

# Human Rights to Environment in Malaysia

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**ABSTRACT:** In Malaysia, there is no specific provision relating to environmental protection in the Constitution but the legislative lists contain all the different components of the environments. The Federal Constitution contains provisions that echo the most fundamental of rights as set out in the Universal Declaration – the right to life and liberty, equality before the law and equal protection of the law, freedom of movement, freedom of speech, assembly and association, freedom of religion, the right to education and possession of property. In this provision, the right to life can be described as the right of every citizen in Malaysia to live in the healthy and clean environment. Human rights to environment means the right of all persons, communities and peoples to a safe, secure, healthy and ecologically sound environment that is protected, preserved and improved both for the benefit of present and future generations, and in recognition of the inherent value of ecosystems and biodiversity. Is there such a thing as environmental rights in Malaysia? In this country, we do not have ‘green-bench’ and the judiciary in general is bound by the ‘black letter of the law’. Hence, numerous calls have been made to the Malaysian Government to amend the Constitution, so as to spell out the public rights to have clean and healthy environment. Nevertheless, there should also be a review of the Constitution to clearly define responsibilities between the state and federal governments in respect of environmental matters for subjects specified in the Constitution.

**Keywords:** human rights, environment, quality, legislation, health

## Introduction

Environment is the representative of physical component of the earth which surrounds man at a given point in space and time. Environment can also be defined as the sum of all social, economical, biological, physical or chemical factors which constitute the surroundings of man. Human beings fully depend on environment for his needs – food, shelter, medicines and recreation.

Human activity is the major threat to environment. It is possible to have development without destroying the environment. Every component of the environment is constantly threatened due to destruction of natural resources due to increasing human demand and development activities. Such over exploitation of environmental components is creating problems all over the world. Human activities affecting the environment are known to affect not only man himself but also other living organisms. These reasons indicate the prime urgency to conserve and preserve of environment. It is

necessary therefore, to have strongly implemented environmental legislation to prevent the environment from continuous deterioration. Laws are essential in guiding enforcement efforts and in the formulation of subsequent policies in carrying out environmental requirements (Environmental Protection Agencies, 1992).

Human rights to environment means the right of all persons, communities and peoples to a safe, secure, healthy and ecologically sound environment that is protected, preserved and improved both for the benefit of present and future generations, and in recognition of the inherent value of ecosystems and biodiversity. Is there such a thing as environmental rights in Malaysia?

## Environmental status and legislation in Malaysia

The Malaysian economy has made great strides. However, some of the development projects have been implemented with such haste that many sectors of Malaysian government and civil society are beginning to question the direction and costs of this projects to the environment. Technological changes and development inevitably impinge on the environment, destroying the ecosystem and the resources on which man’s existence depends (Haliza, 2008).

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Currently, Malaysia is facing many pressing environmental problems such as; depletion and degradation of resources, increasing frequency and severity of floods in urban centre, pollution and contamination of air, pollution of rivers and disposal of toxic materials. Besides that, there are other hazardous substances which are discharged in to the environment but are not under any enforcement regulation at all. For example, many of the industrial waste products scheduled as toxic and not easily degradable or not degradable at all when let in to the environment would lead to serious health and environmental hazards. Therefore, Malaysian Government introduced a variety of regulatory and non-regulatory measures in order to balance the goals of socio-economic development and the maintenance of sound environmental conditions.

Environmental legislation has long been used in Malaysia as one of the strategies to manage the environment. Environmental legislation means the laws for the protection of environment (Shradha et al., 2005). In this country, the consciousness of taking the environment into account whilst planning development was codified in 1974 with the passing of the Environmental Quality Act 1974. This act was the key legislation that paved the way for the development of other environmental legislations in Malaysia. This 1974 legislation covers a wide range of environmental problems such as air pollution (section 22), noise pollution (section 23), pollution on land (section 24) and pollution of inland waters (section 25). Several pieces of legislation have been enacted on matters relating to environment such as Land Conservation Act 1960, Wildlife Act 1972, National Park Act 1980, National Forestry Act 1984, Fisheries Act 1985 and Road Transport Act 1987. All these acts were revised, updated and expanded from time to time to ensure their efficiency. The existence of these laws indicates the awareness on the need for environmental conservation.

The Environmental Quality Act 1974 empowers the Minister of Environment and Natural Resources to prescribe regulations and orders and to establish standards for the environmental protection from the effects of economic activities. Furthermore, Section 3 (1) of this act allows the appointment of Director-General of Environmental Quality to administer this act. The Director-General's powers, duties and functions, among others, shall include coordination of all activities relating to the discharge of wastes into the environment and preventing or controlling pollution and protecting and enhancing the quality of environment (Jamaluddin, 1996). To further enhance the strategy of the Department of Environment in controlling pollution and remedying adverse environmental conditions, several regulations were gazetted for enforcement under the Environmental Quality Act 1974. Presently, there are more than 46

environment-related legislations available in Malaysia.

### **Human rights and environment**

The Universal Declaration of Human Rights was adopted in 1948 by the General Assembly of the United Nations. It represents the core human rights values that all human beings are entitled to, regardless of nationality, race or culture. Human rights are derived from the principle of Natural Law. The idea is that the individual has right, claims upon society, or against society; that these rights which society must recognise, on which it is obliged to act, are intrinsic to human right. "Human (person) possesses rights because of the very fact that it is a person, a whole, a master of itself and of its acts... by natural law, the human person has the right to be respected, is the subject of rights (Shradha, 2005).

Environmental rights could be described as right to environment, a 'right of the people to a healthful environment', a right to live in an 'environment and surroundings which are conducive to health', and, a right to 'use natural resources in accordance with customary traditions and practices which encourage community-based sustainable natural resource management' (Asia Pacific Forum, 2007). Every country should have responsibility to protect, preserve, remediate and improve the environment for their citizens.

Calls for human right to an environment of a particular quality have found voice in a variety of United Nations ('UN') declarations, resolutions and statements of principle (including the preventive principle). These supports the view that a human right to environmental quality is emerging, (see for example the various declarations of principle at the international level, including those which emerged from the 1972 Stockholm Conference on the Human Environment ('Stockholm Conference'), the 1992 Rio Conference on Environment and Development ('Rio Conference') and the 2002 World Conference on Sustainable Development). Although both human rights protection and environmental protection are relatively well-developed areas of public policy, recognition of the linkage between the two has been slow to develop.

In Malaysia, the Federal Constitution contains provisions that echo the most fundamental of rights as set out in the Universal Declaration – the right to life and liberty, equality before the law and equal protection of the law, freedom of movement, freedom of speech, assembly and association, freedom of religion, the right to education and possession of property. In this provision, the right to life can be described as the right of every citizen in

Malaysia to live in the healthy and clean environment.

With the growing environmental consciousness and the struggle to defend one's livelihood and quality of life, public in this country have stood up to fend for their rights. Every citizen needs clean and healthy environment because the state of health of the people does not depend on the number of doctors and hospitals only, but most important is the pristine environment. Stress on environment contaminates our air, water, food etc., and effecting human health. Therefore, the federal and state governments should be very clear about balancing between environment and development.

### Defining right to quality environment

The international community has long sought to define a human right to environmental quality. First, the Stockholm Declaration referred to "an environment of a quality that permits a life of dignity and well-being". In 1993, the UN World Commission on Environment and Development report proposed a right to "an environment adequate for . . . health and well-being". In 1992, the Rio Declaration coupled environment and development, endorsing the principle of 'sustainable development', that is, development that meets the developmental and environmental needs of present and future generations. In 1994, the report of the UN Special Rapporteur on Human Rights and the Environment included the proposed right to a secure, healthy and ecologically sound environment, (Principle 2).

Developments have also occurred at the regional and national level and these have been equally diverse. While both the Inter-American and African human rights instruments recognise a human right to environmental quality, the former recognises an 'individual', and the latter, a 'peoples' right. At the national level, over 27% of national constitutions define a right to a clean and healthy environment but in a variety of ways (Asia Pacific Forum, 2007).

### Human rights and environmental legislation in Malaysia

Article 4 of the Federal Constitution declares that the Constitution is the supreme law of Malaysia. But, there is no Constitution right to environmental protection. However, recent court decisions had indicated that the right is implicitly provided by Article 5, which guarantees right to life and liberty. In the case of *Tan Teck Seng v Suruhanjaya Perkhidmatan Pendidikan* (MLJ, 1996), Gopal Sri Ram JCA in his judgement state:

"...the expression 'life' appearing in art (5) 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 right to seek and be engaged in lawful and gainful employment and to receive those benefits that our society has to offer to its members. *It includes the right to live in a reasonably healthy and pollution free environment* (the emphasis is mine)." (MLJ, 1996)

This is a major boost for environmental law in this country but exactly how far the courts will go in giving teeth to this right remains to be seen. But, it must be pointed out that this case is on unfair dismissal and there is no issue on environment.

The other case (*Adong bin Kuwau & Ors v Kerajaan Negeri Johor & Anor* 1997 – MLJ 418 1998) which has a direct implication on environment was decided based on article 13 which provides for right to property. In this case Mokhtar Sidin JCA pronounced that the Plaintiffs (the aborigines) have propriety rights over the Lingui valley and the defendants had deprived them the rights. The Plaintiff in this case was said to have been deprived the right of heritage in land, freedom of inhabitation or movement under Article 9(2) -deprivation of produce of the forest, deprivation of future living for himself and his immediate family; and deprivation of future living for his descendants. However the judge made no reference that such deprivation was also tantamount to denial to healthy and decent environment to live for the aborigines. From these two cases, it is apparent that the judiciary appreciated the existence of the right to environmental protection; however hesitate to expand the ambit of the right to life under Article 5 to include the right to environmental protection. Maybe, this is because environmental right is not specifically stipulated and the court is of the opinion that their duty is to interpret the law and not make new law (Faridah, 2001).

The Malaysian Court of Appeal has interpreted the right to life broadly as extending beyond mere existence to the quality of life, and '[including] the right to live in a reasonably healthy and pollution free environment'. However, in a more recent case, the Malaysian Court of Appeal reinterpreted the right to life in a more restricted manner.

In Malaysia, there is no specific provision relating to environmental protection in the Constitution but the legislative lists contain all the different components of the environments. Matters of federal responsibility include the development of mineral resources; marine and estuary fisheries; pest control; medicine; water supplies; and many industrial and infrastructural activities. Matter of state responsibility include land; agriculture and forestry;

state works and water; and riverine fisheries. Matters of concurrent responsibility include wildlife; town and country planning; public health; rehabilitation of eroded and mined land; and drainage and irrigation (Mohideen and Shahridan, 1996). The individual legislation made by either the Federal Government or State Governments actually follow the provisions enumerated in the Constitution. The Federal Government in their efforts to create uniformity in the state laws have often acted according to the provisions in the Federal Constitution to enact uniform legislation over matters related to environmental resources and their use by the various states. This action has been well accepted by all the states in Peninsular Malaysia (Jamaluddin, 2001). The Environmental Quality Act 1974 was enacted by the federal government and the Department of Environment is also a federal agency as well.

Department of Environment is a federal agency, because of which there does not appear to be full control over environmental resources. Matters relating to land, forest water resources as mentioned earlier are under the jurisdiction of the state or enacted under different legislation, which are not under the charge of the Department of Environment. As such there is an underlying conflict between the State and Federal authorities regarding environmental matters (Jamaluddin, 2001). For example, the Environmental Quality Act 1974 was enacted by the federal government, but the management of the environmental resources as mentioned above still remains within the purview of the state.

The state governments have exclusive jurisdiction on matters related to natural resources such as land and forests. The state governments might need to take more drastic conservation measures to protect the forests and wildlife. They had, in the past, degazetted large areas of forest reserves to permit logging and agriculture (Mohideen, 1996). In several instances, some state governments and the federal government have come into conflict on proposed measures to be taken to conserve forests. The Endau-Rompin case represented a clash of interests and priorities between the Federal and State governments. The Federal interest was, *inter alia*, in forest conservation. The State's interest was in generating as much revenue as possible from land-based resource, which is under its jurisdiction. Yet the Federal Government was not without some constitutional powers in the field of forest conservation. In the event it did not invoke these powers (Shafruddin, 1987). The Federal Government appears to have opted for a consultative and consensus-building approach ensuring that the final decision rested with the state authorities (Jamaluddin, 2001).

Furthermore, in implementing the Environmental Impact Assessment (EIA) requirements, there have been cases where the state approved certain projects even when the mandatory EIA reports by the project proponents were yet to be approved by the Department of Environment. From the view point of the Constitution, since the existence of environment is only by interpretation, the state approving authorities have the right to do so as land matters especially are within the jurisdiction of the state governments. However, such action is not only detrimental to the environment, but also can cause difficulties to the federal implementing agency. It gives us a clear picture that successful enforcement of the Environmental Quality Act and other environmental resources legislation and the implementation of environmental policies in Malaysia can be fully realised only when there is total co-operation between the state and federal authorities.

In 1956 when the Constitution was drafted, threat to environmental was not as serious as it today as the economy was based on agriculture. But today, Malaysia is moving towards industrialization and therefore matters relating to environment must get the attention not only from ordinary law but, the supreme law of the country i.e. the Federal Constitution (Faridah, 2001). For that reason, the federal government should consider amending the Constitution to obviate these problems. Since environmental protection is crucial to ensure the survival of humankind and other living things, it is high time that the Constitution which deals with fundamental liberties is amended to include the right to a clean and safe environment and the word 'environment' be inserted as Federal subject matters in Federal List, 9<sup>th</sup> Schedule as most the major and important matters are handled by the Federal government. The legislative list should be amended to give exclusive power to the federal government to legislate on matter relating to the protection and preservation of environment in this country.

In 1992, the Environmental Law Review Committee also made a recommendation to amend the Constitution and spell out the right of individual to have a healthy and clean environment (Ministry of Science, Technology and Environment, 1992). However this recommendation was not carried out till today. Another call to amend the Constitution was made at CAP-SAM National Conference State of the Environment in Malaysia held in 1996 where it was stated that: "Since environmental protection is crucial to ensure the survival of mankind and other living things, as had been acknowledged by world leaders during the Rio Conference, it is timely that Part II of the Constitution which deals with fundamental liberties be amended to provide for the

right to a clean and safe environment (Mohideen and Shahrizan, 1996).

Apart from looking at the Federal Constitution, one can examine other legislations if there are any rights for ordinary citizens to participate in decisions affecting the environment. To a limited extent, there are some laws in Malaysia which enable the public to participate in the planning process and in the review of projects for their environmental impacts. The Town and Country Planning Act 1976 for example, introduced the concept of the Structure Plan and Local Plan. The idea of the Act was to ensure much more co-ordinated planning of development projects in each State with participation of local population. Although, in essence, this appears as a good piece of legislation in reality it has very little meaning (Meenakashi and Chee, 2001). The reason is, that the process of obtaining public comments is a mere formality, just to comply with the law. The final decision as to what the plan should be rests with the State Planning Committee and there is no obligation on the part of the State to consider and adopt the views of the people. Nor is there a process to enable those who submitted their comments to know if their criticisms or viewpoints were taken into account at all (Meenakashi and Chee, 2001).

The Environmental Quality [Prescribed Activities] (Environmental Impact Assessment) Order 1987 passed under Environmental Quality Act 1974 makes it a mandatory requirement for 19 categories of activities to have environmental impact assessment report (EIAS) submitted and approved by the Department of Environment before any activities can be carried out. Large scale public participation in such a process is unknown. The reasons for lack of effective public participation in the review process is not that public is not interested but because there is hardly any information provided as to what EIAs have been submitted for review with the Department of Environment. In many instances, the projects have been approved by Department of Environment on the basis of preliminary EIAs, hence, not requiring public comments. The existing EIA review process is perhaps the only statutory mechanism that currently exists for public interest groups and ordinary citizens to effectively voice their concerns over projects detrimental to the environment and people. Even this process has currently been undermined, as is evident in the case of the Bakun Dam project in Sarawak (Meenakashi and Chee, 2001).

The National Land Code 1965 was enacted to consolidate various pieces of legislations that deal with the above matters. It deals with categories of matters relating to the use of land such for agriculture, building and industry. It also makes provision for the conversion of category of use. However, there is no provision in this act that requires an Environmental

Impact Assessment in which public could participate before approval of change of category of use. The government should consider amending the National Land Code to include a provision requiring EIA before approval of any change in category of use (Mohideen and Shahrizan, 1996).

## **Conclusion**

Some countries like India have comprehensive and expansive case laws on the interpretation and application of international environmental law principles and environmental rights. The Indian Supreme Court has recognised that sustainable development, the precautionary principle, the polluter pays principle, and the principle of intergenerational equity, are part of Indian environmental law. At times, the Supreme Court has also ordered state courts to constitute special 'Green Benches' to decide environmental matters. The Supreme Court of Thailand has recognised that '[a] person [has] the right to clean air for good health and quality of life, the right to enjoy nature, and the right to be free from the affects of environmental damages.

In Malaysia, where the right of citizens to have clean and healthy environment life is not otherwise protected in the Constitution, the domestic legislation recognises this right. Malaysian courts also recognise a link between the right to an environment of a particular quality and the right to life. The courts have used cases relating to environmental issues to comment on how environmental harms may affect other rights. But, in this country, environmental proceedings can only be instituted by the Attorney-General, and the rate of environmental prosecutions is low. Individuals and NGOs have limited standing to take action against projects affecting the environment. The government should be proactive to protect individuals and the environment from continuous deterioration.

In Malaysia, we do not have 'green-bench' and the judiciary in general is bound by the 'black letter of the law'. Hence, numerous calls have been made to the Malaysian Government to amend the Constitution, so as to spell out the public rights to have clean and healthy environment. Nevertheless, there should also be a review of the Constitution to clearly define responsibilities between the state and federal governments in respect of environmental matters for subjects specified in the Constitution.

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