

**CITIZENS' RIGHTS AND ENFORCEMENT OF
CONSERVATION LAWS:
A PLEA FOR A COMPARATIVE AND
MULTI-FACETED APPROACH***

"Thus far we have had only a trickle of enforcement, as contrasted with torrents of pollution".

— Albert J. Rosenthal¹

"Once you understand the problem you find that it is worse then you ever expected".

— Barry Commoner²

Alternatives to Law

Every professional is aware of the sense of awe with which the average citizen approaches the mysteries of any particular profession. The lawyer, particularly as he is always dealing with people and their problems (if not actually causing problems to people), is very aware of this sense of public respect. But the lawyer should be the first to admit that the law is not necessarily the best remedy to deal with all of Society's ills.

The law is clouded in mystique and this is very much so in Malaysia. It remains a closed book to many. Its efficacy is therefore questionable and one has to look to alternatives or supports for the law. In this context it may be useful to look at what Murphy has to say in his book *Nature, Bureaucracy and the Rules of Property*:

"Traditional society and low energy culture used other methods for social control. The family, the guild and status relations were among the means whereby such control was exercised. As long as such emotions as sin, guilt, salvation, reward and punishment, eternity and succession (or their ideological equivalents) dominated social intercourse, then the requirement of an external machinery for compulsion was at a minimum. It is only when tradition fails and belief lapses that an external mechanism for enforcing behaviour, which society believes essential for newly developed needs, has to be created. This is the origin for the emphasis the twentieth century has placed upon external controls and the allegedly rationalized processes of bureaucracy".³

*This article is based on a paper presented at the Tenaga '80 International Conference organised by the National Electricity Board in 1980.

¹Grad, Frank P., *Environmental Control: Priorities, Policies and the Law*, (1971), p. 234.

²"Fighting to Save the Earth from Man", *Time*, February 2, 1970, p. 42.

³Murphy, Earl Finbar, *Nature, Bureaucracy and the Rules of Property*, (1977), pp. 121-122.

In Malaysia, one can certainly say that tradition has not failed nor has belief lapsed. The average lawyer is too ready to look upon the average Malaysian's fondness for his own traditions and beliefs as something that interferes with the tidy symmetry of the western-law system practised here. However, one is not concerned with making life easy for the average lawyer but rather with trying to harness all available institutions that would help to achieve the goal of conservation of energy and protection of Nature. One should not therefore look upon the diverse strands in Malaysian life as a weakness and backwardness to be rapidly overcome but rather as a source of strength to supplement the law's inadequacies. For example Chinese culture and tradition, whether it be Confucian, Taoist or Buddhist, urges Man to live in harmony with his environment — to be at peace with nature. Might it not be profitable to use these sources rather than rely on law alone to cause housing developers and tin-miners to respect nature and not to devastate the environment in the course of their operations?

Insofar as Islam is concerned, many in Malaysia, particularly the western-educated, regard it as a religion of prayer and fasting and little else. But here again if its true significance is appreciated could not one influence the decision-makers and policy enforcers to lay greater stress on nature and on conservation? Islam teaches us that man is the Vicegerent of Allah on earth and that this involves living in harmony with Nature. In this connection one could look with profit into what the renowned Islamicist, Professor Ismail Al-Faruqi had to say in a public lecture at the University of Malaya. Professor Ismail tells us that in Islam there is:

“a teleological link-up of phenomena so that they make up an ecological whole. Things in Nature complement one another and affect one another to make it the beautiful world that it is for us. People in the West only began to think of this idea after they began to ruin Nature — to pollute Nature. Muslims knew this all along since they were told in the Quran, ‘We have assigned to everything its measure’.

Didn't your parents tell you not to destroy anything in Nature unless forced to do so by dire necessity? To be an Islamic Muslim is to relate oneself to Nature in such wise as to respect the ecological balance of Nature. [The bounties of Nature] are [Blessings and Goodness] from Allah and we must pass on the heritage to those who come after us. We must use things of Nature responsibly and not wantonly”.⁴

Could not one use such teachings in order to convince the average Malaysian of the necessity of conserving energy? Should not bodies such as the National Electricity Board seek to use these beliefs in creating an awareness of the present energy situation? One has to agree with Seyyed Hossein Nasr, a scholar of the sciences and of comparative religions, when he laments,

⁴Al-Faruqi, Ismail, *Islam and the Modern World*, Public lecture, jointly organised by the students Islamic Society and Department of Student Affairs, University of Malaya, Kuala Lumpur, 2nd July 1980.

"Only rarely has any voice been raised to show that the current belief in the domination of nature is the usurpation, from the religious point of view of man's role as the custodian and guardian of nature".⁵

One will not be able to achieve much in this respect if the current concept of "overcoming Nature" is not replaced in official thinking. In all religions and traditions we find a basic reverence for Nature but we are in danger of losing this in Malaysia. As Nasr points out,

"The dangers brought about by man's domination over nature are too well known to need elucidation. Nature has become desacralized for modern man, although this process itself has been carried to its logical conclusion only in the case of a small minority. Moreover, nature has come to be regarded as something to be used and enjoyed to the fullest extent possible. Rather than being like a married woman from whom a man benefits but also towards whom he is responsible, for modern man nature has become like a prostitute — to be benefited from without any sense of obligation and responsibility towards her. The difficulty is that the condition of prostituted nature is becoming such as to make any further enjoyment of it impossible. And, in fact, that is why many have begun to worry about its condition".⁶

Thus it may be timely to reflect that in changing and raising the expectations of Malaysians as to what constitutes the "good life" we may be introducing concepts that are harmful to the environment and to our own long-term interests. Murphy points out that one can get used quite easily to abusing Nature. He states,

"It is very easy for humanity to speedily adapt to new freedoms provided by technology and culture's demands upon nature. What comes hard to remember is that they have been recent dispositions. Should they disappear, there is more likely to be confusion and resentment than acceptance of the fact that they were fairly recent artificial conditioners of natural systems. Man must never forget that every one of his artificial regimes that are based upon the operation of natural systems are subject to dramatic change. What is often referred to as the 'harmony' in nature is a process of homeostasis that often includes catastrophes within its continuance".⁷

One must ceaselessly remind oneself that our national salvation "does not alone lie in the growth of gross national product".⁸ This may sound like heresy at present but surely this is what all our religions and traditions teaches us. And surely this is where the soundness of Schumacher's arguments lie.⁹ He suggests that the root of our present energy crisis is the

⁵Nasr, S.H., *Man and Nature: The Spiritual Crisis of Modern Man*. (1976), p. 19.

⁶*Ibid.*, p. 18.

⁷Murphy, *op. cit.* n. 3, p. 83.

⁸*Ibid.*, p. 57.

⁹Schumacher, E.F., *Small is beautiful A Study of Economics as if People Mattered*, (1978).

inability of most of us to think clearly and this is a result of the failure of our education. Schumacher points out,

"The problems of education are merely reflections of the deepest problems of our age. They cannot be solved by organisation, administration, or the expenditure of money, even though the importance of all these is not denied. We are suffering from a metaphysical disease, and the cure must be metaphysical. Education which fails to clarify our central convictions is mere training or indulgence. For it is our central convictions that are in disorder, and, as long as the present anti-metaphysical temper persists, the disorder will grow worse. Education, far from ranking as man's greatest resource, will then be an agent of destruction. . ."¹⁰

Deficiencies in Law Enforcement

Assuming that the need to look to alternatives to the law has now been recognized one can look to the problem of law enforcement.

It cannot be gainsaid that community acceptance of law which ensures its efficacy is at its maximum when the law reflects the fundamental values of that community and is an organic growth springing from that society. It must therefore be conceded that, at the moment, law in Malaysia does not possess maximum efficacy because of its alien origins and its imperfect grafting onto Malaysian society.

Law in Malaysia is mainly derived from the Common Law of England. The Common Law is rooted in centuries of Christian and English tradition. To implement it and understand it would therefore demand a certain grounding in the western intellectual tradition and in the English language. We must concede that the average Malaysian does not possess this to the same degree as the average Englishman. To that extent we start off with a handicap.

The malaise, however, is deeper than this. Even if the average Malaysian lacks these qualities we may be able to muddle through if our bureaucrats and our lawyers possess these requirements. However, it must be acknowledged that with the passing of the years the general level of competence in English is falling. Despite heroic efforts at translation into Bahasa Malaysia, if the core of our law remains the Common Law then we still need to know English because the original law was in English. Moreover, in law one cannot hope to get by with the level of comprehension sufficient to understand books on science or economics. Despite the fact that the Law School may insist on knowledge of English as a pre-condition for entry, the University cannot hope to remedy in four years the short-comings of thirteen years of school. Thus it must be recognised that in future many laws may be inadequately enforced simply because the average administrator cannot understand the law.

Aside from the intelligibility of the law, another deterrent to proper enforcement may be the very multiplicity of laws. It appears to be far easier to pass a new law rather than to enforce an existing one. So it is easier

¹⁰*Ibid.*, p. 92.

for a politician to seek to meet a problem by announcing that his Ministry is preparing the draft of a Bill to overcome the very problem. Thus each new problem brings about a committee to study it, a Report on the problem, a committee study the Report, a committee to prepare a Bill, a committee to consider the Bill and so on ad infinitum. Meanwhile perfectly good laws remain on the statute book which, if enforced properly, are perfectly capable of solving the problem.

Thus, for example, it is the writer's belief that many problems of pollution can be met by use of the Penal Code.¹¹ Section 268 provides that;

"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.

A common nuisance is not excused on the ground that it causes some convenience or advantage".

Section 291 provides that;

"Whoever repeats or continues a public nuisance, having been enjoined by any public servant who has lawful authority to issue such injunction not to repeat or continue such nuisance, shall be punished with imprisonment for a term which may extend to six months, or with fine, or with both".

Section 277 provides punishment for persons who voluntarily corrupt or foul the water of any public spring or reservoir, while section 278 makes it an offence to voluntarily vitiate the atmosphere in any place so as to make it noxious to health.

Of equal importance are the sections of the Penal Code relating to "Mischief". Section 425 states:

"Whoever, with intent to cause, or knowing that he is likely to cause, wrongful loss or damage to the public or any person, causes the destruction of any property, or any such change in any property, or in the situation thereof, as destroys or diminishes its value or utility, or affects it injuriously, commits 'mischief'".

Could not so many activities that pollute the environment be prevented by recourse to the Penal Code? Section 430 provides:

"Whoever commits mischief by doing any act which causes, or which he knows to be likely to cause, a diminution of the supply of water for agricultural purposes, or for food or drink for human beings or for animals which are properly, or for cleanliness, or for carrying on any manufacture, shall be punished with imprisonment for a term which may extend to five years, or with fine, or both".

¹¹F.M.S. Cap. 45.

Our Penal Code is based on the Indian Penal Code. Lord Macaulay drafted the Indian Penal Code nearly 150 years ago. He aimed at simplicity of style and clarity of expression especially as there was a shortage of legally-trained people in India at that time. The legislation may be ancient but it was suitable for its purpose and the writer submits that it still remains useful. Macaulay urged that all penal legislation be contained within the Penal Code itself and we have lost much by not following this advice. If the penalties and provisions contained in the Penal Code are deemed inadequate surely it is more sensible to amend it rather than to draft a wholly new law such as the Environment Quality Act (Act 127).

With multiplicity of laws we confuse the persons whose duty it is to enforce the laws. Worse, with multiplicity of laws we are faced with the need to establish a multiplicity of enforcement agencies. Since capable people are always in short-supply we face the danger that the people we select to enforce our laws will not be capable enough. Thus again there is the danger that they may not understand the laws they are supposed to enforce and, moreover, enforcement may be sporadic and only as a result of an outcry in the Press.¹²

The Enforcers

If it is accepted that a reduction in the number of laws will lead to a reduction in the number of enforcement agencies and to a consequent rise in the quality of enforcement officers we must nevertheless ensure that these officers do enforce the law in the public interest.

Commentators have noted how enforcement agencies soon acquire their own special interests and relationships with the people they are supposedly regulating and the public interest suffers. The regulators become spokesmen for industry rather than watch-dogs. They seek "voluntary compliance" and are reluctant to impose sanctions. There is also what is known as the "deferred bribe" in that the erstwhile enforcer obtains a well-paid job in the private sector immediately after retirement and resignation and "naturally" the employment would be in the very industry he was previously regulating.¹³

These problems are real and will affect any programme aimed at the conservation of resources and of energy. We therefore have to look for solutions on the assumption that we are going to depend on laws which in turn need to be enforced by enforcers.

Traditional Solutions

The traditional views has always been that civil service problems are best handled by civil servants themselves. However, it may be noted that when a civil servant is given the task of deciding a dispute involving another civil

¹²For an interesting discussion on the problems faced by enforcement agencies, albeit in a different context see Cranston, *Regulating Business; Law and Consumer Agencies*, (1979), pp. 16-21.

¹³*Ibid.*, pp. 1-4.

servant and a member of the public he instinctively looks for reasons to uphold the action of the other civil servant.¹⁴

Thus it may be a bit impractical to expect solutions from the enforcers themselves. Moreover, reliance on corruption laws may not be too rewarding unless there is the political will to enforce these ruthlessly.

Perhaps it may be more worth while to push ahead with the introduction of the Ombudsman or Parliamentary Commissioner into Malaysian administration so as to increase the efficacy of our enforcement. It would be absurd to suggest that out of the millions of Malaysians it is impossible to secure the service of *one* individual with the qualities of experience, integrity, tact and intelligence that would ensure the confidence of the Executive, of Parliament and of the Malaysian public! No doubt we have a Public Complaints Bureau but surely the time is ripe for Malaysia to accept this institution of Ombudsman, particularly as it has proved its efficacy in improving administration in Scandinavia, New Zealand and the United Kingdom.

Other Solutions

The writer would suggest that national leaders as well as those charged with the enforcement of conservation laws should be required to read the book already referred to, Schumacher's *Small is Beautiful*. This sets out the problem and proposes solutions that are readily attainable. It would be obvious from what has been said above that *motivation* of enforcers is a very important fact. Witness what Schumacher has to say about this:

"I now turn to. . . *The Principle of Motivation*. It is a trite and obvious truism that people act in accordance with their motives. All the same, for a large organisation, with its bureaucracies, its remote and impersonal controls, its many abstract rules and regulations, and above all the relative incomprehensibility that stems from its very size, motivation is the central problem. At the top, the management has no problem of motivation, but going down the scale, the problem becomes increasingly acute. . ."

"Modern industrial society, typified by large scale organisations, gives far too little thought to it. Managements assume that people work simply for money, for the pay-packet at the end of the week. No doubt, this is true up to a point, but when a worker, asked why he worked only four shifts last week, answers: 'Because I couldn't make ends meet on three shifts wages', everybody is stunned and feels check-mated."

"Intellectual confusion exacts its price. We preach the virtues of hard work and restraint while painting utopian pictures of unlimited consumption without either work or restraint. We complain when an appeal for greater effort meets with the ungracious reply: 'I couldn't care less', while promoting dreams about automation to do away with manual work, and about the computer relieving men from the burden of using their brains."

¹⁴ I am indebted to Professor M.P. Jain who lectures in Administrative Law in the Law Faculty, University of Malaya for this revealing insight.

"A recent Reith lecturer announced that when a minority will be 'able to feed, maintain, and supply the majority, it makes no sense to keep in the production stream those who have no desire to be in it'. Many have no desire to be in it, because their work does not interest them, providing them with neither challenge nor satisfaction, and has no other merit in their eyes than that it leads to a pay-packet at the end of the week. If our intellectual leaders treat work as nothing but a necessary evil soon to be abolished as far as the majority is concerned, the urge to minimise it right away is hardly a surprising reaction, and the problem of motivation becomes insoluble."¹⁵

It is submitted that Schumacher's analysis will become increasingly applicable in Malaysia with the spread of hedonism as a principle and consumerism as a way of life. Already, we see signs that work has become drudgery and the average person, be he civil-servant or factory worker, looks forward to the week-end. Advertisements urge us to fly away to "vacation Wonderlands" and soon we will be part of the general madness that empties Paris in August and cripples London at Christmas.

It must be recognised that Government Service cannot hope to match the private sector as far as income is concerned, and it would be folly to try to do so. Moreover, it would appear that it would be far better to house civil servants in Government housing rather than give them huge loans to buy houses and add to the general rush and anxiety for houses. Have we really served our civil servants better or have we served to turn them into anxious land-owners? And if they are anxious about their investments are they going to be very keen to enforce conservation laws?

Is it really necessary for our enforcement officers and other civil servants to dress in a way that is totally unsuitable for our climate? Could we not conserve energy by allowing them to dress in the same way that the vast majority of Malaysians dress? Is it really necessary to imprison our policy-makers and enforcers in cocoons of air-conditioned, neon lit stillness? Would they have the energy or inclination to go out into the hot world where everyone is busily violating every conservation law?

Is it really necessary for us to work the same office-hours as is the case in London and Washington or would it not be wiser to take climatic realities into consideration and work from 7 a.m. until 2 p.m. and then go home for the day? Surely it would be more sensible to make Friday our weekly holiday seeing how little work is actually done in Kuala Lumpur on Fridays? Even if this is not feasible then it may be better to make Friday a half-day and Saturday the holiday. We must consider all possibilities to ensure that every minute of working-time is actually spent on work and not frittered away in all sorts of ways because laws only work if they are enforced and they can only be enforced if the enforcers work!

Much of the above may seem impossible, but in the face of the looming environmental and energy crisis it is somewhat absurd to carry on erecting glass-sided multi-storey buildings that need blinds, artificial lighting, ar-

¹⁵Schumacher, *op. cit.*, n. 9, pp. 232-233.

tificial cooling and energy consuming elevators in order to house bureaucrats sweating in bush-jackets who draft unintelligible laws which are incapable of enforcement by unenthusiastic enforcers.

Federal-state Problems

It is sometimes asserted that the enforcement of some laws is hampered by the fact that Malaysia is a federation and the Constitution grants legislative authority on certain matters, for example forestry and land, to State legislatures, and that therefore the Federal authorities are helpless. However, close examination of the Constitution would reveal the many exceptions and qualifications that give the centre such an over-whelming position vis-a-vis the states.

Thus for example, Item II of List I in the 9th Schedule to the Constitution brings within the Federal Legislative list,

“Federal works and power, including —

- (c) Electricity, gas and gas works; and other works for the production and distribution of power and energy.”

Even where land is concerned provision is made for the Centre to take over State land under Article 83(1)

“If the Federal Government is satisfied that land in a State, not being alienated land, is needed for federal purposes, that Government may, after consultation with the State Government, require the State Government, and it shall then be the duty of that Government, to cause to be made to the Federation, or to such public authority as the Federal Government may direct, such grant of the land as the Federal Government may direct.”

“Federal purposes” is defined very widely in Article 160 and

“includes the purposes of the Federation in connection with matters enumerated in the concurrent list and with any other matters with respect to which Parliament has power to make laws otherwise than by virtue of Article 75” [which deals with implementation of treaties and the promotion of uniformity of the laws of two or more States].

Even though land is a State matter there is still scope for outside action, since the National Land Council is entrusted with the duty, under Article 91(5), to 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 for the administration of any laws relating thereto. The Constitution makes it mandatory for both the Federal as well as State Governments to follow the policy so formulated.

Furthermore, Article 92(1) gives the King power to proclaim an area or areas in one or more of the States as a development area, pursuant to a development plan. Consequently, Parliament is given power to give effect to the development plan, notwithstanding that any of the matters to which

the plan relates are matters with respect to which only States would normally have power to make laws. Clause (3) of Article 92 defines "development plan" very broadly 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."

Article 93 provides for the Federal Government to carry out such inquiries, surveys, collection and publication of statistics as it thinks fit even in relation to matters on the State legislative list and moreover the State is required to assist the Federal Government in these endeavours and the latter can give such directions as it may deem necessary.

"Article 94(1). The executive authority of the Federation extends to the conduct of research, the provision and maintenance of experimental and demonstration stations, the giving of advice and technical assistance to the Government of any State, and the provision of education, publicity and demonstration for the inhabitants of any State, in respect of any of the matters with respect to which the Legislature of a State may make laws"

Even more important is the requirement that agricultural and forestry officers of any States shall accept any professional advice given to that State Government under Article 94(1).

Article 95 empowers the Federal Government to authorise any officer to inspect any department for work of a State Government (not being a department or work within the exclusive legislative authority of the State) with a view to reporting thereon to the Federal Government.

It can be seen then that there is little substance in the argument that the Federal-State dichotomy in the constitution hampers enforcement. The provisions exist. What is needed is the political will and public education as to the realities of the problem.

Moreover, the Central Executive retains the awesome power granted under Article 150 of the Constitution of proclaiming an Emergency.¹⁶ Clauses (4) and (5) give extremely wide powers and enable Parliament and the Executive to take action which, normally, would have been in conflict with the Constitution. The Federal Government has not hesitated to use this power when faced with recalcitrance on the part of a State Chief Minister (as in Sarawak)¹⁷ or of a State Legislature (as in Kelantan).¹⁸ Faced with an ecological and energy crisis of grave proportions it is only logical to assume that the Federal Government will not hesitate to use its Article 150 powers should any State venture to hamper the enforcement of conservation laws.

¹⁶Milne & Mauzy, *Politics and Government in Malaysia*, (1978 and revised in 1980), pp. 42-43.

¹⁷*Ibid.*, pp. 114-115, and p. 293.

¹⁸*Ibid.*, pp. 385-387.

Citizens' Rights

The concept of human/fundamental/citizens' rights has gained widespread acceptance after the near-breakdown of Western Civilisation in the Second World War. It seeks to enshrine as inviolable certain aspects of life and liberty. Perhaps foremost in this quest has been the U.S.A. But even there has come the realisation that rights such as the right to privacy have little value if the citizen is free to sit in his home and free to look out of his window at the devastation to the environment and free to breathe in polluted air and free to drink polluted water (assuming, of course that any water flows out of the tap in the first place!).

Perhaps what is needed is a re-affirmation of the right of mankind to live on this earth as human beings and therefore to be free to enjoy the beauties and benefits of unravaged nature. Perhaps it is more to the point if we stress everybody's DUTY to protect the environment as has been done so effectively in Singapore. The concept of "rights" should not be abused so as to imply that everybody is entitled to a constantly increasing standard of living and of consumption, no matter at what cost to the environment and no matter what irreplaceable natural resources are frivolously frittered away.

In our Constitution Articles 5 to 13 set out certain "fundamental rights" but these are subject to such qualifications that very little is really fundamental. Various restrictions can be, and are, imposed in the name of "security", "public order", or "morality". If these considerations are deemed valid for rights termed "fundamental" then surely restrictions should be placed on unrestrained exploitation of our fragile environment.

Conclusion

We are aware of the problem. We must be aware of the limitations to any proposed solution — particularly law. It might be fitting to conclude with the words of Professor Daniel J. Boorstin:

"Each of us must disenchant himself, must moderate his expectations, must prepare himself to receive messages coming in from outside. . . One of our grand illusions is the belief in a 'cure'. There is no cure. There is only the opportunity for discovery. . .

"We must awake before we can walk in the right direction. We must discover our illusions before we can even realize that we have been sleep-walking. The least and most we can hope for is that each of us may penetrate the unknown jungle of images in which we live our daily lives. That we may discover anew where dreams end and where illusions begin. This is enough. Then we may know where we are, and each of us may decide for himself where he wants to go."¹⁹

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¹⁹Boorstin, Daniel J., *The Image*, Penguin Books, Middlesex, England, 1963, pp. 261-262.

