

2ND NATIONAL SEMINAR ON ENVIRONMENTAL JUSTICE

ENVIRONMENTAL JUSTICE IN MALAYSIA: ISSUES AND CHALLENGES

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**BELUM RAINFOREST RESORT, STATE PARK, GRIK
PERAK**

Legal Framework on Environmental Laws in Malaysia

1. The development of environmental laws in Malaysia date way back to 1960s (e.g. Land Conservation Act 1960; Environmental Quality Act 1970; Sabah Animal Ordinance 1962; Radioactive Substance Act 1968; and Sarawak Forest Ordinance 1954).
2. Sound environmental law and policies, as part of a national management system are critical for sustainable development. Malaysia is a signatory to the ASEAN Declaration on Environmental Sustainability which, inter alia, declared to “promote conservation and sustainable management of key ecosystems, including forests, coastal and marine habitats and to increase the cumulative forest cover in the

ASEAN region by at least 10 million hectares by 2020”. Malaysia has a forested area of 195,200 sq. km. i.e. 58% of the total land area – 35th in the world. 30% of the earth land surface is covered with tree forest.

3. Parallel to the phenomenal economic growth in the last two decades, Malaysia has undergone a major structural transformation, moving from an agriculture to manufacturing-based economy, with significant social changes. This rapid development has nevertheless brought about significant impacts to the natural environment. It should be noted, therefore, that development cannot confer lasting benefits unless environmental considerations and related ecosystems are protected as integral parts of development planning and decision making¹. It is worthwhile to echo the observation made by Professor Jeffrey D. Sachs, an economist and senior United Nations adviser during his public lecture on “Macroeconomic Challenges in the US, Europe and China” in Kuala Lumpur in 2012. This is what he said while commenting on the need for sustainable development in Asia – “*Asia’s growth is tremendously dirty, polluting, damaging and carbon intensive.*” Sachs said the situation is no different in Malaysia that while on the path of development, it is not developing sustainably. He added that Malaysia has remarkable bio and cultural diversity, but they are not being adequately protected².

¹ http://www.apo-tokyo.org/gp/e_publi/penang_symp/Penang_Symp_P133-143.pdf

² The Sun, October 24, 2012 “*Sustainable development alludes Asia*”.

4. There is no lack of legislations on environmental laws in Malaysia. There are at least 34 Acts related to the environmental matters and various regulations, rules and orders passed for the purpose of environmental protection³. In 1974, the first legal framework on environmental legislation in the form of Environmental Quality Act 1974 (“EQA”) was enacted and came into force in 1975. In passing this law, Malaysia embarked on a committed program to control industrial pollution, including wastewater which was not previously regulated, air pollution from factories and solid waste problems. From 1957 when the country gained independence from the British until the enactment of the EQA, Malaysia had no fundamental laws relating to environmental controls and used separate pieces of legislations such as the Forest Enactment, Mining Enactment and Waters Enactment to deal with environmental issues, as and when they arose. As a federal law, the EQA applies to the whole of Malaysia. It also establishes powers to be exercised exclusively by the federal government and it does not depend on parallel enactments for its effectiveness within state boundaries.

5. The Government of Malaysia is serious in fighting against the environment offenders. In response to the quantitative increase in environmental pollution, the Government has taken further step by enacting various other related legislations such as the Public Cleansing Management Act 2007, International Trade of Endangered Species Act 2008 and Wild Conservation Act 2010. Various agencies

³ See Annexure.

have been set up for the enforcement of these acts. At the state level, efforts have also been taken by the state governments to show their commitments towards preserving the environment by enacting and introducing related environmental laws and policies. By having a proper agency and legislation and good cooperation between the federal and state government, it is hoped that the environmental problem in Malaysia can be controlled effectively.

6. The haze problem it seems is now an annual nuisance. We hear of the same apology from Indonesia, the source of the open burnings, for many years now. Environmental ministers and officials meet every year to discuss the problem, but no solution seems to be in sight. It is now time to place an effective legal framework where cross-border legal actions can be taken against the offenders. In Malaysia, open burnings, even in your backyard is an offence.

Procedural Issues on Environmental Cases

7. In Malaysia, access to civil litigation in environmental cases is very tight in which only persons who can demonstrate sufficient connection with or interest in the subject matter in dispute can seek a judicial remedy. Accordingly, this connection or interest, acts as a pre-condition to a person achieving standing in civil courts⁴. The position is different in the Philippines whereby the courts are more pro-active to welcome public interest litigation in which recognition of standing was given not

⁴ See, e.g, *Kajing Tubek v. Ekran Berhad* (1996) 2 M.L.J. 388; *Ketua Pengarah Jabatan Alam Sekitar & Anor. v. Kajing Tubek* (1997) 3 M.L.J. 23.

only on behalf of persons whose constitutional right to a balanced and healthful ecology is violated, but also on behalf of “generations yet unborn”. By giving such recognition, the Philippines courts are the first court worldwide to do so⁵. In addition, the courts in the Philippines also recognize the remedy of “continuing mandamus” in respect of environmental cases by directing any agency or instrumentality of the government to perform an act or series of acts decreed by a final judgment which shall remain effective until that judgment is fully satisfied⁶. In April 2010, the Philippines introduced the “Rules of Procedure for Environmental Cases” which, inter alia, enable the courts to monitor and exact compliance with orders and judgments in environmental cases. It also provides for a simplified, speedy and inexpensive procedure for the enforcement of environmental rights and duties. In June 2012, we saw the filing of a petition to stop the construction of a \$1.3 billion coal-fire power plant in the Subic Bay, with the petitioners which include environmentalists alleging that the plant will negatively impact the environment with acid rain, warming and acidification of Subic Bay’s seawater. At about the same time, an application for an injunction was also filed in the Malaysian High Court by Gebeng residents and environmentalist groups in trying to stop an Australian company, Lynas from operating its rare earth plant⁷ the second largest outside China, where the court allowed an interim order until October 2012. The petitioners were also concerned with the

⁵ *Oposa v. Factoran*, G.R. No. L-24548 (Oct. 27, 1983); *Laguna Lake Development Authority v. Court of Appeals*, G.R. No. 110120 (March 16, 1994).

⁶ See *Metro. Manila Dev. Auth. V. Concerned Residents of Manila Bay*, G.R. No. 171947-48 (S.C. Dec. 18, 2008)(Phil.).

⁷ Used in products ranging from smart phones to hybrid cars.

negative impact on the environment and on health and safety grounds to nearby residents of Gebeng.

8. The institution of criminal proceedings of environmental cases in Malaysia is in the name of the Public Prosecutor, who is also the Attorney General of Malaysia⁸. Environmental cases are registered as departmental summons in courts and are brought by the specialized Deputy Public Prosecutors from the respective environmental departments. There are no standard procedures that apply to criminal environmental cases and the procedures are essentially the same with the normal criminal cases. In **Ketua Pengarah Jabatan Alam Sekitar & Anor. v. Kajing Tubek & Ors. [1997] 3 MLJ 23**, the Court of Appeal held that the respondents lacked substantive locus standi since they were trying to enforce a penal sanction on the Bakun Dam developer, and this was a matter reserved by the Federal Constitution to the Attorney General, who can decide to institute any criminal proceedings. It was also held that the trial judge did not have sufficient regard to public interest in allowing the claim. There are no standard procedures that apply to environmental cases and the procedures are essentially the same with the normal criminal cases.

Legal Issues and Challenges

- How does the jurisdiction in Malaysia deal with the issue of standing in public interest litigation?

⁸ Article 145 of the Federal Constitution of Malaysia.

- Are there any standard procedures applicable to environmental cases?
- What are other procedural challenges faced by our judiciary on environmental cases?
- What is the role of the courts and its influence on the environmental law enforcement and compliance of natural resource?

Analysis on Environmental Challenges

9. During the 2nd roundtable discussion of ASEAN Chief Justices on the Environment held in Melaka in 2012, three environmental areas and the related legal issues were discussed among the delegates, namely illegal trade of endangered species, forestry and coastal and marine pollution. I wish to highlight them in this paper.

(i) Illegal Trade of Endangered Species

Hunting for illegal wildlife trade has the greatest potential to do maximum harm in minimal time and is a serious threat to a number of endangered and vulnerable species. Illegal wildlife trade and contraband includes live pets, hunting for trophies, fashion accessories, cultural artifacts, ingredients for traditional medicines and wild meat for human consumption. A substantial portion of the global illegal wildlife trade, possibly the largest in the world, takes place in Asia. Demand for illegal wildlife is also reportedly increasing in ASEAN and the region is regarded as a key supplier of wildlife products in the world.

Poaching is said to be a chronic threat to Malaysia's wildlife. According to a WWF statement, *"Most of these poachers are armed and they enter the forests without any fear of being caught"*⁹.

In 2009, a Manifesto on Combating Wildlife Crime in Asia was announced as a result of an international meeting in Pattaya, wherein pledges were made to combat, disrupt and dismantle organized wildlife crimes.

In August 2010, Anson Wong, a notorious wildlife smuggler nicknamed "The Lizard King" was arrested at the Kuala Lumpur International Airport whilst in transit after the man tried to smuggle about 100 live snakes from Penang to neighbouring Indonesia¹⁰. He was then sentenced to six months imprisonment and a fine of RM190,000. On appeal, the High Court enhanced his imprisonment sentence to 5 years. On further appeal, the Court of Appeal reduced his sentence to a jail term of 17 months. In another reported case in 2005, a dead tiger which was cut into four parts and kept in a refrigerator was found in a man's house in Pengkalan Kubor, Kelantan¹¹. The tiger was believed to be smuggled out of the country. The man was only sentenced to a fine of RM7,000. The above two cases are instances where the Malaysian courts were criticized for imposing light sentences against environmental offenders and were urged for a more active judicial awareness in protecting our wildlife from illicit trade.

⁹ Dato' Dr. D. Sharma: Illegal Wildlife Trade Conference in London, February 2014

¹⁰ The Star online (August 28, 2010).

¹¹ The Star online (October 15, 2005).

Only last week, it was reported (the Star) that an attempt to smuggle over 770 protected tortoises from Madagascar to Malaysia was foiled by the Madagascar Customs. In 2013, there was a report in Al-Jazeera, which I watched, on Malaysia being a transit hub of wildlife smuggling and Anson Wong was featured, and the reporter revealed that while at KLIA, he witnessed a well-known smuggler by passed the front desk at the cargo area and within minutes he was posting on his Facebook that he got the supply. Apparently, the route was Madagascar to Thailand, to Indonesia and into Malaysia. It was suggested that customs officials were complicit in abetting wildlife traffickers.

Legal Issues and Challenges

- Is there enough legislation in our country to protect endangered species and to combat illegal wildlife trading?
- Does the law in Malaysia provide adequate sentences against illegal wildlife trader?
- What is the approach taken by our judiciary in combating illegal wildlife trade?
- How to combat corruption (or complacency) of our enforcement officials?

(ii) Forestry

The need for the protection and conservation of forest is becoming more important with the rapid industrialization and urbanization of the world. There are many factors contributing to deforestation such as increase of population, illegal logging, forest fire and economic dependency of the states on forest. Deforestation could result in soil erosion and siltation, climate change, negative effects on forest inhabitants, natural habitats, genetic resources and medicinal plants¹². Not to mention, upsetting biodiversity.

Belum – Temenggor is the largest continuous forest complex in Peninsular Malaysia. It has been in existence for over 130 million years, making it the world's oldest rainforest, older than both the Amazon and the Congo. The danger is that only part of this forest reserve has been gazetted as a State Park in 2007. The rest are production forest, open for development. Imagine if deforestation were to occur here. What do we tell our future generations?

In Malaysia, forests has been given great attention by the Government and there are specific legislations to govern the management of forest such as the National Forestry Act, 1984, Environmental Quality Act, 1974 and Wood-Based Industries (State Legislatures Competency) Act of 1984. Other complementing statutes include the National Land Conservation Act of 1960, National Land Code of 1965, Protection of

¹² Rozanah Abd. Rahman, *Deforestation In Malaysia : A Legal Framework For Ecosystem Protection*, [1996] 4 CLJ.

Wildlife Act of 1972, National Parks Act of 1980, National Environmental Policy and National Agricultural Policy¹³.

The enforcement of the laws relating to forests has been hampered not by the inadequacy of the legislation, but by the lack of enforcement of them. There also seem to be a lack of seriousness and focus on the part of the relevant agencies to combat the perpetrators of these crimes against the environment and wildlife. Forestry enforcement officers are small in numbers to police our vast forests which cover 58% of our land mass. Besides that, multiplicity of the government agencies has also resulted in overlapping jurisdiction and confusion among them as to the implementation of the legislation. The complexity of Malaysia's ecology has also been a challenge to ensure consistent monitoring of enforcement. In addition, forestry-related offences has also become progressive and more well-planned where suitable tools and technology for the effective enforcement of these offences are still relatively lacking to keep up with the technology used by the offenders.

(The *gaharu* wood theft incident at the Air Keroh Golf Club in Melaka. Bark of these trees stripped off.)

Legal Issues and Challenges

- What are the challenges faced by our county in protecting forests?

¹³ *Ibid.*

- How extensive is the issue of deforestation and illegal logging in our country?
- What is the role that can be played by our judiciary in preserving and protecting forests?

(iii) Coastal and Marine Pollution

As a maritime nation with resource-rich seas and invaluable mangroves, atolls and coastal areas, keeping the coastline clean and pollution-free is a matter of grave concern for Malaysia¹⁴. In order to protect and preserve the marine environment, Malaysia has ratified and has been a party to a number of international conventions that deal directly with marine pollution. In term of legislation, the legal regime regulating marine pollution in Malaysia consists *inter alia* of the Environmental Quality Act 1974, the Merchant Shipping Ordinance 1952, the Merchant Shipping (Oil Pollution) Act 1994 (as amended in 2005), the Exclusive Economic Zone Act 1984 and Malaysian Maritime Enforcement Agency Act 2004. It should be noted that even though there are adequate legislations in Malaysia to cope with challenges of the present day marine pollution issues, it is necessary, however, for those laws to be systematically harmonized or fine-tuned to ensure their smooth implementation, locally and internationally¹⁵.

¹⁴ Dr. Abdul Ghafur Hamid @ Khin Maung Sein, *Malaysia's Commitments Under International Conventions And The Need For A Harmonized Legal Regime Regulating Marine Pollution*, [2007] 6 MLJ cxxiv.

¹⁵ *Ibid.*

For instance, under the Environmental Quality Act 1974 (“EQA”), discharge or spill in the territorial sea of oil or oily mixture itself is an offence whereas under the Merchant Shipping Ordinance 1952, such a discharge is not an offence. Only a failure to comply with the Director’s requirement or prohibition is an offence; whereas the penalty is a fine only with no custodial sentence. Meanwhile, the authority to oversee the regulation of marine pollution under the former statute is the Director General of Environmental Quality, whereas the authority for the latter statute is the Director of Marine. In addition, the territorial application of the EQA and the Merchant Shipping Ordinance are very limited whereby the Acts are applicable only within the territorial sea of Malaysia, which may extend up to 12 nautical miles from the baselines. In contrast, the Acts are not at all applicable to the Exclusive Economic Zone (which may extend up to 200 nautical miles from the baselines) and the continental shelf of Malaysia¹⁶ (even though the gap in the statutes is seen to have been filled by the Merchant Shipping (Oil Pollution) Act 1994 (as amended in 2005) to expand its jurisdiction to include the Exclusive Economic Zone of Malaysia).

The 500-mile long Straits of Malacca (with coastline sharing between Indonesia 1640 km, Malaysia 950 km and Singapore 130 km), the second busiest commercial shipping lane in the world (used by 600 ships per day) which some 50 years ago was home to the mystical dugongs or mermaid fish is now heavily polluted and can no longer sustain the growth of sea grass, the main food source of the dugongs.

¹⁶ *Ibid.*

The dugong is now “vulnerable to extinction” although protected under section 27 of Wildlife Protection Act 1985.

Legal Issues and Challenges

- Do we have sufficient legislation governing the coastal zone and marine area?
- What are the challenges faced by the enforcement agency in our country in the enforcement of marine legislation?

ANNEXURE

MALAYSIAN ENVIRONMENTAL LAWS

1. Environmental Quality Act 1974 (Act 127)
 - i. Environmental Quality (Licensing) Regulations 1977 [P.U. (A) 198/77]
 - ii. Environmental Quality (Prescribed Premises) (Crude Palm Oil) Order 1977 [P.U. (A) 199/77]
 - iii. Environmental Quality (Prescribed Premises) (Crude Palm Oil) Regulations 1977 [P.U. (A) 324/77]
 - iv. Environmental Quality (Prescribed Premises) (Raw Natural Rubber) Order 1978 [P.U. (A) 250/78]
 - v. Environmental Quality (Clean Air) Regulations 1978 [P.U. (A) 280/78]
 - vi. Environmental Quality (Compounding of Offences) Rules 1978 [P.U. Environmental Quality (Prescribed Premises) (Raw Natural Rubber) Order 1978 [P.U. (A) 250/78] A) 281/78]
 - vii. Environmental Quality (Prescribed Premises) (Raw Natural Rubber) Regulations 1978 [P.U. (A) 338/78]
 - viii. Environmental Quality (Sewage and Industrial Effluents) Regulations 1979 [P.U. (A) 12/79]
 - ix. Environmental Quality (Control of Lead Concentration in Motor Gasoline) Regulations 1985 [P.U. (A) 296/85]
 - x. Environmental Quality (Motor Vehicle Noise) Regulations 1987 [P.U. (A) 244/87]
 - xi. Environmental Quality (Prescribed Activities) (Environmental Impact Assessment) Order 1987 [P.U. (A) 362/87]
 - xii. Environmental Quality (Schedule Wastes) Regulations 1989 [P.U. (A) 139/89]
 - xiii. Environmental Quality (Prescribed Premises) (Schedule Wastes Treatment and Disposal Facilities) Regulations 1989 [P.U. (A) 141/89]

- xiv. Environmental Quality (Prescribed Premises) (Schedule Wastes Treatment and Disposal Facilities) Order 1989 [P.U. (A) 140/89]
- xv. Environmental Quality (Delegation of Power on Marine Pollution Control) Order 1993 [P.U. (A) 276/93]
- xvi. Environmental Quality (Prohibition on the Use of Chlorofluorocarbons and Other Gases as Propellants and Blowing Agents) Order 1993 [P.U. (A) 434/93]
- xvii. Environmental Quality (Delegation of Power on Marine Pollution Control) Order 1994 [P.U. (A) 537/94]
- xviii. Environmental Quality (Prohibition on the Use of Controlled Substances in Soap, Synthetic Detergent and Other Cleaning Agents) Order 1995 [P.U. (A) 115/95]
- xix. Environmental Quality (Control of Emission from Diesel Engines) Regulations 1996 [P.U. (A) 429/96]
- xx. Environmental Quality (Control of Emission from Petrol Engines) Regulations 1996 [P.U. (A) 543/96]
- xxi. Environmental Quality (Refrigerant Management) Regulations 1999 [P.U. (A) 451/ 99]
- xxii. Environmental Quality (Halon Management) Regulations 1999 [P.U. (A) 452/ 99]
- xxiii. Environmental Quality (Delegation of Power) Order 1999 [P.U. (A) 501/ 99]
- xxiv. Environmental Quality (Prescribed Activities) (Open Burning) Order 2000 [P.U. (A) 308/2000]
- xxv. Environmental Quality (Clean Air) (Amendment) Regulations 2000 [P.U.(A) 309/ 2000]
- xxvi. Environmental Quality (Compounding of Offences) (Open Burning) Rules 2000 [P.U. (A) 310/2000]
- xxvii. Environmental Quality (Delegation of Power) (Investigation of Open Burning) Order 2000 [P.U. (A) 311/2000]

- xxviii. Environmental Quality (Sewage and Industrial Effluents) (Amendment) Regulations 2000 [P.U. (A) 398/ 2000]
 - xxix. Environmental Quality (Control of Emission from Diesel Engines) (Amendment) Rules 2000 [P.U. (A) 488/2000]
 - xxx. Environmental Quality (Prescribed Activities) (Environmental Impact Assessment) (Amendment) Order 2000 [P.U. (A) 489/2000]
 - xxxi. Environmental Quality (Delegation of Powers) (Halon Management) Order 2000 [P.U. (A) 490/2000]
 - xxxii. Environmental Quality (Delegation of Powers) (Perbadanan Putrajaya) Order 2000 [P.U. (A) 233/2000]
 - xxxiii. Environmental Quality (Appeal Board) Regulations 2003.
 - xxxiv. Environmental Quality (Declared Activities) (Open Burning) Order 2003.
 - xxxv. Environmental Quality (Dioxin and Furan) Regulations 2004 [P.U. (A) 104/2004]
 - xxxvi. Environmental Quality (Prescribed Conveyance) (Schedule Waste) Order 2005 [P.U. (A) 293/2005]
2. Atomic Energy Licensing Act 1984
 3. Biosafety Act 2007
 4. Drainage Works Act 1954
 5. Fisheries Act 1985
 6. International Trade In Endangered Species Act 2008
 7. Irrigation Areas Act 1953
 8. Land Conservation Act 1960
 9. Local Government Act 1979
 10. Merchant Shipping (Oil Pollution) Act 1994
 11. National Forestry Act 1984
 12. National Park Act 1980
 13. Parks Enactment 1984
 14. Plant Quarantine Act 1976
 15. Pearl Oyster Shell Fishery Ordinance (Sabah Ordinance)

16. Pesticides Act 1974
17. Protection of Wildlife Act 1972
18. Radioactive Substance Act 1968
19. Sewerage Services Act 1993
20. Street, Drainage and Building Act 1974
21. Town and Country Planning Act 1976
22. Water Enactment 1920 (Revised) Act 1979
23. Water Services Industries Act 2006
24. Wildlife Conservation Act 2010
25. Sabah Animal Ordinance 1962
26. Sabah Biodiversity Enactment 2000
27. Sabah Drainage and Irrigation Ordinance 1956
28. Sabah Environment Protection Enactment 2002
29. Sabah Forest Enactment 1968
30. Sabah Mining Ordinance 1960
31. Sabah Wildlife Conservation Enactment 1997
32. Sarawak Biodiversity Centre Ordinance 1997
33. Sarawak Forest Ordinance 1954
34. Sarawak Natural Resources and Environment (Amendment) Ordinance 2001