

Environmental Laws in Malaysia: Time to Walk the Walk

Azmi Sharom*

I. Introduction

If one were to work on the premise that modern Malaysian environmental law began with the coming into force of the Environmental Quality Act 1974 (EQA),¹ then it can be said that environmental law in this country is now thirty years old.² Of course, it can be argued that laws regarding the environment have been in the country for longer than that. Examples would include the Protection of Wildlife Act 1972³ and the Land Conservation Act 1960.⁴ However, the EQA was the first law to control a broad spectrum of environmental problems. The act also led to the creation of the Environmental Division (in the Local Government Ministry) which later became the Department of the Environment in at first the Ministry of Science, Technology and the Environment⁵ and now the Ministry of Natural Resources and the Environment. It is hard to deny that this Act and this Department, in the eyes of many Malaysians, are synonymous with environmental protection. It is fitting therefore, to examine the developments in the

* LLB (Hons)(Sheffield), LLM (Nottingham), PhD (London); Associate Professor, Faculty of Law of the University of Malaya, Kuala Lumpur, Malaysia. The author chose to publish this paper as it was presented at the Inaugural University of Malaya Law Conference.

¹ Act 127.

² The EQA came into force in April 1975.

³ Act 76.

⁴ Revised in 1989 (Act 385).

⁵ *Sejarah Ringkas Penubuhan Jabatan Alam Sekitar (1975-1995)*, Jabatan Alam Sekitar, Kementerian Sains, Teknologi dan Alam Sekitar Malaysia, 15 April 1995.

Malaysian environmental law at this conference today, in the light of this quiet anniversary.

What I shall attempt to do today is to take a critical look at several environmental laws in the country and make suggestions as to what can be done to improve them. This paper is by no means a finished work and is merely a work in progress which can only be made richer with feedback from the participants in this conference.

II. The National Environmental Policy 2002⁶

This Policy is based on eight principles. These are:

- (i) **Stewardship of the Environment**
Where respect and care of the environment is to be exercised in accordance with the highest moral and ethical standards.
- (ii) **Conservation of Nature's Vitality and Diversity**
Which is in effect the protection of ecosystems to maintain biological diversity.
- (iii) **Continuous Improvement in the Quality of the Environment**
Where these improvements are to be ensured whilst pursuing economic growth and human development.
- (iv) **Sustainable Use of Natural Resources**
- (v) **Integrated Decision-Making**
Where the environment is to be integrated into the decision making of all sectors.
- (vi) **Role of the Private Sector**
Where the role of the private sector in environmental protection and management is to be strengthened.

⁶ Ministry of Science, Technology and the Environment, 2002.

- (vii) Commitment and Accountability
Which in effect means transparency in government in their decision making.
- (viii) Active Participation in the International Community

These principles are then supposed to be realised through seven “green strategies”. These are directed towards the following key areas:

- (i) Education and awareness.
- (ii) Effective management of natural resources and the environment.
- (iii) Integrated development planning and implementation.
- (iv) Prevention and control of pollution and environmental degradation.
- (v) Strengthening administrative and institutional mechanisms.
- (vi) Proactive approach to regional and global environmental issue.
- (vii) Formulation and implementation of Action Plans.

This all may look very impressive except for two facts. First, the policy makes it absolutely clear that the primary concern of the nation is economic development stating as it does that its underlying philosophy is “for continuous economic, social and cultural progress and enhancement of the quality of life of Malaysians, through environmentally sound and sustainable development”.

Perhaps it would be better if the policy places sustainable development as its primary goal as opposed to being merely the method to achieving economic, social and cultural progress. The difference might appear pedantic to some, but it is important because by emphasising economic development, it reflects what the government would favour in the event of a conflict between sustainable development and mere economic development.

Secondly, this document is paternalistic in nature. There are no provisions for any sort of bottom up involvement. The voice of the people of Malaysia is not acknowledged and there is no statement as

to the creation of more transparent system of governance. Transparency and accountability are vital in the creation of good environmental governance.

Short of changing the National Environment Policy (with significant feedback from a civil society), steps that have to be taken now is the dissemination of this policy to all government departments. By this it is not meant the simple posting of the document to heads of departments. There has to be a clearly designed programme where the policy is disseminated in a manner that is not only simple to understand but relevant to the various government bodies. Effort has to be made to link specific policy statements to the everyday workings of these bodies as well as the legislation that governs them. Furthermore, an officer has to be put in charge of taking the responsibility of making this happen in the day to day running of the body. An annual report to the Ministry of Natural Resources and the Environment is also needed to ensure that all government bodies are taking the necessary measures to operate within the principles of the policy.

III. Environmental Impact Assessment (EIA)

The EIA was introduced in the EQA in 1986.⁷ It has now become an important part of the environmental law scene. There are however several serious problems with the EIA system as it now stands:

- (i) It is not a prerequisite to developmental projects.
- (ii) There is a conflict of interest in the writing of the EIA report as the consultants who prepare the report are hired by the development company.
- (iii) There are too many loopholes in the criteria of projects that require an EIA report.

⁷ Amending Act A636/85 included the EIA requirements by adding s 34(A).

Although s 34A (2) of the EQA reads:

Any person intending to carry out any of the prescribed activities shall, before any approval for the carrying out of such activity is granted by the relevant approving authority, submit a report to the Director General. The report shall be in accordance with the guidelines prescribed by the Director General and shall contain an assessment of the impact such activity will have or is likely to have on the environment and the proposed measures that shall be undertaken to prevent, reduce or control the adverse impact on the environment.

The fact remains that projects do go on without the said approval as what happened in the case of *Tenggara Gugusan Holidays Sdn Bhd v Public Prosecutor*,⁸ a case regarding a resort project on the beach of Kampung Pulau Kerengga, Marang, Terengganu. Although the crux of the decision was the definition of “any person”,⁹ the case was brought to court because the EIA report was completed after the project itself was completed, thus making a mockery of the process as well as being in breach of the EQA.

This problem arises perhaps because there are two bodies with the responsibility of approving projects. The final say of course lies in the hands of the Local Authority, as determined by the Town and Country Planning Act 1976.¹⁰ The Department of the Environment (DOE) is to give its approval of EIA report for certain types of projects (as determined by the Environmental Quality (Prescribed Activities) (Environmental Impact Assessment Order 1987)).¹¹ Unfortunately, there is no clear statement as to the relationship between these two bodies with regard to the said approvals. They appear to

⁸ [2003] MLJ 508.

⁹ For an analysis of this case see Azmi Sharom, “Environmental Law”, in Norchaya Talib (ed), *Survey of Malaysian Law 2003* (Kuala Lumpur: University of Malaya Press, 2004) at pp 115–117.

¹⁰ Act 172.

¹¹ PU(A) 362/87.

exist in two separate realms. What can be done perhaps is to spell out that if a project falls within the definition of the Order as a project that needs an EIA, the EIA report must be made and passed by the DOE as a prerequisite to approval by the Local Authority. This will make the situation much clearer and go some way in ensuring the EIA is not circumnavigated. It is pointless to impose a fine on a project developer once a project is completed because although it may increase the coffers of the DOE, the damage to the environment would have already been done.

Another problem with the EIA as it stands is with regard to the appointment of EIA consultants. These are the people who write the EIA report. These are private companies and are hired by the developer. The DOE has a list of consultants which they endorse, but a developer is free to choose his own. It does not take a large stretch of the imagination to see that a consultant is highly unlikely going to prepare an unfavorable report for the very person who is paying him. One possible option is to have developers pay the DOE for an EIA report and the DOE in turns finds and pays the consultant. In this way, the consultant's duty is to the DOE and not the developer. Theoretically this would lead to a more objective and honest reporting.

The final problem is with the loopholes that can be found in the EIA Order. For example housing projects only need an EIA report if they are over 50 hectares in size.¹² All it takes is for a developer to break his project into smaller lots and he can in that way circumvent the EIA requirement. A close examination has to be made of the requirements and a revision done. It may be a good idea to demand an EIA report based not on the size of a project but on its potential harm to the environment, either singularly or collectively.

¹² Section 7 of the Schedule.

IV. Constitutional Issues

Perhaps it is also time to take a long hard look at certain constitutional issues and to make some hard decisions; in particular the State/Federal relationship. In environmental issues the primary concern with regard to the Federal Constitution is the fact that Mother Nature has no time for niceties such as the division of legislative powers.¹³ It follows therefore that there are many environmental issues that cross the jurisdictions of the States and the Federal government.

A large part of the problem manifests itself in everyday governance issues; the management of river basins for example. The Federal government is involved through the DOE and the EQA along with its regulations¹⁴ and the EIA process to control inland water pollution. The state government has a large role to play in controlling the various activities that lead to suspended solid pollution; activities such as logging,¹⁵ land clearance and sand mining.¹⁶ The local governments are in charge of litter,¹⁷ earthworks¹⁸ and town planning.¹⁹

These are but a sample of the bodies that would have responsibilities with regard to the single issue of river basin management. Constitutionally it would be difficult to have a single body governing an issue which clearly falls within the legislative jurisdictions of both the Federal and the State governments, but what is perhaps even more disheartening is the fact that there is not even a unified management system. By this it is meant a system where all bodies work in tandem in an organised and clearly defined manner. Without such a system there could easily be duplication of activities, poor co-ordination of

¹³ As found in Schedule 9 of the Federal Constitution.

¹⁴ Environmental Quality (Sewage and Industrial Effluents) Regulations 1979 (PU(A)12/79).

¹⁵ National Forestry Act 1984 (Act 313).

¹⁶ National Land Code 1965 (Act 56).

¹⁷ Local Government Act 1976 (Act 171).

¹⁸ Street, Drainage and Building Act 1974 (Act 133).

¹⁹ Town and Country Planning Act 1976 (Act 172).

enforcement measures and wastage of resources. Efforts have been made in the form of the Lembaga Urusan Air Selangor, but its success or lack thereof is at the moment unclear.

It does not help that this constitutional malaise is made even more complicated by judicial decisions which confuse matters. Two cases in particular reflect this. They are *Ketua Pengarah Jabatan Alam Sekitar & Anor v Kajing Tubek & Ors*²⁰ or as it is more commonly known, the *Bakun Dam* case, and *Malaysian Vermicelli Manufacturers (Melaka) Sdn Bhd v PP*.²¹ In the former case it was held by the Court of Appeal that the EQA, in particular the EIA provisions regarding the building of dams, was unconstitutional. The reasoning for this was because the EQA was Federal law and dams, being built on land, are therefore a land issue and thus should be the State's right to legislate for. With all due respect, it is submitted that this is a rather narrow method of interpreting the situation.²² Looking at the purpose of the EIA one can see that it is actually, by nature, more akin to town and country planning, which falls in the Constitution's concurrent list²³ of legislative powers.

More troubling of course is that almost all matters governed by the EQA will touch land in one way or the other and taking the Court of Appeal's logic, would therefore be unconstitutional. Sure enough, in the *Malaysian Vermicelli* case this argument was used. The respondents argued that the offence that they were charged with under the EQA's Environmental Quality (Sewage and Industrial Effluents) Regulations 1979, that of polluting the Melaka river, was not valid due to constitutional reasons seeing as how rivers is under the State's jurisdiction.

²⁰ [1997] 3 MLJ 23.

²¹ [2001] 7 CLJ 74.

²² For a more detailed analysis of this case, see Azmi Sharom, "Understanding the Environmental Quality Act 1974", in Mimi Kamariah Majid (ed), *Current Legal Problems in Malaysia* (Kuala Lumpur: University of Malaya Press, 1998); and Nijar, GS, "The Bakun Dam Case: A Critique" [1997] 3 MLJ cxxix.

²³ Where either State or Federal government can make laws.

Fortunately the judge in this case took a more broad view as to the aims and purposes of the EQA in coming to his decision. It was held that the true nature and character of the Regulations is for the prevention, abatement and control of pollution as well as the enhancement of the environment. The real purpose of all these is the protection, promotion, maintenance and enhancement of the health of the public in general; which is within the ambit of the Federal government to legislate for. This being the case, the issue is still not settled as the *Vermicelli* case is a High Court decision. Hopefully future courts will also take the High Court view rather than that of the *Bakun Dam* case.

Another constitutional issue which I wish to delve into here is that of a right to a clean environment. If citizens have a clear right to a clean environment the biggest effect it will have is with access to justice. Such a right will empower public interest litigation and will also strengthen the argument for greater public participation in environmental decision making.

In many countries, this right has been spelt out clearly in the constitution, for example the Philippines and South Africa. In countries such as India, the right has been provided for as an extension of the right to life.²⁴ Here in Malaysia the closest we have come is the case of *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan*,²⁵ where the judge held:

[T]he expression "life" appearing in Art 5(1) does not refer to mere existence. It incorporates all those facets that are an integral part of life itself and those matters which go to form the quality of life. Of these are the right to seek and be engaged in lawful and gainful employment and to receive those benefits that our society has to offer its members. It includes the right to live in a reasonably healthy and pollution free environment.

²⁴ *Rural Litigation and Entitlement Kendra Dehradun and Others v State of UP and Others* (1985) 2 SCC 431 and *Devaki Nandan Pandey v Union of India and others* (1985) 3 SCC 614.

²⁵ [1996] 1 MLJ 261 at p 288.

Unfortunately, this particular opinion is *obiter dicta* seeing as the case was not about a right to a clean environment. However, it is hoped that this sort of adventurous judicial decision making will continue and *Tan Teck Seng* will be expanded upon.

V. Environmental Governance

There are too many related issues that I wish to raise here with regard to environmental governance. The first is transparency and the second is about public participation in decision making. It is submitted that good environmental governance and good democratic practices are inseparable. Yet many day to day environmental decisions are made by an organ that is utterly undemocratic and which conducts its business in a most un-transparent fashion; that body being the local government.²⁶ Firstly, local governments are not elected. This is not the ideal situation from an environmentalist perspective because this is the body which makes such fundamental decisions such as town planning and garbage and sewage management. Local government decision making is not open to scrutiny and there is a presumption of secrecy with regard to their meetings.

This being the case, it is hard to properly analyse local government actions or non-actions. Public activism is therefore faced with a serious obstacle. Not to say there is much public activism. This is due to two factors. The first is the issue of *locus standi*. The cases of *Government of Malaysia v Lim Kit Siang*; *United Engineers (M) Berhad v Lim Kit Siang*²⁷ and *Abdul Razak Ahmad v Kerajaan Negeri Johor*²⁸ have pretty much put the possibility of public interest litigation into the ground. It is time that the words of the late Tan Sri

²⁶ For an examination of local government and the environment see Azmi Sharom, "Local Authorities and Environmental Protection", in Mimi Kamariah Majid (ed), *A Collection of Socio Legal Essays* (Kuala Lumpur: University of Malaya Press, 1996).

²⁷ [1988] 2 MLJ 12.

²⁸ [1995] 2 AMR 1174.

Abdoolcader SCJ (one of the two dissenting voices in the *Lim Kit Siang* case) be taken to heart and the Malaysian judiciary drags the matter of standing away from the dark ages and into the 21st century.

However, even when the Malaysians are given a voice, it is done so which effectively means that a right to be heard is simply that, a right to be heard. The EIA process and the Town and Country Planning Act both have provisions for public views to be aired during the decision making process. Yet this right is not meaningful. There are no provisions that the public's voice must be taken into account in the final decision making. So for example, if one were to give a detailed oral and written presentation to the planning authorities why a smelting plant should not be built in the heart of Petaling Jaya's section 16, they are under no obligation to take one's view into account and neither are they under an obligation as to explain their reasons. It boils down to accountability and one of the best ways to achieve accountability is the duty to give reasons for decision making. This will have to be incorporated into the EIA and the town and country planning processes. The return to a system of elected local governments is also needed for an appointed local government is a non-accountable local government.

VI. Miscellaneous

Here other actions that have to be taken in order to improve environmental law and environmental protection in Malaysia will be discussed. First, there must be a review of all Acts relevant to the environment to increase punishments and perhaps to introduce mandatory prison sentences. This is in order to ensure that environmental harm can be punished as the serious offence it is.

Perhaps some lessons can be learnt from the English Environment Act 1995. First, the fines in the Environment Act are unlimited. The idea of an unlimited fine for convictions through indictment is something to be considered. It would surely be a tremendous deterrent if it is used and made public, which leads to the second lesson and that is the practice of the Environment Agency to

publicise their prosecutions. This has two effects, it raises public awareness as to the environmental offences that exists and it also acts as a warning to industries to keep their activities within the confines of the law.

Finally, the Environment Agency (the English government body that enforces the Environment Act) is not the only body able to prosecute wrongdoers. Private citizens have the right to do so and there have been success stories such as Greenpeace successfully prosecuting an American Chemical company for unlawful discharges in Cumbria.²⁹ This might be an option to be considered for Malaysia, for by opening the power to prosecute to private citizens and groups, the DOE itself need not necessarily be burdened with the entire responsibility for prosecutions.

Education is another matter that often arises when discussing the environment. However, it tends to be of the "let us teach our children the value of nature" type rhetoric. If we were to leave all responsibilities to the children, there won't be much of the environment left. Right now, it is submitted that the people that need educating are those in charge with enforcing the laws. Judges and public prosecutors need to be made aware of the seriousness of environmental damage so that when faced with such a case they would treat it with the gravity it deserves.

The government officers who are on the frontline of enforcement too need education. There has to be a concerted effort in determining the kinds of problems that they face and how to overcome them. One that comes to mind is with regard to the collection of evidence. They will need to know the kinds of stringent standards evidence has to achieve in order for it to be useable in court.

²⁹ Wooley D, Pugh-Smith J, Langham R & Upton W (eds), *Environmental Law* (Oxford: Oxford University Press, 2000).

Whilst on the topic of government service, there has to be also a reconsideration of government service. The complexities of modern government means that the shifting of people from one department to another is counter productive. It is not good having an officer in the Department of Wildlife develop his skills only for him to be transferred to another totally unrelated department. Furthermore, is it not time that an issue as important as the environment deserves a well funded and manned ministry of its own?

VII. Conclusion

Malaysian environmental law and enforcement is far from perfect. But then, nothing ever is. Improvements are a continuous process and it would be unforgivable arrogance for it to be suggested here that the following recommendations will produce a flawless system. However, it is hoped that if taken in the right light and with the right attitude, it could be a start. These are the following recommendations:

- (i) The National Environment Policy is made a living document.
- (ii) The EIA process is reviewed.
- (iii) The constitutional relationship between Federal and State governments *vis-à-vis* the environment is dealt with a holistic view and managerial efficacy.
- (iv) A citizen's right to a clean environment is acknowledged.
- (v) Public participation is made meaningful with good democratic practices like the availability of information and a duty to give reasons.
- (vi) *Locus standi* rules are changed.
- (vii) Penalties in environmentally related legislation are reviewed and improved.
- (viii) Environmental education for those in the legal system and legal education environmental enforcement officers.

Sustainable development used to be such a trendy word. It has suffered from being uttered time and time again but not truly acted upon. If environmental law and enforcement is improved in this country,

then the nation could be said to be heading towards that goal. However, the call for such forward movement does not lie in the government, it lies in the public. Unless and until the citizens of this country demand that the environment be a serious consideration, it never will be.

