Environmental justice: its challenges.

Noor Farihah Mohd Noor
College of Government, International Studies and Law,
University Utara Malaysia,
06010, Sintok, Kedah Darul Aman, Malaysia
E-mail: farihah@uum.edu.my

Abstract—Managing environment has been critical over the past years. The heaps of waste produced by industry and commercial players not to mention household surplus have add to the environmental degradation. The laws in Malaysia to handle environmental pollution exist but the effective implementation has yet to be seen. How the courts protect the environment through decided cases will be discussed here. The role played by the government agencies in ensuring ecological justice as practice in Australia and UK cases will be exhibited. Using this as backdrop the extent of go-green culture in Malaysia will indicate the ecological awareness and justice affected here. Environmental sustainable development is important to prevent environmental destruction at all scales. The best practice system that fosters environmental and economic worth is what this paper seek to discuss because ecological concerns can no longer be ignored when pursuing development with high consumption of resources extending to the whole of mankind.

Keywords: ecological justice, environmental sustainable development

I. ECOLOGICAL JUSTICE

Justice implies a complex set of values like justice, transparency and public interest etc. It demand justice be applied to the fullest, not only to protect the public rights against pollution and environmental degradation but also to bring about good administration. Inevitably the duty to promote ecological justice hence lies in good administration. Why is good administration important? This is because good practices will filter any violation and abuses to the environment. The public agencies can ensure that environmental pollution by industries and companies likewise household is minimise to the lowest level. The law governing environmental pollution must be able to allow economic growth but at the same time lessen the damages to the environment.

Before venturing into good governance in environmental context, it is best to elaborate what constitute good administration. Once the core principle underlying good administration is understood it can be applied to any set of circumstances. Justice upheld will bring about not only administrative justice but may go beyond that to cover ecological sustainability. The whole idea is to bring about justice whether in the context of environment or administration etc. Since justice is a subjective concept, there are still deliberations on what good administration stand in any given context. Simon Halliday defines good administration as particularly vague and elusive (Simon Halliday, 2004). For instance, resolving the problem regarding environmental pollution is one form of good administration. Effectively handling complaint regarding environmental pollution also constitutes good administration. Punishing the polluters and making them responsible and pay for the damages done, also means good administration. There is no recognizable goal which could be assessed in a specific manner. Justice report, however, suggests that administrative acts should cover situation where “an administrative author must discharge the duties of its office in accordance with proper standards of administrative conduct.” Proper standard of administrative conduct means averting any manifest misconduct or maladministration such as:

Rudeness, unwillingness to treat the complainant as a person with rights; refusal to answer reasonable question; neglecting to inform complainant on request of her entitlement; knowingly giving misleading or inadequate advice; ignoring valid advice or overruling consideration which would produce an uncomfortable result for the overruler; offering no redress or manifestly disproportionate redress; showing bias on colour or whatever ground; refusing to inform adequately the right of appeal ; failure to mitigate the effect of rigid adherence to the which it can produce manifestly inadequate treatment. (Mary Seneviratne, 2002).

Other scholars like Mohd Zaidi Ismail and Mohd Sani Badron also intelligently tease out what justice to a system of government ought to be (Mohd Zaidi et al, 2011). In arriving to that point he sought some philosophical point behind the idea justice which is profusely practiced during the four rightly guided caliphs’ time and thereafter. Among others is illustrated by Kai Kaus advice to his son, “should you become a judge you must be acquainted with the expedients open to judges so that if an aggrieved person should appear for justice, having no witness and in danger of being victimized of being deprived of what is lawfully due to him, you may come to his aid and by some contrivance or subterfuge convey to every possesssor of a just claim what is duly his. Mohd Zaidi Ismail and Mohd Sani Badron’s ideas resonance with the source of good administration that is justice and what value it carries.
This idea was a pertinent means of realizing ecological justice too. They highlighted about many term that is crucial in public administration. Mohd Zaidi Ismail and Mohd Sani Badron elaborated in the process of tadbir is none other but to govern within the parameter of truth and justice. This adab oriented perhaps to be named good governance or virtue-based governance in English, should be understood as “the intellectual and practical process within the ambit of a true and just system, to obtain good results.”

These are valuable inputs in terms of how governmental power should be governed which is by the same token necessary in managing environment. Their findings and ideas could be used as it did not divert from the idea of preserving the environment promoted by developed countries. Mohd Zaidi Ismail and Sani Badron arguments were inclusive to include ecological justice. They termed good governance as civilized governance. They outline what civilized governance should essentially hold. There are three main conditions to realizing civilized governance which are putting things at its rightful place by treating complaints and effectively addressing them; considering the impact of conduct and omission and to prioritize the actions especially in manifesting justice in administration and environment. All these actions if practiced properly can result to achieving ecological justice.

Public administration cannot be separated from law. They owe their existence from the law. It’s the law that governs their conduct whether it is within limit or otherwise. Thus it is important to see that the law itself must be just in order to give just impact. In order for the law to be just it must strike a balance between growth and ecology as both are necessary to man’s survival. The law governing ecology must reflect the importance of environmental sustainability to mankind. Thus Aziz Bari has advocated (Abdul Aziz Bari, 2008). The laws that are absent from the basis of jurisprudence will contradict each other. These types of law are merely a replica law detached from the original sources and roots fasten to it. It is normally a repressive law.

RH Hickling echoed Aziz Bari and others that law must uphold justice and moral standards as in such absence, corruption and exploitations are bound to happen. He quotes what Devin said that:

If law is out of touch with the moral consensus of the community whether by being either too far below it or too far above it, the law is brought into contempt. Virtue cannot be legislated into existence but non-virtue can be if the legislation renders excessively difficult the struggle after virtue. Such situation can have an eroding effect on the moral ethos of the community in question. The ultimate justification of law is that it serves moral ends.(RH Hickling, 2001).

His attitude showed that justice must be well within the bound of morality of law. Since administrative justice is an elusive concept, the explanation on this aspect will provide some answers to the gap and guidance as to how to deal with problem of environmental abuses.

II. THE APPROPRIATE STANDARDS

There is no hard and fast rule on what good environmental standards are but indicators like Polluter Pay Principle (PPP) showed viable in succumbing violation. Standards of polluters pay principles are one of good indicators of evaluating whether duty to preserve ecological justice has been observed or not. The term “polluter” refers to a polluting, harmful activity. But legislation today often defines the polluter in a more extensive way. Not only those polluters who, in a strict sense, actually “pollute” have to be considered but also who are causing risks for the environment and where pollution has not (yet) occurred (Roller, Gerhard, 2010). Determining good environmental practices also include whether any person has the right to participate in defending environmental degradation, whether the polluters are accountable, agency's complaint-handling system is highly responsive to the environmental violation. All this will help nurture the environmental sustainability. There is no clear cut case to gauge injustices but signs of abuses can be measured by the extent of corruptness, unfairness and unscrupulousness in public dealings.

Since Malaysia has not come up with sound standard in dealing with pollutions, other country’s successful model should be adopted. USA model should be followed in terms of how hazardous elements are released. USA have come with appropriate standards that help to foster ecological justice. Economic activities are inevitable to stimulate growth but there is a price to be paid for that. The environment will be sacrificed. Thus USA have articulated one way of ensuring economic activities will proceed by providing Compliance Assistance (USA EPA, 2016). USA Compliance Assistance Centers help small businesses and local governments to observe ecological justice. The Toxics Release Inventory (TRI) Program provides valuable information to the public about toxic chemicals and to the businesses that are subject to the law requiring disclosure on their releases to the environment. Compliance assistance hotlines, workshops/training, fact sheets and other compliance guidelines all provide important information to regulated community to control the toxic emission and to conserve ecological justice as much as possible.

USA have also given incentive in promoting compliances where industries have demonstrate strong environmental performance beyond current requirements. For example U.S. Environmental Protection Agency (EPA’s) Compliance Incentives & Auditing Web site includes innovative approaches, such as a self-auditing policy to disclose compliance information, as well as guides to better environmental management practices and pollution prevention. They even reward businesses and public facilities that demonstrate strong environmental performance beyond current requirements. (USA EPA, 2016).

USA is also serious in ensuring compliance and built effective monitoring and compliance assessment via inspections which among others include ensuring proper
permits are in order or procedures are followed, ensuring that hazardous materials are correctly labeled and handled, or that emergency plans are in place. Routine self-reporting is also another way to require industries to consistently monitor their own emissions or discharges, and report these to the government. Failure to monitor, or reporting of inaccurate information, will lead to potential noncompliance problems that can be penalized. Citizen Tips and complaints also open prospects to local communities to combat environmental harm. Their inputs can be very valuable in identifying possible violations. Making telephone “hotlines” available for anonymous calls. Some federal environmental laws also provide legal job protection for "whistle-blowers" who report breaches by their employers.

Remote sensing is another advance technology that is available to widen the reach of any environmental abuses. Aerial photography or satellite data can disclose potential hazardous waste sites through the presence of dead or dying vegetation. Aerial photos showing changes over time can disclose illegal filling of wetlands, or unauthorized landfills. Infrared photography can yield clues to the location of industrial discharges (including thermal discharges) into waterways.

As far as enforcement of environmental law is concerned USA enforcement agency has also made a tremendous achievement in protecting the environment. The means of detecting violation can be seen in an enforcement response policy which instructs government agencies to respond to these violations in a timely and appropriate manner. Timeliness is very important. A prompt enforcement response is more effective in deterring future violations than a long delayed response of greater severity (USA EPA, 2016).

Government agencies can also issue an administrative order to compel compliance, and in many cases can impose a monetary penalty for past infractions. Environmental Protection agencies through the U.S. Department of Justice, can initiate a civil lawsuit against a violator in the federal district courts. Such a lawsuit may seek a court order compelling compliance and imposing a monetary penalty. The criminal provisions of the environmental laws are the most powerful enforcement tools available to the Agency. These provisions enable the Agency to pursue criminal investigations and refer for prosecution the most significant and egregious violators. Criminal penalties can include the imprisonment of responsible individuals, substantial fines and restitution to victims. At sites where there’s been a migration or a release of hazardous substances into the environment, EPA investigates the identity of, and negotiates with, potentially responsible parties to do the cleanup or to recover the costs of a cleanup. These environmental cleanups also affect federal facilities and occur under the Comprehensive, Environmental Response, Compensation and Liability Act (CERCLA or Superfund), the Resource Conservation and Recovery Act (RCRA), and the Oil Pollution Act (OPA). EPA encourages cleaning up and developing formerly contaminated sites through the Brownfields Initiative. These are namely a few appropriate standards of maintaining ecology which is open for continuous improvement. (USA EPA, 2016)

III. MALAYSIAN CASE LAWS; THE PATTERN.

Much of the Malaysia cases on environmental matter were burdened with the standing issue which is called as locus standi.

In Datin Azizah bte Abdul Ghani v Dewan Bandaraya Kuala Lumpur & 3 Ors [1992] 2 MLJ 393 (Datin Azizah’s case) the appellant as an adjoining landowner applied to the court for an order of certiorari to quash the decision of the Datuk Bandar (Mayor) in granting planning permission. The respondents argued that the right of hearing for the adjoining landowner conferred by statute had been removed by the enactment of the Federal Territory (Planning) Act 1982 (“FTPA 1982”). Further, the provision of s 23(1) of the FTPA 1982 grants the right of appeal to an applicant for planning permission only. The amendment had provided for appeal to the appeal board only by those landowners whose application for planning permission had been rejected. The trial judge declared the appellant as an adjoining landowner had no locus standi to object against the grant of planning permission since there she had not shown that any legal right or interest belonging to her would be affected by the approval of the plans. This case is not closely related with environmental pollution but more towards objecting to planning development which the adjoining owner was not informed of.

Whilst in Freddie Lee @ Lee Long Kooi & 2 Ors v Majlis Perbandaran Petaling Jaya & Anor (1994) 3 MLJ 640. The issue before the High Court inter alia was whether the Residents Association had locus standi or a legitimate expectation to be notified of the submission of plans by their neighbour, the second defendant. The court clarified that locus standi means a place to stand in court or a right to appear in a court of justice on a given question. Such a right is given to a person who is suing to enforce some private or public right provided it causes direct damage to the person. Besides standing, welfare of the society living in healthy environment is certainly realistic facts that court can contemplate too (Ainul Jaria Maidin, 2012). Rightly the locus standi issue can be expanded to matters effecting environmental standard.

The courts attitude in protecting the environment is sometimes not consistent. In some cases, environmental violation is condemned yet in another instances, supported on the ground of technical insufficiency. In Abdul Razak Ahmad v Ketua Pengarah, Kementerian Sains, Teknologi dan Alam Sekitar (1994) 2 CLJ 363 case, the case directly showed there was abuse of environment and it upheld by the courts. Abdul Razak Ahmad brought an action as the Chairman of the Action Committee of “ Pencinta Alam...
Selat Tebrau”, a non-registered body, and in his own personal capacity as a person affected by potential environmental problems from the project. The court granted a declaration that the Department of Environment (DOE) was obliged to produce to the applicant the Environmental Impact Assessment (EIA) report on the project. Here it is clear that the environment was greatly affected thus the court granted the declaration ordering the DOE to produce the EIA report. This is commendable as it shows how court values the worth of ecology justice. However, in another action by the same plaintiff against the Government of the State of Johor in Abdul Razak Ahmad v Kerajaan Negeri Johor he failed to establish standing to compel the Johor State Government to produce their agreement with the developers. The court held that the State Government was not obliged to consult taxpayers before entering into the agreement and also that the plaintiff had suffered no special damage over and above that suffered by other taxpayers and residents. Further to grant locus standi to a ratepayer like the plaintiff would open the floodgate of litigation that has the effect of halting the development in the country. No doubt development will jeopardize the environment. Striking the right balance hence will remain as challenges facing all country in the world. This is why we see courts are somewhat inclined to pursue development rather than the environment. As a result of the criticism in Abdul Razak’s case, the court differ in Kajing Tube & Ors v Ekran Bhd & Or (1996) 2 MLJ 388 (Bakun Dam case) and decide in favour of plaintiffs. The High Court granted standing to the plaintiffs to institute the action to enforce their rights. The defendants argued that the plaintiffs had no locus standi to bring the action because they had not suffered specific, direct or substantial damage other than those common to the rest of the public. But James Foong J referred to the decision in Tan Sri Hj Othman Saat v Mohamed bin Ismail (1982) 2 MLJ 177 and accepted the decision as the best approach in determining question of locus standi. His Lordship said that, the sensible approach in the matter of locus standi in injunctions and declarations would be an assertion of a contractual or a proprietary right, the commission of a tort, a statutory right or the breach of a statute which affects the plaintiff’s interests substantially or where the plaintiff has some genuine interest in having his legal position declared, and where he could get no other relief.

The High Court decision in the Bakun Dam case open headway for the development of the rule of locus standi in Malaysia. The development of a liberal rule of locus standi are welcome by most. Because it means guaranteeing easier access to justice, for interested third parties who may wish to institute proceedings against private or public bodies’ acts that might be damaging to the environment. However the success of the plaintiffs in the Bakun Dam case was short-lived as the defendants appealed against the High Court decision. The Court of Appeal judges, Sri Ram, Mokhtar Sidin and Ahmad Fairuz held that the respondents lacked substantive locus standi and the relief sought should have been denied because land is a state matter thus acquiring them for development is allowed even though it violates right to livelihood under the federal constitution. In another recent case the court portray irregular outlook. Msia case on environment has not shown polluters are paying for the violation. Much of the suit is driven by personal suit. In Wah Shen Development Sdn. Bhd v Success Portfolio Sdn. Bhd [2016] AMEJ 0113 The plaintiff was a property developer whilst the defendant was in the business of pig-rearing. Whilst the development was going on at all material time, the defendant's pig farm was still doing the same business next door. There was a State Government initiative to locate or re-locate all pig farms in Kuching and Samarahan areas to a designated area. The relocation of all pig farms have a certain bearing to this case because the plaintiff was suing the defendant for nuisance — all on account of the smell from the pig farm which it alleged has compromised or adversely affected the sales of particularly the residential houses as well as the shophouses on their said land causing them RM10,989,111.80 in loss. This case thus was about profit making not so much about preserving the environment cause by the release of hazardous smell .In this case the court held that the defendant has not commit nuisance and dismissed plaintiff’s claimed and justify that “everyone must endure some degree of noise, smell, etc., from his neighbor, otherwise modern life would be impossible and such a privilege of interfering with the comfort of a neighbor is reciprocal.” In fact, the law repeatedly recognizes that a person may use his own land so as to injure another without committing a nuisance. It is only if such use is unreasonable that it becomes unlawful.” The court however fails to appreciate the importance of protecting the environment against any violation including hazardous smell. The area affected for rearing is wide and impacted on the residents living nearby. The courts injudicious judgment has made enforcement for environmental abuses tough to materialize. But in I-Expo Sdn Bhd v. TNB Engineering Corporation Sdn Bhd [2014] 1 LNS 1487, it’s different. In this case the court has shown its tendency to uphold ecological justices. It is this stand that needs to be encouraged in Malaysia. In this case, Tenaga Nasional Berhad (“TNB”) who is the owner of the Perai Power Station was undertaking the re-development of the Perai Power Station by constructing a new plant at the same site to improve and strengthen its national electricity supply system. Defendant, TNB Engineering Corporation Sdn Bhd (“TNEC”) (a wholly owned subsidiary of the TNB) was requested to remove the 3 thermal units. The Defendant issued a proposal to TNEC setting out how the works were to be carried out for dismantling, demolition and disposal 3 X 120MW Thermal Units Perai Power Station. The Plaintiff, I-Expo Sdn Bhd issued its letter of intent to participate as the main contractor in the dismantling, demolition and disposal of 3 Thermal Units. Pursuant of the agreement, Plaintiff would also put in
place a good dust suppression system throughout the demolition contract execution. The Defendant terminates the Letter of Award to plaintiff for the suspended works causing defendant to suffer loss. The court in this case finds that the Plaintiff suspension of works is justified until the DOE issue is resolved. Whilst the Defendant suspension of work is committed due to its own fault for failure to manage the schedule waste as imposed by the DOE and thus defendant should not take advantage of its own wrong. Much of Malaysian cases except for few like I-Expo Sdn Bhd v. TNB Engineering Corporation and Bakun Dam case did not directly relate with environmental issues thus it’s hard to determine the severity of environmental degradation. Normally it arises from civil litigations to claim damages for the loss of profit.

IV. MEASURING SUCCESS

In order to do that, some comparison with other advance countries dealing with the matter need to be invoked. UK for example has shown its commitment in protecting the environment. The UK Environment Agency (“EA”) for instance brought the case against Thames Water in respect of repeated discharges of polluting matter from a sewage treatment works into the Grand Union Canal in Hertfordshire during 2012 and 2013. (Gov UK, 2016) Thames Water is said to have fully co-operated with the EA investigation and has rectified matters by replacing equipment involved in the illegal discharges. The water authority also speedily submitted a guilty plea in respect of the charges under the Environmental Permitting Regulations (2010), to benefit from substantial discount (up to one third) of the fine that would otherwise have been imposed. Here the UK court is keen of punishing for high damages against polluters who are normally big corporations.

On passing sentence, HJ Bright QC is said to have issued a warning that the time had come for very large organizations to “bring about the reforms and improvements for which they say they are striving because if they do not, the sentences passed upon them for environmental offences will be sufficiently severe to have a significant impact on their finances.” Under the Sentencing Guideline, a "large" organization (which includes any entity with a turnover or equivalent of £50 million or more) may expect fines ranging anywhere from as low as £7,000 to as much as £3 million per offence, depending on the level of harm caused, the culpability of the offender, and discounting factors such as attempts to minimize the effects of the offence, co-operation with the prosecution, and entry of an early guilty plea.

The court’s move is to be commended as high fines will force boards of directors to take notice and be cautious in engaging with the environment. Whilst under the EU environmental law, it provides a thorough instrument to implement PPP, namely by having command and control of law. Only certain limit of emission is allowed. The lesser the better in terms of value to the environment (European commission, 2012).

Other instrument of test is economic instrument such as, who bear the liability of pollutions under liability rule and that only eco-friendly product are tradable, as well as rebate for eco taxed goods.

Development is important but it can have severe impact on the environment as well such as loss of individuals or habitat of threatened species, populations or ecological communities. Australia have come up with ways how to deal with this delicate issues. Approval may be granted on condition that offsets, compensatory habitat or compensatory restoration is provided. In the case of Society Inc v Minister for Planning [2008] NSWLEC 173 The extension of the sand quarry necessitated the clearing of, and would have impacts on, endangered ecological communities. Approval was granted on conditions requiring the permanent conservation and restoration of other areas of endangered ecological communities, and compensatory planting.

Likewise in the case of Taralga Landscape Guardians Inc v Minister for Planning [2007] NSWLEC 59, where a wind farm was approved on a condition that the developer pay a specified amount of compensation for the loss of each eagle killed by wind turbines to a specified wildlife rescue society.

V. CONCLUSION

Ecological justice is very important to our survival. Thus many measures taken to preserve them should be encouraged and enriched. The polluter pay principles exhibited by USA is very detail so much so room of abuses can be addressed and tackled effectively. Despite the importance of development to the wealth of the country, USA, UK, EU and Australia have made ecological justice their prime agenda. Strengthening the law and enforcement is one way of dealing with the problem. Exorbitant fines are also noted to be effective as a deterrent to big corporations to be mindful of sustaining the environment. The serious punishment given to those who abuse the environment was remarkable. As for Malaysia the call for changes is timely especially when the severity of violations is hard to determine and gauge when issue of standing is made so difficult to cross. The benchmark is there for Malaysia to emulate. Malaysia is a progressive country and it is not impossible to move towards that direction.

When we talk of rights to development the prerequisite of it actually lies in the manifestation of the responsibilities of protecting the ecology. If everyone discharge their responsibilities thoroughly and properly, no rights will be ever be damaged. It’s the duties of every one, the govt, industry and commercial players as well as households and individuals to preserve the environment. When everybody delivers their duties appropriately, the rights of the environment are safely secured and so will the demand of preserving it, will diminish. That is what ecological justice is all about.
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