

STRENGTHENING CAPACITY FOR ENVIRONMENTAL LAW IN
MALAYSIA'S JUDICIARY:
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Activity 6:
Access to Justice in industrial emission case

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Court Approach to Remedies

- Any action brought to court based upon harm to the environment requires the creation of appropriate remedies mandated by the law.
- It is through remedies that judges reinforce the rule of law in the environmental setting by ensuring that violators do not gain advantage by virtue of their misdeeds.
- In matters involving the enforcement of statutes, judges might be called upon to resolve different interpretations of the law, and the resulting decision can have implications beyond the case at hand.

Court Approach to Remedies

- While remedies are case-specific, and base on the nature of the violation and the prayer for relief in the case, in environmental cases, common remedies include:
 - 1. Injunctive relief to halt the harmful activity;
 - 2. Damages to compensate for harm suffered;
 - 3. Orders of restitution or remediation;
 - 4. Sanctions to punish the wrongdoer and to deter future violations; and
 - 5. Awards of costs and fees.

Remedies: Public Perspective

- Environmental issues can directly affect individual interests and/or rights of certain specific persons.
- Such affect can also occur on collective interests, which do not belong to an individual but to all and each of the members of the group, class or community.
- Consider, for example, a project with adverse environmental effects on an entire region, a landscape, a river system, etc.
- Given this sort of threats, access to judicial appeals on environmental matters requires the availability of adequate tools for effective intervention before courts, with the aim to serve its fundamental purpose: the protection of the environment.



Case Study: Woon Tan Kan (Deceased) & 7 Ors. V. Asian Rare Earth Sdn. Bhd. [1992] 4 CLJ 2207

- **Brief historical background:**

- Residents of Bukit Merah village - Plaintiffs
 - Residents homes located either about 400 yards or about 1500 yards away where ARE factory was.
- Asian Rare Earth Sdn Bhd (ARE) - Defendants
 - Commenced operation in May, 1982
 - Authorization from *Ministry of Health & the Radioactive Substances Act 1974* to handle radioactive materials
 - Obtained manufacturing license from *Ministry of Trade & Industry*
 - *Atomic Energy Licensing Board* ordered plant closure on 5 November 1985, but resume operations on 2 February 1987 after obtaining license from the Board, which the factory in the meantime created new temporary storage facility.

Case Study: Woon Tan Kan (Deceased) & 7 Ors. V. Asian Rare Earth Sdn. Bhd. [1992] 4 CLJ 2207

- **Brief historical background:**

- Rare earth is a complex group of raw materials which are extracted from monazite which is contained in tin.
- They are versatile and important elements in manufacturing of electronics and electrical.
- But production of rare earth materials is very risky as it contain radioactive substances and can release dangerous gases.

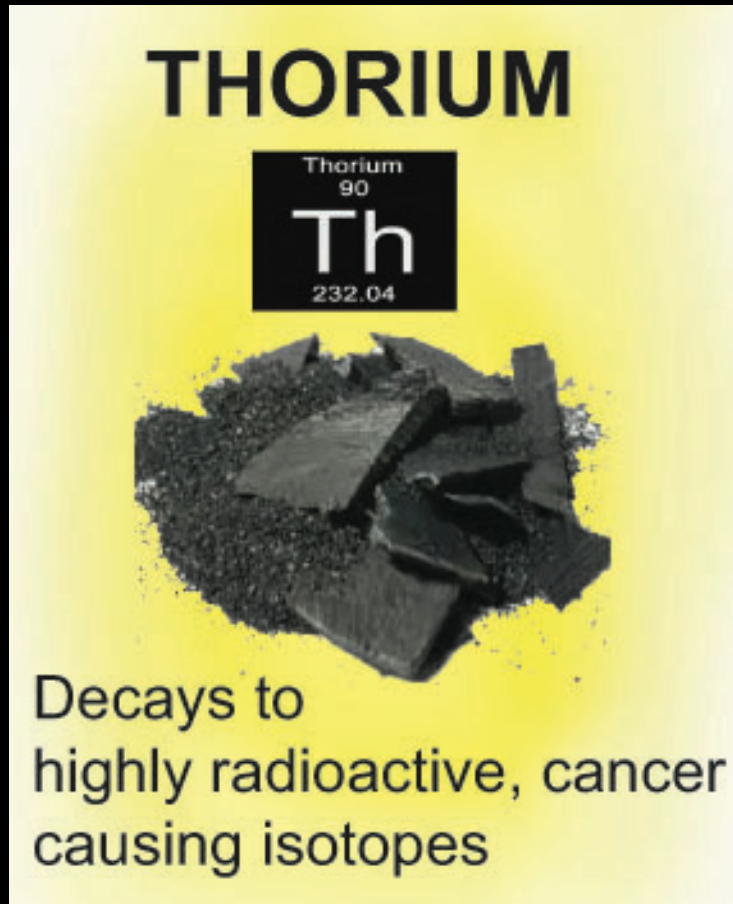
Remedies from industrial emission: The Woon Tan Kan case

- **Facts:** In may 1982 a Japanese-Malaysian joint venture, Asian rare Earth Sdn. Bhd. (ARE) set up a factory at Bukit Merah to manufacture rare earth, a process involving the generation of radioactive by products.
- Soon after the launch of the ARE plant radioactive wastes from the plant began to be dumped at nearby locations.
- Local residents in Bukit Merah objected to the dumping, claiming that their health was being adversely affected by radiation from the dump site.



Asian Rare Earth in 1985. Note the drums of radioactive waste stacked in the open.

Remedies due to industrial emission: The Woon Tan Kan case



- The Factory processed monazite, obtained from tin tailings.
- In 1984 the Bukit Merah residents discovered the danger of irradiation exposure from radioactive waste which had been dumped into the pond at the back of the factory without any special precaution.
- By-product of monazite processing produced a radioactive element, Thorium hydroxide, which is highly dangerous to human beings.
- It can lower white blood cell count, resistance to infection, damage DNA, could then lead to defective cells, deformities, brain damage.

Remedies due to industrial emission: The Woon Tan Kan case

- When the residents discovered the danger, they formed the Perak Anti-Radioactivity Committee (PARC) to investigate and to commence legal proceeding to have the ARE factory closed.
- Eight of the residents joined together as plaintiffs in a suit for injunctions, declarations and damages.



Protests against Asian Rare Earth plant at the Japanese Embassy in KL.

The dispute and litigation which ensued became a test case involving a number of crucial, controversial and interrelated questions, scientific, legal and moral:

- What are the dangers involved in such processes?
- What is the likelihood of adverse effects on the population?
- How are such effects to be measured and prevented?
- How should the law respond to disputes of this kind?
- What kind of legal remedies?
- what kind of legal concepts appropriate to resolve such dispute : tort law? Human rights? Public-interest law? Environmental law?
- Who should be responsible for preventing or curing adverse effects of such processes – the company, the host government, or the home government?

The High Court

- Plaintiffs:

- Claimed defendant's activities produced dangerous radioactive gases which escaped from the plant to their living area, causing serious biological damages including cancer;
- Claimed that the waste was not stored & disposed of in a sufficiently safe manner.
- The plaintiffs sued in negligence, nuisance and the rule in Rylands v. Fletcher, and sought declarations, damages and injunctions.
- Their case revolved around three issues: the levels of radiation, the effects on the population, and the safety measures taken by the defendants.

- Defendant:

- Denied the escaped radiation and dangerous gases;
- Claimed their activities safe and did not enhance background radiation in the area;
- Denied their activities caused increased incidence of leukemia, miscarriages, pre-natal & post-natal deaths, child illnesses & lead in blood among Bukit Merah residents;
- Challenged that ARE was licensed to handle & store radioactive substances.

The High Court

- The case was heard between September 1987 to November 1990
- **Complexity of the issues:**
 - Difficulties in measuring radiation levels.
 - Difficulties in assessing causal linkage between such radiation and the health levels of the community.
 - Difficulties in deciding what precautions are adequate.

Available laws in 1982

- Radioactive Substances Act 1968 (repealed 1984)
- Atomic Energy Licensing Act 1984
- Environmental Quality Act 1974, amended 1985 on EIA

The High Court Ruling

- The judge granted the following remedies:
 - A declaration that ARE was not entitled to operate that factory and keep radioactive waste on its land
 - A prohibitory injunction restraining the defendant from doing so; and
 - A mandatory injunction to remove all the waste to a permanent facility



Thousands of residents of Bukit Merah and nearby areas at the Ipoh High Court in September 1987; "We're here for our children."

In 1992 Judge of High Court, Ipoh:

- Granted declaration & injunctions to restrain defendant from '*producing, storing & keeping radioactive wastes on their land...in such manner as to cause the escape of radioactive gases & wastes*' ;
- Order also imposed specific requirement for storage of wastes;
- Judge held that radiation from substances processed at the factory did caused damage to human cells, although congenital defects might take years or decades to show up, having harmful effects on DNA, even in small doses – no threshold of harm from radioactive substances; also
- Held that high levels of background radiation existed in the area but was augmented by crushing & milling of rocks containing radioactive elements at the factory.

The Supreme Court Decision

- The defendants applied for suspension of the injunctions on the basis that it was impossible to close down the entire factory process within 14 days. On this basis the court lifted the injunctions.
- In 1993 the Supreme Court reversed High Court and decided in favour of ARE.

The Supreme Court Decision

- The Supreme Court's judgement in favour of the appellants was mainly based on the trial court's treatment of the expert evidence.
- The Court also found that the conditions of the grant of injunctive relief were not satisfied.
- Since the appellants were operating under a licence granted by a statute which provides for an appropriate remedy, hence it was for the plaintiffs to convince the licensing authority that the operation of the factory was not in the interest of the public because of the danger of radiation to their health.

Conclusion

- Through this presentation of the Woon Tan Kan case, participants can generate a deeper understanding of remedies in environmental law from the perspectives of judiciary and the public.

Thank you

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