



Should Environmental Rights be a Constitutional Right in Malaysia?

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Abstract. In recent times, there has been international recognition of the fact that environmental rights are human rights. Despite being a State Party to many international conventions that proclaim environmental rights as human rights, Malaysia has yet to explicitly recognise this in any of her domestic legislation, much less the Federal Constitution. This article argues that given the inter-generational nature of environmental rights, there is immediate necessity for Malaysia to boldly and expressly proclaim environmental rights as a human right by including environmental rights as a fundamental liberty in the Federal Constitution. For the purpose of this research, a qualitative research method is adopted. The data collection method is document analysis consisting of both primary and secondary sources such as the Federal Constitution, international instruments, textbooks, journal articles, published law reports, and case law. The research found that the time is ripe for Malaysia to memorialise her international obligations by declaring environmental rights as a separate and distinct human right in the Federal Constitution. Environmental rights deserve to be enshrined and preserved for time immemorial in the supreme law of the land, because only then will there be longevity and continuity in the quest to conserve and preserve the environment not only for the foreseeable future, but for the future generations yet unborn that stand to inherit the Earth.

Keywords: Environmental Rights, Human Rights, Constitutional Rights

1 Introduction

In recent times, there has been more widespread recognition of the fact that environmental rights are closely and inevitably linked and intertwined with human rights. Human rights are usually measured through civil and political rights such as equality before the law, freedom of speech or free and fair elections; or social and economic rights such as access to food, shelter and clothes or livelihood. However, the landscape of human rights that is now gaining momentum all over the world is the idea that underlying all these concepts is first and foremost, the right to a clean and healthy environment.

Rapid growth in human population naturally led to rapid development in terms of housing, transportation and infrastructures, and a higher demand for food. The accu-

mulated effect of the activities of mankind over thousands of years, together with natural occurring phenomena such as volcanic activity and earthquakes, have created new and bigger threats to all inhabitants of Earth, such as climate change, depletion of natural resources, pollution and food scarcity. Today, there is a very real risk that a threat to the environment means a threat to human existence and species survival. In other words, there is now growing recognition of a direct link between the preservation of the environment and basic human rights.

Recognising this burgeoning threat, the international community sprang into action by declaring environmental rights as human rights via various international conventions and United Nations General Assembly Resolutions. Meanwhile, many countries around the world have seen it fit to include environmental rights as a constitutional right in their respective jurisdictions. However, despite being a State Party to many of these international conventions, Malaysia has unfortunately still not taken any action to explicitly declare environmental rights as an actionable legal right, much less as a constitutional right. This has resulted in at least one known situation where there was a wrong without a remedy [1], which goes against the ancient *doctrine of ubi jus, ibi remedium*.

For the purpose of this research, a qualitative research method is adopted. The data collection method is document analysis consisting of both primary and secondary sources such as the Federal Constitution, international instruments, textbooks, journal articles, published law reports and case law. The research found that the time is ripe for Malaysia to memorialise her international obligations by expressly declaring environmental rights as a separate and distinct human right in the Federal Constitution. Environmental rights deserve to be enshrined and preserved for time immemorial in the supreme law of the land, because only then will there be longevity and continuity in the quest to protect and conserve the environment not only for the foreseeable future, but for the future generations yet unborn that stand to inherit the Earth.

2 International Recognition of Environmental Rights as Human Rights

2.1 International Conventions

The United Nations Conference on the Human Environment 1972 ('Stockholm Conference') was to all intents and purposes the first world conference focused solely on environmental issues [2]. The participants adopted a series of principles for sound management of the environment including the Stockholm Declaration and Action Plan for the Human Environment and several other resolutions. The Stockholm Declaration recognized and proclaimed that 'the protection and improvement of the human environment is a major issue which affects the well-being of peoples and economic development throughout the world; it is the urgent desire of the peoples of the whole world and the duty of all Governments' [3]. The Stockholm Declaration contained 26 principles which placed environmental issues at the forefront of international concerns and marked the start of a dialogue between industrialised and developing countries on the

link between economic growth, pollution, and the well-being of people around the world. Some important principles of the Stockholm Declaration include:

Principle 1

Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations. In this respect, policies promoting or perpetuating apartheid, racial segregation, discrimination, colonial and other forms of oppression and foreign domination stand condemned and must be eliminated.

Principle 2

The natural resources of the earth, including the air, water, land, flora and fauna and especially representative samples of natural ecosystems, must be safeguarded for the benefit of present and future generations through careful planning or management, as appropriate.

Principle 21

States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

Principle 24

International matters concerning the protection and improvement of the environment should be handled in a cooperative spirit by all countries, big and small, on an equal footing. Cooperation through multilateral or bilateral arrangements or other appropriate means is essential to effectively control, prevent, reduce and eliminate adverse environmental effects resulting from activities conducted in all spheres, in such a way that due account is taken of the sovereignty and interests of all States.

The United Nations Conference on Environment and Development ('UNCED'), also known as the 'Earth Summit', was held in Rio de Janeiro, Brazil, from 3-14 June 1992 [4]. This global conference, held on the occasion of the 20th anniversary of the Stockholm Conference, focused on the impact of human socio-economic activities on the environment. The UNCED highlighted how different social, economic and environmental factors are interdependent and evolve together, and how success in one sector requires action in other sectors to be sustained over time. The primary objective of the UNCED was to produce a broad agenda and a new blueprint for international action on environmental and developmental issues that would help guide international cooperation and development polity in the 21st century. For the first time, the UNCED concluded that the concept of sustainable development was an attainable goal for all the people of the world, regardless of whether they were at the local, national, regional or international level. It also recognised that integrating and balancing economic, social

and environmental concerns are vital for sustaining human life on the planet. Such an integrated approach is possible through new perceptions of the way human beings produce, consume, live, work, and make decisions.

One of the major results of the UNCED Conference was Agenda 21, a program calling for new strategies to achieve sustainable development in the 21st century. It also led to the Rio Declaration and its 27 universal principles and the United Nations Framework Convention on Climate Change (UNFCCC), as well as to the creation of the Commission on Sustainable Development. The most recent result of the UNCED Conference is the 2030 Agenda for Sustainable Development adopted at the United Nations Sustainable Development Summit on 25 September 2015, which provided for 17 Sustainable Development Goals (SDG 17). Some of the more pertinent principles of the Rio Declaration include:

Principle 1

Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.

Principle 2

States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

Principle 10

Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.

It is really after the Rio Declaration, and in particular Principle 10 thereof which prescribed three pillars of environmental democracy (access to information, public participation and access to justice), that saw many international calls for the embodiment of Principle 10 into domestic legislation, which was the international standard of real environmental human rights.

On 8 October 2021, the United Nations Human Rights Council adopted Resolution 48/13 at its 48th Session, which recognised the right to a clean, healthy and sustainable environment as a human right. This was swiftly followed by the United Nations General Assembly ('UNGA') adopting Resolution 76/300 at its 76th Session on 28 July 2022. UNGA Resolution 76/300 declares as follows:

1. Recognises the right to a clean, healthy and sustainable environment as a human right;
2. Notes that the right to a clean, healthy and sustainable environment is related to other rights and existing international law;
3. Affirms that the promotion of the human right to a clean, healthy and sustainable environment requires the full implementation of the multilateral environmental agreements under the principles of international environmental law; and
4. Calls upon States, international organizations, business enterprises and other relevant stakeholders to adopt policies, to enhance international cooperation, strengthen capacity-building and continue to share good practices in order to scale up efforts to ensure a clean, healthy and sustainable environment for all.

Therefore, at the international arena, there is now no doubt that the right to a clean, healthy and sustainable environment is a human right.

2.2 Constitutional Right to a Clean and Healthy Environment

Many countries around the world, in acknowledging that the protection of the environment is fundamental for the realisation of other human rights [5], have elevated the right to a clean environment as a constitutional right. The following are some examples of the elevation of environmental rights onto a constitutional footing in some international jurisdictions:

(i) Article 33 of Bolivia's 2009 Constitution provides:

Everyone has the right to a healthy, protected, and balanced environment. The exercise of this right must be granted to individuals and collectives of present and future generations, as well as to other living things, so they may develop in a normal and permanent way.

(ii) Article 225 of Brazil's Constitution of 1988 provides:

All have the right to an ecologically balanced environment which is an asset of common use and essential to a healthy quality of life, and both the Government and the community shall have the duty to defend and preserve it for present and future generations.

(iii) Article 19 of Algeria's Constitution of 1989 provides:

The State shall ensure the rational use of natural resources and their preservation for the benefit of future generations. The State shall protect agricultural lands. The State shall also conserve public water domain.

(iv) Article 2, Chapter 1 of Sweden's Constitution of 1974 provides:

The public institutions shall promote sustainable development leading to a good environment for present and future generations.

(v) Articles 11 and 97 of the Constitution of Japan 1946 provides:

The people shall not be prevented from enjoying any of the fundamental human rights. These fundamental human rights guaranteed to the people by this Constitution shall be conferred upon the people of this and future generations as eternal and inviolate rights.

The fundamental human rights by this Constitution guaranteed to the people of Japan are fruits of the age-old struggle of man to be free; they have survived the many exacting tests for durability and are conferred upon this and future generations in trust, to be held for all time inviolate.

(vi) Article 24, Chapter 2 of the Constitution of the Republic of South Africa 1996 provides:

Everyone has the right

- a. to an environment that is not harmful to their health or well-being; and
- b. to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that
 - i. prevent pollution and ecological degradation;
 - ii. promote conservation; and
 - iii. secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

It would be noted that all these articles interlace the need to protect the environment with the rights of future generations. This is reminiscent of the theory of justice by John Rawls, that the present generation owes a responsibility towards the future generations to safeguard the well-being of nature [6].

In the Philippines, the Supreme Court of the Philippines has recognised the notion of inter-generational justice and responsibility as a judicially enforceable obligation through the case of *Minors Oposa v Secretary of the Department of Environment and Natural Resources (DENR)* [7] decided in 1994. the Philippines Supreme Court recognised that a group of children have the right to uphold environmental rights for themselves and for the benefit of future generations. In delivering the judgment the court cited Article II, Section 16 of the Philippines Constitution, which provides that:

The State shall protect and advance the right of the people to a balanced and healthful ecology in accordance with the rhythm and harmony of nature.

The court held that the plaintiffs had standing to represent their unborn posterity, and that they had adequately asserted a right to a balanced and healthful ecology:

Rhythm and harmony of nature include, inter alia, the judicious disposition, utilisation, management, renewal and conservation of the country's forest, mineral, land, waters, fisheries, wildlife, off-shore areas and other natural resources to the end that their exploration, development and utilisation be equitably accessible to the present as well as future generations [8].

In 2004, the Supreme Court of Sri Lanka, citing principles from the Stockholm and the Rio Declarations, also acknowledged this similar doctrine of inter-generational equity [9]. Very recently, a court in the State of Montana, United States of America struck down the Montana Environmental Policy Act Limitation which prohibited the analysis of greenhouse gas emissions and corresponding impacts to the climate, as unconstitutional [10]. The court held that the statute violated the plaintiffs' (consisting of 16 plaintiffs ranging in age from five to 22) right to a clean and healthy environment.

3 Malaysia

Malaysia is the 12th (out of only 17) megadiverse country in the world, which means she houses a large number of endemic species that are singularly unique and peculiar in the world.

3.1 Actions concerning environmental rights

In Malaysia, if an individual private citizen has a grievance for environmental transgressions, his only recourse is in civil litigation, be it a claim in public law (relator action or judicial review), or a claim in private law (tort). It is submitted that as it stands now, civil litigation is insufficient for purposes of protecting the environment. This is because for a private law action in tort, there is generally a need to demonstrate some level of a private proprietary interest; whereas in public law, there are stringent procedural requirements including the issue of locus standi, that can amount to a stifling of an otherwise valid claim.

An example of a claim in private law in tort is *SAJ Ranhill Sdn Bhd v SWM Greentech Sdn Bhd & Anor* [11]. In this case, the plaintiff operated a water treatment plant along Sungai Benut, Johor. The second defendant was the statutory operator (for and on behalf of statutory authorities) of a landfill located along the banks of Ulu Sungai Benut, some 16 kilometres upstream from the plaintiff's water treatment plant. The plaintiff alleged that its water treatment plant had to be shut down on eight separate occasions as a result of overflow of leachate into the stream outside the landfill and into Ulu Sungai Benut, then downstream to Sungai Benut, which led to the pollution of Sungai Benut (high content of ammonia which could not be treated by the water treatment plant) which eventually led to the shut-down of the plaintiff's water treatment plant. The plaintiff's claim was premised on negligence, breach of statutory duty, the principle in *Rylands v Fletcher* and nuisance.

On the evidence, the High Court found that the primary causes of the pollution to Sungai Benut were (i) the location of the landfill upstream which was a high risk factor in itself, (ii) the poorly designed landfill and (iii) the decisions by the local authorities to dump waste from other districts in the landfill which was way beyond the capacity of the landfill. Therefore, the court found that 'the parties who were the primary cause of the whole debacle were the owners of the landfill (instead of the second defendant who was only the operator appointed to manage the landfill) and the local authorities' and on this basis, the plaintiff's claim in negligence and breach of statutory duty failed.

With regard to the claim under the principle in *Rylands v Fletcher* and nuisance, the court said that both these causes of action must involve interference with land belonging to the plaintiff. In this case, the plaintiff did not plead any physical damage to its assets or properties. The basis of the complaint here was the pollution to Sungai Benut. Since the river belongs to the State, and since the plaintiff is not a riparian owner [12], there has been no interference to the plaintiff's property. The saddest part of this case is that the pollution to Sungai Benut remained lost in the civil dispute between the parties.

As for a claim in public law, in the recent case of *Damien Thaman Divean (Mewakili Pertubuhan Pelindung Khazanah Alam) & Anor v Majlis Eksekutif Negeri Selangor Darul Ehsan (Exco) & Ors* [13], the plaintiffs brought judicial review proceedings challenging the defendants' decision to de-gazette the Bukit Cherakah Forest Reserve. The plaintiffs' suit was unsuccessful on the ground, among others, that the plaintiffs lacked sufficient locus standi:

The first applicant is the [sic] representing PEKA [Pertubuhan Pelindung Khazanah Alam] in this application. The court takes cognisance that PEKA was established to save the rainforest and to preserve the environment. Nonetheless, PEKA has 6 branches all over the [sic] Malaysia. In this sense, this court fails to appreciate and comprehend an entity such as PEKA which has members from all over Malaysia and has branches all over Malaysia could be adversely affected by the decision of the first to fourth respondent [sic] to degazette the forest which is situated in Shah Alam.

Further, these courses of action may be insufficient in some situations of environmental degradation that cause real loss to litigants. One such example is the unreported case of *Mohd Nor bin Jamil and 123 Ors* [14], where the plaintiffs' claim for loss of livelihood as a result of pollution to the sea caused by coastal reclamation works failed, as the court found that no constitutional, statutory or common law rights had been infringed. Whilst the Merchant Shipping (Oil Pollution) Act 1994 allows aggrieved persons to claim damages against the owner of a ship or vessel that causes oil pollution [15], there is no remedy available if the pollution is caused by any other means other than oil pollution. This is the sad reality in Malaysia.

These cases do not bode well for the future of Malaysians. It is submitted that without an elevation onto the human rights platform (via recognition as a fundamental liberty in the Federal Constitution), Malaysia's environment will continue to be taken for granted and future generations of Malaysians will be robbed of her magnificent mega-diversity.

3.2 Near attempts at constitutional recognition of environmental rights

Part II of the Federal Constitution deals with Fundamental Liberties. Articles 5 to 13 embodies many of the human rights declared in the Universal Declaration of Human Rights 1948 such as the right to life, freedom of speech and expression, and equality before the law. As yet, the right to a clean, healthy and pollution-free environment is not an expressly recognized right under any of the fundamental liberties contained in the Federal Constitution. The closest Malaysia has come to recognising this right is via

the obiter dictum by the Court of Appeal in *Tan Tek Seng v Suruhanjaya Perkhidmatan Awam* [16] declaring that ‘the right to live in a reasonably healthy and pollution free environment’ is one of the facets embodied in Article 5(1) of the Federal Constitution.

Article 5 provides that ‘no person shall be deprived of his life or personal liberty save in accordance with law’. The key terms in Article 5(1) have been the subject of extensive judicial interpretations, but it is the term ‘life’ that is significant for environmental purposes. Much of Article 5(1) depends on the interpretation and as such the scope of judicial creativity. This is dependent on whether a liberal or literal translation is utilized. In this regard, the Malaysian courts have been fairly liberal in interpreting the meaning of ‘life’ in Article 5. ‘Life’ is not confined to mere animal existence but encompasses an entire spectrum of rights integral to meaningful human existence [17]. It ‘incorporates all those facets that are an integral part of life itself and those matters which go to form the quality of life’ [16]. ‘Life’ has been interpreted to mean ‘the right to seek and be engaged in lawful and gainful employment’, receiving benefits that society has to offer, to ‘live in a reasonably healthy and pollution free environment [16]’, the right to livelihood [18], the right to common human dignity and the right to reputation [19], the right to travel abroad [20], the right of access to justice [21], the right to privacy [17], and the right to continue with one’s way of life, and to preserve one’s culture and religion [22].

With specific regard to the right to a clean and healthy environment, in *Sinuri bin Tubar v Syarikat East Johor Sawmills Sdn Bhd* [23], Mahadev Shankar J stated:

Human calls of nature do not wait for Governments to function. Clean water is a birth-right of every human being as much as clean air.

However, this was a negligence claim for personal injuries sustained by an infant plaintiff at the defendant’s premises. It had nothing to do with environmental issues; hence this statement is merely an obiter at best.

In *Tan Tek Seng v Suruhanjaya Perkhidmatan Awam* [16], Gopal Sri Ram JCA (as he then was) held:

...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 [16]. (emphasis added)

However, once again, it should be noted that this was a case concerning the dismissal of a public servant, and had nothing to do with the environment or environmental rights. Hence, at best (and very unfortunately), the pronouncement of the Court of Appeal in *Tan Tek Seng* on the right to a healthy and pollution free environment is merely an obiter.

Further, one can be deprived of ‘life’ without any remedies if it is done in accordance with law. In *Kajing Tubek & 7 Ors v Ekran Bhd* [22], one of the issues before the

Court was that the proposed development of the hydroelectric project in Sarawak (in Bakun, the 7th division of Sarawak) was on a piece of state-owned land, although about 10,000 natives were in occupation of it under customary rights. It was provided that they would be resettled by the State Government. But if this was the case, the natives argued that this would mean that their customary rights would be extinguished in accordance with the Sarawak Land Code. The plaintiffs in this case were three natives who claimed that they and their ancestors had, from time immemorial, lived upon and cultivated the land. They argued that the Bakun dam project would deprive them of their livelihood and way of life.

The Court of Appeal held that the complaint by the plaintiff in this case amounted to deprivation of their lives under Article 5(1) of the Federal Constitution. The Court added that deprivation of the right to life under Article 5(1) was also where one 'suffers deprivation of their livelihood and cultural heritage'. However, since such deprivation was in accordance with law which in this case was the Sarawak Land Code, they had on the totality of the evidence, suffered no injury. It was therefore not necessary for them to be given a remedy since there was no injury. The takeaway of this case is that generally, we have the right to live in an environment which we are used to, but this can be taken away lawfully.

It is submitted that if there was an express and distinct right to a clean and healthy environment in the Federal Constitution, the natives in Bakun, Sarawak would have had a relatively easier argument on their hands: instead of arguing loss of livelihood and cultural heritage within the confines of Article 5(1) (which right may be extinguished by law), they could now argue that the Bakun Dam would cause serious and perhaps irreversible damage to the environment that they live in, which is incapable of any monetary compensation given that such damage would continue to negatively impact the future generations of the inhabitants of Bakun.

In *Kerajaan Negeri Johor & Anor v Adong bin Kuwau & Ors* [24], the Court of Appeal pronounced that the plaintiffs, who were aborigines, had proprietary rights over the Linggui Valley and the defendants had deprived them of these rights. The Plaintiffs in this case were said to have been deprived of their rights of heritage in land, freedom of inhabitation or movement under Article 9(2), deprivation of produce of the forest, deprivation of future living for themselves and their immediate family; and deprivation of future living for their descendants. However, the judge made no reference that such deprivation was also tantamount to a denial to a healthy and decent environment to live for the aborigines. The direct implication on the environment was decided based on Article 13 which provides for the right to property. In the environmental context, Article 13 is not an ideal option for environmental litigation as it allows adequate compensation as a method for remedying deprivation of property, thus diluting the effectiveness of it.

Unfortunately from the cases, it is apparent that the judiciary appreciated the existence of the right to environmental protection; however, they hesitated to expand the ambit of the right to life under Article 5 to include the right to environmental protection. Therefore, as it stands now, the concept of a right to a clean environment as a fundamental liberty is only implicitly provided for under Article 5(1) introduced in obiter, with no real legal bite.

4 Conclusion

There are many benefits in recognising environmental rights as human rights. The most important is that it will ensure that a higher standard of rights is advocated, as compared to ordinary personal or private rights such as statutory or common law rights. As human rights is a branch of public law, it would also promote a culture of openness, make governments directly and more accountable to its citizens, and therefore promote and uphold the rule of law. It would also encourage governments to embrace the principles enshrined in Principle 10 of the Rio Declaration, which in turn would encourage greater access to information, public participation, access to justice and government accountability. The recognition of environmental rights as human rights may also lead to judicial activism with the judiciary acting as the protector of the environment.

The clearest solution to this opaque and often overlooked conundrum is to make the right to a clean and healthy environment an express, separate fundamental liberty in the Federal Constitution. It is imperative that environmental rights be given its own due recognition, encompassing such concepts as sustainable development and inter-generational rights. This is because such rights are inherent, immutable and absolute, and therefore deserving of the highest accolade and protection. Such rights should not be so easily deprived by ordinary law, but only by the most stringent scrutiny in any civilised society.

Having this right specifically expressed in the Federal Constitution would be a good starting point to jump start the awareness of the monumental importance and urgency in protecting the environment. For starters, it would protect our fishermen from loss of livelihood due to pollution of the sea caused other than by oil spillage [25]. It would also provide a separate mechanism for public interest litigation in the form of constitutional judicial review, which is distinct from judicial review [26]. Further, it opens up an additional avenue for relief as an alternative to common law tort actions which has many pre-requisites such as duty of care, proof of damage and having a proprietary interest in land or property. Finally, recognising environmental rights as human rights would increase awareness and change the public's attitude towards environmental issues, which is a stepping stone towards sustainable behaviour that could change the plight of the environment for the better.

Access to a safe, clean, healthy, and sustainable environment is a human right that needs to be protected and promoted not only for the present, but for time immemorial. Without a clear, express and unequivocal recognition of environmental rights as human rights, such rights will remain elusive, slippery and unachievable to many ordinary Malaysians. In short, it is time for environmental rights to obtain constitutional refuge in Malaysia.

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