The Reid Constitutional Commission: The ‘Lost’ Environmental Proposals for Malaysia

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Abstract

Within the written words of the Malaysian Federal Constitution, ‘environment’ is missing. No express term provides or protects the right to a clean environment, except for a limited questionable right judicially interpreted under art 5(1)’s right to life. It has often been said that the framers of the Constitution, the Reid Constitutional Commission, omitted to provide for the environment given the Constitution’s silence on this matter, and that this omission is fatal. However, it is suggested — contrarily — that there may be historic evidence to demonstrate not only that the Reid Constitutional Commission made proposals for environmental protection, but also that it envisaged a strong federal governmental role in the preservation and conservation of the environment; a role which, if recognised and adopted today, could result in greater protection for the environment and a more certain legal environmental framework for Malaysia.

I. Introduction

‘Silence speaks louder than words.’

E E Cummings

Malaysia’s framework of environmental law and policies is extensive, with provisions ranging from those within the Federal Constitution (Malaysia) (‘Constitution’), federal and state legislative Acts on specific natural resource or natural resource-related legislation, to forward-looking governmental environmental policies and political aspirations. This mix of ‘sources’ results in an environmental framework that is not without its challenges, and much has been written about its weaknesses.

These challenges or weaknesses are not unique to Malaysia; they are common in any jurisdiction with a genuine concern for environmental issues. Environmental challenges are often viewed as unavoidable or inevitable given the nature and variability of environmental concerns, but an express
constitutional environmental provision might add positively to or limit existing challenges. While the effectiveness of a constitutional provision is not within the purview of this article, it is generally recognised that ‘it is better to have an explicit provision spelling out the need to protect the environment’. 1 At present, there is no express provision for the environment in the Constitution. Despite that, what this article hopes to demonstrate is that there is salient and long-misplaced evidence within the historic jurisprudence of Malaysia providing for the protection of the environment — evidence in support of a right that (should it be recognised) could be utilised to recommend a new constitutional environmental provision. The notion that its omission is fatal to existing environmental protection fails to consider quite the opposite: that in its silence it speaks loudest.

Several qualifications must be set out. First, the issues and causes surrounding environmental challenges in Malaysia are numerous. 2 While the study of environmental law in Malaysia (or in general) is extensive; this article will focus only on jurisdictional uncertainties between federal and state authorities with emphasis on their effect on land matters. This is by no means the only environmental challenge Malaysia faces, nor the only cause of it, but this limitation was specifically identified and highlighted for discussion given the emphasis the Reid Commission placed on it.

Second, given the breadth of the article, discussions on constitutional provisions affecting environmental issues will be given priority, while some mention will be made of other contributors to Malaysian environmental laws and policies. Finally, the article focuses primarily on West Malaysia (formerly Malaya), with discussions of Sabah and Sarawak (also known as East Malaysia) limited to providing contrast and perspective to existing laws and practices only.

II. Current Constitutional Protection

It is generally accepted that there is no right to a clean environment in Malaysia given that the Constitution has no express provision to that end. 3 However, it is also recognised that, to some extent, this right is available, albeit implicitly, under art 5(1) of the Constitution.

Under art 5(1): ‘No person shall be deprived of his life or personal liberty save in accordance with law.’ This provision falls within pt II (‘Fundamental

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2. Malaysia faces a host of environmental issues, including water and air pollution, squatter communities, uncertainty surrounding the requirements for environmental impact assessments etc: see Andrew Harding (ed), Access to Environmental Justice: A Comparative Study (Martinus Nijhoff, 2007) 125–56.
3. Demonstrating the Constitution’s lack of a specific provision granting legislative authority to the federal government to enact laws and address issues on the environment, following its commitments under the UN Conference on the Human Environment in Stockholm in 1974, Malaysia’s federal government had to rely on powers under ‘Trade, Commerce and Industry’ and ‘Health’ (both subject matters listed under the Federal List (under sch 9)) as the basis of its power to enact the Environmental Quality Act 1974 (Malaysia): see Terri Mottershead (ed), Environmental Law and Enforcement in the Asia Pacific Rim (Sweet & Maxwell Asia, 2002).
Liberties’) of the Constitution and has been termed loosely the ‘Malaysian Bill of Rights’. While some of the fundamental liberties listed are absolute, others are conditional. A good example is art 5(1), where, ‘in accordance with law’, this fundamental right can be (and has successfully been) extinguished by legislative action. Article 5(1) has been the subject of extensive judicial interpretation given its intent toward the protection and recognition of the sanctity of life. The provision of art 5(1) and the meaning of each of its words has been interpreted extensively, giving judges considerable scope for creativity.

For environmental purposes, however, only a number of judicial decisions have defined ‘life’ more liberally to afford some protection. Primarily, this right has been recognised to encompass one’s reputation and livelihood beyond ‘mere existence … [which] incorporates all those facets that are an integral part of life itself’, and this ‘includes the right to live in a reasonably healthy and pollution free environment’, encompassing a situation where a person ‘suffers deprivation of their livelihood and cultural heritage’.

A similar provision can be found in art 21 of the Constitution of India, which states: ‘No person shall be deprived of his life or personal liberty except according to procedure established by law.’ This right has been interpreted to embody a ‘right to have a living atmosphere congenial to human existence’. It has also been referred to in matters ranging from the misuse of land contrary to stipulated use to pollution issues, and the Indian judiciary has set out precedents and established procedures recognising the need for the protection and conservation of the environment. Such fearless interpretations have earned it a reputation as a judiciary ‘fully sensitive to the endemic universal [environmental] concerns’.

Unlike their Indian counterparts, Malaysian judges have generally taken a more conservative, literal approach when recognising environmental rights as

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4 As an example, art 6(1) of the Constitution states that: ‘No person shall be held in slavery.’ This right cannot be abrogated and is absolute except in the case of constitutional amendment.
5 For example, the individual meanings of ‘personal liberty’, ‘life’ and ‘in accordance with law’ have been reviewed by the courts together with the procedural and substantive aspects of fair trial when considered in the light of art 5(1), and questions such as whether the imposition of a life sentence is contrary to the right to life have also been discussed.
8 See the decision of Gopal Sri Ram JCA in Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan [1996] 1 MLJ 261, 288.
9 Ibid.
part of an individual’s right to life.14 The literal approach recognises only constitutionally enumerated rights that are expressly provided for within the black letter of the law, a strict approach redolent of the influence of legal positivism. Conversely, a more liberal, rights-based approach recognises that situations do arise where ‘the judge may reach beyond the black letter rules he has to apply for extra-legal or unwritten “natural law” principles in interpreting the constitutional text’.15 This more holistic approach, which takes into consideration policy and principles, has generally been recognised as a justice-based concept, with principles Dworkin himself defines as a ‘standard that is to be observed … because it is a requirement of justice or fairness or some other dimension of morality’.16 Indeed, he notes not only that law and order must be maintained as the rule of the day, but also that it must be just.

Two examples of Malaysia’s conservative and literal approach can be seen: first, in Tan Tek Seng,17 where the courts took a step forward in recognising that the right to life under art 5(1) also encompassed other facets of life that ‘form the quality of life’. Unfortunately, the principle facts of the case had no bearing on environmental issues,18 and the judge’s ‘musings’ on what ‘life’ encompassed under art 5(1) were persuasive (with regards to the environment) and fell squarely within the purview of obiter dicta,19 which failed to provide the all-important precedent.

Similarly, while the substantive facts in Kajing Tubek20 were environmental in nature, the judges failed to extend protection of life under art 5(1), preferring instead to define the term ‘environment’ as a ‘multi-faceted and multi-dimensional concept, depending for its meaning upon the context of its use’.21 The judgment in this case has been described as an ‘error of major proportions’,22 being both narrow and unrealistic in its compartmentalisation of

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14 Some Malaysian judges have adopted a more liberal approach; for example, in his judgment in Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan [1996] 1 MLJ 261, 288 Gopal Sri Ram JCA notes that: the courts should keep in tandem with the national ethos when interpreting provisions of a living document like the Federal Constitution, lest they be left behind while the winds of modern and progressive change pass them by … they should when discharging their duties as interpreters of the supreme law, adopt a liberal approach in order to implement the true intention of the framers of the federal constitution.

15 Kevin Tan and Thio Li-Ann, Tan, Yeo & Lee’s Constitutional Law in Malaysia and Singapore (Butterworths Asia, 2nd ed, 1997) 525.

16 Ronald Dworkin, Taking Rights Seriously (Duckworth, 1977) 22.


18 In this case, the issue before the court was the right to lawful and gainful employment.

19 See generally Mohd Bakri Ishak and Azmi Sharom, Undang-Undang Alam Sekitar (Jilid 8, Dewan Bahasa dan Pustaka, 2007) 3–16. However, the definition of ‘life’ incorporating ‘all those facets that are an integral part of life itself’ with regards to the right to seek and engage in lawful and gainful employment has been further affirmed and extended in the cases of Abdullah bin Borhan v Ketua Polis Melaka [2008] 8 MLJ 161; Berkuasa Negeri Sabah v Sugumar Balakrishnan [2002] 4 CLJ 105; Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan [2002] 3 MLJ 72; and Peter James Tenent v Kaka Singh Dhaliwal (Secretary of the Malay Racing Association) [2007] 3 MLJ 67.


21 Ibid 36.

22 Singh Nijar, above n 13, ccxl.
the aspects that could be encompassed within the definition of ‘environment’. Based on the facts in Kajing Tubek, the Court of Appeal found that, while the appellant’s right to life under art 5(1) had been deprived, this ‘fundamental right’ provided for under the Constitution had unfortunately been validly and legally extinguished ‘in accordance with law’ by the existence of a lower-level state legislation and, as such, there was no necessity for a remedy. In Malaysia, the notion that there is some constitutional environmental protection under art 5(1) may be accurate, albeit theoretically. The reality is that the uncertainty that comes with the ability to erase a fundamental right so easily and the very limited and conservative constitutional interpretations (both in application and definition) of what environmental protections are available have resulted in a right that is absent any real constitutional protection.

Constitutional protection is only one of several sources of law that make up the Malaysian environmental framework. The influence of English tort law on Malaysia via judicial decisions, legislative provisions, governmental policies and economic plans all play an equally substantive role.

III. Federalism: Articles 74 and 76

Federalism recognises the ‘establishment of a single political system, within which, general and regional governments are assigned coordinate authority such that neither level of government is legally or politically subordinate to the other’. It is a system of government sometimes viewed as a compromise between independent regional units and, at other times, an effective check against possible abuse of powers from either level of government. In practice, it is a concept that requires ‘adherence to the rule of law and democracy; more than this, it requires the spirit and usage of federalism, not just a legal structure’.

Malaysia adopted federalism due in part to historic circumstances, and possibly even cultural factors; whatever the reason, having multiple jurisdictions and governments often (as is a hallmark of many federal systems of government) results in an unstable entity. The need to achieve a balance between federal and state governments is a perilous challenge which may result in, among other things, uncertainty as to jurisdiction. The worrying overlap of

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29 Harding, above n 27, 183.
It has been written that the legislative division of powers between federal and state governments under art 74 of the Constitution, read with sch 9, has had ‘the most profound effect on environmental law’ in Malaysia. Under that provision, the legislative powers of authority are divided between the federal and state governments based on the subject matters enumerated under sch 9’s three lists. Subject matters falling within the Federal List fall within the federal government’s purview, while those under the State List fall within the state’s legislative authority, and matters falling within the Concurrent List are shared between the two, and include subjects about which either government may legislate. In the event of an inconsistency of law between state and federal legislation, the latter prevails, and state law, to the extent of the inconsistency, is deemed void. Theoretically, this implies that subject matters are neatly divided between the two authorities, with jurisdictional authority clearly differentiated based on what is or is not on the list, as a result of which each has absolute jurisdiction within its own ‘pond’. However, in reality, this is not the case.

For the purposes of the environment, there can be no neat division of power for three primary (though not exhaustive) reasons. First, while sch 9’s enumerated lists of subject matters are long and detailed, ‘environment’ is not mentioned in any of the lists. As a result, there is no single overarching body that has authority over this subject matter. Second, environmental challenges are interconnected and inter-related, and do not respect physical boundary lines or invisible lines of authority, as such, ‘stepping on another’s toes’ is fairly
common. Finally, while there are natural resource-related subject matters identified within the three lists, a large number of them are found within the State List.\textsuperscript{36} States having primary jurisdiction over natural resources per se is not a concern; what is of concern is that states have absolute constitutional legislative jurisdiction over these natural resources, which can result in dissimilar pieces of legislation covering similar subject matters throughout the federation or an unequal emphasis from one state to another on the protection or need to conserve natural resources as a whole. Different weightages and different legislative provisions have contributed to current challenges within the Malaysian framework.

Under art 76 of the Constitution, the federal government is granted the power to legislate over subject matters enumerated under the State List in specific situations. This right has been utilised by the federal government in the past, specifically art 76(1)(b), where the federal government can ‘for the purpose of promoting uniformity of the laws of two or more states’ legislate on matters within the State List. However, art 76(1)(b) must be read with art 76(3),\textsuperscript{37} which allows states to have the final say as to whether to implement, or as to how much of the said federal law it wishes to implement.\textsuperscript{38} What this provision demonstrates is that the successful application of nationwide laws is dependent on and entirely in the hands of the state government.

Jurisdictional uncertainty has resulted in, among other things, a host of sector-specific and state-specific legislation and policies that differ from state to state; situations where one state has inadequate, diluted or lax legislation as oppose to another where standards are high and environmental regulation is a priority; and uncertainty over applicable laws and authorities, resulting in friction for federal-state relations, inevitably resulting in weak working relationships and mediocre levels of protection for the environment.\textsuperscript{39}

The federal government structure has also resulted in a more complex structure of environmental decision making. In Malaysia there are three levels of government: federal, state and local. On matters concerning the environment, the

\textsuperscript{36} Natural resource-related subject matters falling within the State List are (and are not limited to) agriculture, forests, rivers, riverine fishing, and land matters. 

\textsuperscript{37} Article 76(3) states that federal law ‘shall not come into operation in any state until it has been adopted by a law made by the legislature of that state, and shall then be deemed to be a state law and not a federal law, and may accordingly be amended or repealed by a law made by the legislature’.

\textsuperscript{38} A good example of this can be seen in the federal National Forestry Act 1984. Although the long title of the Act provides that the statute shall be applicable to the ‘administration, management and conservation of forests and forestry within the states of Malaysia’, the Act is (till now) not in force in Sabah and Sarawak, although portions of it have been incorporated into East Malaysia’s local forestry Acts.

\textsuperscript{39} For a more complete discussion on the effects of jurisdictional weakness, see Ling, above n 25, 65–73.
federal government has consistently passed national environmental policies, realigned Ministries to better meet the environmental needs, and introduced new economic initiatives and plans towards a more economic and yet environmentally sustainable environment. While much takes place at the federal level, the real jurisdictional power to affect matters concerning land, rivers and agriculture (to name a few) is in the hands of the state authorities under sch 9 of the Constitution. State governments, in turn, under the Local Government Act 1976, the Town and Country Planning Act 1976 and the Federal Territory Planning Act 1983, authorise and appoint local authorities (either a municipal council or a district council) for designated areas. While the state government (via the State Planning Committee or Local Planning Committee) is responsible for the general policy, direction and planning of the state’s (in this instance) environment, it is at the local authority level that more detailed plans are worked out involving day-to-day issues like treatment of public amenities, parks, trees, recreational lands etc. Although at each level planning committees and authorities must have regard to current national and state polices, how effective have these been? How much of the federal policy signed at Putrajaya has found its way down to the grassroots is still anybody’s guess.

In order to further appreciate the dynamics of the relationship between the state and federal government, as well as the intention and purpose of the framers of the Constitution when drafting these constitutional provisions, a brief historic discussion is required.

IV. Malayan History and the Reid Constitutional Commission

The existing federal-state parameters that define the relationship between the two, as outlined by the Constitution, are a result of an historic state of affairs. Constitutions, as living and breathing documents of history, reflect ‘political, economic and social forces prevalent [and] have a significant impact on the shape of the constitution’; this is no different for Malaysia. Prior to Malaya’s independence in 1957, the system of government was vastly different from the present system, due to British colonial administration. Pre-independence, Malaya was divided into three administrative systems, one for each of the different units formed under historic circumstances: the Federated Malay States, the Unfederated Malay States, and the Straits Settlements.

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40 As an example, see National Policy on the Environment (Ministry of Science, Technology and the Environment, 2002).
41 For example, the Ministry of Natural Resources and Environment was established in March 2004, from a combination of existing departments from four different Ministries and in April 2009 the Ministry of Energy, Green Technology and Water was established.
42 From the earlier Malaysia Plans to the latest Tenth Malaysia Plan unveiled in 2010, Malaysia’s vision has been to promote environmental sustainability and economic development.
In 1946, the Malayan Union established the *Malayan Union Constitution* and, for the first time, united the different units within one entity — Malaya. However, many of the provisions and terms of this constitution were never implemented in part because of Malay opposition. It was only in 1948, when the *Federation of Malaya Agreement* (‘1948 Agreement’) was passed, that relations between the federal and state governments became more clearly defined. The 1948 Agreement not only replaced the 1946 Constitution, it also consolidated a ‘disparate collection of administrative units that existed previously’. The result was that the Malay rulers became constitutional monarchs, and the High Commissioner took on the role of the chief executive of Malaya, yielding huge legislative and executive powers (while aided by a federal executive council to advise him at federal level), with the Residents at state level; this was the beginning of a federal state. Federalism was thus the ‘outcome of the British system of ruling…and a response to the problems posed by the survival of nine Malay monarchies’.

Under the 1948 Agreement, the federal government’s powers to make laws were listed in the Second Schedule, while states had very limited, almost residuary, legislative power. Under cl 100 of the 1948 Agreement, states had legislative jurisdiction only over matters that were omitted from the Second Schedule; states also had powers over religious and customary matters. This was a ‘fairly workable framework’, except where it conferred huge legislative powers on the federation and executive powers on the state. This was deemed ‘impractical’ and an area that would very likely lead to ‘friction and might well have graver consequences’.

As a result, when the drive towards independence began, the task of framing the constitution for the Federation of Malaya was placed in the hands of a five-man team headed by the British Law Lord, Lord Reid. Among the tasks assigned to the Reid Constitutional Commission (‘Commission’) based on the terms of reference drawn up was a federal form of government, specifically referred to and even coveted.

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44 The *Malayan Union Constitution* as it was known is made up of a collection of instruments and treaties passed pursuant to the setting up of a Government of Malaya: see J C Fong, *Constitutional Federalism in Malaysia* (Thomson, Sweet & Maxwell Asia, 2008) 5.
45 Ibid.
46 Fernando, above n 43, 28.
48 Fernando, above n 43, 68.
50 The Reid Constitutional Commission was made up of Lord Reid, chairman of the Commission; Sir William McKell, a former Governor-General of Australia; Justice B Malik from India; Justice Abdul Hamid from Pakistan; and Sir Ivor Jennings, a former King’s Counsel and Vice-Chancellor of the University of Cambridge.
51 The Commission was given the task of framing a constitution based on a set of terms. These terms of reference were drawn up by a group of representatives from the Alliance, the Malay Rulers and the Colonial Office. Among other things, the Reid Commission’s mandate was to
In its endeavour to fulfil the mandate, the Commission sought to strike a ‘balance of powers between the central government and the States in the spirit of the concept of federalism’. Its main aim was to secure ‘uniformity of policy and efficiency of administration’. This was not contested by the rulers of the Malayan states and it was observed that they had ‘unwittingly aided the creation of a strong central government and diminished state powers’. While parts of the Commission’s recommendations were contested and reassessed when it was finally published and presented simultaneously to the British government as well as the Malay Rulers, in terms of the federal-state relationship, the constitutional draft which recognised and differentiated the legislative and executive powers of the federal and state governments remained substantially unchanged. Thus it ‘creates and regulates the law-making power of the federation’. From that point on, a strong federal government for Malaysia was established.

V. The Reid Proposals and Recommendations for the Environment

The Commission was in Malaya for approximately eight months in 1956. Arriving separately, its members assembled to conduct interviews and meetings, collect information and reference materials, visit states, and meet with local officials and organisations. The Commission was also briefed by senior members of Malaya’s civil service and received memoranda from a range of sources — from individuals to trade unions — airing their concerns. When this was completed, the Commission adjourned to Rome and then to the United

provide Malaya with a strong central government, and a measure of autonomy for states, and to ensure that the traditional position of the constitutional monarchs and rulers were safeguarded, together with a provision on special Malay rights and the issue of citizenship for other communities.

52 See Fernando, above n 43, ch 2 17–40.
53 Ibid 71.
54 Mohammad Agus Yusoff, Malaysian Federalism: Conflict or Consensus (University Kebangsaan Malaysia Press, 2006) 23.
55 Fernando, above n 43, 78.
56 See arts 73 and 82; see also Sukma Darmawan Sasmitaat Madja v Ketua Pengarah Penjara Malaysia [1999] 1 All Malaysia Reports 281, 289; [1999] 1 MLJ 266, 271.
57 The Commission arrived in Malaya at different times due in part to the difficulty of assembling and obtaining approval for the candidates who made up the Commission. For example, Lord Reid arrived at the end of May 1956 and was informed that the Canadian candidate was unable to join the panel, and was urged to begin work regardless. Subsequently, in the first meeting held by the Commission, the Indian candidate, Justice B Malik, was absent. From the inward telegram sent from the United Kingdom High Commissioner to India dated 18 June 1956 (CO1030/130 (232)), it was clear that Justice Malik’s services had just been offered (presumably in June, the same month the telegram was sent, about a month after Lord Reid had arrived to begin work in Malaya). See generally Joseph M Fernando, The Making of the Malayan Constitution (Monograph No 31, MBRAS, 2002) 99–109. Note also that the primary sources of the discussions and debates by the Commission can be found deposited in the Public Records Office in Kew, United Kingdom. The information is stored particularly in the CO1000, CO941 and CO2000 series and several others which are pertinent and are mentioned below.

58 Fernando, above n 57, 114–15.
59 CO1030/136 (2) from the Secretary of State to Reid dated 2 August 1956 indicates that Rome was chosen as a venue to write its report in order to assist Jennings, who had agreed earlier to

Kingdom to draft and to write the reports for presentation to the British government and the Malayan government and Rulers.

From the Commission’s point of view, it was pertinent that the outcome of the division of legislative powers should satisfy the mandate required of it to provide Malaya with a strong central government, and at the same time establish and retain a measure of the states’ historic position. It was aware that it could not give the federal government ‘a completely free hand without undermining the autonomy of the states and possibly causing friction between the states and the federation’ and of the ‘difficult question of the allocation of powers between the federation and the states’. From this need to maintain an acceptable division of power a number of key points of interest arise, suggesting that the Commission had made provisions for the environment.

A. The proposed national development scheme

Chapter V of the Reid Commission Report discusses the division of legislative and executive powers. Under para 82, the Commission recognised that while art 74 of the Constitution divides subjects into different lists and allocates legislative authority between both federal and state authorities in general, a qualification exists:

We say that ‘in general’ the State Legislative Assembly and the State Government should have these powers and responsibilities because we think it necessary to recommend that in certain particular circumstances … the Federation should have overriding powers.

Of these ‘particular circumstances’ that the Commission felt required express recognition and mention were matters ‘with regard to land and kindred subjects’.

To emphasise this point, the Reid Commission Report described (immediately after this qualification) the existing state of the use of land in Malaya, drawing for the reader a situation whereby ‘already erosion and soil conservation present formidable difficulties and ill-considered schemes for rapid development might easily have disastrous consequences’, and recommended

Chair the Royal Commission on Common Land. The decision was also made as a conscious effort on the part of the Commission to distance itself from the United Kingdom government so as to remain objective and impartial. See ‘We Shall Decide on Own — Reid’, Straits Times (Singapore), 26 October 1956, 6, where Reid was reported to have said: ‘We have never consulted Whitehall. One reason that we are to meet in Rome to draft our report is to avoid the impression that we would consult the British Government. It will be our report and nobody else’s.’

Reid Commission Report para 109. This has been reproduced under App 1 of Fong, above n 44, 317.

CC1000 (56) 24th Meeting, dated Monday, 27 August 1956.

Reid Commission Report ch V para 82.

Ibid para 84.

Ibid para 85.
the ‘introduction of a soil conservation programme … and the conservation and
development of forests’. 65

Reading the Reid Commission Report it becomes clear very quickly that
land matters were an issue of concern; although the Commission recognised the
need to retain this matter under state jurisdiction, 66 it was equally ‘convinced by
many representations and by our own investigations that in many respects the
present position is not satisfactory’. 67 To overcome this, the Commission
recommended for the present Constitution art 76, which gives federal parliament,
in specific situations, the right to pass laws for matters enumerated under the
State List. This right was intended to be used for the passing of a new national
land code, which the Commission felt should be done ‘without undue delay’,
given that the presence of a ‘uniform land law is of such importance to the future
of Malaya’. 68

Regardless of this right (as enumerated under art 76), the Commission
was still clearly uncomfortable with this division of authority, evident when it
re- emphasised and added that:

the matters to which we have alluded earlier in this chapter are, in our opinion, so
important that we would have had difficulty in recommending that land should be
a state subject if we had not found it possible to combine this recommendation
with another that the federation should have all powers necessary to carry out in
the national interest development schemes such as we shall later describe. 69

The Reid Commission Report describes such national interest
development schemes as those that are beyond the resources of any single state
and are generally ‘schemes which cut across state boundaries, and, within the
boundaries of a particular state it may be necessary to initiate development of a
kind which is primarily in the national interest rather than in the interest of the
particular state’. 70 Already at first blush this definition plainly puts
environmental issues, its trans-boundary nature and its wide national impact
within those parameters. Any doubts about this were dispelled when the Reid
Commission Report illustrated the point further with examples, among which
were ‘the conservation of natural resources including soil conservation and the
prevention of erosion’ as a cause that required ‘direct federal control’ 71 under the
scheme. The Commission seems to have felt comfortable recommending that
land matters remain under the State List only as a result of and in combination

65 Ibid.
66 SOME of the reasons in the Reid Commission Report were that it was not practicable to transfer
land administration rights to the federal government; the Commission felt the general
administration of land was best left to local authorities. The Commission also recognised that
should states be deprived of this right to manage their own land, they would in essence have no
real autonomy, given that in many states a large part of their revenue is derived from the grant of
leases, licenses and matters related to land: see Reid Commission Report paras 85–9.
67 Ibid para 88.
68 Ibid para 89 (emphasis added).
70 Ibid.
71 Ibid.
with the creation of a national development scheme which it had intended for the federal government to utilise in situations where national development overrode states’ interests or, in this case, where environmental or conservation needs required. Having created such a wide power, the Commission immediately set out to lay down two general limitations to this federal power, demonstrating its sensitivity towards state-federal relations while taking great pains to ensure that environmental issues and concerns can be and are addressed by the federal government.

Post-1957, the intentions for national development can be found embodied under art 92 of the Constitution. Under art 92(1), the Yang di-Pertuan Agong may proclaim an area to be a ‘development area’ and, thereafter, federal Parliament would then give effect to that development plan, notwithstanding that any of the matters to which the plan relates are matters with respect to which only states would have powers to make laws. Article 92(3) defines ‘development plan’ to mean ‘a plan for the development, improvement or conservation of the natural resources of a development area, the exploitation of such resources, or the increase of means of employment in the area’.

What this demonstrates for environmental management is that the Constitution has made provisions for avenues of federal influence over state governments for the purpose of coordination and uniformity of laws. However, having these avenues is of no relevance if the paths are not recognised or traversed. In his keynote address given at the World Judiciary Summit 2006, the Attorney General of Malaysia made clear the government’s recognition of the presence and function of art 92 and suggested that, although Malaysia does not have an explicit right in the Constitution for a healthy or clean environment, it does have art 92 and, in lieu of this, there are provisions (among other ‘various environmental laws’) in place to ensure that the environment is safeguarded for its people. He stated that:

72 Under para 110 of the Reid Commission Report, the Commission noted that:

before the federation can initiate any scheme of development or conservation which involves interference with state rights, there should be an examination of the scheme and a report on it by an expert body, followed by consultation between the federation and states in the National Finance Council. And secondly, in view of the wide powers of interference with State rights … we recommend that any such scheme should be confined to a specified area or specific areas.

It goes on to say also that, subject to these limitations, federal parliament should be able to pass legislation ‘required to carry into effect any … conservation scheme which is declared and such legislation to be in the national interest’. It is also suggested that such schemes must be accompanied by additional financial grants by the federal government to states affected, so that they do not suffer any direct financial loss as a result of the scheme.

73 The Yang di-Pertuan Agong (the King) will only give his consent upon the recommendation of an expert committee, after consultation with the National Finance Council and the state government involved.


75 Ibid.
although the right to a healthy environment is not constitutionally guaranteed under the Malaysian federal constitution as in the constitutions of some other jurisdictions, the federal constitution, in art 92 empowers the federal government to implement and regulate national development plans. Such development plans include the regulation of the environmental aspects thereof, notwithstanding that any part of such plans involve state legislative-making powers.\footnote{Ibid 6.}

What this seems to mean is that the federal government is concerned with environmental issues generally, and does recognise its constitutional ability to, in a situation of environmental concern, evoke the powers under art 92 for the conservation of the natural resources of the said affected area. ‘If a state is acting irresponsibly in a matter like logging, the central government can interfere under the authority of art 92(1) by declaring the affected area to be a “development area” or by means of giving directions through the National Land Council.’\footnote{Shad Saleem Faruqi, Document of Destiny: The Constitution of the Federation of Malaysia (Star Publications (Malaysia) Berhad, 2008) 169. The provisions under art 92(1) of the Constitution do not apply to Sabah and Sarawak (by virtue of art 95E(3)) unless consent is first obtained from the Yang di-Pertua Negeri.} Yet, the reality is that ‘the federal government has very limited influence in terms of land development policies even though article 92 of the Constitution provides for the adoption of a National Development Plan by Parliament to protect the national interest’.\footnote{Lee Lik Meng, ‘Who’s the Ultimate Planning Authority in Malaysia? Reviewing the Powers and Role of the Appeal Board’ (2002) 29 Journal of Malaysian and Comparative Law 283.}

While art 92 has been used by the federal government for developmental purposes,\footnote{As an example, Putrajaya was declared under art 92: see Catchment Development and Management Plan for Putrajaya Lake, Vol 12, Chapter 8, 8-6 <http://www.putrajaya.gov.my/flipbook/e-garis/Volume%202-%20Sectoral%20Report%20%E2%80%93%20Part%208-9/book.html>.} the use of this provision for the purposes of ‘conservation of the natural resources’, while containing much potential for the preservation of the environment, has never occurred.\footnote{S Sothi Rachagan, Sustainable Forest Management in Malaysia — Guidelines for Conflict Resolution <http://enviroscope.iges.or.jp/modules/envirolib/upload/1504/attach/ir98-2-9.pdf>-.} The full intention of the Commission for the environment, stipulated 55 years ago, has not yet been realised.

### B. The proposed National Land Council

The Commission saw the ‘proper use of land’ as crucial to the development and ‘the future prosperity’ of the federation, and that, in order to achieve this purpose, a national-based body, passing national policy, had to be established. The White Paper\footnote{Proposed Constitution of Federation of Malaya (G A Smith Government Printer, 1957) 10–11 (‘White Paper’). The purpose of the White Paper (as indicated in its preamble) is to ‘describe the more important changes in the recommendations of the Constitutional Commission’ and it should be read ‘in conjunction with the Report of the Commission’. The White paper was published after the Reid Commission Report had been submitted to the British government on 21 February 1957. In Malaya, the Reid Commission Report was also studied and scrutinised by a working party made up of the High Commissioner, representatives of the Malay Rulers, representatives from the Alliance government, the Chief Secretary and the Attorney General.} recommended that ‘the federal government should have
power, subject to certain limitations, to pass any legislation required to carry into effect any development or conservation scheme declared in such legislation to be in the national interest’.

In order to achieve this objective, it was agreed that a provision in the Constitution establishing a national land council would best do the job. The scope of its functions, the requirement for it to be spearheaded by a federal minister with representation from every state, as well as its objective, it was stated, was welcomed by both federal and state governments at the time of recommendation. This intention was formulated and is embodied under the current art 91 of the Constitution.

Article 91 provides that the National Land Council (‘Council’) shall formulate a ‘national policy for the promotion and control of the utilisation of land throughout the Federation for mining, agriculture, forestry or any other purpose’ and may be consulted by the federal or state governments concerning land matters. The main function of the Council is to propose and formulate, in consultation with federal and state governments, national policies to apply throughout Malaysia.

Section 9 of the National Land Code proceeded to provide for the powers of the Council: the minister of land must notify the state governments of any policies passed by the Council, and make enquiries for the purpose of keeping the Council informed as to whether those policies have been implemented. Further, in the exercise of its functions the Council may make recommendations for the amendment or repeal of existing provisions within the National Land Code.

However, reading art 91 and s 9 in tandem, there have been doubts raised as to whether the Council is conferred with legal powers by the Constitution, given that much of art 91 discusses the functions and purpose of the Council, with art 91(5) stating that the Council only has a ‘duty’ to formulate policies. It has been suggested that the Constitution did not expressly provide the Council with proactive powers to regulate the use and administration of land at state levels. As a result, ‘this has caused variations in land administration depending on the exigencies of the state especially the socio political aspect’.

Subsequent to these reviews, further drafts were made by both parties which culminated in meetings held in the United Kingdom and a consensus as to the changes. These key changes make up the White Paper.

82 White Paper, above n 81, 11.
83 Constitution art 91(5).
84 Constitution art 91(6).
85 Constitution art 91(5) states that the ‘federal and state governments shall follow the policy so formulated’.
86 Act 56 of 1965.
87 National Land Code s 9(1).
88 National Land Code s 9(2).
89 Anesh Ganason and Associate Professor Dr Ainul Jaria Maidin, ‘Land Administration System in Malaysia: Building Institutional and Organisational Capacity for Coordinating Land Administration between the Federal and State Authorities’
It has also been reported that the Council has made some general ‘broad based formulations on policies on squatters, land speculation and use of land for industries’. Unfortunately, these policies have not been made available to the public; they ‘have been kept confidential and there is no known assessment of their effectiveness. As land is a state matter it can be expected that each state will want to decide on what it can do with its land first rather than be subjected to a national policy’. Also, in practice, the federal government often consults and obtains the consent of the Council and state governments before it proposes legislation affecting land or the administration of law within their jurisdiction, although there is no mandatory requirement for this. A proposed federal policy could easily be derailed by states’ refusal within the Council to subscribe to the same and to give their consent to it, given the federal government’s conscientious practice to obtain some form of consent before it acts. However, this has not necessarily been an impediment to federal authorities where there is a sufficiently strong political will at play.

Existing practice seems to suggest that the function of the Council, intended by the Commission as a tool for federal control, has fallen by the wayside, either misused or no longer utilised for the purpose for which it was intended. It is clear that the question as to whether the Council has any legal powers conferred upon it, and the existing ambiguous nature of its persuasions, decisions and effectiveness, particularly in relation to states, has contributed to the present state of uncertainty.

C. Specific natural resources related to land

In the Reid Commission Report, as well as the White Paper, the Commission took the time to specify several natural resources of particular concern to them, among which were agriculture, soil conservation and forestry. Each will be considered in turn, starting with agriculture. In the Reid Commission Report the Commission recognised that most of the functions performed by the federal government in relation to agriculture were advisory in character, apart from research, with some assistance rendered to state departments when it was

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91 Ibid.
92 See Constitution art 91(6) and the words ‘may consult’.
93 As an example of the federal government’s political will, on 5 December 2009 the Council approved a controversial orang asli land title policy introduced by the federal government in the midst of much opposition. For further information, see generally Yogeswaran Subramaniam, ‘The “UNDRIP” and the Malaysian Constitution: Is Special Recognition and Protection of the Orang Asli Customary Lands Permissible?’ [2011] 2 MLJ cxxvi.
94 Research into agriculture, the control of such pests and prevention of plant diseases are matters falling within the Federal List; as such, the federal government has legislative authority over these matters.
sought. In its discussions, the Commission recognised that each state had its own agriculture department that was autonomous and ‘under no obligation whatever to follow any directions issued by the federal department’. At the time of writing, the Commission recognised that, although there was no official policy for collaboration or support between the federal and state departments, in practice, however:

there was a close co-operation between the two departments … these officers at different times have been associated with the central and state administrations and have been accustomed to work closely with their fellow officers in the various departments throughout the Federation.

Yet the Commission left a cautionary note stating that ‘so long as close co-ordination is maintained between … the federal department and the state … the present arrangement is satisfactory. Whether or not this state of affairs will continue in the future … is problematical’.

Similar observations were made concerning forestry policy and forests. At the time of writing, forests and forest policies were within the jurisdiction of the state, with states being in a position to plan and make any requirements they saw fit to meet their demands. However, the Commission was of the view that there was an urgent need to have a more uniform policy, not only to become more self-sufficient in terms of timber needs, but, more importantly, because it recognised that ‘over the federation as a whole, the picture is one of a country rapidly exhausting its expendable reserve of timber in state land and failing at the same time to grow improved crops for the future’.

In the Commission’s discussions there was a clear awareness that, while it was difficult at present to induce states to cooperate and work with each other, it was certainly going to get more difficult. McKell notes this in the minutes of the meeting dated 13 September 1956, when he writes that:

it will be more difficult because the federation is still working under the influence of a tradition of goodwill and joint action which comes from the past and is dependent on the present personal relationships of the senior members of the Public Service … it would appear that these problems can only be met by a National approach … it seems to follow that it is necessary for the federal government to have enough power to ensure that all states follow a uniform policy.

Today, many of the apprehensions voiced by the Commission remain concerning. While there is a spectrum of legislation aimed at the protection and

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95 See also generally para 98 of the Reid Commission Report, above n 62.
96 CC2000/25, 177.
97 Ibid.
98 See generally para 101 of the Reid Commission Report, above n 60.
99 The Commission felt that although Malaya (at the time of writing) could meet its domestic timber requirements with surplus for export, this was not sustainable unless present logging policies were revisited: see point 100 of the Reid Commission Report, above n 60.
100 CC2000/24, 176.
101 Ibid 146.
management of forests and its biodiversity, its practical effectiveness continues to be discussed and debated. The root causes of the unease are numerous, with the question of federal-state control still a key cause due to lack of consultation and an uncertainty as to jurisdiction between the two authorities.

When discussing soil erosion or soil conservation, the Commission was concerned that no serious consideration had been given to the formulation of a wider national policy on this matter. Soil erosion had become a matter of ‘considerable seriousness’, one that was only dealt with ‘in an un-coordinated piece-meal and inefficient manner’. Soil erosion was identified as taking place with an ‘alarming degree’ at rivers and creeks, resulting in siltation and the loss of hillsides due to cultivation and erosion. The Commission recognised that, although the then Department of Drainage and Irrigation was carrying out maintenance work and dealing with river bank erosions, the ‘growth of mining and agriculture has resulted in serious erosion … so that the problem of dealing with this matter has become a major one’. In its place the Commission recommended that the federal government should have the power to ‘set up a soil conservation service as a central authority to work in cooperation with states in carrying out a soil conservation programme’. Again, this was reiterated: ‘It would appear to be in the interests of the whole country if power was vested in the government of the federation to set up a soil conservation service, with power to delegate certain of its functions to state … administrations.’

Administratively, McKell noted on 29 August 1954 that:

at present the system outwardly appears to work reasonably well. This is due to the fact that the administration is carried out on a personal basis by officers who work in co-operation, whose association appears to be a most harmonious one, and who at various times may be working either as officers of the federal or state governments. Whether this system would work as well under a new constitutional arrangement would appear to be very doubtful.

Was the Commission’s pessimistic interpretation of Malaysia’s future justified with such a bold statement? It seems to say that post-1957 there would be little or no communication between federal and state agencies in dealing with environmental concerns. The late Lord President once remarked (in the 1970s) that ‘despite the strict letter of the constitution, informal consultation goes on all

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104 CC2000/25, 178.
105 Ibid.
106 Ibid.
107 CC2000/17, 147.
108 See point 99 of the Reid Commission Report, above n 60.
110 CC2000/17, 149.
the time, not only at the highest level but more importantly at many levels down the line, so that nobody treads on anybody’s toes’.\textsuperscript{111} He observed that unofficial backroom discussions and considerations did take place, regardless of the black letter of the law. Yet a more poignant observation, for the present, can be made qualifying this statement, suggesting that the opposite occurs today, especially in states that do not share similar political ideologies with the present federal government.\textsuperscript{112}

While informal consultation might have been the common in 1970s, a recent observation suggests quite the opposite (in this case, where federal and state governments support different political ideologies), in that amicable consultations were absent and, in some instances, parties were openly hostile.

From the meetings conducted by the Commission and the concern demonstrated over the use of and policies concerning different natural resources, several conclusions can be drawn. First, it was plain that the Commission was concerned generally about the environment, its existing and future degradation; second, the Commission recognised that, although the then prevailing administrative policies worked, they were fragmented and worked only subject to existing relationships between key persons in the various departments; and, finally, there was a need, moving forward, to have a uniform national policy on these environmental concerns championed by the federal government.

VI. Conclusion

There is historical evidence not only that the Commission had made proposals for environmental provisions, but that it had also envisaged a strong federal governmental role in the protection and conservation of the environment. This is not intended to imply, however, that the federal government has, post-Reid, seen a dilution of powers or has enjoyed a measure of success (even without fully utilising the powers provided for by the Commission) in managing existing environmental issues.

What this article does argue is that the intended role of the federal government (post-Reid) and the proposed schemes recommended, if fully utilised, could give the federal government greater authority in its effort to protect the environment and, more importantly, could encourage a more certain legal environmental framework for Malaysia.

Recognising this role could result in one (or more) of several possible effects: the revitalisation of the purpose and the use of Constitution art 92, resulting in a more pro-active federal government concerning conservation on

\textsuperscript{111} Tun Mohamed Suffian Bin Hashim, An Introduction to the Constitution of Malaysia (Government Printer, 2nd ed, 1976).
\textsuperscript{112} In the article, it was reported that civil servants politically supportive of the federal government, when entering into discussions with the state government (from another political party) demonstrated ‘less than enthusiastic support’ and even ‘open animosity’: see Gurmit Singh K S, ‘Environmental Issues under Pakatan Rakyat in Selangor: Success and Challenges’ in Tricia Yeoh (ed), The Road to Reform: Pakatan Rakyat in Selangor (SIRD, 2010) 127–35.
land matters; a review of the function of the existing National Land Council and the retaking of the environmental mantle; and the recognition that an express provision for a clean environment or conservation based on historic intentions and the presence of an implicit right long forgotten exists. Its existence justifies, if not encourages, a review of the current Constitution and an insertion of a right long overdue.

Thus, to say that the omission of an express right to a clean environment in the Constitution is fatal to environmental protection in Malaysia is to ignore the historic significance of what the Reid Commission attempted to establish and to turn a blind eye to the ‘tools’ already provided for the creation of a better managed and more certain environmental framework for Malaysia.