

## **Environmental Issues in a Federation: The Case of Malaysia**

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**Abstract:** From a constitutional perspective, the responsibilities over environmental issues cannot be precisely divided between federal and state governments. Environmental problems could only be dealt with successfully, as the Malaysian case exemplify, through a concurrent jurisdiction. The responsibility for the implementation of environmental laws is left to the states which because of their nearness to the source of environmental problems are in a better position to monitor violations. However, interstate environmental problems must be addressed jointly by federal and state governments.

The Federal Constitution of Malaysia by providing Federal, State and Concurrent Legislative Lists has one of the most elaborate schemes for the distribution of legislative powers. However, it does not explicitly demarcate the boundaries of federal and state powers over environmental issues. Environmental issues could be related to various subjects in the Federal, State and Concurrent Legislative lists. Environmental issues have, therefore, given rise to conflicting arguments on whether federal or state governments should legislate on them. This study analyses the problems that may arise if both federal and state governments legislate on environmental issues. It discusses the consequences of environmental protection if it is treated as an independent subject and assigned to Federal, State or Concurrent Legislative lists. It concludes that environmental protection should be assigned to the Concurrent Legislative List which would encourage better federal-state joint efforts and cooperation.

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## **Federal-State Relations in Malaysia**

Federalism is a system in which there exists two sets of government, and there is a constitutionally-stipulated division of powers between the national government and constituent units (states, provinces, republics, regions or cantons). This enables both levels of government to maintain their existence and authority and to execute their laws directly on the people.

In Malaysia, Part VI of the Federal Constitution governs the relations between the Federation and the states. Article 74 together with the Ninth Schedule of the Constitution deals with the distribution of legislative powers between federal and state governments and provides for Federal, State and Concurrent Legislative Lists. The Federal List covers 27 headings which include external affairs, defence, internal security, civil and criminal law and procedure, finance, commerce, industry, communication and transport, surveys, education and publications. The State List has 13 headings and includes Islamic law, land, agriculture, forestry, local government, and water. The Concurrent List covers 12 subjects such as social welfare, public health, drainage and irrigation, and housing. The Constitution also provides supplementary State and Concurrent lists with regard to certain subjects in relation to the states of Sabah and Sarawak. For instance, water, power and electricity, agriculture and forestry research are concurrent subjects in the states of Sabah and Sarawak. They, however, are federal subjects for the states in peninsular Malaysia.<sup>1</sup>

## **Federal/State Jurisdiction over Environmental Issues**

Environmental protection is of a relatively recent character and is not mentioned, as a subject, in any of the three Legislative Lists. However, environmental problems are related to various subjects in the Federal, State, and Concurrent Legislative Lists. These, for instance, include transportation, industries, agriculture, fisheries, public health, sanitation, mining, land, forestry and water. Environmental issues could also be related to item 1 of the Federal List which deals with external affairs as there are international and regional conventions and treaties that call for environmental protection.<sup>2</sup> This multi-dimensional character of environmental issues has led to various arguments on the distribution of responsibility for combating air and water pollution.

It has often been pointed out that environment is a multi-dimensional issue. In *Ketua Pengarah Jabatan Alam Sekitar v. Kajing Tubek*, the Court of Appeal held that environment is a multi-dimensional subject which could be related to various subjects in the Federal, State and Concurrent Legislative Lists. Federal law, the court held, would govern environmental issues arising out of subjects in the Federal List, while the state law would deal with those aspects of the environment that could be related to land, water and forests, which are state subjects.<sup>3</sup>

However, it has been observed that the existence of both federal and state environmental legislation results in unnecessary overlaps and duplications. In certain cases, it led to the diversity of environmental laws in the country. The federal and state governments set various environmental standards for the protection of air and water quality and for the assessment of impacts similar projects will have on environment. Consequently, this led to jurisdictional disputes between the federal and state governments and inconsistencies between the federal and state environmental laws. In *Ketua Pengarah Jabatan Alam Sekitar and Anor v. Kajing Tubek and Ors and other Appeals*, the court was asked to decide which of the two sets of environmental laws - the Environmental Quality (Prescribed Activities) (Environmental Impact Assessment) Order 1987, a law made under the Environmental Quality Act 1974 (EQA) or the Natural Resources and Environmental (Prescribed Activities) Order 1994, a Sarawak law made under the Natural Resources Ordinance 1949 - was applicable to the Bakun dam project.

Under the EQA, the Director General of the Environment was empowered, by virtue of section 34 A, to issue guidelines. One of these guidelines provided that the Environmental Impact Assessment (EIA) report of a certain project should be made available to the public upon request. The Sarawak law, on the other hand, did not contain such provisions. The respondents argued, inter alia, that environmental issues arising out of the project should be governed by the EQA which "itself declares that it applies throughout Malaysia ... the project falls squarely within para 13 (b) of the 1987 Order and is therefore a prescribed activity in respect of which the requirements of section 34 A must be met." The appellants, on the other hand, contended, inter alia, that the project concerned a

particular land and river that were wholly within Sarawak. Since land and river were state subjects, the state law, it was argued, should govern environmental issues arising out of the project. It was, therefore, contended that the EQA did not extend to the project.<sup>4</sup>

Furthermore, air and water pollution, whether they arise out of industries, transportation, construction of dams, airports and highways which are federal subjects, or resulting from forest, agriculture, rivers, local land use, open burning and sanitation, which are state subjects endanger the same environment throughout a certain state or even the country. Air pollution and haze, for instance, is attributed to industries and transportation, open burning or forest fire.<sup>5</sup> Similarly, the sources of river pollution are varied. Rivers are polluted by suspended solids, largely from land development activities, housing and urban development, industrial discharges, siltation caused by deforestation and indiscriminate cutting of trees, sewage and agricultural farms.<sup>6</sup> Industrial discharges and domestic sewage are identified as the two major sources of water pollution.<sup>7</sup> Thus, it is difficult to ascertain the extent to which air and water pollution is caused by the activities that come under federal jurisdiction or by the activities of the state governments on subjects in the State List. Subsequently, it is not possible to determine precisely the extent of responsibilities that the federal and state governments should undertake.<sup>8</sup> It also resulted in the fragmentation of enforcements among federal and state agencies.

It has also been argued that states should have exclusive responsibility over environmental issues. The Constitution provides that the states “shall have power to make laws with respect to any matter not enumerated in any of the Lists set out in the Ninth Schedule.”<sup>9</sup> Since environmental issues are not specifically mentioned in any of the three Legislative Lists, the states may have power over them. In *Kajing Tubek and Ors v. Ekran Bhd and Ors*, the defendants argued that environmental impact “is neither in the Federal List (List I), nor the Concurrent List (List III) ... that under article 77 of the Federal Constitution, the State of Sarawak is lawfully entitled to legislate over such matters.”<sup>10</sup>

This argument is further strengthened by the fact that a greater number of environmental problems are local in nature. They are closely related to land, agriculture, farming, water and forests, which

are state subjects. State and local authorities are also in a better position to identify environmental problems and to monitor situations in their particular areas. They are the first governmental agencies to which the public would turn to. Moreover, due to close proximity between the source of environmental problems and the state and local government agencies, enforcement measures would be more effective. State governments through their local agencies are in a better position to identify environmental problems and to monitor the situation.

However, states due to the paucity of their resources are not in a position to effectively deal with environmental problems. Combating water and air pollution and dealing with many other environmental problems require adequate manpower, finance, monitoring equipments and technical expertise which exceed the financial resources of any single state. Inadequate funding, lack of manpower and technical expertise are “major constrains in the effective management of the environment.”<sup>11</sup>

States have limited sources of revenue. The only important sources of revenue assigned to the states are the “revenue from lands, mines and forests.”<sup>12</sup> Even with regard to forests, a subject assigned to the State List, states’ policies are dominated by economic considerations rather than environmental concerns. The revenues derived from the sale of timber are used to finance other development projects and state expenditures. Hence, the role of forests in protecting the environment, conserving water, and providing a safe protection for wild animals is given less consideration. The states fear that the requirements for a sustainable forest management and other environmental and ecological restrictions on logging companies will result in lower revenues for them.

There are incidents which show that the states have not necessarily followed the regulations under the Environmental Quality Act (EQA). In 1996, for instance, there was an outcry in the newspapers about logging activities and the resulting environmental degradation at Lojing Highlands in Kelantan. The situation was considered “critical” and the Kelantan Government was asked to carry out immediate rehabilitation work, which included, among other things, replanting of trees. The Department of Environment identified 55 development projects, involving a total area of 135,000 hectares, which were

going on in the area. Fourteen of these projects required E.I.A. reports. However, only some developers had submitted their E.I.A. reports.<sup>13</sup>

In 1999, the Federal Government warned that land clearing and logging around Tasik Kenyir had to be strictly regulated before the activities could irreversibly damage the eco-system. The warning was based on 1996 and 1998 satellite images of Tasik Kenyir. The logging activities, however, were not illegal but were done under licences issued by the Kelantan and Terengganu State Governments. The Terengganu State Government, however, promised this: “once the licences of these companies expire, we will not issue any new logging licence for the western side of Tasik Kenyir, at least for the next 30 years.”<sup>14</sup>

Furthermore, environmental problems do not stop at states’ borders. They move across state lines and have nation-wide implications. For instance, clearing water catchments areas in one state would pose a threat to water supplies in another state. Opening additional land for agriculture, industry or housing, and carrying out logging in forest reserves in upstream states affect the water catchment areas and subsequently reduce the amount of water in a state to which the river flows.

Similarly, water pollution in one state is transported by river flows to the contiguous state or states. Pollution of rivers by upstream states affect the downstream states in several ways. A river overloaded with siltation, toxic effluents, and discharge from agricultural farms, construction works, and industries in one state may damage human health, agriculture, and crops in another state or states to which it flows. It also add to the cost of water purification as more expenditure is required to treat the water of a polluted river for drinking. It even led to the shortage of water in states to which the polluted river flows. For instance, river pollution and the need to frequently clean the polluted dams and treatment plants were the reasons behind the frequent disruption and shortage of water supply in several parts of Selangor and the Klang Valley in 1997 and 1998.<sup>15</sup> Similarly, a forest fire in Putrajaya affected the quality of air in Selangor, Negri Sembilan and Perak states.<sup>16</sup> Since state law has territorial limitations and could not be enforced outside a particular state, an affected state is not able to prevent water and air pollution that originates beyond its boundaries.<sup>17</sup> This presents a unique difficulty which militates against

assigning the responsibility for environmental protection exclusively to state governments.

If the responsibility over environmental protection is assigned to the federal government, a uniform federal environmental law should be applicable throughout the Federation. Malaysia is also a signatory to regional and international treaties and conventions on environmental issues.<sup>18</sup> International treaties and conventions confer rights and duties on the individual members of the international community and not upon the states in a federation. Thus, the federal government in order to fulfil its international obligations may legislate on environmental issues<sup>19</sup> under Item 1 (a) of the Federal List read together with Article 76 (1) (a).<sup>20</sup> The main federal legislation that deals with environmental issues is the Environmental Quality Act, 1974, Act 127 (1974). Section 1(1) of the EQA stipulates that the Act “shall apply to the whole of Malaysia.” Questions, however, were raised on several occasions on whether the Act is applicable to certain activities that come under states’ jurisdiction. It was argued that the applicability of the EQA was limited to those matters which were enumerated in the Federal List.<sup>21</sup> Besides EQA, other federal legislations that could be related to environmental issues are the following:

1. The Local Government Act 1976, Act 171 (1976). Some of the provisions of the Local Government Act are directly relevant to environmental issues. Sections 69 and 70 of the Act, for instance, provide fines and punishments for polluters of water courses such as streams, channels, public drains and other waterways. It also imposes preventive and mitigating measures to curb pollution. Moreover, the power of licensing available under the Act could also be used to control pollution.<sup>22</sup>
2. The Town and Country Planning Act 1976, Act 172 (1976). The Act is intended for the control and regulation of town and country planning in local authority areas. The Act requires that development activities that are carried out within a local authority area must be examined and reviewed by the state planning committees and should conform to the local plans. The Act provides for the submission of the Development Report which is similar to an E. I. A. report. The report is useful as it enables the authorities to incorporate environmental concerns into the

planning process. This is particularly important when a certain activity is not included as a prescribed activity under the Environmental Quality (Prescribed Activities) (Environmental Impact assessment) (Amendment) Order 1995. The Act also empowers the local planning authority to revoke or modify planning permission granted under this Act or any other local government law.<sup>23</sup>

3. The Street, Drainage and Building Act 1974, Act 133 (1974). The Act empowers the local authorities to construct, maintain and repair drains and water courses. Section 25 of the Act also provides for the control of any trade effluents that communicate with the river or sea.
4. The Land Conservation Act 1960, Act 385 (Revised 1989). The Act provides for the conservation of hill land and the protection of soil from erosion, and for the protection of land with rivers flowing to the foreshore and eventually to the sea. The Act provides that measures should be taken to prevent passage of soil or silt to any rivers, canals or drain.
5. The Merchant Shipping Ordinance 1952. FM Ord. No. 70 of 1952. The Act provides that the Director of Marine should take preventive measures where oil or other harmful substances are discharged from a ship consequence to maritime accidents.<sup>24</sup>

However, environmental protection cannot be secured simply through legislation. The most important question about environmental law relates to enforcement. Environmental issues need constant surveillance and monitoring. It may not be possible for the federal government to implement the environmental law it has enacted, conduct inspections, and take other enforcement measures in the various states.

### **Concurrent Jurisdiction over Environmental Issues**

In *Malaysian Vermicelli Manufacturers (Melaka) v. P.P.*, the High Court held that section 25 of the Environmental Quality Act 1974 and the regulations made under it were in pith and substance legislation with respect to item 7 of the Concurrent List that deals with “public health, sanitation and the prevention of diseases.”<sup>25</sup> This is a significant decision as environmental issues were related



to public health which is a subject in the Concurrent Legislative List. It has been argued that instead of relating environmental protection to the subjects in the Federal, State and Concurrent Legislative Lists, environmental issues should be treated as an independent subject and assigned through a constitutional amendment to the Concurrent Legislative List. This will enable the federal government to secure a uniform environmental law and lay down standards which will be applicable throughout the federation. The states which are in touch with the real situation will provide details to suit their special needs and local circumstances. This will enhance the applicability of federal environmental laws without sacrificing local variations. This will also avoid unnecessary duplications and focus diverse efforts toward a proper and effective management of environmental issues.

A concurrent jurisdiction by allowing both federal and state governments to cooperate on environmental issues also encourages consultations between them as to the proper measures to be taken and thereby brings about greater efficiency to the working of federal-state relations. A concurrent jurisdiction assigns the responsibility for the pollution in states to the states concerned. Consequently, it would be up to the states to combat pollution within the state efficiently. They have to balance the need for economic and social developments with the equally strong need for environmental protection. However, if environmental problems transcend the border of a particular state and are nation-wide, the federal government may step in to provide remedies, fund and expertise.

However, the exercise of both federal and state jurisdictions over environmental issues may occasionally result in inconsistencies between federal and state laws. Inconsistency arises when two laws on the same subject applied to the same facts produce conflicting results. According to A.K. Brohi, two laws are "said to be repugnant when they involve impossibility of obedience to them simultaneously."<sup>26</sup> For instance, federal and state environmental laws are considered inconsistent when one of them takes away a right which is conferred by the other. They could also be inconsistent when they provide different sanctions for committing similar environmental offences. In order to resolve issues of inconsistency between federal and state laws, the courts at first may try to give harmonious interpretation to apparently conflicting federal and state

environmental laws. However, if there exists glaring inconsistencies and reconciliation is impossible, in such cases Article 75 of the Federal Constitution could be invoked and as such any conflicting state environmental law will be declared, to the extent of inconsistency, to be void.

### **Conclusion**

The responsibility to make laws on environmental issues and to manage them cannot entirely be left to the federal government. Since most environmental problems are local in nature, the federal government would still depend on states and local government authorities to enforce its environmental laws and monitor violations. Similarly, states cannot be assigned exclusive responsibility over environmental issues as air and water pollution could easily cross state boundaries. A state environmental law due to its territorial limitation cannot be enforced beyond its boundaries. If both federal and state governments legislate on environmental issues as they relate to the various subjects in their respective Legislative Lists, it may result in unnecessary duplications, overlapping, and legislative disputes between federal and state governments. This is not an argument for a unitary management of environmental issues or for a division of power over them. What is argued is that environmental protection should be treated as an independent subject and assigned to the Concurrent Legislative List. This will allow the federal government to provide for general principles and to set uniform standards concerning water and air pollution that would be applicable throughout the states. It also allows the states to provide through legislation details that may suit their local variations.

Although most environmental issues are local in nature, they are also more likely not confined to a particular state as water and air pollution may easily spread to other states. Consequently, environmental concerns that cross state boundaries require cooperation among states and between federal and state governments. On the other hand, environmental problems that are confined within the borders of a particular state should be the responsibility of that particular state. In this way, both federal and state governments would make efforts based on their respective abilities, to achieve common goals. Federal efforts should not displace

state efforts to protect the environment but should guide them to exercise their powers more effectively.

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## Notes

1. *Federal Constitution* (Kuala Lumpur: International Law Book Service, 1998), List III A, items 13 and 14.
2. See for example, United Nations Convention on Biological Diversity 1992, The Vienna Convention for the Protection of the Ozone Layer 1985, International Tropical Timber Agreement 1994, ASEAN Agreement on the Conservation of Nature and Natural Resources 1985, ASEAN Resolution on Sustainable Development 1987. See M. Sabri Yusof, *International Environmental Law* (Kuala Lumpur: International Law Book Services, 2000), 32-3; Mohd Afandi Salleh, *International Environmental Conventions and Treaties* (Kuala Lumpur: International Law Book Services, 2002), 365, 481, 567.
3. *Malayan Law Journal*, no. 3 (1997): 23, 52.
4. *Ibid.*, 23-35.
5. *The Star* (Malaysian daily), March 23, 2005.
6. *Ibid.*, March 15, 21 & 22, 2005.
7. See Sham Sani, "Urban Environment in Asean: Changing Regional Concerns and Approaches," in Maria Seda, ed., *Environmental Management in ASEAN: Perspective on Critical Regional Issues* (Singapore: Institute of Southeast Asian Studies, 1993), 97-98. See also Sham Sani, *Environment and Development in Malaysia: Changing Concerns and Approaches* (Kuala Lumpur: ISIS Malaysia, 1993), 114-115.
8. For a discussion, see Gurdial Singh Nijar, "The Bakun Dam Case: A Critique," *Malayan Law Journal*, no. 3 (1997): ccxxix, where it was argued that compartmentalisation of the environment into geographical units, relating it to a certain development activity and then identifying it with the subjects in the Legislative Lists may not solve environmental problems.
9. *Federal Constitution*, Article 77.
10. *Malayan Law Journal*, no. 2 (1996): 388.
11. Sham Sani, *Environment and Development in Malaysia: Changing Concerns and Approaches*, 91.
12. *Federal Constitution*, Tenth Schedule, Part III, Item 2.

13. *New Sunday Times*, May 26, 1996.
14. *New Straits Times*, February 25 & 26, 1999.
15. *Ibid.*, May 18 & 24, 1998.
16. *Ibid.*, Wednesday August 3, 2005.
17. *Federal Constitution*, Article 73 (b), which states, "The legislature of a State may make laws for the whole or any part of that State."
18. See, M. Sabri Yusof, *International Environmental Law*; Mohd Afandi Salleh, *International Environmental Conventions and Treaties*.
19. See *Kajing Tubek and Ors v. Ekran Bhd and Ors*, [1996] 2 M.L.J. 388, p. 403. A similar argument was also accepted by courts in Australia. See *Commonwealth v. Tasmania (The Tasmanian Dam Case* [1983] 158 C.L.R., 1. For a discussion see Gurdial Singh Nijar, "The Bakun Dam Case: A Critique," *Malayan Law Journal*, no. 3 (1997): ccxxix.
20. Item 1 (a) of the Federal List assigns the power over external affairs to the federal government, while Article 76 (1) (a) empowers the federal government to legislate on any subject, including subjects in the State List, for implementing an international treaty to which the Federation is a party. See *Federal Constitution*, Article 76 (1) (a) and Ninth Schedule, Federal List, item 1 (a).
21. See for instance, *Ketua Pengarah Jabatan Alam Sekitar and Anor v. Kajing Tubek and Ors and other Appeals* [1997] 3 M.L.J. 23 and *Malaysian Vermicelli Manufacturers (Melaka) v. P.P.*, *Current Law Journal*, no. 7 (2001): 74.
22. See Azmi Sharom, "Local Authorities and Environmental Protection" in *A Collection of Socio - Legal Issues*, Mimi Kamariah Majid, ed. (Kuala Lumpur: University of Malaya Press, 1996): 287-302.
23. See Hunud Abia Kadouf and Ainul Jaria Maidin, "Theory and Practice in Land Use Planning in Malaysia: An Overview" (A paper presented at a national Seminar on The Legal Regime of Sustainable Land Use and Environmental Development: Policies and Trend, organised by Land Tenure and Environmental Management Unit (LATEC), Law Centre, and Ahmad Ibrahim Kulliyah of Laws, IIUM, August 9, 2003), 3-14.
24. See Hanim Kamaruddin, "Coastal Zone Management in Malaysia- Pollution Control," *Malaysian Journal of Law and Society*, no. 2 (1998): 50-1.
25. *Current Law Journal*, no. 7 (2001): 74.
26. A.K. Brohi, *Fundamental Law of Pakistan* (Karachi: Din Muhammadi Press, 1958), 253.