

Environment And The Legislative Lists Of Malaysia Federal Constitution

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Abstract: The Federal Constitution has specifically distributed the legislative powers between Federal and State government as listed in the Ninth Schedule of the Federal Constitution. The lists determine subject matters which legislative body and consequently government has the legal authority to pass laws and act upon accordingly. However environment as a subject matter is left unlisted. The term environment could not be found anywhere in the Federal Constitution. This is unfortunate for Malaysia especially when environment realistically has become one of the biggest concerns amongst Malaysians and international community. The absence has been partly blamed for lack of legal enforcement against polluters and offender of the environment. The study focuses on the status of environment in the Federal Constitution and the possibility of placing the subject matter in any of the three legislative Lists of the Federal Constitution. The study is exploratory in nature. Data are collected from literature reviews, interviews and focus group discussions with experts. The analysis and report of data is done in descriptive and qualitative manner. As an important subject matter, environment is very dynamic. It could be placed under any of the listed Legislative lists of the Federal Constitution.

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1. Introduction

It is quite a surprise to discover the term environment is never listed in any of the legislative lists of the Federal Constitution. This is despite the fact that the Federal Constitution has been amended several times since the day of independent until to date. So far none of the amendments was on environment or any matters that are related to environment. The insertion and presence of the term environment in the Federal Constitution is salient. It shall clearly determine once and for all purposes which party between the Federal or State government should have the overriding legislative authority hence jurisdictions to protect and conserve the environment. By the same accord neither the Federal nor State governments could refuse or neglect to incorporate in the management and protection of the environment any more. Likewise enforcement officers either at Federal and State levels can no longer hide behind the legal *lacunae* or complaint that they lack the jurisdictions or legal authority to take any effective enforcement actions against the polluters or infringer. Most importantly it would give the Federal or State or both the legal bullets necessary to implement and enforce existing legal provisions on environment.

1.2 Distribution of Legislative Powers

As a Federation state, Malaysia exercises a clear division of powers, authorities and jurisdictions

between Federal and State government as found in the Ninth Schedule of the Federal Constitution. They are named as Federal List (Article 74i), State List (Article 74i) and Concurrent List (Article 74i). Operationally the Federal government is legally permissible to pass laws on all subject matters enlisted in the Federal List. National policy, taxes, education, national defence and internal security are few examples of subject matters that fall under the ambit of Federal List.

State governments are in-charge of matters stated in the State List. They may include religious affairs, land, rivers, forest, and waterways. In terms of application, these laws have restricted applicability. Unlike Federal laws, the state laws are only applicable within the boundaries and territories that particular state only (Article 74i).

As far as the Concurrent List is concerned both Federal and State governments can share the legislative powers and jurisdiction over matters like culture, sport, antiquities, town and village planning or conservation of wildlife. Together, both or any of them could take the first initiative to pass laws or act on subject matters enumerated in the list.

Positively the Federal Constitution has provided another list known as Residual List (Article 77). The Residual List contains subject matters that are not listed either in the Federal List, State List or Concurrent List of the Federal Constitution, if any (Article 77). A quick look at the contents of Residual List reveals the Residual List, so far does not contain

any specific subject matter yet. There is no concrete explanation or legal reason for it. It is plausible Lord Reid Commission, the body specially set up by the British as colonial master to draft the Federal Constitution between the years 1955 until 1956, has purposely left the List blank. Positively in that sense, the Residual list could be regarded as a safety net. The creation of the List is perhaps to allow the Federal Constitution to be flexible enough to tackle any matters that may unintentionally had been left and at the same time, able to accommodate any pressing needs of the public or include new sunrise matters in the future.

Consequently neither the Federal nor State government have automatic rights to claim the legislative powers and jurisdictions over those “residual” matters (Article, 75 and Article 77) Therefore, none of them could arbitrarily deal with the residual subject matter(s) in any manners. In order to avoid a deadlock between the governments, again the Federal Constitution has positively provided a built in mechanism to solve the problem abovementioned. The first limb of Article 77, grants the Parliament the legislative power to determine which government would eventually enjoy the residual powers. In this context, the second limb of Article 77 has specifically bestowed State governments with the residual powers. Practically State governments now enjoy an “additional” legislative powers and jurisdictional authority to act upon subject matters that falls under the Residual list.

To date the mechanism seems to work well. However State governments have yet exercised their rights to claim “new” subject matters to be placed under Residual List as permitted by the Article 77. As a result they rarely put Article 77 or Article 75 into action in the name of environment so much so the existence or usefulness of those provisions is almost ignored. It is uncertain when state government would finally take that first initiative. In furtherance, it is also unknown whether Article 77 allows individual state government to make the claim individually or collectively with others. It is also interesting to see which subject matter would state government(s) consider fall under the list.

1.3 A Missing Term

The terminology environment is clearly not listed in any of the Federal List, State List or Concurrent List. This could probably due to the general state of Malaysia then. Looking back, at that time Malaya, a former name for Malaysia then, was largely an underdeveloped country. More than ninety percent of the country then was covered with thick virgin jungle (Records of Malaysia, 2006). It is suspected Lord Reid Commission mentioned above, may not consider

environment as a vital issue at that time. Presumably the Commission may had put more emphasis on feeding the basic needs of a new country (Jolly, 1976) such as education, unity, eradicating poverty or physically and technologically develop the country than environment which represents the higher needs of a society (Denton, 1990, Ghai, 1978).

Admittedly the Parliament has through the years successfully amended the Federal Constitution several times (Parliamentary Hansard Report). The amendments are to enable the Constitution to progress with time and accommodated new challenges (Faruqi, 2010). Yet, none of those amendments has ever attempted in bringing environment as a subject matter specifically under the purview of Federal List, State List or Concurrent List. Again it is unknown whether the above is due to mistake, by design or simply a case of oversight (Abas, 1995). Currently both the Federal and State governments still choose not to make that first initiative but crucial step. Rather, they have been adopting “wait and see” attitude. Both seemingly prefer not to offend each other by stepping out of their “usual” jurisdictions. As far as the Malaysian public is concerned, the above is often translated and perceived as the government’s lack of interest, will power or legal bites in protecting and conserving the environment (NPE Report 2012).

2. Methods

The research is exploratory in nature. It adopts qualitative methodology, a suitable approach in exploring a new subject matter (Yin, 2010, Miles & Huberman, 1994). The primary data is collected through focus group discussions, interviews, observations. The secondary data are gathered from analysis of relevant statutory laws, policy documents and literature reviews. The objectives of this study are (i) to determine the status of environment in the Federal Constitution being the supreme and highest law of the land and (ii) the possibility of placing the subject matter in any of the three legislative Lists of the Federal Constitution in the name of protecting and conserving the environment. Choices of questions for the focus group discussion were derived from a review of the literature found in library and online databases. A series of focus group discussions were conducted with stakeholders ranging from decision makers, policy makers, enforcement officers, professional bodies and non-governmental organizations focussing on implementation and enforcement issues or lack of them. Several in depth interviews were arranged with policy and decision makers to verify some facts gathered during the focus group discussions.

3. Findings

Environment is perhaps the only subject matter that is eligible to be placed under any of the Lists discussed above. This statement is made base on the following supporting grounds as discussed in ensuing paragraphs. As a matter of practicality, it is always wise for the Federal government to firstly conduct an investigation, survey or pole opinion amongst the Malaysian public. It is to seek their preferences and opinion on the suitability of decision and action as well as trying to create a “buy-in session” in garnering the public supports on important issue like this (Bardach, 2009). Article 93(1) of the Federal Constitution permits the Federal government to conduct such exercise on any subject matters, even when those subject matters fall under the ambit of State List. Based on the results, the Federal government then could place environment under any of the List mentioned above hence assigns the appropriate and suitable party with the necessary legislative powers to handle the issues of environment.

4. Discussion

4.1 Federal List

Arguably, the Federal government would be the most eligible party to handle environment. This is largely due to present legal norm and other factors. Since the day of independent in 1957, the Parliament has so far taken the lead in enacting various Federal laws concerning or relates to environment. This is despite the fact that the term environment does not belong to any of the legislative list discussed above. To date there are thirteen statutory laws of them. Amongst them are Land Conservation Act 1960, Environmental Quality Act 1974, Street, Drainage and Building Act 1974, Town and Country Planning Act 1976, Solid Waste and Public Cleansing Management Act 2007 and Biodiversity Act 2007.

By virtue of Article 94(3) of the Federal Constitution, the Parliament apparently obtains an implied legislative authority to enact laws on matters investigated under Article 93(1) abovementioned. As a result, the Parliament subsequently shall enjoy the authority and powers to enact laws on matters like protection and conservation of land, local government, town and village planning. In materializing the above intention, Article 94(3) of the Federal Constitution has in furtherance, granted the Federal government an overriding authority to create ministry, department or unit necessary to handle and manage subject matters mentioned above.

Since the day of independent, the Federal Government has successfully executed and satisfied the said provisions. Few Ministries and Department

like Ministry of Natural Resources and Environment, Ministry of Green Technology and Water as well as Department of Environment are set up to handle *inter alia* matters investigated under Article 93(1). On top of that, Article 81(a) of the Federal Constitution demands State governments to render assistance to Federal government whenever necessary. It is ensure a smooth and appropriate execution of Federal Law at state, district or village levels. Cumulatively, these three constitutional provisions have granted and consequently armed the Federal government with more than sufficient legislative authority and powers to take care of the environment. Positively the Federal government could optimize the said opportunity to take charge, influent or persuade state governments to support the Federal government’s initiatives for the environment.

Apart from the above, the Federal government also has bigger resources in terms of financial budgets and human capital. Currently, there are about four different ministries that are directly or indirectly in-charge on various subject matters relating to environment. They are namely Ministry of Natural Resources and Environment, Ministry of Green Technology and Water, Ministry of Housing and Local Government and Ministry of Science, Technology and Innovation. Under these Ministries, there are numerous other government agencies, specially set up to help the Ministries to execute their tasks. Each Ministry is allocated with certain amount of financial budget to look after the environment. The Parliament also granted the Ministries to pass substantive and procedural laws or by-laws called Regulations for enforcements purposes. Amongst them are Environmental Quality (Sewage & Industrial Effluents) Regulations 1979, Essential (Clearance of Squatters) Regulations 1969, Kuala Lumpur City Hall Parks by-laws (Federal Territory) 1981. These Ministries have their sets of enforcement officers, who usually larger in numbers, better trained and more experienced than their counterparts at state level.

4.2 State List

Alternatively it is equally suitable to place environment under the jurisdiction of state government or tentatively the Residual List. By virtue of Article 75 and 77 respectively, if environment is placed under Residual List, the subject matter shall be handled eventually by State governments.

The above proposal is made mainly due to the transborder nature of environment. Despite the needs to contain environmental hazards or problems, it is almost impossible to pin or bind environmental problems to a particular geographical or physical location. They could easily travel beyond state and

national borders fast, and along the way, leave a long trail of problems, spreading the negative effects in multiple areas and states. Secondly, all environmental issues, like deforestation, destruction or encroachment of water catchment area, wild bush fire or pollution of rivers are usually related to land. By virtue of section 5 of National Land Code 1965, land as a subject matter, is currently under the jurisdiction and management of State government. Section 5 of the Code defines land as (i) the surface of the earth and all substances forming that surface, (ii) the earth below the surface and all substances, (iii) all vegetation and other natural products, whether or not requiring the periodical application of labour to their production and whether on or below the surface, (iv) all things attached to the earth or permanently fastened to anything attached to the earth, whether on or below the surface and (v) land covered by water. Admittedly, as seen from the details of the above provision, section 5 of the Code obviously does not define the term environment. The said term is again clearly missing and not mentioned anywhere in the National Land Code 1965 document. In view of this and for easy management purposes, it could be good to tie up all land matters and issues related to it, including environment and place it under the management of one authority namely State government. By so doing, it would enable all states to combine forces, work together and help each other for mankind common cause.

In order to translate the above into reality, there are few things that the Parliament needs to do beforehand. One of them is to legally amend the National Land Code 1965 in order to insert the term environment. The term could be made as part of the section 5 or stand as on its own as a totally new provision of the Code. The National Land Code 1965 document is identified and selected as the most appropriate law document to contain such definition. As federal statutory law, the law is applicable throughout the nation and its territories. It is illogical to enact a new law document solely for the purpose of introducing the above definition. Any suggestion of such nature could be deemed as frivolous and waste of resources. It is only proper then to have a standardized definition for the said term for uniformity. The Parliament could for example adopt, enhance and use the same definition of environment as found in section 2 of Environmental Quality Act 1974. The said section defines environment as “the physical factor of the surrounding of the human beings including land, water, atmosphere, climate, sound, odour, taste, biological factors of animals and plants and the social factor of aesthetics.”

Though issues like lack of enforcement officers, human resources, financial budgets, experience or

exposure may be raised, they could be overcome with some initial assistance and delegation of powers from the Federal government.

4.3 Concurrent List

For better and more effective management purposes, environment is one of the most eligible and suitable subject matter, to be placed under the Concurrent List. Considering the transborder nature of environment and its ability to cross borders fast, by right the Federal and all State governments should collectively have equal share of responsibility towards the protection and conservation of environment. The above suggestion would be able to save a lot of financial resources, promotes better sharing of data, information, limited financial resources, exchange of staff, experience and avoid any redundancies or duplication of duties, if any. The insertion would enable all parties involved to consult and support each other in the name of environment for future generations. This is especially so when State governments may not have the necessary experience, expertise, sufficient human as well as financial resources to execute their constitutional duties.

Most importantly the said insertion also would eliminate the current practice and trends of making the protecting and conserving the environment an independent, territorial and institution-centric in nature. The insertion could deny States governments or any other interested parties from refusing to render any assistance or cooperation with the other counterparts. None of them could hide behind the legal *lacunea* in attempt to neglect their duties or use it as an excuse for not executing their duties.

5. Way Forward

The absence of the term environment in the Federal Constitution should neither be construed negatively nor dampen the spirit of the public in their efforts to care about the environment. Admittedly the Federal government has so far executed that duty at its level best. However in order to be more encompassing and inclusive in the name of environment and for the sake of future generations, it is better to have the term environment expressly stated in any of the above list mentioned above.

The insertion of the term environment as part of the Federal Constitution would have two big impacts. It would firstly give the Federal Constitution as the supreme and highest law of the land, the biting teeth in protecting and conserving the environment. Likewise it would give environment the necessary legal overriding effect above anything else. In other words, no developmental programs should be allowed

when it is done at the expense of the environment. By so doing, causes for environment would always enjoy a one of top national priorities or legal agenda.

The timing for the above proposition is perfect. Environment has long become one of the biggest concerns domestically and amongst international community. After more than fifty years of independent, the landscape of Malaysia has change tremendously. The country has undergone a very rapid economic and physical development with sharp increase in population. Such development has directly or indirectly imposed burdens on the environment. As such, Malaysia should become more concern and pay more attention to efforts in protecting and conserving the environment as it develops socially, technologically, physically or economically. Regardless of everything else, destruction of the environment should be at its minimum for the benefits of the future generations and mankind.

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