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POLLUTER PAYS PRINCIPLE: DID THE POLLUTER IN KIM KIM RIVER POLLUTION TRIAL GET OFF TOO EASY?

by

Mariani Ariffin*

INTRODUCTION

In recent decades, discharges of pollutants into the environment, especially waterbodies, remain a significant challenge for Malaysia. In a series of harrowing incidents beginning in March 2019, the Kim Kim River in Pasir Gudang, Johor, became a focal point of concern when thousands of people sought medical treatment for symptoms like shortness of breath, nausea, and vomiting due to inhalation of toxic fumes with several of them were put in the Intensive Care Unit. The situation, which forced more than a hundred schools to be closed, was believed to have been triggered by hazardous wastes illegally dumped into the river (Palansamy et al., 2019). Ismail et al. (2020) identified at least seven toxic industrial chemicals, including methane, hydrogen chloride, acrylonitrile, acrolein, benzene, xylene, and methyl mercaptan, as related to the 2019 Kim Kim River pollution. The financial burden of the pollution on the public funds was huge, with initial costs estimated to be around RM6.4 (NST, 2023). Although there is no official final figure, we can foresee that the cost might have multiplied further with the potential costs of further clean-up, river and health monitoring, medical treatment, and business closures. The costs were borne by the government, businesses, victims, and the public at large (Mahadi, 2019). After five years, the culprits who caused the Kim Kim River pollution incident were finally convicted and sentenced. However, the sentences received by the lorry driver and the company involved, respectively, were deemed to be lenient by many.

The following section of the paper summarises facts and judgments of court cases arising from the 2019 Kim Kim River pollution. There is currently an ongoing civil suitcase involving victims of the Kim Kim River

pollution, but this paper will focus on criminal prosecution under the Environmental Quality Act 1974 ('EQA') and its regulations. As not all the prosecution cases were reported by law journals, this paper also refers to news reports to highlight an unreported court case related to the Kim Kim River pollution to enrich the discussion. The subsequent section will give a concise exposition of the cases. This will be followed by a brief discussion of the application of the polluter pays principle (PPP) in the EQA and its regime. The paper then proceeds with an analysis of the Kim Kim River cases in light of the PPP before concluding the discussion.

SUMMARY OF THE COURT CASES

In November 2023, the Johor Bahru Sessions Court found a lorry driver guilty of polluting the Kim Kim River by depositing oily sludge which is listed as scheduled waste sometime in March 2019. The charge was for breaching restrictions on pollution of inland waters without a license contrary to section 25 of the EQA which provides for a fine not exceeding RM100,000 or imprisonment for a period not exceeding five years or both. The lorry driver pleaded guilty, and he was sentenced to a maximum fine of RM100,000 (DOE, 2023; The Star, 2023). This charge was an amended charge offered by the Prosecution Division after accepting representation from the accused. As reported in newspapers, the initial charge against the lorry driver was for illegal dumping of scheduled wastes under section 34B of the same Act which allocates much stricter penalties upon conviction, namely a fine that may go up to RM500,000 or a jail term of not more than five years or both.

In another case, *PP lwn. P Tech Resources Sdn Bhd* [2024] SMCU 58, a company with a premise located in Pasir Gudang, Johor which carried out tyre pyrolysis activities, was initially charged together with the convicted lorry driver mentioned above and three directors of the company for 60 charges of various offences under the EQA and its regulations (Bernama, 2019). However, the prosecution withdrew 52 charges and proceeded with only eight amended charges against the accused company alone. The

amended charges were brought under multiple provisions under the Environmental Quality (Clean Air) Regulations 2014 ('EQCAR'). The charges involved the failure of the accused company to submit a written notification to the Director General ('the DG') before working at and constructing the premise which created a source of emissions; failure to operate and maintain the air pollution control system ('APCS'), following sound engineering practice and to ensure that the APCS is in good working condition and was supervised by a competent individual; failure to equip its premise with relevant instruments for and to conduct performance monitoring of the APCS; failure to maintain records of manufacturing processes, maintenance and performance monitoring of the APCS; and failure to conduct periodic monitoring as required by the EQCAR. Each of the charges was read together with regulation 29 of the EQCAR. The maximum penalty for each of the offences is a fine of not more than RM100,000 or imprisonment for not more than two years or both. The accused company pleaded guilty to all the amended charges, and the Johor Bahru Sessions Court subsequently convicted it of these charges.

In deliberating his sentencing, the Sessions Court judge looked at the facts of the case and the arguments by both parties. The Sessions Court judge noted the accused's willingness to engage with the Department of Environment ('DOE') to bring the company into compliance with the regulations. He also considered the accused's cooperation in obtaining approval for their Environmental Impact Assessment (EIA) report as well as in adhering to DOE directives and procedures following the prosecution charges. The judge also acknowledged the hardships faced by the accused company due to business interruptions stemming from DOE forfeiting its equipment and the impact of the COVID-19 pandemic. However, the judge noted the paramount importance of adhering to the EQA and its regulations to safeguard public interests and prevent environmental pollution incidents and that the accused failure to comply with the law may lead to future air pollution incidents.

Despite its recognition of public interest, the Sessions Court agreed with the accused's defence council that the eight charges against the accused constituted administrative offences and that no substantiated evidence linking the accused's operations to the air pollution associated with the Kim Kim River pollution (because the initial charge which implicated the accused in the Kim Kim River pollution along with four others was subsequently dropped). The prosecution's move to drop the original charge seemed to suggest the accused's lack of involvement in the river pollution incident. The Sessions Court emphasised its important role in observing impartial justice and being insulated from public sentiment. After considering the gravity of the offences, facts, presence of mitigating factors, and sentencing trends for similar cases in determining the punishment, the accused company was found guilty and fined RM40,000 for each of the amended charges. This brought a total of RM320,000 fine for all eight charges. Both the prosecution and the accused appealed against the sentence.

In June 2024, the appeal case *PP lwn. P Tech Resources Sdn Bhd* [2024] 8 CLJ 95 was concluded. The High Court judge allowed the prosecution's appeal and rejected the accused's appeal regarding the sentence. The honourable judge doubled the fine for each of the eight convictions of the accused company to RM80,000, bringing the total fine to RM640,000. The High Court judge stated that the Sessions Court Judge, in his judgment, was so preoccupied with the administrative nature of the offences committed by the respondent company that he had failed to appreciate the purpose of the environmental regulations aimed at protecting air quality in the country and addressing the prevalent air pollution cases in Malaysia and Johor specifically. Furthermore, the High Court judge highlighted that if the authorities had not inspected the respondent's premises, the company would have continued committing the offences, adversely impacting the surrounding community.

The polluters responsible for the terrible 2019 Kim Kim River pollution incident have been identified based on the court trials. Nevertheless, half a decade has passed since the fiasco, and those individuals who suffered from the pollution and communities near the river still endure uncertainty as they await a resolution (The Star, 2023). This situation emphasises the need for accountability and safeguards against such environmental disasters in the future. Urging for stricter regulations to enhance the management of river sustainability following the 2019 pollution, Yap et al. (2019) propose the adoption of the polluter pays principle in Malaysia. Similarly, Buang (2020) agreed that Malaysia should implement the polluter pays principle, especially to address repeat offenders who pollute the environment at the expense of the public's convenience and economic cost. The following section explains the manifestation of the principle within Malaysia's federal environmental legislation.

THE POLLUTER PAYS PRINCIPLE IN MALAYSIA'S ENVIRONMENTAL LAW

Moving towards achieving sustainable development, the polluter pays principle ('PPP') is one of the principles that must be observed by nations as outlined by the United Nations Declaration on Environment and Development of 1992 ('the Rio Declaration'). Principle 16 of the Rio Declaration proclaims that:

‘... national authorities should endeavour to promote the internalisation 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 ...’.

In tandem with the call, Malaysia's National Environmental Policy, adopted in 2009, advocates the application of the PPP to prompt industries to both prevent pollution and manage its impacts. However, effective implementation of the PPP requires a supportive enabling environment. Reflecting this need, the National Environmental Policy states that the implementation of PPP should be integrated with measures like the

precautionary principle, control at source for all major emissions, and the best practicable means for pollution reduction.

In environmental law and policy, the PPP is a fundamental concept at both the national and international levels. According to the principle, those who pollute the environment should bear the expenses related to preventing, controlling, and cleaning up pollution, as well as the societal costs it generates (Pedersen, 2010). This principle makes polluters accountable for the harm they cause to the environment and encourages them to minimise any damage at all stages of their operations. The principle also puts the financial burden of environmental restoration on polluters rather than the public. Meanwhile, in economics, the discussions on the PPP are rooted in the concept of externality. An externality occurs when the effect of one's business action on another's well-being is not reflected in market transactions (Xu, 2006). For example, the cost of a product or service provided by the company responsible for the Kim Kim River pollution does not consider in its price the scarcity of the resource in question, namely clean river water and clean air. Therefore, an externality occurs.

In Malaysia, one of the government's mechanisms for internalising externalities is through our environmental regulations. The EQA and its various regulations apply the PPP through varied command-and-control tools. Among other things, the polluter is required to bear the compliance costs through licensing, emission limit values, pollution control technology, and sanctions for non-compliance. These tools collectively provide a facilitative setting to enforce the PPP by making polluters financially accountable for the harm they cause and for the cost of mitigating it. Nevertheless, the EQA largely targets point-source pollution from industrial activities. As the cost of compliance is relatively economically costly, and when coupled with weak enforcement of the law, some industrial premise owners or their employees may deliberately choose to ignore the legal requirements. Such blatant offenders are willing to take the low risk of detection and prosecution as part of their business costs.

These brazen culprits should be met with strict enforcement and deterring punishments (Ariffin et al., 2015; Ariffin, 2019).

In the event of pollution to the environment by accident or deliberately by bold offenders like in the 2019 Kim Kim River pollution, the EQA empowers the DG to undertake necessary actions to address, mitigate, or eliminate the pollution. This provision allows the authority to act swiftly in containing such pollution as the party responsible for the pollution may not be identifiable yet or may not have the resources to do so promptly. If the authority takes the necessary action to address such pollution, the DG may then recover all related costs and expenses from the responsible party (EQA, section 47). This provision enshrines the restorative function of the PPP. Under this function, the PPP put accountability on polluters to remove the pollutants and support the restoration of the environment affected by the pollution they caused. In the 2019 Kim Kim River pollution incident, it is unknown if the DG has made a claim of cost towards the party responsible for it to cover the clean-up costs of the river as provided under the EQA.

Apart from that, the PPP also plays a redistributive function by asking polluters to pay compensation to those individuals directly affected by the pollution or by the associated environmental damage for financial loss or health impacts (Pedersen, 2010). This function is important to reduce socio-economic disparities and, thus, injustices resulting from such environmental pollution. In line with this, the EQA allows the court to order the person convicted of an offence under the legislation to pay costs, expenses, or compensation to any individual who has suffered *loss or damage to any property* due to the commission of the convicted offence, in addition to the fines imposed upon the conviction (EQA, section 46E). For this purpose, the amount awarded is at the court's discretion. However, the Act gives no clues on how the cost should be calculated. Furthermore, its language seems to ignore the effects of the convicted person's offence on human health because it only mentions compensation to individuals who "suffered loss or damage to property". The limited scope of the provision

might result in the community bearing the costs of damage to their health due to pollution. Contrary to the logic of the PPP, this causes the financial burden of treating affected individuals to be placed on the public. The alternative for the victims is to bring a civil suit, as what has been done by the Kim Kim River pollution victims.

EVALUATING THE POLLUTER PAYS PRINCIPLE APPLICATION

The Sessions Court Judge in *PP lwn. P Tech Resources Sdn Bhd* [2024] SMCU 58 highlights the accused's efforts to observe legal requirements after being charged as mitigating factors. The view, however, neither considers the need for the accused to take measures to rectify its past environmental impacts nor to invest in steps that prevent future harm beyond immediate adherence to legal requirements. Furthermore, the ruling can be seen as empathetic to the accused's financial losses rather than prioritising stringent preventive measures to safeguard public health and deter potential future offenders.

In addition, although the Sessions Court judge acknowledged the importance of environmental law in safeguarding public interests, he did not incorporate this consideration when assessing the impacts of the defendant's operations on public health and the environment. This may be because the amended charges against the accused company were not directly related to polluting the Kim Kim River, making any impacts on the environment and victims' health irrelevant to the case. This is so despite the prosecution's plea for a stringent sentence to be imposed by referring to the concept of public interest and trying to present news reports to link the amended charges against the accused company to Kim Kim River pollution. The recent High Court's judgment on the appeal case upheld the Sessions Court judge's decision not to allow this argument.

Some may wonder why the prosecution only proceeded with the eight amended charges against the accused, but it is within the prosecution's privilege to do so. The Attorney General, as a prosecutor, has the power to institute, conduct, or discontinue any proceedings for an offence

exercisable at his discretion (Federal Constitution, Article 145(3)). Nevertheless, the withdrawal of all charges against the three directors of the convicted company for colluding with the convicted lorry driver or the company resulted in them being held neither accountable nor financially liable for the damages arising from the illegal dumping of wastes into the Kim Kim River or breaches of clean air regulations by the convicted company. By withdrawing charges against the three directors of the accused company, the prosecution also missed a chance to foster a culture of environmental stewardship and accountability. Under the EQA, if a company commits an offence under the Act or its regulations, any person who was a director or held a similar position at the time of the offence is considered guilty of the offence. They can avoid accountability only if it is proven that they did not consent to or knowingly allow the offence and that they took all reasonable steps to prevent it, considering their role and the circumstances (EQA, section 43(1)). This provision is in line with the PPP by holding individuals in positions of authority within a company accountable for environmental offences committed by that entity. It reinforces the idea that those who oversee operations must ensure compliance with environmental laws. This approach encourages responsible leadership and highlights the principle that those in managerial roles should bear responsibility for the environmental impacts of their organisations' activities.

Apart from that, the Kim Kim River pollution should have provided a perfect opportunity for the DOE, prosecution, and the court to set deterrence action towards blatant environmental offenders. The perpetrator in the Kim Kim River incident disregarded existing environmental regulations, resulting in significant environmental pollution and harm to public health. There is no ambiguity in determining 'who is the polluter'. The lorry driver admitted guilt. He was a blatant offender who dumped the hazardous waste. Similarly, the accused company simply did not want to bear additional costs and charges for efficient industrial emissions management. They tried to pass on the costs to the public. For blatant

offenders like these, enforcement should be stringent to ensure a level playing field for industry players (Ariffin et al., 2015; Ariffin, 2019). Otherwise, those who have complied with the law may find themselves at a disadvantage because it can be ‘cheaper’ to disobey the law. Even if they are caught and prosecuted, the fine may still be relatively lower than the cost of compliance.

The Honourable High Court judge’s decision in *PP lwn. P Tech Resources Sdn Bhd* [2024] 8 CLJ 95, which allowed the appeal by the prosecution against the sentence handed out by the Sessions Court, is more consistent with the polluter pays principle by raising the fines imposed on the accused company. The substantial increase in the penalties for each charge supports the PPP by demonstrating that non-compliance with environmental regulations can have significant financial repercussions aimed at preventing further harm to the community and the environment.

In comparison to Malaysia’s court, the significance of the polluter pays principle has been recognised by courts in India, especially when dealing with environmental cases. The case of the *Indian Council for Enviro-legal Action v. Union of India* AIR 1996 SC 2715 marked the first milestone in this course. The case concerned the pollution of a river by untreated effluents discharged from tanneries in the state of Tamil Nadu. The Indian Supreme Court ruled that industries that cause pollution must bear absolute liability to compensate for damages inflicted on the environment and the villagers in the affected areas. Industrial polluters are also responsible for undertaking the necessary actions to clean up the pollutants. In subsequent court rules, such as the case of *Vellore Citizens Welfare Forum v. Union of India* (1996) 5 SCC 647, the Supreme Court of India further emphasised the PPP as integral to sustainable development, which is in line with the Rio Declaration. The Indian Supreme Court’s support for the principle as an essential component of the law of India has led to its consistent application in various judicial proceedings. It is hoped that Malaysia’s judiciary will move in the same direction soon.

CONCLUSION

In the Kim Kim River pollution court trials, withdrawing initial charges against the directors and amending the charges to favour less severe maximum penalties for the lorry driver and the company made it easier for them to evade full accountability. As a result, there was very limited room for applying the polluter pays principle in achieving comprehensive environmental and social justice in these cases. While the perpetrator company and the lorry driver who dumped the scheduled wastes were convicted and fined, respectively, the amended charges against them denied any connection between their actions and the toxic air pollution that occurred during the 2019 incident. In addition, the fines imposed by the courts in the Kim Kim cases were relatively low compared to the extent of environmental damage, the health impacts on the affected locals, and the financial costs to the government.

The Kim Kim River pollution cases highlight the complexities of translating environmental liabilities under the polluter pays principle ('PPP') into meaningful accountability and prevention strategies. Despite the legal provisions within the Environmental Quality Act ('EQA') and its regulations that support the implementation of the principle, various factors outside the regulatory framework may hinder its application, including the public prosecutor's discretionary power to pursue or drop charges. Additionally, the economic capability of a polluter, such as the informal or formal status and the size of the industrial firms involved, may further complicate the imposition of liability on such polluters (Gaur et al., 2022). This makes it challenging to implement the PPP in developing countries like Malaysia.

Nevertheless, as a country aspiring to become a developed nation, Malaysia must act now to ensure better accountability for polluters. Greater determination from enforcement authorities to gather evidence and from prosecutors to build stronger cases that lead to stricter penalties is required. Authorities must also use existing relevant legal provisions, such

as the DG's power to recover costs and expenses from polluters, to apply the PPP. Apart from that, the public and the environment in Malaysia will be better protected if the judiciary acknowledges the importance of the PPP in its rulings. The recent High Court judgment in *PP lwn. P Tech Resources Sdn Bhd* [2024] 8 CLJ 95, which increased the fine for the accused company, offers some hope for this. The PPP demands a stronger focus on ensuring ongoing compliance, environmental stewardship, and the prevention of future harm beyond immediate legal requirements. Therefore, future prosecutions and judgments should prioritise these aspects to uphold environmental sustainability and public interest effectively.

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