The Social Sciences 2 (3): 370-375, 2007

Sustainable Development in Malaysia: Focusing on Environmental Management Through Legal Approaches Towards the Private Nuisance

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Abstract: The environmental degradation has formed a great deal of concern among federal and state governments as well as the public. Therefore, a variety of mechanisms and tools had been developed to promote the best management practices in order to achieve sustainable development. Malaysia's hard works in managing her environment and natural resources which in line with the principles of sustainable development are shown through the introduction and implementation of legislation and public, as well as the establishment of a range of advisory councils. Thus, in order to strengthen and support those efforts, private law also plays an essential role in protecting the environment as well as to achieve sustainable development in this country. Private nuisance is one branch of under the law of tort which purpose to provide comfort to individuals who have proprietary interests in land or properties, through control of environmental conditions. Nuisance is divided into two main categories: Public nuisance (which is a crime or as a tort) and private nuisance (which is a tort). However, report shows that less attention has been given in the application of the private law compared to the public law. This study will outline the importance and relevance of the law of private nuisance in controlling the environmental problems and also to propose the use of private nuisance law as an alternative to the existing efforts in handling problems relating to the environment as well as to achieve sustainable development.

Key words: Environmental management, unlawful interference, law of private nuisance, legal approaches

INTRODUCTION

Malaysia is very committed to achieve the objectives of sustainable development. Thus, the natural resources are carefully managed in accordance with the principles of sustainable to achieve a balance between conservation of the environment and development. However, rapid industrialization and economic development invariably resulted in the threats to the environment. Any misbehavior by member of the public shall lead to a significance worsening of the environment. Wilkinson (2002) emphasized the need to limit human actions under certain laws. In order to overcome this problem, Wilkinson stressed the important to develop plans for modifying human activities towards environmentally benign practices through incentives and disincentives. In this regard, law is itself is incentive and disincentive.

In Malaysia, environmental legislation is applicable as one of the plans to manage the environment (Jamaluddin, 1999). The environmental management in Malaysia can be divided into two approaches: Environmental management through non-legal and legal approaches (Jamaluddin, 1996; Muhammad Rizal *et al*., 2003). Environmental management through non-legal approach can be done through research and development, education, formulation of policies, guidelines, development plans and monitoring. Meanwhile, environmental management through legal approaches is divided into two, namely public and private law.

ENVIRONMENTAL MANAGEMENT IN MALAYSIA

According to Jamaluddin (2001) our involvement at the international fore has influenced the environmental management in this country. Malaysia responsive and learn from her experience at the international level and to adopt that knowledge into the strategy and policy on environment. Thus, Malaysia committed to implement provisions and decisions made at the international level to overcome and manage the environment domestically. In fact, Item 1(a) to (d) Federal List, under the Ninth Schedule of Malaysian Federal Constitution provided the responsibility of Federal Government to participate and implement decisions made under treaties, agreements and conventions with other countries.

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The awareness and commitment of Malaysia towards the environment begin as early as the colonial time with the formulation of various enactments and ordinances. Then after the independence, the environmental legislation expanded from time to time as the increase in the awareness and responsibility to protect the environment. In Malaysia, management matters related to the environment is guided by the Federal and State Constitutions and the legislation made under the purview of these Constitutions. There are about 45 legislations related to environment and natural resources in this country. Among others, they are the Environmental Quality Act (EQA), 1974; Local Government Act, 1976 and National Forestry Act, 1984. Most of the laws seek to regulate human activities that may directly or indirectly affect the quality of the environment (Jamaluddin, 1999).

On the other hand, effort to increase the efficiency of administration and management of environment and natural resources is also given a great emphasize in this country. Thus, various advisory councils on environment had been formed. The main objective is to strengthen the administration and as a platform for leaders, administrators, local governments and related government agencies to exchange views and formulate policies related to development and management of environment in Malaysia. National Councils that responsible for consultation and administration on matters related to environment and natural resources are as in Table 1.

Table 1: Malaysian national councils that in charge on natural resources and environmental matters

Councils	Establishment and functions
Environmental Quality Council (EQC)	EQC was established under Section 4 of the Environmental Quality Act, 1974 to advise the minister in charge of the environment on matters pertaining to the Act and also on any matters referred to it by the minister.
National Forestry Council (NFC)	Under Article 74(2) of the Federal Constitution, forestry comes under the jurisdiction of the representative State Governments. As such, each state is empowered to enact laws on forestry and to formulate forest policy independently. NFC was established on 20th December 1971 by the NLC. NFC serves as a forum for the Federal and the State Governments to discuss and resolve common problems and issues relating to forestry policy, administration and management in Malaysia.
National Land Council (NLC)	NLC was established under Article 91 of the Federal Constitution. Article 91(5) explained the responsibility of NLC for consultation and administration of any matters relating to utilization of land for mining, agriculture, forestry or any other purposes at Federal and State levels. NLC is also empowered to formulate a national policy for promotion and control of utilization of land.
National Council Local Government (NCLG)	NCLG was established under Article 95A of the for Federal Constitution. Article 95A (5) provided the responsibility of NCLG for consultation and administration of matters on local government. Federal and State governments shall follow policies formulated by the council.

Source: Malaysian Federal Constitution and Environmental Quality Act, 1974

Table 2: Malaysian policy documents that related to natural resources and environmental matters

Policy documents	Objectives
National Forestry Policy, 1978 (Revised 1992).	National Policy on Environment, 2002. National Forestry Policy, 1978 (Revised 1992) was formulated to facilitate and enhance the administration and management of the national forest resources to meet the need of socio-economic development, the protection of the environment, the conservation of forest resources and its sustainable utilization. The objectives are to: Conserve and manage the nation's forest based on the principles of sustainable management and protect the environment as well as to conserve biological diversity, genetic resources and to enhance research and education.
National Policy on Environment, 2002	National Policy on Environment, 2002 was formulated to continue the economic, social and cultural progress of Malaysia and enhancement of the quality of life of its people, through environmentally sound and sustainable development. The objectives seek to achieve: A clean, safe, healthy and productive environment for present and future generations, conservation of the country's unique and diverse cultural and natural heritage with effective participation by all sectors of society and sustainable lifestyles, patterns of production and consumption.

Source: Modification from FDPM (1995) and MOSTE (2002)

Besides the formulation of various acts and regulations to manage and control the quality of environment, Malaysia also introduced national policies. These policies aimed to furnish the formulation of existing acts and regulations. Table 2 indicates two examples of federal government's policies relating to environmental management in order to achieve sustainable development.

PUBLIC AND PRIVATE LAW

As what has been discussed above, the environmental management through legal approaches can be divided into two, namely public and private law. Public law refers to legislative that governs the relationship between a state and an individual, for example the constitution law, criminal law and environmental law. Whereas, private law governs the relationship between an individual and other individual such as property law, contract law and the law of tort. Both the public and private laws play an important role in environmental management. Private law, essentially, law of tort, serves as a tool of environmental management (Ball and Bell, 1991; Rogers, 1989). The law of tort can be divided into 5 types, namely the law of negligence, law of trespass, strict liability, law of public nuisance and law of private nuisance. This study outlines the importance and relevance of the law of private nuisance in protecting the environment in order to achieve sustainable development.

NUISANCE

Section 2 of the Local Government Act, 1976 (Act 171) defines nuisance as: Any act, omission or thing occasioning or likely to occasion injury, annoyance, offence, harm, danger or damage to the sense of sight, smell or hearing or which is or is likely to be injurious or dangerous to health or property or which affects the safety or the rights of the inhabitants in large. Nuisance can be categorized into public nuisance and private nuisance. Public nuisance is any conduct or act that causes interference to the enjoyment of property which is shared by the public. Public nuisance is classified as a crime and/or tort. Section 268 (1) of the Penal Code (Act 574) provides: A person is guilty of a public nuisance, who does any act, or is guilty of an illegal omission, which causes any common injury, danger, or annoyance to the public, or to the people in general who dwell or occupy property in the vicinity, or which must necessarily cause injury, obstruction, danger or annoyance to persons who may have occasion to use any public right. Therefore, a person who is found guilty of public nuisance may be subject to a criminal sanction.

PRIVATE NUISANCE

A private nuisance is referred to any unlawful interference with a person's use or enjoyment of land or of some right over or in connection with it (Rogers, 1989). Hughes (1996) further explained on the private nuisance as follows:

- Actual physical interference with land itself. For example, in the case of Meux's Brewery Co. v City of London Electric Lighting Co. [1895] 1 Ch 287, where powerful vibrating from engines on neighboring land cause damage to the structure of plaintiff's house.
- Interference with use and enjoyment of land. For example, in the case of Bone v Seale [1975] 1 All ER 787, [1975] I WLR 797, interference occurred as a result of an unpleasant smell arising from a neighboring pig farm.

In addition, based on the case of Read v Lyons and Co. Ltd. [1945] K.B.216, 236; Lord Scott defined private nuisance as:

- Private nuisance as unlawful interference with a person's use or enjoyment of land or some right over, or in connection with it.

The definition pointed that law of private nuisance is concerned with the unlawful interference with a person's use or enjoyment of land, some right over, or in connect with it. The essential difference between private nuisance and other law of torts such as law of negligence and law of trespass which the protection afforded is directed towards controlling proprietary interests rather than the control of individual's activities and conduct (Muhammad Rizal *et al*., 2003). Thus, the law of private nuisance which gives the protection of proprietary interests may provide a general helps to members of public as a means to protect environment.

Norchaya (2003) explained that in an action of private nuisance, the plaintiff must prove interference with the enjoyment of his land. Therefore, a plaintiff must have an interest in land to be able to sue in private nuisance, unlike a claim based on public nuisance which does not require the plaintiff to have any interest over land. Person who have an interest over land are a land owner, a tenant and a licensee who has been granted a license to use the land for a particular purpose.

IMPORTANT FACTORS UNDER THE LAW OF PRIVATE NUISANCE

One important concept in the application of the law of private nuisance is the reasonableness. For nuisance, reasonableness is measured by balancing the rights and interests of both parties-the plaintiff and the defendant. Interference becomes unlawful and constitutes a nuisance when it unreasonably interferes with the plaintiff's enjoyment of his land. According to the case of Saunders Clark v Grosvenor Mansions Company Limited and D'Alles-Sandry [1900] 2 Ch.D.373, Lord Buckley highlighted that, the court will consider whether the defendant is using his property reasonably or not. If he is using it reasonably, there is nothing which at law can be considered a nuisance; but if he is not using reasonably, the plaintiff is entitled to relief.

In assessing the balance between the reasonableness of defendant's conduct and its impact on the plaintiff's ownership rights, the court will take into consideration five factors: locality, duration of interference, the sensitivity of the plaintiff, intention of the defendant and the utility of the defendant's activity (Bell, 1997; Wan Azlan and Mohsin, 1998; Norchaya, 2003; Muhammad Rizal *et al*., 2003).

Locality: The location of the plaintiff's and defendant's premises is relevant considerations in assessing whether the defendant's activity is unreasonable and amount to

substantial interference. The case of St. Helen's Smelting Co. v Tipping [1985] 11 HLC 642 illustrates factor on locality. The plaintiff acquired an estate which was situated in a manufacturing area. The smoke from the defendant's copper-smelting factory had caused considerable damage to the trees on the plaintiff's estate.

Lord Westbury LC distinguished between a physical damage (actual damage to the property) and non-physical damage (personal discomfort). The factor of locality is not taken in the event of a private nuisance which causes actual damage to the property. However, the factor of locality is essential to determine whether a personal discomfort can be considered under legal action. In this case, the respondent/plaintiff able to prove to court that this case based on a private nuisance, which causes actual damage to the property, where the factor of locality is not taken into account.

In Syarikat Perniagaan Selangor Sdn. Bhd. v Fahro Rozi Mohdi and Ors [1981] 2 MLJ 16 (FC), the appellant who had a lease over a piece of land had agreed and promised to use the land as a skating rink, restaurant and cinema. The appellant subsequently build an open stage and staged some shows. He also opened a discotheque. The court held that people who lived in the town area must be prepared to accept a lot of noise from their neighbors and he himself may make noise. However, no one has the right to create excessive noise. Similarly, a person is not required to tolerate an excessive level of noise which is unreasonable and is a nuisance.

Duration of interference: Duration of the interference made by the defendant must be something that is continuos or occurs very often. The plaintiff is required to prove to the court that the duration of the interference caused by the defendant that is not considered as temporary basis in nature.

In Harrison v Southwark and Vauxhall Water Co. [1891] 2 Ch.409, the defendant was a water company which had dug a shaft to pump water from land adjacent to the plaintiff. As shaft was being sunk the pumps that were being used created a continuous noise. Plaintiff brought an action in nuisance to stop the noise. The court held that the duration of the interference caused by the defendant in this case was not permanent in nature.

The sensitivity of the plaintiff: The law of nuisance is not sympathetic to a plaintiff who is extra sensitive, whether the sensitivity is related to the plaintiff himself or to his property. Sensitivity cannot be used as a basis for claiming that the defendant's conduct constitutes an unreasonable and substantial interference, but once unreasonable and substantial interference is established, sensitivity will not deprive the plaintiff from obtaining the remedy.

Based on the case of Robinson v Kilvert [1881]41 Ch. D. 88, the defendant was in the business of making paper boxes. The process involved using hot air. The plaintiff who lived in the floor above the same premises was in the business of selling special paper which was sold according to weight. Naturally, the hot air from the defendants place caused the moisture in the plaintiff's papers to dry up. The raised temperature in the plaintiff's premises did not inconvenience the plaintiff's workers and it would not have affected normal paper. The court denied the plaintiff's claim for compensation on the ground that ordinary paper would not have been affected by hot air and therefore the plaintiff's property was extra ordinary sensitive.

Intention of the defendant: In nuisance, to determine the issue of reasonableness, the court may take into account the purpose or malice of the defendants activity. The existence of malice may cause the defendants act to be unreasonable. For example, in the case of Christie v Davey [1893]1 Ch.316, the plaintiff was a music teacher who conducted music class at her house. Her neighbor, the defendant, did not like the sounds from the musical instruments and in turn shouted, banged at the adjoining walls and clashed pots and pans whilst the plaintiff was conducting her classes. The plaintiff took legal action against the defendant on the basis that the defendant had caused interference by creating unreasonable noise to disturb the plaintiff. The court found that the defendant was malicious in his actions and an injunction was granted to the plaintiff.

The utility of the defendants activity: Plaintiff is required to prove to the court that the defendant's activity that caused interference to the plaintiff is not utility advantage and benefit to other public members. If the defendant's conduct benefits the members of public generally, it is more likely that the conduct will not be deemed unreasonable. So, a claim for building of schools, factories, government hospitals and power stations, although giving rise to interference in the form of noise and dust to nearby residents, would probably be denied on the basis of the utility derived from the construction of the facilities.

According to the case of Adams v Ursell [1913]1 Ch. 269, the defendant was in the trade of selling fried fish. The shop was located in the residential part of the street. Faced with the claim for an injunction, he argued that his

business benefited the public, especially the poor and therefore the smell produced by his trade was justified. The court rejected the defense as the plaintiff's comfort and convenience also had to be considered.

APPLICATION THE LAW OF PRIVATE NUISANCE IN ENVIRONMENTAL MANAGEMENT IN MALAYSIA

To date, there is no specific statute to govern the law of private nuisance in Malaysia. Therefore, Civil Law Act, 1956 (Revised 1972) can be applied to fill in the *lacuna* in law. According to Ahmad and Ahilemah (1987), the application of English Law throughout Malaysia is based on the provisions of Section 3 and 5 of the Civil Law Act, 1956. In this situation, where there is no specific statute that governs a particular private law, therefore Civil Law Act 1956 (Revised 1972) will take place. Thus, the law of private nuisance is based on the English Law of private nuisance (Muhammad Rizal, 2002; Muhammad Rizal *et al*. 2003).

In Malaysia, successful environmental management programme relies many on the enforcement efforts in line with the principles of sustainable development. For the public law, enforcement is in the hands of government agencies such as Department of Environment (DOE) and local authorities. Report from DOE highlights a total of 1,015 compounds were issued to companies and premises for a range of offences under the EQA, 1974 and its regulations in 2002. Meanwhile, 109 offenders were taken to court and fined. These involved offences for pollution of inland waters by discharges of effluent above the stipulated standards, non-compliance of licensing conditions and open burning. Under Section 31A of the EQA, 1974, 3 Prohibition Orders were issued against factories or premises for causing serious environmental pollution which, affecting the public interest (DOE 2003).

Based on the above offences, it is apparent that the implementation of public law is given priority. As the result, with the effective enforcement form the related government agencies, the total environmental offences taken to court through the public law in 2002 is decreasing if compared to previous year. Table 3 highlights the comparison between total environmental offences in 2002 and 2001 through public law.

On the other hand, private law also attempted to serve in controlling damage caused to the environment. Unfortunately, report shows that the application of private law in the environmental management in Malaysia is given less attention compared to the enforcement through the public law. For instance, the total environmental cases under the private law for this country for the period of 20 years (1980-2000), shows only 23 claims had taken to the High Court under the Law of Tort (Esther and Muhammad Rizal, 2003). From that amount, 10 cases are prosecuted under the law of private nuisance; 9 cases under the law of trespass and 4 cases under the law of negligence.

Table 3: Total courts procedures on environmental offences under public law (2001 and 2002)

	Year	
Environmental offences	2002	2001
Prohibition orders	3	11
Compounds	1,015	1,198
Prosecution	109	220

Source: Modification from DOE (2003 and 2002)

Table 4: Total high court cases on environmental matters under private law (2003-2001)

	Year		
Types of the law of tort	2003	2002	2001
Nuisance	-	-	1
Trespass	-	1	-
Negligence	1	-	-
Total	1	1	1

Source: Modification from Malayan Law Journal (2004)

In fact, from 2001 until 2003, the number of cases taken to the High Court is still extremely low. Only a case has been filed under the Law of Tort in 2003, 2002 and 2001, respectively (Malayan Law Journal, 2004). These cases were involved matters which direct dealing with flooding, landslide and noise pollution. Table 4 shows that the application of the private law in environmental management in Malaysia is still extremely low compared to the application of the public law. The differentiation between total prosecutions under the public law is 109 cases compared to only a case filed under the private law in 2002 proved this matter.

CONCLUSION

Malaysia had depended very much on the existing institutional and legal arrangements for the implementation of its environmental policy objectives and strategies. Thus, legislative is important as a tool to manage and protect the environment. According to Bell (1997), the development of the law relating to the protection of environment is not solely governed by the realm of public and administrative law. Private law provides a general help to the members of the public as a means of to protect environment. For that reason, members of the public can appoint any law firms to represent and bring cases to the court.

Therefore, it is recommended to apply the law of private nuisance as an alternative to the existing law and regulations. Nuisance is that branch of the law of tort most closely concerned with protecting the environment. The whole of the law of private nuisance represents an attempt to preserve a balance between two conflicting interests, that of one occupier in using his land as he thinks fit and that of his neighbor in the quiet enjoyment of his land (Rogers, 1989). Thus, efforts should be taken to create awareness among members of the public as well as to the lawyers to apply the law of private nuisance as an alternative in controlling damage to the environment.

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