pearl' en route from India to Singapore caught fire and drowned in the sea around 9.5 nautical miles Northwest of Colombo with 1486 containers containing tonnes of hazardous and highly reactive chemicals and 325 metric tonnes of bunker oil aboard. The incident created an unprecedented and unimaginable environmental disaster with widespread spill over effects on the marine environment, species and resources. While some of these environmental damages could never be rectified, the most viable solution available to preserve the pollution ravaged oceans in Sri Lanka is making the polluter to restore the environment (at least to the most part possible) into its previous condition. Therefore, this paper seeks to analyse the application of the polluter pays principle in Sri Lanka to ascertain whether it can be used to impose a duty on the polluter for ocean environment restoration in the MV X-Press Pearl Disaster. This research is carried out using the Black Letter approach of research based on international conventions, legislations and judicial decisions as primary sources and books, journal articles, conference proceedings, theses and online resources as secondary sources. The paper concludes that the duty of the polluter for environmental restoration in Sri Lanka can be recognized by virtue of Chunnakam case and the Wilpattu case.

Keywords— *polluter pays principle, restoration of the environment, Mv Xpress Pearl disaster*

I. INTRODUCTION

On the 20th May 2021, the Singapore-flagged cargo vessel 'MV Xpress Pearl' enroute from India to Singapore caught fire while it remained anchored around 9.5 nautical miles Northwest of Colombo waiting to enter the harbour. According to a list obtained by the Centre for Environmental Justice under the Right to Information Act, No. 12 of 2016, at that time, the ship had 1486 containers containing tonnes of hazardous nitric acid, caustic soda, sodium

methylate, lead ingots, lubricant oil and other highly reactive and inflammable chemicals, 78 metric tons of plastic nurdles, and 325 metric tonnes of bunker oil aboard. Fire fighters and the Sri Lankan Airforce were deployed to extinguish the fire, but notwithstanding their efforts, the fire, which was initially doused, ignited again and the ship burnt for nearly 10 days just outside the port of Colombo (BBC 2021, Perera 2021, Oceanswell 2021, Ground Views 2021).

MV Xpress Pearl had been an unprecedented environmental disaster, and its exact impacts are not known to the humanity, at least as of yet, since the ship, even nearly two months later, is still leaking oil into the ocean (Oil Leak from X-Press Pearl? Activists demand immediate action 2021). According to the scientists and experts, the area is home for thousands of marine life and the plastic nurdles will affect them through ingestion and entanglement; the pollution of the ocean will put the critically endangered and endangered animals further at risk, oil spillage will result in poor body condition, inflammation, reproductive failure, infections and the death of marine life, plastics and other debris can irreversibly damage and obstruct coral reefs and the list continues (BBC 2021, Perera 2021, Oceanswell 2021, Ground Views 2021, Oil Leak from X-Press Pearl? Activists demand immediate action, 2021).

While some of these environmental damages could never be rectified, the most viable solution available to preserve the pollution ravaged oceans in Sri Lanka is making the polluter to restore the environment (at least to the most part possible) into its previous condition due to two main underlying reasons. First, the damage occurred to the environment cannot merely be ignored, if did, its consequences will last for several millennia and some of the damages would even be permanent. Second, the cost of restoration of the environment cannot be imposed on the government parties who are dependent on the tax money of the people of the country. If did, it will

unfairly punish the general community by depriving them of the ocean resource at first, and then compelling them to bear the costs to restore it back to the previous condition with no fault of theirs. Therefore, this paper seeks to answer the question, whether the polluter pays principle as recognized in Sri Lanka can be used to impose a duty on the polluter for ocean environment restoration in the MV X-Press Pearl Disaster?

II. METHODOLOGY

The research was carried out using the black letter approach of research based on international conventions, legislations and judicial decisions as primary sources and books, journal articles, conference proceedings, theses and online resources as secondary sources.

III. DISCUSSION AND ANALYSIS

A. *Polluter Pays Principle*

The polluter pays principle embodies the simple idea that he who pollutes the environment shall bear the costs of such pollution. The first express reference to the polluter pays principle in the international level can be seen in 1972 Council Recommendation on Guiding Principles Concerning the International Economic Aspects of Environmental Policies of the OECD (OECD Legal Instruments, 2021). Polluter pays principle was thereafter incorporated in principles 21 and 22 of the Stockholm Declaration in 1972 and principle 15 of the Rio Declaration in 1992. The principle is one of the most widely accepted and respected international environmental legal principles today and is embodied in a number of international legal instruments including the European Charter on the Environment and Health in 1989, the Single European Act in 1986, Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment in 2009 and the Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes in 1999. Also, the principle now forms an integral part of the domestic legal systems of many countries around the world.

B. *The Duty of the Polluter to Restore the Environment*

The polluter pays principle in order to be meaningful shall impose the duty of bearing the total cost of pollution on the polluter. In a very narrow, anthropocentric sense, the total cost of pollution may mean compensating the people who have gotten

affected by the pollution. However, it shall not be forgotten that the human beings are only a part of the wider earth community, and they are not and cannot be the sole victims of environmental pollution. Any sort of environmental pollution, even the most trivial form, affects the environment and all those who inhabit it one way or the other. Therefore, the true application of the polluter pays principle shall impose two-fold duties on the polluter. First, to compensate the people who were victimised by the pollution and second, to restore the environment back into its previous condition. Logically, the second component is more complex and expensive.

The duty of the polluter to restore the environment is being increasingly recognized in the international arena. In the *Costa Rica v Nicaragua* case decided in 2018, the International Court of Justice held that the environmental damage shall be valued from the perspective of the ecosystem as a whole. The Court in assessing the compensation, assigned value for the restoration of the damaged environment as well as to the impairment or loss of environmental goods and services prior to recovery.

The strongest recognition of the duty of the polluter to restore the environment, arguably, can be seen in India. In *Vellore Citizens' Welfare Forum v Union of India* [1996], the court 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.

This approach was accepted and followed in *Indian Council for Enviro-legal Action v Union of India (Sludge Case)* [1996], *MC Mehta v Kamal Nath* [1997] and several other cases. Therefore, it is not incorrect to say that India has conclusively accepted that the polluter pays principle necessarily entails the duty of the polluter to restore the environment back to the previous condition.

C. *Recognition of Environmental Restoration by the Polluter in Sri Lanka*

Polluter pays principle was first recognized in Sri Lanka in the landmark judicial decision, *Tikiri Banda Bulankulama v Secretary, Ministry of Industrial Development and others* [2000]. In the case, the

Supreme Court placed its attention on the argument of the petitioners that the protection afforded in the proposed agreement with regard to the repair of environmental damage is inadequate and held that these provisions are based on the outdated, archaic thought of nominally recognizing the environment and not placing a value on it. Honourable Amerasinghe J. referring to principle 16 of the Rio Declaration further held that,

[t]he 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.

Thus, though not laid down in express and explicit terms, the honourable J. signalled the necessity of recognizing the environmental restoration duty of the polluter.

It was thereafter recognized in the *Ravindra Gunawardena Kariyawasam v Central Environmental Authority* where the court directed the respondent company 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 pollution of groundwater and soil due to the operation of the thermal power station by the respondent. Why did not the Supreme Court impose the entire cost of pollution on the respondent is open for debate, perhaps it might be due to the reason that the respondent company was found not to be the sole perpetrator of the water and soil pollution in the area. Moreover, whether the court has been entirely successful in imposing the liability of environmental restoration on the polluter is questionable given that the focus of the court was on cleaning the contaminated wells, rather than on bringing the groundwater in the area into its previous condition in general.

The strongest recognition of the duty of the polluter for environmental restoration can be seen in the recent *Wilpattu* case. In the case, the court of Appeal in Sri Lanka dealing with an alleged illegal settlement of internally displaced persons in the forest complex adjoining Wilpattu National Park, issued a writ of mandamus ordering the Conservator General of the Department of Forest Conservation to implement a tree planting programme in any area equivalent to the reserve forest area used for re-settlement of

internally displaced persons. The court further issued an ancillary or consequential order directing the then Minister of Industry and Commerce to bear the full cost of the above tree planting programme who was recognized to be instrumental in using the forest land for non-forest purposes. The court ordered the Conservator General of the Department of Forest Conservation to calculate the costs of the tree planting programme, inform the former minister of this cost and the details of the account to which the said sum should be paid within two months. The court, in holding that, referred to and relied on a number of Indian judicial decisions which states that the polluter pays principle shall be interpreted as including the absolute liability to restore the environment.

This recognition is by far the widest recognition of the duty of the polluter to restore the environment in Sri Lanka. The decision is debatable on the ground that whether a tree planting programme in any area equivalent to the deforested forest area can be taken as a true restoration of the invaluable forest resource; trees, animals, insects, birds and soil which was lost. Yet, the decision of honourable De Silva J. shall be considered a significant landmark in the environmental jurisprudence in the country for its recognition of the duty of the polluter to restore the environment in clear and cogent terms.

D. The Use of the Polluter Pays Principle for MV X-Press Pearl Disaster

According to the above discussion, the polluter pays principle has been recognized as a part of the domestic environmental legal regime in Sri Lanka including the duty of the polluter to restore the environment. Restoration of the marine environment following the X-Press Pearl disaster is vital for the human community as well as the biotic community and shall be done at the highest phase possible. A fundamental rights petition has already been filed in the apex court of Sri Lanka by the Centre for Environmental Justice (Guarantee) Limited and several other petitioners against the Marine Environmental Protection Authority and several other respondents and it can be positively expected that the polluter pays principle will be strongly recognized in the case reaffirming the duty of the polluter to restore the marine environment in clear and cogent terms.

IV. CONCLUSION

The MV X-Press Pearl disaster has been one of the greatest environmental tragedies in the recorded

history of Sri Lanka. While the line of incidents which ultimately resulted in this environmental disaster cannot now be reversed, certain damages caused to the environment as a result of it can still be and shall be reversed. In Sri Lanka, the polluter's duty to restore the environment is recognized through judicial precedents. It would therefore, not be unreasonable to expect the judiciary in Sri Lanka to once again play its crucial role in the fight for environmental protection in the country by the imposition of the duty on the polluter (the ship owner and the local agent of the shipping company) for the unprecedented and far-reaching damage caused to the marine environment due to their actions or inactions and for the restoration of the environment back to its previous condition.

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AUTHOR BIOGRAPHIES



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