

## Challenges To The Environmental Protection In Malaysia

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### *Abstract*

*This article addresses the challenges in compliance implementation in Malaysia for environmental protection measurements. The deliberation started with some prevalent Environmental Quality Act 1974 background fact and authorities involved in managing and monitoring issues arises in Malaysia. Issues relating to the environmental issues and challenges through the rapid developments in Malaysia. Some of the developments were poorly planned by developers and local council. Current policies which provide the framework for managing and implementation of the laws and regulations have encouraged in protecting the environment. Nevertheless, there are departments, councils and agencies that have played a role in protecting the environment and handling environmental issues. With the laws and regulations, it helps to conserve and intensify the standard of the atmosphere. The execution of the legislations in accomplishing the means, the country continues to face the task of conflicting and overlapping with the demands for greater urban development and environmental conservation.*

**Keywords:** *environment, jurisdiction, environmental law, Malaysia*

### **Introduction**

Located in Southeast Asia, Malaysia's first being introduced with the English legal system in 1780's. During the introduction of Water Enactment 1920, it was the issues on the environmental problem in Malaysia,

The traditional way in implementing the environmental law is that Parliament passes the law before the government enforces it against the public or any developers and business owners which are considered as the polluters.

The understanding of environmental law is very narrow and considered as not important. The simple idea is to control the environmental pollution in any possible ways, one of them is through the management policy.

The policy of Malaysia's environmental management can be seen in the Third Malaysia Plan<sup>1</sup>. Three principal policies were introduced and it is structured as the guideline on its formulation of environmental protection measures.

The three principles policies are introduced with the purpose to promote sustainable development of the country in order to meet the necessity of rapid change in society. These three principles are National Development Policy, Vision 2020, the Five-yearly Development Plans and the National Environmental Policy.

In order to make these environmental policies to be successful, there must be objectives to be carried out. The general aim of the environmental policy included in the National Development Plan is to further strengthen it by bilateral or multilateral commitments through agreements, resolutions, declarations and international conventions.

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<sup>1</sup> Government of Malaysia, Third Malaysia Plan 1976-1980, (Kuala Lumpur, Government Printers, 1975)

Therefore, in our research, we focus into details through discussion on the antiquity of the environmental legislation development before and after the Independence Day, the separation of powers on its jurisdiction and its overlapping of power.

This will be including the obstacles that caused the problems in enforcing law.

### **Law Relating to Environment**

It is noteworthy that almost all laws enacted before 1974 were sectoral in nature and focused on their respective fields and did not have an integrated approach to address the increasingly complex environmental problems of the modern nation.

#### **Law relating to various environmental problems before independence**

- ◆ **Straits Settlement Ordinance No.3 of 1894** - The main purpose of this enactment is to protect some species of wild bird
- ◆ **Waters Enactment 1920 (Act 418)** was created to control and prevent disruption of river, so not disrupt so that it flows smoothly
- ◆ **Merchant Shipping Ordinance** control marine pollution by watercraft
- ◆ **Poisons Ordinance 1952** to control the use of toxic substances
- ◆ **Animals Ordinance 1953** controls the transmission of animal disease and prohibit brutality toward animals
- ◆ **Mining Act** constrained wastes from mining activities into watercourses
- ◆ **Forest Enactment 1934 Cap 153** to allow the inception of forest reserves and control in logging activities

#### **Post-independence legislation**

- ◆ **Factories and Machinery Act 1967** provides for care in the working environment by requiring the necessities to provide a safe working place
- ◆ **Land Conservation Act 1960** was aimed at preserving the hill land and safeguarding the soil from erosion and the inroads of silt.

Government's action in enacting more comprehensive environmental conservation laws were enacted when Environmental Quality Act 1974 ("EQA 1974") was passed. The main agency entrusted with the Department of the Environment ("DOE") is to lead this legislation.

#### ***Environmental Quality Act 1974***

In Environmental Quality Act 1974, Section 2 defines that, environment indicates the physical factors surrounding human beings including land, water, atmosphere, climate, sound, odour, taste, the biological factors of animals and plants and the social factor of aesthetic.

It was not until 1987 that environmental impact assessment (EIA) procedures were introduced under the EQA to emphasize the importance of preventative controls. Under the EQA 1974, the Environmental Quality (Assigned Activities) (Environmental Impact Assessment) Order 1987 ("EIA Order 1987") was in force in 1988. The EIA Order 1987 was introduced to ensure the activities prescribed in the schedule to the EIA Order 1987 conduct an environmental impact assessment ("EIA") process for prescribed activities.

Section 34A of the EQA 1974 sets out the criteria for an EIA. A person planning to carry out a specified operation shall appoint and present the DG with an EIA report a eligible person. The EIA report should be drawn up in accordance with the DOE guidelines and should include an assessment of the environmental effects of or is likely to be affected by this operation. The EIA study will also include information on the steps proposed for the prevention, mitigation or regulation of adverse environmental impacts.

In recognition of the need to amend current environmental laws, the government gazetted the Environmental Quality (Prescribed Activities) (Environmental Impact Assessment) Order 2015 (“2015 Order”). It has been part of the government mitigation policy for ensuring, at each level of planning, construction and operations, that all development projects take account of environmental factors.

By changing the prescribed activities requiring EIA, the 2015 Order replaces the previous Environmental Quality (Prescribed Activities) (Environmental Impact Assessment) Order 1987 (“1987 Order”).

It should be noted, however, that, before the 2015 Order was in effect on 29 August 2015 for any specified action in compliance with the 1987 order, the 1987 Order shall refer to every environmental assessment report (“EIA report”) authorised or provided by the Director General for Environmental Quality (“DG”).

The introduction of a two-tier approach to EIAs is one of the most notable changes within the 2015 Order. The Order 2015 contains two schedules, the first and the second. Unless ordered by the DG otherwise, EIAs of approved activities as set out in the Second Schedule must be released and made public for public display and comment, and public comments shall be made available.<sup>2</sup>

The Order of 2015 aims to fine tune the 1987 Order's loopholes by reducing thresholds for certain activities, providing more comprehensive provisions. In Item 3(4) of the 2015 Order, plugs the loopholes in the 1987 Order by deeming certain activities to be prescribed activities. This include any activities divided into a size or a quantity smaller than or equal than the size of the activities listed in the first schedule and the second schedule, or any changes in size or quantity that result in the activities falling within the limits specified for the activities prescribed in the 2015 Order. ,

The 2015 order incorporates the idea of a "environmentally sensitive area" and expands the EIA provision to all activities within or near an environmentally sensitive area (e.g. coastal and terrestrial restoration along river banks and extraction of minerals).

It is important that, under some conditions, construction or land clearing in slope areas, land reclamation in man-made islands, the capital dredging and disposal of waste dragging materials and hazardous material activities are now all restricted under the 2015 Order as approved activities. These activities, which have received bad media attention in recent years, now require EIAs under the 2015 order. EIAs are necessary under the 2015 order. There is also a requirement that, depending on the ways and the conditions in which the activities are to be carried out, the EIA reports concerning certain of the above activities should be presented for public comment.

The most common factor in making environmental offenders regardless of the charge is the locus standi and cause the public litigants to enforce environmental protection law failed. There is no clear explanation for the court's discretion. The courts in Malaysia are seen to be inconsistent in interpreting the law as it has given a relatively general view in some cases and limited to others.

In the case of *Government of Malaysia v Lim Kit Siang, United Engineers (M) Berhad v Lim Kit Siang*,<sup>3</sup> standing has been severely limited. According to the fact of the case, the plaintiff depends on his position as a road user, taxpayer, as well as his political position as an MP and Leader of the Opposition, to initiate **locus standi** to defy the legality of any contract of the government for construction of a highway. The Supreme Court<sup>4</sup> rejected him by the reasons that he could not establish any distinction between himself and other citizens that use the same road as road users and he had no special relations

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<sup>2</sup> Environmental Quality (Prescribed Activities) (Environmental Impact Assessment) Order, 2015

<sup>3</sup> [1988] 1 MLJ 50, [1988] 2 MLJ 12.

<sup>4</sup> Predecessor to the Federal Court.

or any exception to the contractor, for example through the holding of shares. This decision makes public-interest litigation extremely difficult.<sup>5</sup>

### **Federal and State Jurisdiction**

Generally, The Federal Constitution<sup>6</sup> has given a clear right to its citizens for a secure protection of living in a good and comfortable environment. When the Constitution was drafted in 1956, the natural purposes were towards the awareness of the individuals of the Reid Commission on the consideration within the Constitution's listed control list. Any people who are involved with the environmental litigation were cleared out with Article 5(1) of the Federal Constitution in the matter of right to life.<sup>7</sup> Thus, it is on the judge's discretion to choose on that particular matter to interpret and decide. The right to life can be defined here as the right to live in a safe and healthy environment of every citizen in Malaysia.

With an increasing environmental concern and a struggle to protect one's livelihood and quality of life, the public in this country has risen up to defend their rights. Every person needs a clean and safe environment. The federal and state governments should therefore be very clear about the balance between the environment and development.

Malaysia's Federal Constitution gives significant powers to the respective states regarding land use and natural resource resources, retaining some special privileges as well as some special rights for the people of Sabah and Sarawak in the Eastern Malaysia.

The Parliament has the authority to govern, control and interfere with the States' matters only in those fields that the Constitution has specifically defined by the Constitution. Accordingly, some key issues which related on the matters of land and natural resources shall still remain as the exclusive authority to be governed by the state law<sup>8</sup>. Therefore, the DOE would only undertake a coordinating and cooperation position with respect to state bodies

Under the Federal jurisdiction, the issue to highlight is whether the Federal government has the competency to work on the subject-matter based on regulations.

By considering the challenges arise on the issues of protecting the environment, especially in the areas related to land use, forestry, generating hydroelectricity, which are also under the state jurisdiction.

The inadequacy of legislation governing sectors or natural resources at the state level, it will still not fall under the federal government to impose the regulations. For states matter, only will be competent for state legislatures to legislate the matters. Anything that relates to the matter under the federal legislation will not be applicable. This causes confusion in law application and agencies to regulate certain projects.

In the example of the controversial case surrounds the authorisations between Federal and State agencies arose during the submission of the proposal for construction of the Bakun Hydroelectric Dam ("Bakun Dam") in Sarawak<sup>9</sup>. There were many issues arise.

The then Minister of Science, Technology and Environment had prescribed a number of activities has to be handled according to the EIA procedure as required in their Environmental Quality (Prescribed

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<sup>5</sup> cf. the Chapters on Bangalore and Karachi; Harding, above n6, pp.260ff

<sup>6</sup> Federal Constitution of Malaysia 1957

<sup>7</sup> Article 5(1) of the Federal Constitution

<sup>8</sup> Article 74 of the Federal Constitution

<sup>9</sup> Ketua Pengarah Jabatan Alam Sekitar & Anor. v Kajing Tubek & Ors.[1997] 3 MLJ 23

Activities) (Environmental Impact Assessment) Order 1987.<sup>10</sup> However, these include the EIA report was not divided by four parts (reservoir, dam, transmission line and undersea cable).

The construction activities of dams and hydroelectric power schemes which had either one or both as following features: (a) dams over 15 meters high and ancillary structures covering a total area in excess of 40 hectares; (b) reservoirs with a surface area in excess of 400 hectares.

At the same time, the existence of Sarawak State Ordinance called the Natural Resources Ordinance 1949 (the Sarawak Ordinance), which under it requires the submission of Environment Impact Assessment (EIA), to the Sarawak Natural Resource Board to review in a few cases of prescribed activities. Under Section 2(1) of Natural Resources Ordinance 1949 (the Sarawak Ordinance), means any of the activities specified in the First Schedule.<sup>11</sup> Nevertheless, it did not evaluate the long term impact, example the water quality.

The Sarawak state government enacted the Natural Resources and Environment (Prescribed Activities) Order 1994, (hereinafter referred to as the "Sarawak Order"), in 1994. It stated the dam project as the prescribed activities. Because it is prescribed under Natural Resources and Environment (Prescribed Activities) Order 1994, it placed the Bakun dam within the ambit of the Sarawak legislation.

Therefore, the jurisdiction of the authorities between the state government and the federal government compromise that the Federal structure inhibits combined environmental policy and its developments at the federal level and state level. The delegation power between the federal and state government makes overall planning for environmental management a complicated exercise.

It is difficult for the Federal government to establish a monitoring system, with the different jurisdiction between federal and states. Especially the states controlled by the opposition. It causes the government to frequently be unable to implement the planning and environmental protection policies and law.

#### **Department of Environment (DOE) and Environment Impact Assessment (EIA)**

With the involvement of the DOE, local councils, agencies and Non-Governmental Organizations (NGOs), one of the issues will be the overlapping powers and authorities in the perspective and the jurisdiction in enforcement.

Implementation for the prescribed activities under the Environment Impact Assessment (EIA) Order 1987 is an example. In implementing the regulation, the list of the prescribed activities requiring an Environment Impact Assessment (EIA) report holding issues consist of issues from the industries and other agricultural irrigation programs that includes land reclamation forestry and fisheries that listed in the First Schedule and Second Schedule.

Assessment made by the DOE to the Environment Impact Assessment (EIA) report for a land development project. The development project should not be in the environmentally sensitive area. Environmentally sensitive area means that the project development should not be in an area which is under the Town and Country Planning Act 1976 and any protected area under any of the Enactment in the State of Sabah or Ordinance in the State of Sarawak. The EIA was assessed in order to make recommendations for the developer, by considering various factors and measurements taken that the results were derived from the EIA reports.

Notwithstanding, the recommendation given to them was not compulsory for them to follow. Therefore, by using the power given to the project developer has further made them use the power and stand on their own.

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<sup>10</sup> Environmental Quality (Prescribed Activities) (Environmental Impact Assessment) Order 1995

<sup>11</sup> Natural Resources and Environment (Prescribed Activities) Order 1994

Compared with Western counterparts, Malaysia is still new with the bureaucracy in managing environmental issues and problems. According to Environment Performance Index (EPI) 2020, Denmark is ranked number one. The country pays attention to their air quality in particular. Energy consumptions in Denmark are coming from renewable energy.

### **Lack of Resources**

In enforcing the law, especially in the area of environmental, it required a large amount of budget allocations. It is because manpower with a related background in the environment is needed. These allocations funding is used in carrying out the operations of enforcement and in ensuring the functions of the law, as well as the manpower allocation.

Expertise is required in reviewing and checking the proposal. Most of the time, the lack of expertise had caused difficulties and time consuming in order to get the development proposal to be verified. Developers have to wait for their application and Environment Impact Assessment (EIA) reports seeking planning permission.

The personnel who is given the responsibility to make new policies and regulations often lack in the environmental knowledge and legal qualification. Most of the personnel are from different backgrounds and not from law backgrounds. Because of their nature of work in verifying the development proposal, they came from different backgrounds and have knowledge from areas that vary and they are given training in these areas.

Therefore, they are under contract basis of employment. By considering all, lacking in funding to hire expertise and personnel causes the existing officials are burdened with excess workloads.

The implementation of policies related with environment has always been sensitive between Federal and State levels. There is always inevitable political confrontation among different political interests underlying any major policy on environment decisions. The issues concern various government operations, which includes transport, land planning, agriculture, industries, housing development and various others.

### **Recommendations**

The legislation related to environmental protection should prioritize the management of natural resources compared to the preventive measurement. The law itself must include preventing environmental damage by development activities, based on planning environmental policies.

Besides, the government actively promotes and creates awareness among public participation in protecting the environment. With the awareness coming from the public, it will be much easier to successfully implement environmental policies and legislation.

Allocation of budget for manpower and expertise in monitoring and managing the environmental policies should be taken into consideration. Government also needs to give more powers in dealing with environmental problems rather than leave it to the judgement of the states to avoid mending the power while overseeing the natural resources such as land which are incorporated in the Federal Constitution.

### **Conclusion**

This article discussed a number of issues concerning environmental law policy which include issues on challenges in implementation of policy in protecting the environment. In overcoming the issues, all relevant departments, agencies and NGOs should committed and contribute according to their jurisdiction power, including the enforcement of the law.

From a policy point of view given, to the related origins and purposes, it is unclear the intensity of similarities between the field of environment and the climate change initiative in sharing the same objectives and policies.

The overlapping powers and jurisdiction between the federal and states, including related agencies, reflects that the functions of all are separated by different ministries and bureaucracy. The implementations are different based on their specialized status and mandates. It is believed that Malaysia has taken several measures to abate pollution including implementing emissions standards, conducting inspection, maintenance standards and enforcing stricter penalties for non-compliance of the law.

Finally, the growing awareness and capacity to understand the link between pollution and climate change will eventually help this country to manifest a concerted holistic approach on issues of climate protection and pollution control.

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