

Ensearch K. Kumarasivam Endowment Fund

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**“Environmental Courts: Lessons Learned and
Future Direction”**

By:

The Right Honourable Chief Justice

Of The Federal Court Of Malaysia

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Introduction – The Global Scene

1. May I begin by thanking the organisers for inviting me to deliver this lecture. It is indeed an honour and a privilege for me to be here this afternoon to speak on a subject in which I have a keen interest.
2. May I respectfully state at the outset that what I am about to say are my personal views and not necessarily representing that of the Malaysian Judiciary.
3. I have often advocated that one of the best ways to rehabilitate the environment is to raise awareness. In this vein, I welcome this lecture series. I believe this is what the late Ir. K. Kumarasivam would have wanted as the environment was his life work.
4. The topic of this lecture is “**Environmental Courts: Lessons Learned and the Future**”. Our environment,

and by this, I mean the global environment, is in a debilitated condition.

5. The outlook of the world is changing. Literally. As we sit comfortably in this air conditioned room, the rising global temperature is not only setting turning life on Earth into life on Venus, but is causing a drastic rise in sea levels.

6. It was recently reported that the Middle East and surrounding states are becoming an inferno. The Iranian city of Basra recorded the highest temperature ever at 50 degrees Celsius and the heatwave in Pakistan has claimed the lives of hundreds.¹ It is also said that the resulting rise in sea levels will soon cause the drowning of Island States like the Maldives.²

¹ <<https://www.theguardian.com/world/2015/aug/04/middle-east-swelters-in-heatwave-as-temperatures-top-50c>>.

² <<https://realclimatescience.com/2018/08/four-weeks-left-until-the-maldives-drown/>>.

7. This of course is only one part of the bigger mess. Where once we only worried about air and water pollution, the list now includes sound and light pollution. Then there is the destruction of our flora and fauna.
8. So, it is therefore apt to ask, what it is we have learned and where we are headed. After all, it was the great historian, George Santayana who once said that “those who do not learn from history are doomed to repeat it”.
9. But, despite this warning, it seems we have learned very little. And may I say, environmental law and environmentalism are not new phenomena. They date even as far back as 223 BC *i.e.* nearly 2, 300 years ago. The son of Emperor Asoka of India once preached to another king during a hunting trip as follows:³

³ ***Gabčíkovo-Nagymaros (Hungary v Slovakia)*** [1997] ICJ Rep 7, at pages 101-102 (Separate Opinion of Vice-President Weeramantry).

“O great King, the birds of the air and the beasts have as equal a right to live and move about in any part of the land as thou. The land belongs to the people and all living beings; thou art only the guardian of it.”

Ladies and gentlemen,

10. In this lecture, I will first highlight how the condition of the environment in Malaysia is in dire straits. I will then highlight how the Judiciary plays a crucial role in arresting this decline. We will then discuss the history of environmental courts in Malaysia and the progress we are making.

The Deteriorating State of the Malaysian Environment

11. Malaysia is not a stranger when it comes to environmental disasters. Perhaps two of the biggest

ones would be the Asian Rare Earth and Bakun Dam cases.

12. The Asian Rare Earth fiasco has to do with this one Australia company named Lynas. It operated in West Malaysia refining rare earth metals. In the process of doing so, they employed radioactive material which eventually leaked into the water, air, and soil.
13. To this very day as reported in the media, we still shudder at the irreparable damage caused to nearby civilians resulting from these leakages. There have of course been rebuttals by the management of Lynas denying the harms caused. Let us see how that unfolds.⁴

⁴ <https://www.thestar.com.my/news/nation/2018/11/09/some-facts-on-lynas-malaysia/>

14. The Bakum Dam case is a scandal from East Malaysia. It was essentially an environmental calamity disguised as wishful propaganda. Those running the program promised that there will be great opportunities for the peoples of Sarawak. Those behind the said project claimed that the dam would generate electricity not just for Sarawakians but amounts large enough to supply to West Malaysia. That was of course a fabrication.
15. What resulted was two major injustices. For one, at least 10,000 residents of the aboriginal community there were relocated at the expense of their customary land. And might I add that this relocation was done inefficiently because those relocated were accorded inadequate land unsuitable for farming purposes. This is because the lands they were given were mostly flooded.⁵

⁵ <https://ejatlas.org/conflict/malaysia>.

16. These unfortunate people lost their traditional way of life and the resulting effect is that many of them have resorted to mass urban migration. But, because they became fishes out of water, they could not adapt to the urban living and many of them ended up resorting to crime.

17. Second, we lost about 700 km² of virgin jungle. Much of it was valuable fauna. The dam itself was a damned idea, but the timber companies walked into those virgin jungles with their mouths watering, and left with their pockets full of money. What they did was to sell our children's tomorrow for their today.

18. And we have not learned our lesson. The same is happening now in Sabah with the Kaiduan Dam project. This construction is also projected to displace the lives of at least 2000 people and will clear about 5.5 km² of land.

19. While we are on this subject on deforestation, it is also pertinent for me to note the scourge of illegal logging in Malaysia. It is not so simple to define the concept, but it is in gist, the clearing of trees for timber without lawful authority.⁶ It is a large black market and if it continues, it is projected that by 2100, South East Asia will have lost about three quarters of its forests. We will be nothing but a desolate land.

20. Mangrove swamps are being cleared for prawn farming.⁷ But rather than cultivating prawns the reverse happened. The population of prawns, shellfish, and fish which spawn naturally in those areas dwindled. The

⁶ Richard Malanjum (CJSS), *Illegal Logging and Illegal Smuggling of Logs and Timber Products in ASEAN* (The Regional Training for Judges on Environmental Law Issues), at pages 3-5.

⁷ <https://www.thestar.com.my/news/nation/2018/10/18/no-more-mangrove-lands-for-shrimp-farming-says-sabah-minister/>.

locals there are now complaining that there are losing their natural food supplies.⁸

21. Of course I cannot leave out the killing of animals. We have recently become fascinated with oil palm farming. But the animals that once lived on those estates are being taken as trespassers on their own lands. In one case in Sabah, it was reported that a pygmy elephant was killed by a snare set for it.⁹

22. Then there is also the bane of plastics. There is a viral online video where a team of biologists attempt to remove a straw lodged in the nose of an ocean turtle. The video, I must say is agonising as the turtle cries in pain in the process of removing that straw.

⁸ <https://www.thestar.com.my/news/nation/2014/03/02/pitas-aquaculture-park-an-ecohazard-say-villagers/>.

⁹ <https://www.thestar.com.my/news/nation/2018/07/17/elephant-found-dead-in-sabah-from-infected-foot-wound/>.

23. The Minister for Environment, YB Yeo Bee Yin pointed out in Parliament on 16 October 2018 that we produce 1 billion tonnes of plastic a year. About 15-40% of that waste lies underwater (rivers and oceans). She pointed out that if these statistics continue, then by 2050 we will have the same number of fish as plastic waste in our oceans.¹⁰

24. That having been said, the present Government appears to be serious in tackling environmental issues. In fact, the present administration has re-styled the Ministry of Natural Resources and Environment to the Ministry of Energy, Science, Technology, Environment and Climate Change. It is indeed taking efforts to increase environmental enforcement measures.¹¹

The Role of the Courts in Preserving the Environment

¹⁰ Hansard, Dewan Rakyat, YB Yeo Bee Yin (16 October 2018), at pages 9-10.

¹¹ *Ibid.*

25. We now come to the role of the Judiciary. In explaining the crucial role it plays, I would like to quote the words of former Vice-President of the International Court of Justice, Christopher Weeramantry in an introduction penned by him for the **Judicial Handbook On Environmental Law**:¹²

“The judiciary is... one of the most valued and respected institutions in all societies. The tone it sets through the tenor of its decisions influences societal attitudes and reactions towards the matter in question. This is all the more so in a new and rapidly developing area. Judicial decisions and attitudes can also play a great part in influencing society’s perception of the environmental danger and of the

¹² Dinah Shelton and Alexandre Kriss, *Judicial Handbook on Environmental Law*, (UNEP, June 30 2004), at page xx. Available at <https://www.elaw.org/system/files/UNEP.judicial.handbook.enviro.law_.pdf>.

resources available to society with which to contain it. A judiciary exhibiting sensitivity to environmental problems can also stimulate more resort to the judiciary for settling environmental problems. A judiciary that is adequately sensitized and informed regarding this vibrant area of legal development will be in a good position to handle the cases that are brought.”

26. That is very apt in the Malaysian context. Article 5 of our Federal Constitution guarantees the right to life and personal liberty. But, in **Tan Tek Seng** the Court of Appeal read into Article 5 as being part of the right to life and liberty a healthy and pollution-free environment.¹³

¹³ **Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan Malaysia & Anor** [1996] 1 MLJ 261, at page 288.

27. Based on this broad constitutional framework, the Courts next task is to see that these rights are enforced. This is where the Judiciary acts as an oversight mechanism ensuring that laws and regulations are complied with. Further, the Courts provide guidance and creativity in reading and implementing legislation effectively.¹⁴
28. The Judiciary therefore stands on two fronts. It is the institution before whom all complaints are adjudicated fairly. After hearing complaints, the Courts then decide which party is at fault and orders the appropriate remedy with the broader view of preserving the environment.
29. The next step, especially so in environmental cases is the Judiciary's role as a monitor. Justice Weeramantry in his separate opinion delivered in the ICJ case of the

¹⁴ Kenneth Markowitz and Jo Gerardu, 'The Importance of the Judiciary in Environmental Compliance and Enforcement' 29 [2012] *Pace Environmental Law Review* 538, at page 543.

Gabčíkovo–Nagymaros project (a dispute between Hungary and Slovakia) noted that the role of the court as a monitor has been recognised internationally as far as back 1941.¹⁵

30. His Excellency Justice Weeramantry then continued to say this:

*“Domestic legal systems have shown an intense awareness of this need and have even devised procedural structures to this end. In India, for example, **the concept has evolved of the "continuous mandamus"** – a court order which specifies certain environmental safeguards in relation to a given project, and does not leave the matter there, **but orders a continuous monitoring of the project to***

¹⁵ *Gabčíkovo-Nagymaros (Hungary v Slovakia)* [1997] ICJ Rep 7, at pages 112-113 (Separate Opinion of Vice-President Weeramantry).

***ensure compliance with the standards
which the court has ordained.”***

31. India is not the only country to use the “continuous mandamus”. Bangladesh is another example. The seminal case would be the decision of its Supreme Court in **Dr Mohiuddin Farooque**.¹⁶ NGOs filed actions against the Government to force them to perform its statutory public duty to control air and sound pollution emanating from motor vehicles.

32. Some of the orders I find illuminating are as follows:

- i) That the Government phase out certain vehicles and replace them with cleaner transport alternatives;

¹⁶ ***Dr Mohiuddin Farooque, et. Al v Bangladesh*** [2002] 22 BLD (HCD) 345.

- ii) That all relevant vehicles be fitted with catalytic converters;
- iii) That the Government give wide publicity to the directions of the Court on 2 consecutive days, twice a week for a month; and
- iv) That the writ actions were deemed pending for the purpose of monitoring. **The Government was ordered to submit reports every six months on the results of the actions and measures taken.**

33. That is just one example on how judicially active courts and judges play their respective roles in upholding environmental rights.

34. There has been some progress in Malaysia. For example, the Court of Appeal admirably held in the

Sagong Tasi case that when it comes to the *Orang Asli* community, the State owes them a fiduciary duty.¹⁷

35. Another important aspect, I think, is the consultative role of the Judiciary. The Courts and the Executive should work together in ensuring that laws and policies are effective. Just two days ago, the Government through announced its plans to pass the Climate Change Act in light of Malaysia's commitment to the Paris Agreement.¹⁸ I hope a meaningful discussion will take place between the Judiciary and the Executive to ensure that this proposed Act is implemented in the best way possible in line of the current legal framework.

36. Consultation aside, the other fundamental requirement is judicial independence. In 2002, a Global Judges' Symposium was conducted where it was affirmed that

¹⁷ *Kerajaan Negeri Selangor & Ors v Sagong Tasi & Ors* [2005] 4 CLJ 169.

¹⁸ <https://www.thestar.com.my/news/nation/2018/12/12/acting-on-climate-change-malaysia-drafting-laws-in-efforts-to-overcome-any-possible-scenario/>

judicial independence is a vital element to environmental justice.¹⁹ By independence, I mean the Judiciary must be free from any external or internal influences to abide by a certain agenda where the failure to make the correct decision would not only desecrate the judicial oath of office, but spell the end of the environment.

The Malaysian Environmental Courts

37. This now brings me to my next point. How and what have our Courts done in the context of environmental law?

38. Regrettably, our early history in this field is nothing to write home about. The decision of the Court of Appeal in the Bakun case failed to arrest the travesty that took

¹⁹ Robert Carnwath, 'Environmental Law in a Global Society' 28th Sultan Azlan Shah Law Lecture delivered on 9 October 2014, at pages 29-31. Available at <http://www.sultanazlanshah.com/pdf/Tributes/SAS_Lecture_28.pdf>.

place to the indigenous community, and that too, on technical grounds of *locus standi*.²⁰

39. Indeed, ever since the narrow majority decision of the Supreme Court in the **Lim Kit Siang** case, our approach to *locus standi*, has, up to an extent, been pathetic.²¹

40. Fortunately, our Rules of Court were later amended to widen the definition of *locus standi* from anyone having ‘sufficient interest’ to anyone who is ‘adversely affected.’ This is an improvement and courts have become more receptive to public interest litigation (**PIL**).

41. This was as a result of the decision of the Court of Appeal in **QSR Brands** which was later affirmed by the Federal Court in **MTUC**.²² But mind you, these

²⁰ **Ketua Pengarah Jabatan Alam Sekitar & Anor v Kajing Tubek & Ors and other appeals** [1997] 3 MLJ 23.

²¹ **Government of Malaysia v Lim Kit Siang** [1988] 2 MLJ 12.

²² **QSR Brands Bhd v Suruhanjaya Sekuriti & Anor** [2006] 3 MLJ 164; **Malaysian Trade Union Congress & Ors v Menteri Tenaga, Air dan Komunikasi & Anor** [2014] 3 MLJ 145.

decisions still have not lifted the shadow of the **Lim Kit Siang** decision because instead of expressly overruling it, the respective Courts chose to distinguish it.

42. Then, as recent as 2016, there was the decision in **TR Sandah**.²³ The question was whether the natives in that case were entitled to compensation for land over which they claimed native title. The majority of the Federal Court took a pedantic approach and held that ‘custom having the force of law’ must mean that such custom must be enacted into law before it has any binding effect. In the result, the said native custom not having been so recognised, could not be used to claim native title. As pointed out in the dissenting judgment of Zainun FCJ, if custom having the force of law must be statutorily enacted, then there would be no purpose in Article

²³ *Director of Forest, Sarawak & Anor v TR Sandah ak Tabau & Ors (suing on behalf of themselves and 22 other proprietors, occupiers, holders and claimants of native customary rights (‘NCR’) land situated at Rumah Sandah and Rumah Lanjang, Ulu Machan Kanowit) and other appeals* [2017] 2 MLJ 281.

160(2) defining law to mean written law, common law and **custom having the force of law.**

43. Speaking of statutes, we also have the Environmental Quality Act 1974. It is an old piece of legislation which we are still using until today.
44. Eventually, after returning from the Asian Environmental Working Group, Jakarta, we finally gained the foresight to establish our own environmental courts. These Courts began sitting sometime toward the end of 2012.
45. But even then, these courts functioned half-heartedly. While they were styled “environmental courts” the judges were anything but green. In other words, the judges were not specialised in environmental law nor particularly sensitive to environmental issues. And such courts, heard both criminal and civil environmental cases as though were simple run of the mill cases.

46. Another flaw behind these so-called environmental courts was that they only heard criminal cases relating to environmental offences. And the policy as it appeared then was to give a light slap on the wrist. Axe an ancient tree, or kill an endangered species, and you could simply walk away by paying a fine or at most, a lenient jail sentence.
47. One infamous example is that of Anson Wong, also known as the 'Lizard King'. It is sad that Malaysia has produced an internationally wanted criminal notorious for the smuggling of wildlife. As if a 71-month jail-term in the United States was not enough, he came back to Malaysia and repeated his crimes. Sometime in August 2010, he was arrested in Kuala Lumpur for smuggling 95 boa constrictors.²⁴ The appellate court, amongst other things, lowered his jail term from 5 years to 17 and a half months! This was, amongst others, simply on the

²⁴ <https://www.bbc.com/news/world-asia-pacific-11203270>.

grounds that he was a 'first offender' in Malaysia and that he had pleaded guilty.²⁵

48. It is therefore high time that our courts no longer take this cosy approach when dealing with environmental offenders. You do not have to kill just a human to be labelled a murderer.

49. This also ties in to the point I made earlier. Not only did we lack environmentally sensitive judges, we did not really have any civil courts tasked to deal with civil environmental claims. This further stresses my view that the environmental judicial regime was half-hearted.

50. We did ultimately establish civil environmental courts through Practice Direction 7 of 2015. But even then, progress is slow.

²⁵ <https://www.thestar.com.my/news/nation/2012/02/22/wildlife-trader-anson-wong-freed-after-court-reduces-jail-term/>.

The Future

51. Enough about history. Our future is the bigger concern. And to tie it back to what Santayana said, have we learned anything from our history?
52. One country in which environmental law developed healthily since the 1990s would be The Philippines. As a result of public interest litigations, their courts have consistently upheld environmental rights and have even called upon the Filipino government to observe them.²⁶
53. In fact, The Philippines enacted their own set of environmental rules known as the Rules of Procedure for Environmental Cases which came into force on 29 April 2010. I would like to highlight their relevance to civil environmental proceedings.

²⁶ Dante Gatmaytan, 'Part III: Environmental Disputes and Resolution Techniques in the Philippines', at page 3.

54. Amongst other things, the Filipino rules specifically cater for continuous mandamus. They also, to an extent, liberalise *locus standi* by allowing any citizen to bring an environmental action not only on behalf of himself, but even for generations unborn. Another notable feature of said rules would be the power of the Filipino courts to grant Environmental Protection Orders ('**EPO**'). These orders enjoin any party to perform or desist from performing an act with the view to protect, preserve, or rehabilitate the environment.
55. Two other important features of the Filipino rules I would like to highlight are these:
- i) the 'precautionary principle'; and
 - ii) the 'polluter pays' concept.
56. The precautionary principle is a basic principle that any environmental judge must know. It exists in Filipino rules

and is also recommended in the Judicial Handbook I referred to earlier. It means that when a judge is faced with a lack of scientific certainty, that uncertainty shall not be an excuse to postpone judicial relief.

57. The polluter pays principle is one based on logic. If you make a mess, be responsible for cleaning it up. In civil proceedings this means that the court, in addition to protection or preservation orders, may also make orders that the polluter pays the full costs of rehabilitating the environment.

58. As we speak, the Malaysian Judiciary is also in the process of working out amendments to the Rules of Court 2012 carving out a rule specific to environmental proceedings. We are seriously considering adopting into our rules the principles that I mentioned just now.

59. One key area of our focus in the proposed environmental rules is *locus standi*. The Judiciary wants to make it amply clear that we encourage public interest litigation and further access to justice. Our procedural laws must reflect the same.

60. In a chapter co-written by Professor Andrew and Associate Professor Azmi Sharom they said:²⁷

*“In almost all the interviews conducted there was cynicism as to the usefulness of the courts. There was a belief that the courts are the last opportunity for justice, but this belief was minimal at best... **Litigation is in our view fundamental to the retention or development of a rule-of-law state.**”*

²⁷ Andrew Harding and Azmi Sharom, *Access to Environmental Justice: A Comparative Study* (The Hague, Martinus Nijhoff, 2007)', at pages 8 and 23.

61. Considering that our administration of justice is adversarial in nature, there is little the Courts without litigation. On our part, the courts can engage in judicial activism in, but lawyers must also do their part in bringing those cases to our doors.

Conclusion

Ladies and gentlemen,

62. The courts play an important part in protecting and preserving the environments. While action by the Court in the past has been unsatisfactory, we are present making efforts to turn that around.

63. I see before me many budding lawyers. Some of you may already be lawyers. You also play an equally important role. There is more to law than making money.

I encourage you to take up public interest litigation to uphold the cause of justice. Also do your part in raising environmental awareness.

64. If anything, I hope everyone here, including myself, walks out of this room feeling a greater sense of responsibility towards the environment. Let us not allow the late Ir. K. Kumarasivam's hard work be in vain.

65. Thank you for listening.