

## Achieving Bingham's Notion in Environmental Protection and Preservation

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### *Abstract*

*Referring to the concept of the 'Rule of Law', Malaysia's environmental laws should protect the substantive environmental rights of the public and they should also be implemented and exercised in a consistent manner. In truth, however, to what extent such expectations have been met? Arguably, prima facie, through the efforts of the three branches of the Government (Judiciary, Executive, and Parliament) the aforementioned expectations have been met to a large extent. However, scepticism remains that current laws are consistent with the concept of the Rule of Law. Environmental rights are not always guaranteed due to various orthodox legal challenges. Notwithstanding contradictory views, nonetheless arguably it is inexorable that one would conclude on two positions. Firstly, that the current legal framework for environmental protection in Malaysia somewhat meets the benchmark of Lord Bingham's notion on the Rule of Law due to the various efforts afforded, and owing to the fact that improvements and modifications have been made to accommodate new developments; It is opined that such improvements should be progressively maintained in the future. Secondly, akin to the Rule of Law, Malaysia's environmental laws will only be as effective as they should be if non-legal initiatives are being made. Such initiatives, however, may be dependent on the public itself or other bodies such as the media.*

### **Introduction**

#### **a. The Concept of the Rule of Law**

The Rule of Law is a fluid-like yet salient constitutional principle governing society.<sup>1</sup> Since time immemorial, there have been vehement debates as to what should be embodied in the heart of the tenet of Rule of Law. The debates can be divided into two conflicting camps.<sup>2</sup>

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<sup>1</sup> YAA Tun Arifin bin Zakaria, Chief Justice of Malaysia, (Speech at the Opening of the Legal Year 2017 Putrajaya International Convention Centre, 13 Jan 2017) <[http://www.malaysianbar.org.my/speeches/speech\\_by\\_yaa\\_tun\\_arifin\\_bin\\_zakaria\\_chief\\_justice\\_of\\_malaysia\\_at\\_the\\_opening\\_of\\_the\\_legal\\_year\\_2017\\_putrajaya\\_international\\_convention\\_centre\\_13\\_jan\\_2017.html](http://www.malaysianbar.org.my/speeches/speech_by_yaa_tun_arifin_bin_zakaria_chief_justice_of_malaysia_at_the_opening_of_the_legal_year_2017_putrajaya_international_convention_centre_13_jan_2017.html)> accessed 22 February 2018.

<sup>2</sup> The explanation is provided in Andrew Le Sueur, Maurice Sunkin, Jo Eric Khushal Murkens: *Public Law Text, Cases and Materials* (2nd edn, OUP 2013) p 81-84.

On the one hand, there was the campaign for a content-free interpretation which places emphasis on the form of law and the procedures by which the law is made. This interpretation alludes that the Rule of Law may be upheld so long as the introduction and application of the law are consistent in nature.

In stark contrast, the competing interpretation is that the Rule of Law should be content-rich. Such interpretation underscores the importance of the protection of the public's substantive rights, insinuating that the Rule of Law possibly only be upheld for example, if the law in question complies with human rights afforded to the general public.

**b. Using Lord Bingham's notion as the yardstick on achieving the Rule of Law in Environmental Protection**

Despite the aforementioned, the debates were eclipsed by Lord Bingham's 'reintroduction' on the concept through his proposed eight-sub rules of the Rule of Law.<sup>3</sup> This is because Lord Bingham's notion had encapsulated the two competing interpretation.<sup>4</sup> With such encapsulation, the notion suggests, laws now should be introduced and applied consistently, and they should also now guarantee the public's substantive rights. This arguably had elevated the notion to become a more preferable interpretation as it had created an idealistic and desirable threshold required to achieve the idea of the Rule of Law.

Speaking of ex-Chief Justice YAA Tun Arifin Zakaria's reference<sup>5</sup> to the 'Environmental Rule of Law',<sup>6</sup> the reference can be regarded to be consistent with Lord Bingham's notion as the reference reflects the same form of encapsulation as well.<sup>7</sup> Interjecting a view here, considering the reference and Lord Bingham's notion in the context of Malaysia's legal framework for environmental protection, one could opine that

<sup>3</sup> Lord Bingham, 'The Rule of Law' (2007) 66(1) Cambridge Law Journal 67.

Lord Bingham's eight sub-rules of the Rule of Law:

(1) *The law must be accessible, intelligible, clear and predictable.*

(2) *Questions of legal right and liability should ordinarily be resolved by the exercise of the law and not the exercise of discretion.*

(3) *Laws should apply equally to all.*

(4) *Ministers and public officials must exercise the powers conferred in good faith, fairly, for the purposes for which they were conferred – reasonably and without exceeding the limits of such powers.*

(5) *The law must afford adequate protection of fundamental Human Rights.*

(6) *The state must provide a way of resolving disputes which the parties cannot themselves resolve.*

(7) *The adjudicative procedures provided by the state should be fair.*

(8) *The rule of law requires compliance by the state with its obligations in international as well as national laws.*

<sup>4</sup> For example, Lord Bingham's sub-rules 1,2,6 and 7 reflects the content-free interpretation as they emphasise on the form of law and the procedures which the law is made; whereas sub-rules 5 and 8 illustrates the content-rich interpretation as they have advanced laws should be in compliance with human rights.

<sup>5</sup> Ibid (n 1).

<sup>6</sup> "(i) A system of laws that regulate, as far as is feasible and practicable, all human-induced actions that by themselves or collectively have a significant impact on the environment; (ii) Consistent application of these laws over time and throughout the jurisdiction; (iii) Effective and fair enforcement against those who break the law, regardless of the offender's socio-economic or political status." – by Elizabeth Barrett, 'The Role of Philippine Courts in Establishing the Environmental Rule of Law' (2012) 42(2) Environmental Law Reporter <[https://works.bepress.com/elizabeth\\_ristroph/3/](https://works.bepress.com/elizabeth_ristroph/3/)> accessed 22 February 2018.

<sup>7</sup> Refer (n 6): It is opined that (i) illustrates the content-rich interpretation of the Rule of Law; whereas (ii) and (iii) reflect the content-free interpretation of the Rule of Law.

for Malaysia's environmental laws to uphold the idea of the Rule of Law, the former must be introduced and applied consistently and at the same time they must entitle the citizens their substantive environmental rights.

Hence, the question to be asked now is whether Malaysia's legal framework for environmental protection has met the yardstick for achieving the Rule of Law as set by Lord Bingham's notion and the reference made by YAA Tun Arifin Zakaria? To put it in normal parlance and in a same train of thought, the question to be asked now is whether Malaysia's legal framework for environmental protection has been implemented and applied consistently, and has the framework guaranteed the citizens' environmental rights in which they are entitled to?

**Efforts made to ensure environmental protection: Arguments substantiating the proposition that Malaysia's Environmental Laws are consistent with the Rule of Law**

Prima facie, Malaysia's environmental laws have somewhat achieved the idea of the Rule of Law as evinced through the efforts made by the three branches of the Government of Malaysia.

**a. Efforts made by the Judiciary**

**(i) Judicial decisions**

Through various judicial decisions, the Malaysian courts have fortified environmental protection by enforcing environmental laws and prohibitions against offenders.<sup>8</sup> To illustrate this point, in *Malaysian Vermicelli Manufacturers (Melaka) Sdn Bhd v PP*<sup>9</sup>, the court dismissed the appeal against the Sessions Court Judge's decision to convict and impose a fine, in default of a one-year imprisonment, for discharging effluents into the Malacca River without a licence. The decision was made on the basis that the appellant's actions were contrary to reg. 8(1)(b) of the Environmental Quality (Sewage and Industrial Effluents) Regulations which entailed they were to be regarded as an offence under s.25(1) of the Environmental Quality Act 1974.

**(ii) Extra-judicial efforts**

Aside from judicial judgments, there were various initiatives made by the Malaysian Judiciary to promote environmental protection. Among others would be through extrajudicial speeches,<sup>10</sup> the set-up of environmental courts in both criminal<sup>11</sup> and civil<sup>12</sup> settings, hosting of events which have a theme on environmental protection.<sup>13</sup> In addition,

<sup>8</sup> *PP v Cocolin Industries SDN BHD* [2008] 8 CLJ 116; *Malaysian Vermicelli Manufacturers (Melaka) SDN BHD v PP* [2001] 7 CLJ 74.

<sup>9</sup> *Malaysian Vermicelli Manufacturers (Melaka) SDN BHD v PP* [2001] 7 CLJ 74.

<sup>10</sup> Example *ibid* (n 1).

<sup>11</sup> Vide Practice Direction of the Chief Registrar No. 2/2012.

<sup>12</sup> Civil courts that deals specifically on environmental issues were established in 1<sup>st</sup> Jan 2016 – *Ibid* (n 1).

<sup>13</sup> Federal Court of Malaya and the Asian Development Bank (ADB) hosted the Second Association of Southeast Asian Nations (ASEAN) Chief Justices' Roundtable on Environment: Environmental Law and Enforcement 2012 from 7 to 10 December 2012 at the Philea Resort and Spa, Melaka, Malaysia; Federal Court of Malaya's co-organization of the 1<sup>st</sup> Asia and Pacific International Colloquium on the Environmental Rule of Law – Defining a New Future for Environmental Justice, Governance and Law in Putrajaya, in 2013.

through the establishment of the National Judicial Working Group on the Environment in 2015<sup>14</sup> and the Judicial Academy, these two institutions serve to raise awareness of the importance of environmental issues and protection within the judiciary.

#### b. Efforts made by the Parliament of Malaysia

Meanwhile, the main role played by Malaysia's Parliament in upholding the Rule of Law in the context of environmental protection and preservation is through the enactment of environmental legislation.

##### (i) Environmental legislation and regulations

There are multiple legislations and regulations in Malaysia that protects environmental rights<sup>15</sup>, but the most well-known piece of legislation that guarantees such rights is the Environmental Quality Act 1974 (EQA 1974). The EQA 1974 is the core legislation for environmental protection because it provides various restrictions. The restrictions include among others, restrictions on pollution on inland waters,<sup>16</sup> soil,<sup>17</sup> as well as prohibitions of discharging oil<sup>18</sup> or waste<sup>19</sup> into Malaysian waters, and it even includes a prohibition for open burning.<sup>20</sup>

##### (ii) New Act in sight: Environmental Protection Act

Owing to the proliferation of technological and economic developments, the complexity of environmental pollution cases has increased. To accommodate the complexities and developments, a new Act – the 'Environmental Protection Act' (EPA) (which will be ready this year (2018)<sup>21</sup>) will be introduced to replace the EQA 1974.<sup>22</sup>

Although the EPA is yet to be concluded, one may gauge that the new Act will strengthen both the protection made to the environment and the idea of the Rule of Law in guaranteeing substantive rights. This is due to the fact that according to various reports, the EPA will have 41 new sections<sup>23</sup> which will allow a wider range of coverage. The EPA will also increase the fines imposed on offenders,<sup>24</sup> and most notably it will extend liability to offenders even if they are merely negligent.<sup>25</sup>

<sup>14</sup> Ibid (n 1)

<sup>15</sup> Environmental Quality (Clean Air) (Amendment) Regulations 2000; Environmental Quality (Control of Pollution from Solid Waste Transfer Station and Landfill) Regulations 2009; Environment Protection Enactment 2002.

<sup>16</sup> EQA 1974, s.25.

<sup>17</sup> EQA 1974, s.24.

<sup>18</sup> EQA 1974, s.27.

<sup>19</sup> EQA 1974, s.29.

<sup>20</sup> EQA 1974, s.29A.

<sup>21</sup> Note: At the time of the writing of this paper, the EPA has yet to be introduced.

<sup>22</sup> Stated by Department of Environment director-general Datuk Dr Ahmad Kamarulnajib Che Ibrahim as derived from Hidir Reduan 'New law being prepared to deal with new environmental complexity – DoE', New Straits Times (9 November 2017) <<https://www.nst.com.my/news/nation/2017/11/301179/new-law-being-prepared-deal-new-environmental-complexity-doe>> accessed 22 February 2018.

<sup>23</sup> Natural Resources and Environment Minister Wan Junaidi Tuanku Jaafar quoted in 'Wan Junaidi: The new Environmental Protection Act will have Plenty of Bite', Clean Malaysia [website] (22 November 2017), <<http://cleanmalaysia.com/2017/11/22/wan-junaidi-new-environmental-protection-act-will-plenty-bite/>> accessed 22 February 2018.

<sup>24</sup> Ibid (n 22).

<sup>25</sup> Ibid (n 23).

#### c. Efforts made by the Executive

Obviously, the Executive had also made various contributions in environmental protection which can be evident via:

##### (i) Commitments to international agreements

Commitments made by the Executive on behalf of Malaysia towards international agreements that emphasise environmental protection. Just to name a few, Malaysia is a party to the Paris Climate Agreement,<sup>26</sup> United Nations Framework Convention on Climate Change (UNFCCC),<sup>27</sup> Vienna Convention for the Protection of the Ozone Layer,<sup>28</sup> United Nations Convention to Combat Desertification,<sup>29</sup> Convention on Biological Diversity,<sup>30</sup> and etc.

Looking at the most recent agreement – the Paris Climate Agreement which emphasises on climate change mitigation<sup>31</sup>: by becoming a party to the agreement, Malaysia is imposed with obligations such as pursuing domestic mitigation measures,<sup>32</sup> providing capacity building,<sup>33</sup> and providing cooperative action on technology development and transfer,<sup>34</sup> in order to achieve the objectives set out in the Agreement.

##### (ii) Creation of authorities in the interest of environmental protection

Other notable efforts made by the Executive would be through the creation of authorities that stimulates environmental protection. For example, the Department of Environment

<sup>26</sup> UNFCCC, 'Paris Agreement - Status of Ratification' <[http://unfccc.int/paris\\_agreement/items/9444.php](http://unfccc.int/paris_agreement/items/9444.php)> accessed 22 February 2018.

<sup>27</sup> UNFCCC, 'Status of Ratification of the Convention' <[http://unfccc.int/essential\\_background/convention/status\\_of\\_ratification/items/2631.php](http://unfccc.int/essential_background/convention/status_of_ratification/items/2631.php)> accessed 22 February 2018.

<sup>28</sup> UNTC, 'Depositary, Status of Treaties, (Vienna Convention for the Protection of the Ozone Layer)' <[https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XXVII-2&chapter=27&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-2&chapter=27&lang=en)> accessed 22 February 2018.

<sup>29</sup> UNTC, 'Depositary, Status of Treaties, (United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa)' <[https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=XXVII-10&chapter=27&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-10&chapter=27&lang=en)> accessed 22 February 2018.

<sup>30</sup> Convention on Biological Diversity website, 'Information (List of Parties)' <<https://www.cbd.int/information/parties.shtml>> accessed 22 February 2018.

<sup>31</sup> Evident in Paris Agreement art.2:

1. *This Agreement, in enhancing the implementation of the Convention, including its objective, aims to strengthen the global response to the threat of climate change, in the context of sustainable development and efforts to eradicate poverty, including by:*
  - (a) *Holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change;*
  - (b) *Increasing the ability to adapt to the adverse impacts of climate change and foster climate resilience and low greenhouse gas emissions development, in a manner that does not threaten food production; and*
  - (c) *Making finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development.*

<sup>32</sup> Paris Agreement art.4.

<sup>33</sup> Paris Agreement art.11.

<sup>34</sup> Paris Agreement art.10.

(DOE),<sup>35</sup> Marine Department, Malaysia,<sup>36</sup> Malaysian Maritime Enforcement Agency,<sup>37</sup> and etc.

#### d. Summary

Through the efforts made by the three branches of the Government of Malaysia, a strong stance can be taken that Malaysia's current legal framework for environmental protection is seemingly consistent with the concept of the Rule of Law. This is evinced by the fact that there are consistencies in the introduction and application of environmental laws, and moreover, the efforts mentioned have reflected the eagerness of the three branches to ensure the public's environmental rights.

#### Deficiencies in environmental protection and preservation: Scepticisms on the current environmental legal framework is in line with the Rule of Law

However, detractors can be cynical towards the proposition that Malaysia's legal framework for environmental protection is in line with the Rule of Law. But the criticisms should not be easily put off without any examination.

#### a. Commercial, public, investors' interests are guaranteed at the expense of environmental protection: Investor-state arbitration

Due to economic developments, there has been a rise in the number of investment arbitrations. Investment arbitration essentially is a legal procedure that enables foreign investors to initiate claims against host states, particularly when they have exercised their sovereign rights such as introducing legislation which may or may not violate the foreign investors' entitlements under the Bilateral Investment Treaties (BITs) or Multilateral Treaties.<sup>38</sup>

The relevance of investment arbitration for the purpose of discussion in this paper is that there are instances where environmental protection has been the core issue in the disputes between foreign investors and host states.<sup>39</sup> Take for example, in *S.D. Myers, Inc. v Government of Canada*<sup>40</sup> the claim arose out from Canada's ban on S.D. Myer's export of polychlorinated biphenyl (PCB).<sup>41</sup> In its defence, Canada attempted to justify the ban on the basis of environmental concerns in reference to the Basel Convention on Hazardous Waste. Eventually, however, the tribunal still held in favour of S.D. Myers' claim and Canada was held to be liable to compensate S.D. Myers.

<sup>35</sup> Ministry of Natural Resources & Environment, 'Frequently Ask Question' <<https://www.doe.gov.my/portalv1/en/soalan-lazim>> accessed 22 February 2018.

<sup>36</sup> Marine Department of Malaysia, 'Profile' <[http://www.marine.gov.my/jlmeng/Contentdetail.asp?article\\_id=221&category\\_id=2&subcategory\\_id=2&subcategory2\\_id=0#.Wo-h2ecRU2w](http://www.marine.gov.my/jlmeng/Contentdetail.asp?article_id=221&category_id=2&subcategory_id=2&subcategory2_id=0#.Wo-h2ecRU2w)> accessed 22 February 2018.

<sup>37</sup> Malaysian Maritime Enforcement Agency Prime Minister's Malaysia Department, 'Functions' <<https://www.mmea.gov.my/eng/index.php/en/mengenai-kami/fungsi>> accessed 22 February 2018.

<sup>38</sup> Examples would be the North American Free Trade Agreement (NAFTA), or the Energy Charter Treaty.

<sup>39</sup> Among others, *MTD Equity Sdn. Bhd. and MTD Chile S.A. v Republic of Chile*, ICSID Case No. ARB/01/7; *Metalclad Corporation v The United Mexican States*, ICSID Case No. ARB(AF)/97/1; *Methanex Corporation v United States of America*, Ad hoc Tribunal UNCITRAL, Award (3 August 2005).

<sup>40</sup> *S.D. Myers Inc. v Canada*, UNCITRAL, Partial Award (13 November 2000).

<sup>41</sup> PCB is an environmentally hazardous chemical compound usually used in electrical equipment.

Similarly, in *Chevron Corporation and Texaco Petroleum Company v Republic of Ecuador*,<sup>42</sup> there was a successful judgment made against Chevron favouring the Ecuadorian citizens for environmental violations which arose out from Chevron's affiliates' oil operations in Ecuador. Nonetheless, the tribunal disregarded the Ecuadorian plaintiff's claim and came to a conclusion in favour of Chevron.

As some commentators have noted, the amount of money required to compensate investors can have a significant impact on a state's ability to provide basic government services,<sup>43</sup> which may push states to have a strong urge to settle (even when the dispute is in their favour) in order to avoid lengthy litigation and the huge costs required to litigate the matter.<sup>44</sup> This in one's view, could give a false impression to the general public that comparably investors' or commercial interests will always triumph over the public's entitlement towards fundamental environmental rights.

Malaysia is not immune from the risk of investors' rights and commercial interests are being enforced at the expense of environmental protection. This is because Malaysia had contracted into various BITs,<sup>45</sup> multilateral treaties, treaties with investment provisions (TIPs),<sup>46</sup> the most recent example would be the Trans-Pacific Partnership (TPP). With that, the challenge posed here by investor-state arbitrations is that there is a need for balance between the conflicting interests, which would be to a large extent be placed in the hands of the arbitrators appointed.

One question to ponder about is if an investment arbitration enforces the public's environmental rights at the expense of the investors' rights, although the idea of 'Environmental Rule of Law' is being upheld, could one still say that Lord Bingham's notion on the Rule of Law in general terms (particularly from the investors' perspectives) are being upheld as well?

<sup>42</sup> *Chevron Corporation and Texaco Petroleum Corporation v The Republic of Ecuador*, UNCITRAL, PCA Case No. 2009-23, Final Award (31 August 2011).

<sup>43</sup> "In the case of *Plama Consortium v Bulgaria* ... (the claim) was ultimately found to be fraudulent ... [however Bulgaria was] forced to pay. . . US\$6,243,357 (legal fees). At that time Bulgaria was grappling with a healthcare crisis due to a shortage of nurses—the money could have paid the salaries of more than 1,796 Bulgarian nurses." - Pia Eberhardt & Cecilia Olivet, 'Profiting from Injustice: How law firms, arbitrators and financiers are fuelling an investment arbitration boom' (2012) <<https://corporateeurope.org/sites/default/files/publications/profitting-from-injustice.pdf>> accessed 22 February 2018.

<sup>44</sup> Tamara L. Slater, 'Investor-State Arbitration and Domestic Environmental Protection' (2015) Volume 14 Issue 1, *Washington University Global Studies Law Review* <[https://openscholarship.wustl.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1519&context=law\\_globalstudies](https://openscholarship.wustl.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1519&context=law_globalstudies)> accessed 22 February 2018.

<sup>45</sup> UNCTAD, 'International Investment Agreements Navigator (Malaysia Bilateral Investment Treaties (BITs))' <<http://investmentpolicyhub.unctad.org/IIA/CountryBits/127#iiaInnerMenu>> accessed 22 February 2018.

<sup>46</sup> UNCTAD, 'International Investment Agreements Navigator (Malaysia Treaties with Investment Provisions (TIPs))' <<http://investmentpolicyhub.unctad.org/IIA/CountryOtherIias/127#iiaInnerMenu>> accessed 22 February 2018.

**b. Judicial leeway given in the interest of accommodating other legal principles**

Apart from investment arbitrations, some may regard judicial leeway given in domestic judicial decisions as a deficiency in ensuring environmental protection.

An illustration of judicial leeway given can be shown in *PP v Intrakota Consolidated BHD*.<sup>47</sup> The case concerned an appeal against the dismissal of the respondent's charge under s.22(1) of the Environmental Quality (Amendment) Act 1996. The respondent was charged because the respondent's bus was found to emit smoke in excess of the prescribed limit. The court dismissed the appeal as the respondent was exempted from liability under s.43(2) of the Act owing to the fact that the respondent had exercised all diligence to prevent the commission of the offence. In other words, the leeway given by the court to the respondent was in the form of 'diligence defence'.

In a similar vein, in *PP v Synenviro SdnBhd*<sup>48</sup> a conviction and a fine of RM50,000 on Synenviro for committing an offence under s.34B(1)(b) of the EQA 1974 (offence in receipt of scheduled wastes without the written permission of the Director General of Environmental Quality) were set aside on the grounds that a reasonable doubt was made against the prosecution's case as Synenviro's directors have shown that they have no knowledge the kinds of goods they have imported were scheduled wastes. This decision connotes that even in cases concerning environmental protection there is a need to accommodate the legal principle – the prosecution is required to prove a criminal charge beyond reasonable doubt.

Note, however, according to the then Natural Resources and Environment Minister Wan Junaidi Tuanku Jaafar, the Environmental Protection Act would extend liability for environmental violations even to individuals who are merely negligent<sup>49</sup> (hinting that liability maybe strict). Hence, it is questionable how the leeway mentioned here would be played when the new Act is enacted.

**c. Lack of explicit protection of environmental rights in the Malaysian Constitution**

Moving to examine Malaysia's constitution, although in *Tan Teck Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] Gopal Sri Ram JCA (as he then was)<sup>50</sup> had interpreted the word 'life' in Article 5(1) of Malaysia's Constitution to include "...right to live in a reasonably healthy and pollution free environment ..." but yet there are valiant calls for the Malaysian Constitution to be amended to make an explicit inclusion of environmental rights.<sup>51</sup>

Notwithstanding one may rely on Gopal Sri Ram JCA's (as he then was) interpretation, but if one takes into account the entire Article 5 of Malaysia's Constitution in its context,<sup>52</sup> seemingly Article 5's primary emphasis is on the rights of individuals in

<sup>47</sup> *PP v Intrakota Consolidated BHD* [1999] 4 CLJ 714.

<sup>48</sup> *PP v Synenviro SDN BHD* [2012] 1 CLJ 141.

<sup>49</sup> *Ibid* n 23.

<sup>50</sup> *Tan Teck Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 2 CLJ 771 at 800.

<sup>51</sup> *Ibid* n 1.

<sup>52</sup> Article 5 of Malaysia's Constitution:

(1) no person shall be deprived of his life or personal liberty save in accordance with law.

detention. With that, one would agree with the recommendation that the better approach would be for Parliament to amend the Constitution to provide a more explicit reference towards protection of environmental rights.

**d. Summary**

After scrutinising the discussed deficiencies, one would acknowledge that the legal challenges posed against environmental protection in Malaysia remain orthodox. That is to say, environmental protection is still subject to the conventional challenge of it being balanced against conflicting rights particularly commercial and public entitlements. On top of that, environmental rights are also subject to the orthodox challenge of them having to give way to accommodate other legal principles as well.

**Concluding remarks**

I wish to conclude in three points.

Firstly, in so far as environmental protection is concerned, the deficiencies and legal challenges posed remain as the legal framework for environmental protection is still subjected to be balanced against other competing interests and legal principles.

Secondly, notwithstanding with the aforementioned challenges, as far as Lord Bingham's notion on the Rule of Law and the reference of 'Environmental Rule of Law' are concerned, Malaysia's legal framework for environmental protection has somewhat met the threshold required, owing to the fact that great strides have been made to ensure environmental protection as evinced through the legislation enacted, judicial decisions, international agreements and etc.

Lastly, it is reasonable to expect that in the near future, Malaysia's legal framework for environmental protection will continue to be consistent with the notion of the Rule of Law as there are progressive changes being made to accommodate new practices in environmental protection. A clear example would be the legislation currently in works – the Environmental Protection Act. To further ensure that the notion of the Rule of Law in context of environmental protection is to be entrenched, it is posited that constant

(2) where a complaint is made to a High Court or any judge thereof that a person is being unlawfully detained the court shall inquire into the complaint and, unless satisfied that the detention is lawful, shall order him to be produced before the court and release him.

(3) where a person is arrested he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice.

(4) where a person is arrested and not released he shall without unreasonable delay, and in any case within twenty-four hours (excluding the time of any necessary journey) be produced before a magistrate and shall not be further detained in custody without the magistrate's authority: provided that this Clause shall not apply to the arrest or detention of any person under the existing law relating to restricted residence, and all the provisions of this Clause shall be deemed to have been an integral part of this Article as from Merdeka Day: provided further that in its application to a person, other than a citizen, who is arrested or detained under the law relating to immigration, this Clause shall be read as if there were substituted for the words "without unreasonable delay, and in any case within twenty-four hours (excluding the time of any necessary journey)" the words "within fourteen days": And provided further that in the case of an arrest for an offence which is triable by a Syariah court, references in this Clause to a magistrate shall be construed as including references to a judge of a Syariah court.

(5) Clauses (3) and (4) do not apply to an enemy alien.

evaluations and progressive changes must continuously be attempted for the many years to come.

Bearing in mind, however, that the concluding points made here reflect the subjective views of this paper, and one should also note that Lord Bingham's idealistic notion on the Rule of Law does not make any evaluation easier. As to whether the notion is being upheld it may still be subjected to the commenters' own subjective views. To put it in another way, whether Lord Bingham's notion on the Rule of Law is being upheld may be subjected to 'Which side are you on?'

Finally, it is sensible to assert that, to ensure environmental protection and preservation other non-legal efforts are pivotal to fill the gaps in which the mechanistic legal framework cannot circumvent. The non-legal efforts are generally dependent on the public and other bodies such as the media. An example to substantiate this point is that, although the idealistic view is that when judicial judgments concerning environmental issues are being made, the judgment itself is deemed to be a medium to dispense the essence of environmental protection to the general public. In truth, however, to what extent is it sufficient to rely on judicial judgments alone to raise awareness in the public? Such doubt accentuates the media's role in affording the currency of environmental protection, as generally, the lay public would only be aware of such decisions if the media had made reports about it. Hence, to ensure environmental protection and to tackle environmental violations effectively, there is still work to be done not only in terms of resolving the legal challenges but also there is a need to take non-legal initiatives.