

**STRENGTHENING CAPACITY FOR ENVIRONMENTAL
LAW IN MALAYSIA'S JUDICIARY:
TRAIN-THE-JUDGES PROGRAM (TTJ)
10 - 13 JULY 2017
ILKAP, BANGI, Malaysia**

**PRESENTATION:
FEDERAL AND STATE JURISDICTIONS
DR. NORMAWATI BINTI HASHIM
PROF. MADYA NORHA ABU HANIFAH
ELF MEMBER**

FEDERAL CONSTITUTION

NINTH SCHEDULE (Articles 74,77)

LEGISLATIVE LIST

LIST 1
FEDERAL LIST

LIST II
STATE LIST
LIST IIA
SUPPLEMENT TO STATE LIST SABAH
SARAWAK
ARTICLE 77
RESIDUAL POWER

LIST III
CONCURRENT

Relevant areas on environment

Federal List

- Treaties, agreements and conventions with other countries

- Trade, commerce and industry

- Development of mineral resources, mines, mining, minerals, factories, fisheries, maritime

Relevant areas on environment

Federal List

- Communication, transport

- Federal works and power

- Water supplies, rivers, canals except those within one state

Relevant areas on environment

Federal List

- Electricity

- Gas and gas works

-Welfare of aborigines

State List

Land tenure

Permits and licenses for prospecting for mines

Agriculture and forestry

State List

- Local government outside Federal territories Kuala Lumpur, Putrajaya, Labuan, including obnoxious trades and public nuisances in local authority areas
- Water (excluding water supplies), rivers, canals
- Control silt, riparian rights
- Turtles
- Riverine fishing
- Islamic Law

Concurrent List



Animal husbandry



Town and country planning except in the federal capital



Public health, sanitation (excluding sanitation in federal capital), prevention of diseases

Concurrent List

 Drainage, irrigation

 Protection of wild animals, wild birds

 National parks

Concurrent List

 Prevention of cruelty to animals

 Veterinary services

 Animal quarantine

Concurrent List

- Rehabilitation of mining land which has suffered soil erosion
- (Subject to Federal list) water supplies and services
-

Conflict of jurisdictions between Federal and State

- Art. 75 states if state law is inconsistent with the Federal law, and State Law is void to the extent of its inconsistency.
- Scholarly opinions and judicial pronouncement – conflict between State Law and Federal Law, Federal Law prevails:
 - *City Council of George Town v Govt. of Penang* [1967] 1 MLJ 169
 - 2 State Laws invalidated because of inconsistency with federal Local Government Elections Act 1960
 - *Nordin Salleh v State Legislative Assembly, Kelantan* [1993] 3 MLJ 344
 - Kelantan State Law against defections was declared to violate Article 10(2)(c) Federal Constitution which allows Parliament to regulate freedom of association.

Conflict of jurisdictions between Federal and State:
**Ketua Pengarah Jabatan Alam Sekitar v. Kajing Tubek [1997] 3
MLJ 23 [CA]**

- Respondents are 3 of the 10,000 natives living in Sarawak where the Bakun Hydro-Electric Project ('the Project') is situated.
- Following commencement of the Project, steps were taken by appellants to compensate respondents and to resettle them.
- The compensation and resettlement were not challenged.

Conflict of jurisdictions between Federal and State:
Ketua Pengarah Jabatan Alam Sekitar v. Kajing Tubek [1997]
3 MLJ 23 [CA]

- They challenged:
 - (i) the Project, would adversely affect their fundamental rights as their livelihood would suffer from impact on the environment
 - (ii) they had been subjected to procedural unfairness that they had been deprived of their vested right to obtain a copy of the Environmental Impact Assessment ('EIA') of the Project, or to make representation
 - (iii) the appellants, were bound but had failed to observe the requirements of the Environmental Quality Act 1974 ('the Act'), s. 34A

Conflict of jurisdictions between Federal and State:
Ketua Pengarah Jabatan Alam Sekitar v. Kajing Tubek [1997]
3 MLJ 23 [CA]

- Respondents applied to High Court to declare:
 - invalid the Environmental Quality (Prescribed Activities) (Environmental Impact Assessment) (Amendment) Order, 1995 (“the Amendment Order”)
 - Ekran Berhad, the company appointed to carry out the Project, comply with the Act.

Conflict of jurisdictions between Federal and State:
Ketua Pengarah Jabatan Alam Sekitar v. Kajing Tubek [1997]
3 MLJ 23 [CA]

- Dispute was whether the Bakun Dam was to be considered under EQA 1974 (federal environmental legislation) or be governed by Sarawak State law, (Natural Resources Ordinance 1949 (“Sarawak Ordinance”)).

Conflict of jurisdictions between Federal and State:
Ketua Pengarah Jabatan Alam Sekitar v. Kajing Tubek [1997]
3 MLJ 23 [CA]

- Held:
- In the context of State and Federal relations, Parliament is presumed not to encroach upon matters within constitutional authority of a State within Federation.
- The principle of interpretation is Courts should, when determining the scope of Federal and State legislation upon a particular subject, ensure that enactments of each legislative power are read so as to avoid inconsistency or repugnancy between them.

Conflicting jurisdictions between Federal and State:
Ketua Pengarah Jabatan Alam Sekitar v. Kajing Tubek [1997]
3 MLJ 23 [CA]

- Applying settled principles of interpretation, both Parliament and the Legislative Assembly State of Sarawak have concurrent power to make law regulating production, supply and distribution of power, including hydro-electric power.
- In the present case, the place where the power is to be generated is land and water and this is the “environment” which the Project have an impact.

Conflicting jurisdictions between Federal and State:
Ketua Pengarah Jabatan Alam Sekitar v. Kajing Tubek [1997]
3 MLJ 23 [CA]

- “Environment” in question, lies under Item 2(a) of List II and Item 13 of List IIIA (of the Ninth Schedule), within legislative and constitutional province of Sarawak, the State have exclusive authority to regulate, by legislation, the use of it in such manner as it deems fit.
- In the circumstances, the relevant statute that regulates the use of the environment in relation to the Project is the Ordinance and not the Act.

**STRENGTHENING CAPACITY FOR ENVIRONMENTAL LAW IN MALAYSIA'S
JUDICIARY:
TRAIN-THE-JUDGES PROGRAM (TTJ)
10 - 13 JULY 2017
ILKAP, BANGI, Malaysia**

**OVERVIEW OF RELEVANT AGENCIES
AND
NATIONAL MEASURES**

Overview of Relevant Agencies and National Measures

- National Policy on the Environment was adopted in 2002 (NPE)
- NPE outlines strategies to propel country's growth trends towards sustainable development which embodies the three pillars:
 - economic development
 - social development
 - environment protection.
- Ministry of Natural Resources and Environment (NRE) was formed in 2004.

Overview of Relevant Agencies and National Measures (Natural Resources)

Land

- Land – State Land Administration
- Land – planning
- *State Authority* is the highest planning authority in the State responsible for general policies in respect of the planning of the development and use of all land and buildings
- 2nd tier is the *State Planning Committee* (SPC) - power to issue directives which local planning authority must comply

Overview of Relevant Agencies and National Measures (Natural Resources)

Land

➤ Federal intervention: -

National Physical Planning Council

- Chairman - Prime Minister
- Representations from all States to advise both the Federal and State Governments on matters pertaining to town and country planning.
- Enforcement of national policies is **National Physical Plan**
- National policies must be considered in the preparation of **State Structure Plans.**

Overview of Relevant Agencies and National Measures (Natural Resources)

Land

- Malaysia's Second National Physical Plan (2010 - 2020) provides a long-term strategic framework for national spatial planning and includes measures required to shape the direction and pattern of land use, biodiversity conservation and development in Peninsular Malaysia

Native/Indigenous Rights to land

- Native refers to the native of Sabah, Sarawak and the aborigines or 'orang asli' of Peninsular Malaysia.
 - Article 161A (6) and (7)

Native/Indigenous Rights to land

- Article 8(5)(c) Federal Constitution
 - aboriginal people enjoyed a special position inclusive land
- “This article does not invalidate or prohibit any provision for the protection, well-being or advancement of the aboriginal peoples of the Malay Peninsular (including the reservation of land)...”
- Also read with Article 13

Native/Indigenous Rights to land

- Common law recognizes the existence of customary title of the native and their rights on customary land
- *Adong bin Kuwau & Ors v Kerajaan Negeri Johor & Anor* [1997] 1 MLJ 418
 - High court decision affirmed by Court of Appeal, upheld that aborigines had rights in common law over land vested in the State.

Native/Indigenous Rights to land

- “...the aboriginal peoples’ rights over the land include the right to move freely about their land, without any form of disturbance or interference and also to live from the produce of land itself, but not to the land itself in the modern sense that the aborigines can convey, lease out, rent out the land or any produce therein since they have been in continuous and unbroken occupation and/or enjoyment of the rights of the land from time immemorial...In Malaysia the aborigines’ common law rights include, *inter alia*, the right to live on their land as their forefathers had lived and this would mean that even the future generations of the aboriginal people would be entitled to this right of their forefathers...”

-[1997] 1 MLJ 418, p. 420.

Native/Indigenous Rights to land

- Kerajaan Negeri Selangor v Sagong Tasi (2005) 6 MLJ 289 –Court of Appeal
- Sagong Tasi & Ors v Kerajaan Negeri Selangor, [2002] 2 CLJ 543. - High Court's decision.
 - High Court's decision was affirmed by the Court of Appeal.
 - common law recognises a form of native title which reflects the entitlement of the aboriginal people

Reference to other jurisdictions

- *Adong*, and *Sagong Tasi* referred to decisions of other jurisdictions with regards to the rights of the aboriginal people which are of universal interest.
- *Amodu Tijani v The Secretary, Southern Nigeria* [1921] 2 AC 399- Privy Council

Amodu Tijani v The Secretary, Southern Nigeria [1921] 2 AC 399-
Privy Council

- The Privy Council ruled that compensation should be on the basis of full ownership
“The title... may be that of a community. Such a community may have the possessory title to the common enjoyment of a usufruct, with customs under which its individual members are admitted to enjoyment, and even to a right of transmitting the individual enjoyment as members by assignment *inter vivos* or by succession. To ascertain how far this latter development of right has progressed involves the study of the history of the particular community and its usages in each case. Abstract principles fashioned *a priori* are of but little assistance, and are as often as not misleading.”

- [1921] 2 AC 399, p. 403-404.

Mabo No. 2. Mabo v Queensland [1991-1992] 175 CLR.

- To determine tenure of land among native community, Court relied on a report in West Africa:
 - Report - all members of native of community had an equal right to the land although the headman or the head of the family had charge of the land and in a loose mode of speech was sometimes called the owner who held the land for the use of the community or family, and the land remained the property of the community or family.

Overview of Relevant Agencies and National Measures (Natural Resources)

WATER

Supply - Federal

Suruhanjaya Perkhidmatan Air Negara (National
Water Services Commission)

National Water Resources Policy was formulated in
2012

Inter-basin water transfer projects are implemented to supply water to areas experiencing water-stress due to high economic and population growth and spatial and temporal shifts in rainfall distribution.

Overview of Relevant Agencies and National Measures (Natural Resources)

WATER

Tenth Malaysia Plan

- over RM 12 billion were spent on improving water sector infrastructure with over RM 5.6 billion being used for developing the water supply for the rural areas.

Eleventh Malaysia Plan

- Strengthen regulatory framework of the water services industry, expand water supply network and treatment capacity infrastructure and increase the efficiency of water supply services.

Overview of Relevant Agencies and National Measures (Natural Resources)

Forestry

- Forestry :

- State empowered to enact laws on forestry and formulate forestry policy independently.

- Executive authority of Federal Government only extends to provision of advice and technical assistance to the States, training, conduct of research, and in the maintenance of experimental and demonstration stations.
 - National Land Council was established to enable Federal and State Governments to discuss and resolve common problems and issues relating to forestry policy, administration and management, and to enhance cooperation between Federal and State Governments (Portal NRE)

Overview of Relevant Agencies and National Measures (Natural Resources)

Mineral resources, mines, mining, petroleum

- Treaties, agreements and conventions with other countries – Ministry of Foreign Affairs
- Trade, commerce and industry – Ministry of International Trade and Industry
- Mineral resources, mines, mining, petroleum:
 - Ministry of Natural Resources and Environment (NRE) responsible to oversee the Malaysian mining industry.
 - Mining activities involve land which is a State related matter, respective States have power to approve mining applications in consultation with federal agencies like Department of Minerals and Geoscience and the Department of Environment.
 - Malaysia's State-owned Petroleum National Berhad (PETRONAS) dominates the natural gas sector. The company has a monopoly on all upstream natural gas developments, and also plays a leading role in downstream activities and the LNG trade.

Overview of Relevant Agencies and National Measures
(Natural Resources)
Fisheries

- Fisheries - Ministry of Agriculture & Agrobased industry - Department of Fisheries Malaysia
 - Capture Fisheries – Vessel Monitoring system (VMS)
 - Fisheries Technology
 - Program National Key Economic Areas (NKEA)
 - Agro-based industry – Fishery product
 - Biosecurity Program Fisheries

Task

- Divide into 5 groups
- Identify the relevant national laws and regulations in protecting the environment and relating these to actual cases heard at the courts.
- Allocated 20 minutes for the discussions
- Allocated 20 minutes for the feedback

REFERENCES

- Adibah Awang , **Conflict in the Land Law under the Federation Structure**, *eprints.utm.my/5026/1/ICUDM_Paper_on_Conflict.doc Retrieved 12.6.2017*
- Khairil Azmin Mukhtar, Maizatun Mustafa , “Effect of Federal Constitutional Framework to Marine Environmental Law, Policy and Administration in Malaysia”, *Australian Journal of Basic and Applied Sciences*, 6(11): 130-136, 2012 ISSN 1991-8178

REFERENCES

- Ainul Jaria Bt. Maidin, “Challenges in implementing and enforcing environmental protection measures in Malaysia”, http://www.malaysianbar.org.my/environmental_law/challenges_in_implementing_and_enforcing_environmental_protection_measures_in_malaysia_by_ainul_jaria_bt_maidin.html

REFERENCES

- Rudi Arman Ahmad Athsani, “Legal framework of mining industry in Malaysia”,
<file:///C:/Users/busuw/OneDrive/TTJ/Federal%20State%20List.pdf>
- Nor Ashikin Mohamed Yusof, “Environment And The Legislative Lists Of Malaysia Federal Constitution” , Report and Opinion 2013;5(12), <http://www.sciencepub.net/report>
- Report of the National Inquiry into the Land Rights of Indigenous Peoples, SUHAKAM

REFERENCES

- Normawati Binti Hashim, Malaysian Public Law Jurisprudence: Urgent need for a shift of focus towards a dynamic regime. PhD Thesis, University Malaya, 2012.