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PUNISHMENT FOR POLLUTING INLAND WATER: CASE OF CORPORATIONS

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Abstract

Water pollution is among the common environmental problems where industrialization is identified as one of its reasons. Industrial activities by corporations produce by-products and wastes and this has intensely caused harm to the environment. As a non-science mechanism, law and legislations function to control environmental problem by, among others, imposing punishment. This article studies the punishment for polluting water that imposed by court towards the corporations. The observations are made to the penalty's provisions of the Environmental Quality Act 1974, the main environmental statute in Malaysia, and penalties imposed by court. The cases of water pollution are obtained from the records of Department of Environment Malaysia for a three-year period, from 2013 until 2015. The study found that there was a wide gap between the maximum punishment by law and penalties positioned by court, and the corporations opted for fines. It is therefore suggested for a stiffer and more appropriate punishment imposed on the corporations as well as individuals behind it for an effective implementation. It should not just higher fine but imprisonment can be made possible so that the law would function as a control mechanism that can curb, shape, manage and regulate the society.

Keywords: Punishment, corporation, environment, pollution, water.

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1. Introduction

Environmental problem does not only kill human being and animal, but other living things. There have been a growing concern of the modern societies and world populations on the preservations of the environment. Recently, green technology is the most providential alternative intended to mitigate or reverse the effects of human activities to the environment. In the case of pollution, problems are closely tied to the mode of development in developing countries, combining together with industrialisation, urban development and mass consumption trends by the companies, plus the operating foreign companies that give little regard for the impact on the local environment (JICA, 2005). Industries like food processing, chemical-based industries, electric and electronic, metal, papers, textile, palm oil, rubber-based products and plastic that involve variety and stages of processes produce by-products and wastes. Hence, it is common to put a blame on the companies, or corporations, who largely put profits ahead of protecting the environment.

Corporations are referring to the companies or industrial players whose industrial activities may cause harm to the environment. By putting profits ahead and attempting to avoid technical hitches, financial and time cost when disposing legitimately, corporations disposed their wastes in contrary to the environmental law (Lee & Detta, 2014). Essentially, corporate entities should have significant roles in protecting the environment by ensuring their activities are not inconsistent with the legislations (Manap et al., 2016).

Being an instrument of social engineering (Yaqin, 1996), law functions as a tool to shape the society as well as to regulate the people's behaviour. In the context of environment, law functions as a non-science mechanism to approach environmental problems (Wahab & Yaacob, 2014) particularly through the implementation of the legislations (Razman et al., 2011). Accordingly, countries in the world come with their legal frameworks in the forms of guidelines, rules, laws, legislations and regulations. The functioning law as a control mechanism may be executed by imposing sanctions or punishments. This means the law is not merely providing guidelines, determining standards or ensuring the monitoring aspects, but also imposing punishment to the wrongdoers with the aim to shape and regulate the society's behaviour.

In Malaysia, the Environmental Quality Act 1974 (EQA 1974) is the primary legislation that aims to protect the environment. It regulates environmental problems like pollution through many regulations that forms the regulatory framework (Razman et al., 2011). The objective is about the prevention, abatement, control of pollution and enhancement of the environment. In general, the Act restricts the discharge of wastes into the environment in contravention of the acceptable conditions through pollution licensing. It is the aim of this paper to discuss the punishment for inland water pollution as provided by EQA 1974 and the one that imposed by court, specifically on the corporations.

2. Literature Review

2.1. Principle of Punishment

Punishment is a penalty that inflicts on someone who had done wrong. It may come in the forms of fine or imprisonment that are imposed by court. Principle of punishment is associated with the aims and objectives of sentencing namely deterrence, retribution, prevention and reformation (Ho, 2014).

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According to Mah (2000), deterrence means to dissuade the offender from committing offences in the future and to deter potential offenders from committing crime aiming to protect the public interest as mentioned in *PP v Loo Chang Hock* [1988] 1 MLJ 316. Retribution gives the notion that a sentence must reflect the community's abhorrence of particular types of crimes. The High Court in *PP v Mohd Amin bin Mohd Razali* [2002] 5 MLJ 406 expressed that the sentence passed on the accused persons served the public interest and reflected the public abhorrence of the crime committed by them.

Prevention is a punishment against the recurrence of an offence with the intention to prevent the offender from committing further crimes against the members of society. Ho (2014) believes that the public can only be protected from the offenders if they are prevented from continuing their lives of crime. This is done by way of imprisonment. Reformation or also known as rehabilitation intends to reform an offender from being a criminal to being an honest and responsible person. This principle is considered when the offence is not so serious and the court may consider the interest of the accused, for example, a bond for a good behaviour.

For the purpose of discussion and in the context of a corporation, punishment aims for deterrence and prevention of pollution from being continuously done by the corporation culprits. According to the Honourable Judge Wan Yahya in *Safian b Abdullah & Anor*. [1983] 1 CLJ 324, at 325, punishment, sanction and sentencing should depend "on various considerations of facts and circumstances relating to the offence, the offender and public interest".

As an entity holding its own personality, corporations are subject to the criminal law, contract law and also torts. Corporations can commit crimes either directly or vicariously. As offence of pollution is subject to punishment of fine or imprisonment, the corporations shall be subject to the same even though some argued on the question of who shall be imprisoned for corporation. Wilson (2017) claimed that the object of punishing companies is to prevent harm, not to apportion blame; therefore, subjecting the corporation to penalty rather than any individual member who may bear the responsibility has a number of advantages, namely: (a) helps to plug an evidential gap: In *Alphacell v Woodward* [1972] AC 824, it is not to show which company's employees had caused the river to become polluted but what was clear was that the river had become polluted through the defendant company's activities i.e. the company had caused the river to be polluted; and (b) ensures that the bill for activities causing social harms is picked up by the entity i.e. the corporation which benefits by those activities. This prevents the company from passing the responsibility.

Individual can be punished separately on retributive grounds but the company needs to be sanctioned as well for a more effective enforcement. Herring (2016) had to relate this with the principle of responsibility where people should only be guilty in respect of conduct for which they are responsible. In other words, people should not be guilty for the conduct over which they had no control. For corporations, blame and guilty should be posted to both the corporations and the person/s responsible for the pollution. In Malaysia, the Environmental Quality Act 1974 (EQA 1974) has clearly identify those can be charged and punished for the environmental offences as mentioned under s 43 of the EQA 1974 which are being discussed further.

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3. Problem Statement

Having said the law as a mechanism to control pollution and preserve the environment through sanctions and punishments, the legal provision relating to inland water pollution under the EQA 1974 becomes the main reference of the authors. Section 25 of the EQA 1974 stipulates penalty of a maximum RM100, 000 or an imprisonment of not more than five years or both. A further fine of RM1,000 each day will be imposed for continous offence commited and after the notice given by the Director General was not complied with. This indicates that punishment can be in the forms of fine, imprisonment or both.

Looking at the punishment with fine, the amount of Malaysian Ringgit of up to RM100, 000 may be considered to be high enough in view of the previous version of RM10, 000 as amended twenty years ago. Nevertheless, the aim of reducing environmental violations by imposing higher punishment looks disappointing when the cases are kept mounting. Furthermore, as far as imprisonment is concerned, had it been imposed on the corporation, and how?

4. Research Questions

The research question are as follows:

(a) What is the punishment for environmental pollution/violation, particularly in inland water, that stipulated by Malaysian environmental law?

(b) How far has the court of law imposed the punishments, fine and/or imprisonment, towards the offenders, in particular, the corporations?

5. Purpose of the Study

The purpose of this paper is to briefly discuss the principles of punishment as the foundation of the study and to analyse the legal provisions relating to punishment of the inland water pollution. While working on the related section/provision of law, the punishments imposed by the court of law on the corporations that polluting the inland water in Malaysia were also examined. Hence, other than analysing penalty provisions that contain in the EQA 1974, observations are also made to the reported cases by looking at the penalties determined by the court. By observing the law and judgment in court**,** the authors would draw some findings and associate them with the principle of punishment.

6. Research Methods

Using a qualitative study with the application of doctrinal legal research, this study involves both exploratory as well as analytical and critical approaches. This includes the study of the law/legal provision relating to the punishment of water pollution stipulated under the EQA 1974; and also an observation to the reported cases that have been decided by court. In brief, content analysis method was used for analysing systematically the content of the documents. To be specific, to answer research question 1, a specific section relating to punishment for inland water pollution i.e. section 25 under the EQA 1974 was analysed. Secondly, the application of the law was examined based on the judgment of court. It is to note that these cases are involving corporate entities as the culprits, thus excluding the individuals

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The list of cases was obtained from the Department of Environment website, http://www.doe.gov.my/portalv1/en/awam/maklumat-umum/paparan-kes-mahkamah (DOE, 2016) for three-year period. The selection was made based on the following considerations: (a) corporations as the offenders; and (b) section 25 as the violated provision.

7. Findings

The findings of this study are explained as follows:

7.1.Individual or Corporation?

Section 25 (1) of the EQA 1974 provides that: "No persons shall, unless licensed, emit, discharge or deposit any environmentally hazardous substances, pollutants or wastes into any inland waters in contravention of the acceptable conditions…"

The section stipulates pollution of the inland water as contravenes the law unless the "persons" are being licenced. Even though nothing was mentioned about the corporations, the word "persons" shall include "a body of persons, corporate or unincorporated" when one looks at the Interpretation Act 1948 & 1967. In other words, "person" who may be guilty of these offences can be an individual or business entities, thus should encompass corporation (to be caught of causing pollution).

Since corporation can be sanctioned, as indicated, with fine or imprisonment, the question is who will be liable for the imprisonment on behalf of the corporation? The EQA 1974 has plainly mentioned that corporate officials who may be held liable in cases of environmental crime are the company director and other corporate officials or their agents (Mustafa & Mohamed, 2015). This is evident from Section 43(1):

Where an offence against this Act or any regulations made thereunder has been committed by a company, firm, society or other body of persons, any person who at the time of the commission of the offence was a director, chief executing officer, manager, or other similar officer or a partner of the company, firm, society or other body of persons or was purporting to act in such capacity shall be deemed to be guilty of that offence unless he proves that the offence was committed without his consent or connivance and that he had exercised all such diligence as to prevent the commission of the offence as he ought to have exercised, having regard to the nature of his functions in that capacity and to all the circumstances.

This section makes clear that among the corporate officials who may be liable for corporate crimes are director, chief executive officer (CEO), manager or other similar officer. However, these officials can defend themselves or avoid the liability when proving the offence as committed without his consent or he has exercised all his diligence in order to prevent the commission of the act. Furthermore, subsection (2) of section 43 says:

Whenever it is proved to the satisfaction of the court that a contravention of the provisions of this Act or any regulations made thereunder has been committed by any clerk, servant or agent when acting in the course of his employment the principal shall also be held liable for such contravention and to the penalty provided thereof unless he proves to the satisfaction of the court that the same was committed without his knowledge or consent or that he had exercised all such diligence as to prevent the same and to

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ensure the observance of such provisions: Provided that nothing in this section shall be deemed to exempt such clerk, servant or agent from liability in respect of any penalty provided by this Act or regulations made thereunder for any contravention proved to have been committed by him.

Subsequently, if the court satisfies that the offence was committed by a clerk, servant, or agent when acting in the course of his employment, the principal, that is the corporation, shall also be held liable. This is when the operation of vicarious liability applies, where the act was committed by the employees in the course of their employment unless the principal/corporation can prove that the action was committed without his consent and he had exercised his diligence to prevent the act. In other words, the act of clerk, servant or agent can make the company as the principal liable, and such individuals themselves could not be exempted from the liability if it has been proven that the act was committed by them.

Section 43 shows that both corporation and individuals can be charged and punished for the pollution caused. When the Act provides so, there should not be a problem in imposing both fines and imprisonment to a corporation because the corporation can be fined and the individual/s that had been the "directing mind" and caused the harm can be locked up. In actual fact, the punishment of imprisonment should be furthered when ones look at the principle of punishment that among others is for deterrence and to educate the wrongdoer. The idea is for the corporation to learn from fault and damage they had caused so that the individuals within the corporation would take further notes for not being the "mind" that causing the harmful act that can damage the environment.

7.2. Punishment Imposed by Court

Table 1 shows 19 cases involving 17 companies and 21 charges between years 2013 and 2015. The offence was a violation of section 25(1) EQA 1974. There were 7 cases recorded in 2013, 5 cases in 2014 and 7 cases in 2015, with 13 of them occurred in Negeri Sembilan, 2 cases in Johor, 2 cases in Selangor and 1 case each in Perak and Kuala Lumpur. Looking at the punishment imposed, a maximum fine was RM80, 000 while the lowest was RM8, 000 with only one case for each. Details of the range of fine imposed by the court are shown in Table 2.

Table 01. Cases Involving Corporations for Violating Section 25 in 2013-2015

1	Company Name	Year	Court/Place	Sentence
1.	Oon Corporation Resources (M) Sdn Bhd	2013	Negeri Sembilan	Fine RM10,000/4 months imprisonment
2.	Platinum Green Chemicals	2013	Negeri Sembilan	Fine RM20,000/8 months imprisonment
3.	Comfort Rubber Gloves Industries Sdn Bhd	2013	Perak	Fine RM8,000/6 months imprisonment
4.	Kim Hin Ceramic (Seremban) Sdn Bhd (Rolnic Seramic Sdn Bhd)	2013	Negeri Sembilan	Fine RM18,000/3 months imprisonment
5.	HL Rubber Industries Sdn	2013	Negeri Sembilan	Fine RM15,000/3 months

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	Bhd			imprisonment
6.	PTS Poultry Processing Sdn Bhd	2013	Johor	Fine RM30,000/9 months imprisonment
7.	Rubbercare Protection Product Sdn Bhd	2013	Negeri Sembilan	Fine RM10,000/1 months imprisonment
8.	Sykt A1 Globe Sdn Bhd	2014	Negeri Sembilan	Fine RM15,000/2 months imprisonment
9.	Sykt PK Agro-Industrial Products (M) Sdn Bhd	2014	Negeri Sembilan	Fine RM15,000/3 months imprisonment
10.	Oren Puba Sdn Bhd	2014	Selangor	Fine RM30,000/3 months imprisonment
11.	Bostic Vision Sdn Bhd	2014	Negeri Sembilan	Fine RM10,000/2 months imprisonment
12.	Sykt PK Agro-Industrial Products (M) Sdn Bhd	2014	Negeri Sembilan	Fine RM20,000/5 months imprisonment
13.	Kerabat Processing House (Pedas) Sdn Bhd	2015	Negeri Sembilan	Fine RM25,000/5 months imprisonment
14.	Kerabat Processing House (Pedas) Sdn Bhd	2015	Negeri Sembilan	Fine RM20,000/4 months imprisonment
15.	Kilang Advance Healthcare Products Sdn Bhd	2015	Negeri Sembilan	Fine RM15,000/3 months imprisonment
16.	Kilang Kim Hin Ceramic (Seremban) Sdn. Bhd.	2015	Negeri Sembilan	Fine RM20,000/5 months imprisonment
17.	Natural Oleochemicals Sdn Bhd	2015	Johor	Fine RM50,000
18.	Shoo Woo Electroplating Industries (M) Sdn. Bhd.	2015	Selangor	Charge 1: Fine RM40,000; Charge 2: Fine RM30,000
19.	Chew Chee Keong (Kyros Food Industries Sdn Bhd) *second offence	2015	Kuala Lumpur	Charge 1: Fine RM80,000/4 months imprisonment AND 1 month imprisonment; Charge 2: Fine RM60,000/2 months imprisonment AND 14 days imprisonment run concurrently

Source: Department of Environment Malaysia, 2016.

It is interesting to note that, although section 25 imposes punishments of fine or imprisonment or both, the court essentially in its judgment had imposed imprisonment only for default of payment. In other words, it is not the imprisonment as the punishment, but due to default payment. It is also

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remarkable that all companies opted for paying the fine. Nevertheless, there was one case where the court imposed imprisonment on the individual in-charged (no. 19) with 1 month imprisonment for the first charge, and 14 days for the second charge that run concurrently. Furthermore, looking at the length of imprisonment, except three, it was less than one year ranging between three to five months.

Table 02. Range of Fine

Range of Amount fined (in Ringgit Malaysia)	**No. of charges**	**Percentage (%)**
20,000 and below	13	61.9
20,001-40,000	5	23.8
40,001-60,000	2	9.5
60,001-80,000	1	4.7
80,001-100,000	-	-
Total	21	100.0

From Table 2, 13 charges/companies (61.9%) were fined with the lowest range i.e. below RM20,000; five charges/companies (23.8%) were imposed within the range of RM20,001-RM40,000; two charges/companies (9.5%) with the amount of RM50,000 and RM60,000; and only one charge/company (4.7%) was imposed with a fine of RM80,000. The highest charges was imposed on the company that recorded to have committed the second offence.

7.3. Discussion

In response to the rapid economic growth, stiffer penalties had been proposed by virtue of the Environmental Quality (Amendment) Act 1996. As such, penalties under section 25 was amended and increased to reflect the seriousness of the offences. After 20 years of its implementation, cases of environmental violations are still mounting with a variety of pollution sources (DOE, 2017). In the case of river, its water quality has declined in year 2014 with the percentage of clean rivers have decreased to 52% in year 2014 compared to 58% in year 2013. Meanwhile the percentage of polluted rivers has increased from 5% in year 2013 to 9% in year 2014. In the case of rivers, the trend since 2009 until 2014 showed a decreasing number for clean rivers and a fluctuation for slightly polluted and polluted rivers with the increasing trends in 2014.

It has clearly shown that EQA 1974 imposes criminal sanctions in environmental pollution both for individual and corporate wrongdoers (Mustafa & Mohamed, 2015). While section 25 sanctions the punishment of fines and imprisonment for the “person”, either the individuals or corporations, section 43 plainly mentions the individuals within the corporation who can be charged for the environmental harm committed by the corporations, subject to certain defence.

Looking at the penalties imposed on the corporations particularly on fines, it shows that majority of companies are still being sanctioned with mild punishment compared to the harm they have committed. Only two cases had been charged with the amount of fine Malaysia Ringgit fifty thousand above; one case was fined with Malaysia Ringgit fifty thousand and without imprisonment, and another one was charged with two charges amounting to Malaysia Ringgit sixty thousand and eighty thousand

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respectively. Moreover, for this latter case, the punishment can be said as stiffer when it came with imprisonment for default in payment and also imprisonment for the individual who committed the act.

Even so, majority of the companies were imposed below Malaysia Ringgit twenty thousand. Small amount of fines is too light to big company with business mind that aiming just for profit. Without prejudice to the courts' judgment nevertheless, the amount of fines imposed might not be able to deter the company from repeating the same harm. For punishment of imprisonment, it seems that the court is not willing to impose it on the corporations, except in cases of default payment. Although the courts had imposed the punishment of fines or imprisonment in default of payment, the company would definitely prefer the fines. It indicates the companies' willingness to pay. Evidenced from the Tables above, they showed a very small number of cases being fined with the amount of Malaysia Ringgit fifty thousand and above when compared to the maximum penalties of one hundred thousand. Low amount of fine would probably be the cause for the company to repeat committing the act especially when the amount is affordable and within their means. At the same time, the only possible conclusion for a higher fine could be due to the repeating offences, as clearly observed from the two charges of repeating offences by the corporations as shown in Table 1.

Perhaps the approach of sanctioning imprisonment to the corporations is impossible. However, it should be noted that there is still an alternative to impose it on the individuals within the corporations though it may face some complications. If stiffer punishment like imprisonment can be imposed on the individuals within the corporations, it may become a lesson not only to the corporations but also to its "directing mind". One however must bear in mind that the severity of punishment could not be merely judged from the amount of fine but to look from the circumstances of the case without neglecting the function of court in upholding justice.

8. Conclusion

The study found that: (a) there was a wide gap between the maximum punishment by law and penalties positioned by court, and; (b) corporations preferred to pay fines. It is therefore suggested for a stiffer and more appropriate punishment imposed on the corporations as well as individuals behind it for an effective implementation. Moreover, other than imposing fines or imprisonment for default of payment, the sanction of imprisonment itself might be operative. In recent years, industrial activities continue to become the major contributors towards environmental pollution. Law as a controlling mechanism deters such violation through the environmental legislations and regulations. In managing the environment, the EQA 1974 stipulates harsher punishment for environmental offences. Despite this, the records still show mild punishment handed down towards the corporations, and from the list, only one had been bestowed with imprisonment. While the severity of punishment could not be judged from the amount of fine imposed, it is the principle of punishment, either as deterrence, retribution, prevention or reformation that must be the ultimate idea in sentencing and handing down the sanction. Although circumstances of the case should be the utmost consideration of the judges in determining the weight of punishment, the outcome of the punishment itself must function as a lesson to the culprits for not repeating the harm especially when it causes damage the environment and the public at large. In the context of environmental protection, the law serves to shape the society as well as regulate people's

behaviour. To shape the society's behaviour, the functioning law as a control mechanism is effective by imposing appropriate sanctions and punishments. Therefore, the law is not merely providing guidelines, but can act to penalize the wrongdoers so as to be the lesson and to deter them from again committing the fault. Accordingly, punishment should be the reminder, to reprimand others from doing the same. Hence, harsher punishment is expected especially on the corporations.

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