

ENVIRONMENTAL GOVERNANCE IN MALAYSIA: CONSTITUTIONAL AMBIGUITY OF FEDERALISM

Cassandra Liew Wei Shin and Chong Jian Lit*

ABSTRACT

Malaysia is one of the countries which practices federalism, where legislative powers are exercised either by the federal government, the state government or concurrently. The legislative jurisdiction of both governments is regulated by Article 74 of the Federal Constitution. It is also read to be together with the Ninth Schedule of the Federal Constitution, where the powers are specifically allocated under the Federal, State and Concurrent Lists. However, environmental issues are not clearly categorised under any of the Lists. Environmental issues are multidimensional in nature and correlative to each other. It mainly covers matters about land, river, forest, wildlife, treaties, agreements and conventions, etc. This position has resulted in conflicts between both levels of governments in tackling issues about the environment. This study looks into the uncertainty of the jurisdiction covering environmental issues in relation to the Federal Constitution. Comparisons are made with other countries and policy recommendations are provided accordingly. The method used in this study is doctrinal research methodology, by providing critical views from existing journals and research papers.

Introduction

With the recent major changes to our environment, which is mainly due to human activities, the public is more consciously aware of the preservation and protection of the environment. Malaysia was no exception in "going green" and the government appeared to be taking a positive stand on this matter.¹ It can be said that the law of environment in Malaysia is 30 years old if it is to be calculated from the day that the Environmental Quality Act 1974 (hereinafter known as 'the EQA 1974') came into force and hence, became the first law to control a broad spectrum of environmental problems.²

In Malaysia, the state government has devolved power of administration as the country is a federation. In exercising its duties and powers, the state government has a clear cut geographical boundary and legitimacy. Its control is small and indirect as it is independent, autonomous and united at the level of isolation from the federal

* LLB candidates, Faculty of Law, Multimedia University.

¹ Azmi Sharom, 'Malaysian Environmental Law: Ten Years After Rio' (2002) 6 Singapore Journal of International & Comparative Law 855.

² Azmi Sharom, 'Environmental Laws In Malaysia: Time to Walk the Walk' (2008) Selected Issues in the Development of Malaysian Law <http://eprints.um.edu.my/13465/1/environmental_laws_in_malaysia.pdf> accessed 27 August 2016.

government.³ According to K.C. Wheare, federal government is defined as existing when the government's power is substantially divided according to the principle that in respect of some matters, there is a single independent authority for the whole area whereas for other matters, there are independent regional authorities - both authorities being co-ordinate with and not inferior to the others within its own prescribed sphere.⁴ Where the powers of both governments are separated, it is hard to determine which government shall be responsible for environmental issues despite the fact that we do have the laws to govern them.

Mustafa and Mukhtar⁵ had studied the division of power between the federal and state government under the Federal Constitution and their jurisdiction over the environment. They had found that the enforcement and administration of environmental law remains unclear, especially when it falls under the power of the state government. The federal government could not interfere with the states' business. It was suggested that a system of intergovernmental consultation needs to be developed in Malaysia and cooperation between both the federal and state government is needed to tackle environmental issues.

In another related work, Saleem⁶ had also discussed about the legislative jurisdiction concerning environmental issues. The consequences of environmental protection if it is treated as an independent subject and distributed according to the legislative lists found in the Federal Constitution is also discussed in this paper. By viewing it from a constitutional perspective, the duty over environmental issues cannot be divided precisely between the federal and state government. It was suggested that this issue of uncertainty can only be solved through a concurrent jurisdiction. This is because it would encourage joint efforts and cooperation between both governments.

As a result, the main purpose of this paper is to address the issue of uncertainty of jurisdiction over environmental issues in Malaysia and with the full hope that the state and the federal government could work hand in hand in managing all of our environmental issues and ensuring that the environment of our country is satisfactory protected.

Right to Clean and Healthy Environment

According to the landmark case of *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor*,⁷ Datuk Seri Gopal Sri Ram stated that the term, 'life' in Art 5(1) of Federal Constitution should be given a broader and liberal meaning. It does not refer to mere existence but incorporates all factors which are an integral of life and circumstances that form the quality of life. The right to live in a reasonably healthy and pollution free environment is included in such interpretation.⁸

³ Mohd Rizal Yaakop Norman Suratman, Aziawati Zakaria, Hussaind Yusrisa Zawawi, Jaziman Zakaria, Ainul Adzellie Hasnul, Ali Seman, Ruslizawati Taib & Samsu Adabi Mamat, 'Environmental Governance in Malaysia: How the Public to Government Police' (2017) 12(6) The Social Science 1044.

⁴ KC Wheare, *Federal Government* (Oxford University Press, 1980).

⁵ Khairil Azmin Mukhtar & Maizatun Mustafa, 'Effects of Federal Constitutional Framework to Marine Environment Law, Policy and Administration in Malaysia' (2012) 6(11) Australian Journal of Basic and Applied Sciences 130, 131.

⁶ Muhammad Yusuf Saleem, 'Environmental Issues in a Federation: The Case of Malaysia' (2005) 13(2) Intellectual Disclosure 202, 203.

⁷ [1996] 1 MLJ 261.

⁸ Ibid 288.

This case is further cited in the speech given by former Chief Justice, Tun Arifin Zakaria at the Opening of the Legal Year 2017. The learned judge stated that the right to clean and healthy environment is found in numerous modern constitutions and it would be ideal to expressly include such a right in our Federal Constitution by amending it.⁹

Since 1970, more than 70 countries' constitutions had been revised or adopted the principle of a specified quality of environment constituting a human right or of imposing environmental duties on the state. An example could be seen in Article 50 of the Ukraine Constitution that was adopted in 1996, which states that "every person has the right to a safe and healthy environment and to compensation for damage resulting from the violation of this right". Similar wording or provision can also be seen in other constitutions. Article 35 of the Korean Constitution refers to a "pleasant environment" whereas other constitutions such as the Peruvian, Philippine, and Portuguese enshrines for a natural, clean, ecologically balanced environment.¹⁰

The authors are of the opinion that the right to clean and healthy environment should be expressly included in our Constitution. This is because in order to protect such a right, clear governance is needed. The authors are of the opinion that by inserting such a right into the Federal Constitution, it shows the importance of it and it will bring more attention to its governance.

The Uncertainty of Jurisdiction over Environmental Issue

To protect the people's right to clean and healthy environment, the authorities play important roles, especially the government. As mentioned above, Malaysia practices federalism where the authority to govern the country is divided into Federal and State Government. The state government and federal government's legislative jurisdiction is stated in Article 74 of the Federal Constitution and shall be read together with Ninth Schedule of the Federal Constitution.¹¹

According to Article 74 of the Federal Constitution, Parliament may make laws in areas stated in the Federal and Concurrent List whereas the State Legislature can make laws in areas stated in the State and Concurrent List. In the Ninth Schedule of the Federal Constitution, there are three lists, which are the Federal List, State List and Concurrent List that clearly separates the authorities' legislative powers. However, the issue, uncertainty of jurisdiction on duties and responsibility for environmental matters¹² has been commonly raised because if one observes the lists properly, the term, the environment, is left unlisted. In fact, this term cannot be found anywhere in the Federal Constitution.¹³

⁹ Shaila Koshy, 'Make clean environment a clear right in the Constitution, says CJ' *The Star Online* (Malaysia, 13 Jan 2017) < <https://www.thestar.com.my/news/nation/2017/01/13/make-clean-environment-a-clear-right-in-the-constitution/> > assessed 15 January 2018.

¹⁰ Noor Mohammad, 'Environmental Rights for Administering Clean and Healthy Environment towards Sustainable Development in Malaysia: A Case Study' (2014) 9(8) *International Journal of Business and Management* 191, 195.

¹¹ Mukhtar & Mustafa (n 5) 131.

¹² *Ibid* 130.

¹³ Nor Ashikin Mohamed Yusof, 'Environment and The Legislative List of Malaysia Federal Constitution' (2013) 5(12) *Rep Opinion* 68.

According to section 2 of the EQA 1974, 'environment' is defined as the physical factors of the surroundings of human beings. Even though the term, 'environment' is not listed in the three lists, its elements can be seen in these lists. The Federal List covers agriculture, treaties and maritime, the State List covers land, river, forest and airways whereas the Concurrent List covers the conservation of wildlife. All these elements are interrelated and it reflects that the environment is a multi-dimensional issue.

As the environment's elements are correlative, it is hard to determine who should be handling the environmental issue as each authority has no powers to interfere with another authority's matters. In the case of *Mamat bin Daud & Ors v The Government of Malaysia*,¹⁴ it was stated that the law may be declared void on the ground of *ultra vires* if the federal government passes the law on the matter listed in the State List.¹⁵ From here, it is frustrating that there is no unified management system to govern the environmental issues as both parties play a role in it.

Both government's environmental legislation causes needless overlaps and duplication. In a number of cases, it directs us to the diversity of environmental laws in the country as each of them has their own environmental standards.¹⁶ In the appeal case of *Ketua Pengarah Alam Sekitar & Anor v Kajing Tubek & Ors*,¹⁷ the issue was whether the Environment Quality (Prescribed Activities) (Environmental Impact Assessment) Order 1987, a law made under either the EQA 1974 or the Natural Resources and Environmental (Prescribed Activities) Order 1994, or even a Sarawak law made under Natural Resources Ordinance 1949 was applicable to the Bakun dam project. Parliament contended that environmental issues caused by the project should be governed by the EQA 1974 because it applies throughout Malaysia whereas the State Assembly contended that land and river are state subjects and state law should be applied.¹⁸ The Court of Appeal stated both governments are capable of making laws on environmental impact. In order to decide what law is applicable, we have to look into the activity to which the environmental impact is aimed at.¹⁹ However, in reality, it is impossible to determine accurately the extent of duty that the federal and state governments should undertake. It also leads to the fragmentation of enforcement among both parties' agencies.²⁰

In *Malaysian Vermicelli Manufacturers (Melaka) Sdn Bhd v PP*,²¹ it was argued that the offence, namely the polluting of Malacca River, that was charged under the EQA's Environment Quality (Sewage and Industrial Effluents) Regulations 1979 was invalid because of constitutional reasons as rivers are under the State's legislation. The court held that the charge was valid because the Regulation is legislation with respect to item 7 of the Concurrent List, which is public health, sanitation and the prevention of diseases. It was decided that the true nature of the Regulations is for the abatement, prevention, control of pollution and enhancement of the environment, the purpose of which is to

¹⁴ [1988] 1 MLJ 119.

¹⁵ *Ibid* 119.

¹⁶ Saleem, (n 6) 203.

¹⁷ [1997] 3 MLJ 23.

¹⁸ *Ibid* 32-33.

¹⁹ *Ibid* 38-39.

²⁰ Saleem, (n 6) 204.

²¹ [2001] 7 CLJ 74.

protect public health and this area falls within the federal government's legislative powers.²² Here we can see the conflict between the federal and state levels.

The implementation of policies has often been accompanied with other sensitive issues at the Federal and State levels.²³ Malaysia's environmental management policy is in the Third Malaysia Plan,²⁴ whereby the objective is to balance the goals of socio-economic development and maintain sound environmental condition.²⁵ It is being continued in the five-yearly National Development Plans.²⁶ The environmental policies' general aim embodied in the National Development Plans are complemented and further strengthened by bilateral or multilateral commitments through agreements, declarations, resolutions and international conventions.²⁷ Different international conventions have been signed by Malaysia, such as the Earth Summit and the Brundtland Report in 1987.²⁸ As environment issues encompass various governmental activities, it is often said to generate political conflict between different interests in making environmental policy decisions.²⁹

Solution

a. National Environmental Council

Coordination between the federal and state governments is crucial to ensure smooth environment protection. A coordinating mechanism should be established in the form of a 'council' and committees.³⁰ According to Article 95A of the Federal Constitution, a national council is formed. However, there is no specific national council on the environment. In the Sixth Malaysia Plan, the importance to strengthen the inter-agency coordination is evidently recognised with a plan to set up the National Council for the Environment.³¹ However, it was replaced at the time of the Seventh Malaysia Plan.³²

In Nigeria, the 10th National Council on Environment at Lafia Nasarawa State was held on the 15th to the 19th of August 2016. It was chaired by the Federal Ministry of Environment, Permanent Secretaries of State, Ministries of Environment and other

²² Ibid 76.

²³ Ainul Jaria Bt Maidin 'Challenges in implementing and enforcing environmental protection measures in Malaysia' (*The Malaysian Bar*, 17 November 2005).
<http://www.malaysianbar.org.my/environmental_law/challenges_in_implementing_and_enforcing_environmental_protection_measures_in_malaysia_by_ainul_jaria_bt_maidin.html#ftn6> accessed 27 August 2016.

²⁴ Government of Malaysia, *Third Malaysian Plan 1976-1980*.

²⁵ Abu Bakar Jaafar, 'Malaysia Country Report' in Azman Awang, Mahboob Salim & Halldance, J. F. (eds), *Environmental and Urban Management in SEA* (Malaysia: Sultan Iskandar Institute of Urban Habitat and High Rise 1994).

²⁶ Maidin, (n 23).

²⁷ Gregory Rose, 'Regional Environmental Law in South East Asia' (1995) 4(1) *Review of European Community and International Environmental Law* 40, 42.

²⁸ Sham Sani, *Environmental Quality Act 1974 - Then and Now* (Bangi, Malaysia: Institute for Environment and Development, University Kebangsaan Malaysia 1997) 16-17.

²⁹ Robert Garner, *Environmental Politics* (Hemel Hempstead, UK: Harvester Wheatsheaf 1996) 12.

³⁰ Noor Mohammad. 'Environmental Law and Policy Practices in Malaysia: An Empirical Study' (2011) 5(9) *Australian Journal of Basic and Applied Sciences* 1248, 1255.

³¹ Government of Malaysia (1991), *Sixth Malaysia Plan 1991-1995*, para 15.86.

³² Adnan A. Hezri & Mahadi Alizan, 'Confronting the 'New Scarcity'? Environmental Governance in Malaysia' in Sacchidananda Mukherjee & Debashis Chakraborty (eds), *Environmental Challenges and Governance: Diverse Perspectives from Asia* (Routledge 2015).

delegates from 36 states and the Federal Capital Territory. Two issues discussed were encouraging the States' full participation in the implementation of the 'Extended Producer Responsibility Programme' nationwide and urging the Federal Ministry of Environment to develop

In the US, a Council on Environmental Quality (hereinafter known as 'the CEQ') has been formed. It coordinates the environmental efforts of the Federal government and works with agencies and other White House officers in the environmental policies' development and initiative.³³ Several of the responsibilities of the CEQ include the encouragement of government-wide coordination and the balance of competing positions. This will bring federal agencies, state governments and other stakeholder meet together on matters which relates to the environment, natural resources and energy.³⁴ From here, we can see that a Council will be able to strengthen the cooperation between the Federal and State Government as it gives advice and guidance.

b. Amendment of Concurrent List

Furthermore, it is also suggested to place environment as an independent object under the Concurrent List³⁵ as it is one of the crucial issues in Malaysia. Both the Federal and State governments should have equal share of collective responsibility on the environment's protection. This enables both governments to consult and support each other on environment subjects. It also eradicates independent, territorial and institution-centric practices in protecting and conserving the environment.³⁶

In Brazil, its environmental law is a combination of federal and state law.³⁷ The Brazil Constitution has the entire chapter, which is Chapter 6, Article 225. The right of people to a balanced environment is protected. According to Articles 23 and 24 of the Brazilian Constitution, the federal and state government and the municipalities have the common administrative competence in protecting the environment and provides powers for the federal and state governments' concurrent competence to make environmental laws. Brazil's federal agencies have also established national programmes and guidelines; however, the state government can elect to implement them or otherwise, except in cases involving public lands or cross-state issues.³⁸

Recommendations

In the authors' opinion, the alternative way to encourage effective cooperation between federal and state governments is to insert a section requiring the same in the EQA 1974. According to Article 76 of the Federal Constitution, it gives the power to Parliament to legislate for states in certain cases. According to Clause 1, the area is restricted to implement any treaty, agreement or convention between the Federation and any other

³³ The Council on Environment Quality, 'Council on Environmental Quality'.
<<https://www.whitehouse.gov/administration/eop/ceq/about>> accessed from 23 March 2018.

³⁴ Council on Environmental Quality, US Legal <<http://system.uslegal.com/executive-branch/council-on-environmental-quality/>> accessed from 26 March 2018.

³⁵ Mukhtar & Mustafa (n 5) 135.

³⁶ Mohamed Yusof (n 13) 71.

³⁷ Lesley K. Mcallister, *Making Law Matter: Environmental Protection and Legal Institutions in Brazil* (Brazil: Stanford University Press 2008) 22.

³⁸ Ralph H. Espach, *Private Environmental Regimes in Developing Countries: Globally Sown, Locally Sown* (Springer 2009) 106.

country, or any decision of an international organisation to which the Federation is a member. The promotion of the states' law uniformity must be in line with the areas stated in Clause 4, or if so requested by the legislative assembly of any State.

A section on joint forces to manage environmental issues should be inserted in the EQA 1974 by referring to Article 76. As mentioned previously, the term, 'environment' covers a number of areas as defined in section 2 of the EQA 1974. It is the main statute governing the environment in Malaysia, and by inserting the section, it resolves the conflict between parties as the cooperation is required legally and the conflict as to whose responsibility it is to carry out environmental initiatives can be prevented. The environment belongs to everybody and each of us has the obligation to protect it.

Furthermore, if the section was not implemented in the EQA but only a law created under Article 76(1), according to Article 76(3) of the Federal Constitution, the state can choose to not implement the law until it has been adopted by the state legislature. As coordination between both governments is crucial, there is a need to implement a section in the EQA 1974. Furthermore, according to Article 94 of the Federal Constitution, it provides "federal powers in respect of State subjects". The Federal Government can give advice the State Government in respect of any matters where the State Governments can make legal provisions. By implementing a section in the EQA 1974, the State Government can also give suggestions to the Federal Government as there are a few areas where the State government may provide their expertise.

Conclusion

It can be clearly seen that the environmental issues in Malaysia are scattered around the law of our country and there is no clear set of rules or unambiguous guidance in determining which jurisdiction has the authority. The consequences could be grave as it will cause differences among those environmental-related cases and indirectly contribute to the inconsistent interpretation and judgment under this incomplete framework of environmental law. The question of applying federal or state law are all left to the court's interpretation and such decision made could be mixed with the judges' personal perspectives. The same case with the same subject matter might have differing judicial outcome in respect of these environmental law issues.

The political cooperation between the federal and state governments in Malaysia should be strengthened to protect the people's right to a clean and healthy environment. Perhaps it is suitable to quote Tun Arifin Zakaria:

Increased efficiency and enforcement coupled with commensurate punishment, will have a tremendous effect in curbing illegal practices, assisting directly in the protection and conservation of our matchless environment.³⁹

³⁹ An excerpt from the speech by YAA Tun Arifin bin Zakaria, Chief Justice of Malaysia, at the Opening of the Legal Year 2017 (13 January 2017).