KERTAS KERJA 1

LEMBAGA RAYUAN : IMPIAN, REALITI DAN CABARAN

SEMINAR
LEMBAGA RAYUAN & PELANCARAN e-RAYUAN NEGERI PULAU PINANG 2016

14 MAC 2016 (ISNIN)

HOTEL OLIVE TREE, JALAN MAHSURI, BAYAN BARU

OLEH :

PROFESOR DR. AINUL JARIA BINTI MAIDIN

JABATAN UNDANG-UNDANG AWAM UNIVERSITI ISLAM ANTARABANGSA (UIAM)

The Dispute Resolution Mechanism in the Town and Country Planning System in Malaysia: An Analysis and Suggestions for Reform
By Ainul Jaria Maidin

I. Introduction

The Town and Country Planning Act 1976 provides that in the event if a person is aggrieved with the decision of the local planning authority, appeal can be made to the Appeal Board. The Appeal Board is an administrative tribunal i.e. a body established by law externally from the judicial system which sits and decides on questions of fact and law in determining disputes between individuals and government department or between individuals themselves. The rationale for setting up an Appeal Board is that the local planning authority is vested with discretionary powers by this Act, the most important being the right to determine an application for planning permission to carry out development. The expansion of functions and responsibilities of the local planning authorities encompasses wide socio-economic activities. Therefore, such powers can be invariably countered or checked by a right of appeal to the Appeal Board. A right of appeal is a means of ensuring accountability. One important principle of a democratic government is that officials to whom powers have been delegated must account for their actions to the community. The underlying assumption is that all government powers, whether the sovereign powers of legislatures or the delegated powers of officials, are held on behalf of the community and therefore account must be made to it. This presentation seeks to examine the establishment and functioning of the Appeal Board and provide some proposals to enhance the Appeal Board in assuming a proactive role in promoting sustainable development in the states in Malaysia.

II. Appeal Mechanism in the Land Use Planning and Development Control System

The land use planning and development control process provides recourse to two procedures to challenge the decision of the planning authority. First, the applicant can appeal to the local planning authority. This is done by writing a letter of appeal to the planning authority for reconsideration of their decision to refuse planning permission or the imposition of planning conditions. Second the applicant can appeal to the Appeal Board pursuant to section 23 of the TCPA 1976 when their appeal to the planning authority is rejected.[1] The Appeal Board has powers to reverse the decision of the local planning authorities to refuse to grant planning permission or impose conditions or to sustain the decision of the planning authority. The planning applicant is however, required to exhaust the administrative appeals procedure before seeking the aid of the court to exercise its supervisory powers over the exercise of discretionary powers by the planning authority. In *Majlis Perbandaran Seberang Perai v Tropiland Sdn Bhd*,[2] Sri Ram ACJ observed that the planning applicant had done none of the three procedures mentioned and said, "we do not think it ought to be heard to complain now." The local planning authority in dealing with an appeal from an aggrieved applicant usually refers the appeal letter to the Town

[1] similar provisions can be found in s 23 of the Federal Territory Planning Act 1982.
[2] *Majlis Perbandaran Seberang Perai v Tropiland Sdn. Bhd.* [1996] 3 MLJ 94 at pp.106-107.

Planning Committee meetings for consideration.[3] The dispute may or may not be resolved at this stage. However, if the dispute still remains unresolved the aggrieved applicant can make an appeal against the decision of the local planning authority to the Appeal Board. The decision of the Appeal Board is said to be final and there is no recourse to appeal to court of law.[4] However, an aggrieved applicant can seek the court to exercise its supervisory powers over the administrative authority and review their decisions.

- **Establishment of Planning Appeal Board**

The provision of section 36(a) of the TCPA 1976 provides for the establishment of an appeal board to hear all disputes arising from the decision of the local planning authorities in the course of administering the planning decision making and development control system. An Appeal Board[5] is required to be constituted in the respective State for the purposes of hearing all the appeals arising from the implementation of the provisions of the TCPA 1976.[6] A State Authority may by notification in the State Gazette, with the concurrence of the Minister, appoint a Chairman and a Deputy Chairman of the Appeal Board, being persons who have had judicial experience or other suitable qualifications and experience.[7] The Chairman and a Deputy Chairman of the Appeal Board, must be appointed from persons who are or have been judges or advocates and solicitors of the High Court or members of the Judicial and Legal Service of Malaysia or who have had judicial experience or other suitable qualifications and experience.

This requirement is similar to the stipulations in various other statutes, which has provided for the establishment of administrative tribunals in Malaysia. Obvious reason for this stipulation is to give credibility and impartiality to the decisions of the Appeal Board. Furthermore, a Chairman with legal background is trained to be objective and has gained experience in adjudicating disputes and providing sufficient reasons for substantiating the decision awarded. It is stipulated in this paragraph that additional members not exceeding twelve can be appointed to be members of the Appeal Board. The choice of the members is at the discretion of the State Authority. The Act did not restrict the appointment of the officers from the local planning authority to the Appeal Board. As such there is a possibility that qualified members from the local planning authority qualified can be appointed as members of the Appeal Board. A further number of person who are fit and as the State Authority considers adequate, can be appointed to be additional members of the Appeal Board but not to not exceed twelve persons. A member of the Appeal Board can hold office for a period not exceeding three years.[8] The Town and Country Planning Act 1976 (Appeal Board) Rules 1989, regulates the functioning of the Appeal Board. The State Authority can also appoint fit persons, not exceeding 12, as it considers adequate, to be additional members of the Appeal Board.[9]

---

[3] *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan* [1999] 3 MLJ 1 at p.29.
[4] TCPA S 36(13)
[5] Appeal Board constituted under Town and Country Planning Act 1976 s 36.
[6] Town and Country Planning Act 1976 s 36(a);
[7] S 36(2)(a) of the Town and Country Planning Act 1976.
[8] State Authority can revoke appointment of a member to Appeal Board without assigning any reason for revocation, s 36(4) TCPA 1976; members are eligible for reappointment see s 36(3).
[9] Town and Country Planning Act 1976 s.36(2)(b).

- **Jurisdiction of the Appeal Board**

The jurisdiction of the Appeal Board is to hear appeals related to the followings:

i. Planning permission is refused or granted subject to conditions. The applicant for planning permission as well as objectors reserves the right to appeal;[10]

ii. Revocation or modification of planning permission or building plan approval previously granted by the local authority.[11] This right is with regard to the amount of compensation to comply with the notice.[12] There is no right of appeal against the revocation or modification order;

iii. A requisition notice is issued by the local planning authority. The notice may require the landowner to discontinue any land use; or to impose conditions for the continued use of the land; or to require the relocation of any building or activity on the land. The right of the landowner under this action includes the right to appeal against the notice itself and the amount of compensation to recover the costs and expenditure due to depreciation of the value of property.

iv. Right of appeal against:
   - a tree preservation order;[13]
   - the amount of compensation awarded with regard to such orders;[14] and
   - an order to replace trees removed in contravention of the Act[15]

An application to an Appeal Board is limited to persons who are aggrieved by the decision of the local planning authority. The applicant for planning permission and adjoining neighbours who have made objections pursuant to section 21(6) of the TCPA 1976 have the right of appeal against the revocation or modification of planning permission or building plan approval previously granted by the local authority.[16]

- **Conduct of an Appeal by the Appeal Board**

The Appeal Board is required to hear[17] the appellant and the local planning authority. The Board has a right summon and examine witnesses, can require any person to bind himself by an oath to state the truth.[18] The Board may compel the production and delivery of any document that it considers relevant or material to the appeal.[19] Upon hearing all the evidence and witnesses, the

[10] Town and Country Planning Act 1976 s.23(1)
[11] Town and Country Planning Act 1976 s.25(1)
[12] Town and Country Planning Act 1976 s.25(9)
[13] Town and Country Planning Act 1976 s.35C
[14] Town and Country Planning Act 1976 s.35D(3)
[15] Town and Country Planning Act 1976 s.35E(3)
[16] S 25(1) Town and Country Planning Act 1976
[17] S 36(10) Town and Country Planning Act 1976.
[18] S 36(10) Town and Country Planning Act 1976.
[19] S 36(10)(d) Town and Country Planning Act 1976.

Appeal Board may confirm, vary or reverse the order or decision appealed.[20] The Appeal Board may also make any order whether or not provided for so long such an order is not inconsistent with, the provisions of the TCPA 1976.[21] Every person summoned by the Appeal Board to attend its proceedings is legally bound to attend at the place and time specified in the summons. Furthermore, every person required by the Appeal Board to produce or deliver any document to the Appeal Board or to any public servant is legally bound to produce or deliver the document.[22]

The Chairman makes the decision of the Appeal Board after considering the opinions of the other two members. However, the Chairman is not bound to conform to the opinions of the other two members or either of them and he shall record his reasons for dissenting.[23] The chairman in arriving at the decision solely, unanimously or by majority is bound to comply with the rules of natural justice. The Federal Court, held that the principles of natural justice are applicable to all cases where an individual is adversely affected by an administrative action, whether it is labelled 'judicial', 'quasi-judicial' or 'administrative', or whether or not the enabling statute makes provision for a hearing.[24] The two important principal components of the rules of natural justice must be complied with are rule of *'audi alteram partem'* (that no man shall be condemned unheard) and rule against bias (that the judge must be impartial and neutral in making his decision).[25]

When the Chairman is unable to exercise his functions owing to illness, absence from Malaysia, or any other cause, the Deputy Chairman must exercise the functions of the Chairman; and in exercising those functions, the Deputy Chairman, for the purposes of the Town and Country Planning Act 1976, must be deemed to be the Chairman of the Appeal Board. Whenever a need arises for the Appeal Board to be convened, the Chairman is required to call upon any two of the members, to serve with him on the Appeal Board; and it is the duty of every member if called upon, to serve on the Appeal Board, unless he is excused by the Chairman, on such grounds as the Chairman considers reasonable, from serving the Appeal Board.

A member of the Appeal Board having an interest in any matter is required, to disclose the fact and the nature of the interest to the Chairman. The member will be disqualified and cannot take part in the proceedings of the Appeal Board relating to the matter.[26] Disclosure of interest by the members of the Appeal Board is aimed at preventing bias on the part of the members if the dispute before them involves their personal interest. The rule against bias or *nemo iudex in causa sua* is important to be observed by a decision making authority which is required to adhere to the two basic requirements. First, persons having financial or pecuniary interest in the matter to be decided must not sit in the decision making forum that determines the matter in order to prevent

[20] S 36(10)(e) Town and Country Planning Act 1976.
[21] S 36(10)(g) Town and Country Planning Act 1976.
[22] S 35(11) Town and Country Planning Act 1976.
[23] Town and Country Planning Act 1976 s 36(9)
[24] *Ketua Pengarah Kastam v Ho Kwan Seng* [1977] 2 MLJ 152 FC
[25] *FAI Insurers Ltd v Winneke* (1982) 56 ALJR 388, at p.395, Aust. HC, per Mason J; *University of Ceylon v Fernando* [1960] 1 All ER 631, PC; *Ketua Pengarah Kastam v Ho Kwan Seng* [1977] 2 MLJ 152; *JP Berthelsen v Director General of Immigration Malaysia* [1987] 1 MLJ 134.
[26] Town and Country Planning Act 1976 s 35(7).

them being seen as being bias. Second, even if the decision maker does not have a direct financial interest in the subject matter in question, the decision could not be allowed to stand traditionally if there is a 'real likelihood' or 'reasonable suspicion' of bias.

There can be three types of bias, they are pecuniary, personal and policy bias. Pecuniary bias may arise if a member has a pecuniary interest of any kind no matter how small in the matter before him.[27] Personal bias on the other hand, may arise in the process of adjudication, for example, if the other party is related to the member or they are business partners or it may even arise if there are hostile feelings or behaviour towards each other.[28] A member of the Appeal Board is thus prevented from dealing with a matter in which he may have personal interest. Policy bias may arise if the member is appointed from amongst the officers of the local planning authority who may have been responsible in formulating a planning policy and as such may be inclined to be bias towards the successful implementation of such policy. It is important to observe the rule against bias to ensure that the Appeal Board proceedings are conducted in a fair and just manner to prevent abuse of power on the part of the members of the Board.
Assurance to the aggrieved person of the impartiality of the decision maker since the decision of the Appeal Board is final and cannot be made subject to appeal to a court of law. However, if the person can prove that the members of the Appeal Board has acted unfairly by failing to observe the rules of natural justice, then an application to review the decision of the authority is available.

- **Decision of the Appeal Board**

Every decision of the Appeal Board must be made by the Chairman after considering the opinions of the other two members, but in making the decision the Chairman is not required to be bound to conform to the opinions of the other two members or either of them, but if the Chairman dissents therefrom, he shall record his reasons for dissenting. The Chairman has discretion in accepting or rejecting the opinions of any one or both members of the Appeal Board. However, he is required to record his reasons for dissenting the opinions of the other members. The chairman in arriving at the decision either solely unanimously or by majority is bound to comply with the rules of natural justice. It is well settled in Malaysia that all quasi-judicial body or administrative tribunals has to act according to the principles of natural justice. Failure to observe the rules of natural justice will open the decision handed down by the Chairman to be open for scrutiny. The Appeal Board is required to give an opportunity to the appellant to state his case. This means that must be a reasonable opportunity of being heard. To be a real right which is worth anything, the right to be heard must carry with it a right in the accused to know the case which is made against him. He must then be given fair opportunity to correct or contradict them.[29] The Registrar of the Appeal

[27] *Dimes v Grand Junction Canal Properties* (1852) 3 HL 759, decision of Lord Cottenham in favour of the canal company was set aside because he held shares in the company to the value of several thousand pounds. On appeal the House of Lord held that a pecuniary interest leads to automatic disqualification.
[28] *Govindaraju v President, MIC* [1984] 1 MLJ 19.
[29] Although no oral hearing is required by Art 135(2) Federal Constitution, the authority must act fairly and what is fair depends on the circumstances; Nevertheless, it has been held that eventhough the right to be heard is non-inclusive of a duty to afford an oral hearing, this does not mean that decisions reached are safe and harmless from attack. The categories of procedural fairness are never closed and the measure of fairness afforded to a particular plaintiff is a question of fact and degree.

Board is required to send notice to all relevant parties including the person who have filed the appeal.

- **Powers of the Appeal Board**

The Appeal Board can overturn the decision of the local planning authority. It is often said that the powers of the Appeal Board is uncontrollable and it is the supreme decision making body in the land use planning decision making and development control process. In *Hwa Properties Sdn. Bhd. v Majlis Perbandaran Pulau Pinang,*[30] the applicant applied for planning permission to erect one block of three-storey apartment in Tanjong Tokong. The Planning and Building Standards Committee of the Majlis Perbandaran Pulau Pinang gave directions to the applicant to restrict the development to a two storey building in order for such building to be compatible with the requirement prescribed in the Tanjong Tokong draft local plan. The draft local plan restricts the building of high-rise buildings in the Tanjong Tokong area to prevent loss of amenities, congestion and result in increase of motor vehicles and noise since the existing road cannot accommodate increase in the traffic flow, as it is not possible to further widen the road. Further being an established housing estate consisting of bungalows, it is preferable to maintain the area to prevent interference with the continuous enjoyment by the residents. The applicant appealed against the direction, to the Planning and Building Standards Committee. The appeal was rejected on the ground that the proposed development is not compatible with the draft local plan. The applicant appealed to the Appeal Board. The Appeal Board in allowing the appeal held that the additional population of an extra floor could not possibly cause loss of amenities and congestion.

***Datastream Corporation v Majlis Perbandaran Pulau Pinang*[31]**

An appeal against the decision of the Penang Town Council to reject the application for planning permission by Datastream Corporation to develop a land in Paya Terubung. The reason for rejecting the appeal was based on the ground that the proposed development is hillside land, which is located within the Interim Zoning Plan. Further, the Penang Island Structure Plan and the Paya Terubung local plan clearly provides that that development in that area should not be permitted. The Appeal Board in allowing the appeal granted the applicant the permission to develop. This proves that the Appeal Board has wider powers compared to the local planning authority. The Board has decided against the development policies outlined in the structure and local plans.

***Richvale (M) Sdn Bhd v Majlis Perbandaran Pulau Pinang*[32]**

The Appeal Board allowed the appeal by the applicant seeking to develop hillside land despite the clear prohibition in the development plans prohibiting developments in those areas. This case also demonstrated the discretionary powers of the Appeal Board in overruling any decision made by the local planning authority. The Appeal Board has demonstrated that they can make a decision incontravention of the planning policies incorporated in the development plans. Thus, it is clear that though the power to grant permission to an application for planning permission is within the

[30] *Hwa Properties Sdn. Bhd. v Majlis Perbandaran Pulau Pinang* Appeal No.LR/PP/6/93
[31] *Datastream Corporation v Majlis Perbandaran Pulau Pinang* Appeal No.LR/PP/7/93
[32] *Richvale (M) Sdn Bhd v Majlis Perbandaran Pulau Pinang* Appeal No.LR/PP/8/93

powers of the local planning authority, the discretionary powers of the Appeal Board is unfettered.

Puan Kang Lih Yuan v Majlis Perbandaran Klang[33]

Payment of contribution fee in lieu of providing adequate parking spaces is no longer practiced by the local planning authority following the decision in the case of *Rethina Development Sdn Bhd v Majlis Perbandaran Seberang Perai*, where the court ruled that the planning authorities are not allowed to collect money in lieu of the developer carrying out the conditions imposed on the grant of planning permission.[34] The Appeal Board held that the respondent was right in rejecting the planning application submitted by the appellant.

- **Extent of Powers of Appeal Board**

The Appeal Board can make any order either to confirming the decision of the local planning authority, or allow the appeal by directing the local planning authority to grant planning permission absolutely or subject to conditions, allowing the appeal by setting aside any planning permission granted or allowing the appeal by directing the local planning authority to remove or modify any condition subject to which planning permission has been granted or to replace the condition with other conditions.[35] The other fact established from the analysis of the cases above, is that the developer as a rightful owner of the property has the understanding that they can utilise their rights to maximize the use and profit from a proposed development. However, they should realise that their right to develop and use their land beneficially will need to be balanced with public interests. Public will not want developments which will cause problems such as insufficient parking spaces, high density and lack of open space which may subsequently culminate in other social problem. Therefore, it is the duty of the local planning authority to control and regulate the development proposals submitted. Progress and advancement in technology has enabled the public to be aware of their rights in determining the types of development in their area. The developers are also aware of their rights and well verse with the law and regulations. Thus, the local planning authority should be prepared to support their decision with the rights reasons especially in refusing to grant planning permission. They cannot simply reject or impose unreasonable conditions as they choose especially with an ulterior motive.

- **Exclusion of Appeal to Court**

An order made by the Appeal Board on an appeal before it, is final and cannot be called into question in any court, and is binding on all parties to the appeal or involved in the matter.[36] This means that there is no right of appeal against the decision of the Appeal Board. The word 'final' or 'final and conclusive' provided in a statute has been widely considered by the courts. It has been uniformly held that they preclude any appeal to a court of law.[37] The statutory provisions are

[33] [SABLR/2/2/2012, February 2012], Volume 2, Issue 2, p18-21
[34] (1990) CLJ 24
[35] Section 23(3) Town and Country Planning Act 1976
[36] Town and Country Planning Act 1976 s 35(13)
[37] See *Westminister Corpn. v Gordon Hotels Ltd*.[1907] 1 KB 910, CA (Eng); affd. [1908] AC 142, HL; *Hall v Arnold* [1950] 2 KB 543.

designed to protect administrative orders and determinations against judicial review by describing them as final or by providing that no appeal or review will lie against the decision must be construed restrictively so as not to deprive the courts of their supervisory jurisdiction. The court remains entitled to review the decision on the traditional grounds upon which an application for judicial review may be made. If the purported decision is *ultra vires* because the decision maker did not have jurisdiction to make a decision, or because he misconstrued his powers, or because he acted in bad faith or contrary to the requirements of natural justice or because he took into account irrelevant matters or failed to consider relevant matters, then there is no 'decision' to which the statutory exclusion can apply.[38] In the *Pentadbir Tanah dan Gailan Wilayah Persekutuan v Sri Lempah Enterprise*,[39] case, the court held that the Court is not an appellate authority that is vested with more powers than the approving authority but it is a judicial authority that is empowered to check as to whether the approving authority has acted in excess of its powers provided in the Act.

In *Zain Azahari Bin Zainal Abidin v Datuk Bandar Kuala Lumpur*,[40] the court agreed that it is the function of the local planning authority, and not the court, to determine the planning of the city of Kuala Lumpur because they are best suited to carry out this task. It is the planning authority who should decide whether a planning approval should be granted or refused, as the planning authority has access to the information and material relevant to the decision making process. This affirms the fact that the court is not willing to disturb planning authorities' in matters related to planning applications.

III. Developments in Dispute Resolution Mechanism in Land Planning System

Access to dispute resolution mechanism in the land planning system is limited to planning authorities and persons aggrieved by decisions made by the planning authorities. The group of persons allowed to make an appeal to the Planning Appeal Board is limited Any interested third parties and Non-Governmental Organisations ("NGOs") have no right to seek relief against the decision of the planning authorities irrespective of the harm that may arise from such decisions.

Dispute resolution within the machinery of an effective legal system is one of the assured means of redressing damage to the environment caused by indiscriminate development. A dispute resolution process can be fair only when it ensures access to the courts or to another adjudicating system or public inquiry towards the attainment of substantive environmental justice. Land planning and environmental disputes have been settled by various methods but judicial review and public interest litigation appears to be the most common methods. The common recourse to a court of law by resorting to common law causes of action has proved to be cumbersome and unavailable unless the person can prove that he has suffered damage to his property or his life. Common law is not able to recognise the interest of a third party who has not suffered any damage to his person or property. Land planning and environmental litigation, is a relatively

[38] *R v Medical Appeal Tribunal, ex p Gilmore* [1957] 1 QB 574; [1957] 1 All ER 796, CA (Eng); *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147; [1969] 1 All ER 208, HL.
[39] *Pentadbir Tanah dan Gailan Wilayah Persekutuan v Sri Lempah Enterprise* [1979] 1 MLJ 135 (FC); see also *Ipoh Garden Bhd. v PTG Perak* [1979] 1 MLJ 271
[40] *Zain Azahari Bin Zainal Abidin v Datuk Bandar Kuala Lumpur* [1995] 2 CLJ 478

undeveloped area of law in Malaysia, because the development of the planning and environmental law itself has been sporadic, peripheral and haphazard, hence the reason for its relatively slow development.

At present, the Malaysian judiciary, has established Environmental Courts that started operating throughout Malaysia since 10th September 2012. The Chief Registrar's Practice Direction No.3 of 2012, "The Establishment of the Environmental Court", provides as follows:

- Environmental cases are assigned to the designated courts at the Sessions Court and the Magistrates' Courts level (42 Sessions Courts and 53 Magistrates' Courts).
- Involving 38 Acts and Ordinances, 17 Regulations, Rules and Orders.
- Environmental cases are being given priority. Special codes are given for certain offences registered in the respective courts.

The present Environmental Courts only deal with prosecution of environmental offences and do not handle civil claims. The Environmental division handle cases related to environment and planning appeals under the Town and Country Planning Act 1976 and Environmental Quality Act 1974 as well as from all other subsidiary and related legislation. This division could hear planning and environment appeals from lower courts, especially the Magistrate and Sessions Court, which are the lower tier in the hierarchy of courts.

IV. Way Forward

The achievement of ecologically sustainable development depends on the commitment and involvement of all branches of government the legislature, executive and judiciary as well as other stakeholders. Klaus Toepfer, the then-Executive Director of the United Nations Environment Program (UNEP), stated in his message to the UNEP Global Judges Program: Success in tackling environmental degradation relies on the full participation of everyone in society. It is essential, therefore, to forge a global partnership among all relevant stakeholders for the protection of the environment based on the affirmation of the human values set out in the United Nations Millennium Declaration: freedom, equality, solidarity, tolerance, respect for nature and shared responsibility. The judiciary plays a key role in weaving these values into the fabric of our societies. The judiciary is also a crucial partner in promoting environmental governance, upholding the rule of law and in ensuring a fair balance between environmental, social and developmental considerations through its judgements and declarations.[41]

The judiciary has a role to play in the interpretation, explanation and enforcement of laws and regulations. As Kaniaru, Kurukulasuriya and Okidi state: The judiciary plays a critical role in the enhancement and interpretation of environmental law and the vindication of the public interest in a health [sic] and secure environment. Judiciaries have, and will most certainly continue to play, a pivotal role both in the development and implementation of legislative and institution regimes for sustainable development. A judiciary, well informed on the contemporary developments in the field of international and national imperatives of environmentally friendly development, will be a

[41] U.N. ENVIRONMENT PROGRAMME [UNEP] GLOBAL JUDGES PROGRAMME at v (2005), available at http://www.unep.org/publications/search/pub_details_s. asp?ID=37473

major force in strengthening national efforts to realize the goals of environmentally-friendly development and, in particular, in vindicating the rights of individuals substantively and in accessing the judicial process.[42] Increasingly, it is being recognized that a court with special expertise in environmental matters is best placed to play this role in the achievement of ecologically sustainable development.

According to Pring and Pring, over 350 specialized forum for resolving environmental disputes are now found in many countries in every region throughout the world.[43] The surge in popularity of ECTs, and the concomitant benefits that have been experienced by stakeholders in jurisdictions that have established and utilized these specialized forum.[44]

The successful forums are those that have been established as a superior court (the LECA NSW), or as a division of a superior court (Environmental Division of the Superior Court of Vermont),[45] whereas others have been established as inferior courts (the Environment Court of New Zealand,[46] the Planning and Environment Court of Queensland, and the Environment, Resources and Development Court of South Australia) or tribunals with one or more environmental divisions or streams (eg the State Administrative Tribunal of Western Australia, the Victorian Civil and Administrative Tribunal or the Environment and Lands Tribunals of Ontario).

Land development activities are interrelated with environmental degradation and despite the various measures to promote sustainable development it has not been an easy journey. Environment problems on the other hand are polycentric, multidisciplinary and everything is connected to everything else. The scale of environmental problems is such as to require a holistic solution. Environmental problems can have wide, even trans-boundary, impacts, examples include climate change, forest fires, and hazardous waste. Tackling environmental problems involves implementing ecologically sustainable development. The original concept of sustainable development articulated in the Brundtland Report is "development that meets the needs of the present without compromising the ability of future generations to meet their own.

Successful environmental dispute resolution forum located throughout the world have been characterized by a comprehensive jurisdiction. The jurisdiction of a Land and Environment Court

---

[42] Donald Kaniaru et al., UNEP Judicial Symposia on the Role of the Judiciary in Promoting Sustainable Development 22 (1998) (paper presented to the Fifth International Conference on Environmental Compliance and Enforcement), available at http://www.inece.org/5thvol1/lal.pdf.

[43] George Pring and Catherine Pring, Greening Justice: Creating and Improving Environmental Courts and Tribunals (The Access Initiative 2009) 1. Cf Nicholas Robinson, 'Ensuring Access to Justice Through Environmental Courts' (2012) 29 Pace Envtl L Rev 363, 381 (noting that informal estimates suggest there are over 400 ECTs throughout the world).

[44] Brian Preston, 'Benefits of Judicial Specialization in Environmental Law: The Land and Environment Court of New South Wales as a Case Study' (2012) 29 Pace Envtl L Rev 396; Ulf Bj¨all˚as, 'Experiences of Sweden's Environmental Courts' (2010) 3 J Ct Innovation 177; Merideth Wright, 'The Vermont Environmental Court' (2010) 3 J Ct Innovation 201.

[45] Vermont Judiciary, 'Vermont Superior Court – Environmental Division' <http://www.vermontjudiciary.org/gtc/environmental/default.aspx> accessed 27 May 2014.

[46] Bret Birdsong, 'Adjudicating Sustainability: New Zealand's Environment Court' (2002) 29 Ecology LQ 1, 26–38.

should be comprehensive in three respects. First, a Land and Environment Court should enjoy comprehensive jurisdiction to hear, determine and dispose of matters and disputes arising under all environmental laws enacted by the government of the land. To this end, the laws must create or enable legal suits in relation to the aspects of the environment that are sought to be used or protected when accessing the Land and Environment Court. If there is no right of action, the Land and Environment Court will simply not have any jurisdiction to hear a party which feels aggrieved by a decision or action.

The followings are some proposals to enhance the planning appeal mechanism, either it be the Appeal Board or a specialised Land and Environment Court.

1. Knowledgeable and Competent Judges and members

An essential characteristic of successful Land and Environment dispute resolution forum is specialization.[47] Environmental issues and the legal and policy responses to them demand special knowledge and expertise. In order to be competent, judges and other members need to be educated about, and attuned to, environmental issues and the legal and policy responses, they need to be environmentally literate. Ideally, judges and other members should be environmentally literate prior to their being appointed. There is a need for education for judges and other members who are to be appointed to a specialized forum as well as continuing professional development of judges and other members during their tenure. Having a critical mass of cases also enables judges and other members to increase knowledge and expertise over time which proves practice makes perfect. Decision-making quality, effectiveness and efficiency can be enhanced by the availability of technical experts within. Bringing together both judges and many governmental and non-governmental organisations have supported environmental training for judges, lawyers and others involved in land and environmental dispute resolution forum all over the world, including, eg, the UN Environment Programme, the International Union for the Conservation of Nature, and the Environmental Law Alliance Worldwide.

2. Input from technical expertise

Technical experts in one specialised forum can create a synergy and facilitates a free and beneficial exchange of ideas and information, thereby developing the forum's internal expertise. In particular, the presence of multidisciplinary decision-makers enables the assembling of panels of decision-makers with expertise relevant to the issues in the case so as to facilitate interdisciplinary decision-making. This, in turn, serves to produce better quality decisions not only in terms of devising and applying general principles to environmental matters, but also in terms of facilitating greater consistency in decision-making. This may result in greater certainty in decision-making and less disputes arising or matters being brought before land and environmental forum for determination. There have been several forums that have been successful in their efforts to develop a centralized and specialized forum for hearing, determining and disposing of environmental matters and disputes. The resolution of environmental disputes will invariably turn on complex scientific evidence and expert testimony in areas such as causation, damages and likely environmental harm if development is approved. Many of the more

[47] Preston, 'Benefits of Judicial Specialization' (n 2) 425–26.

successful land and environmental dispute resolution forum have addressed the issue of access to scientific and technical expertise through appointing internal technical experts as commissioners to hear, determine and dispose of complex environmental disputes.

3. Provide Alternative Dispute Resolution Mechanisms

Centralization, specialization and the availability of a range of court personnel facilitate a range of alternative dispute resolution (ADR) mechanisms. Centralization enables a land and environmental dispute resolution forum to deal with multiple facets of an environmental dispute without the constriction of jurisdictional limitations. For example, remedies for breach of law could include not only civil remedies of a prohibitory or mandatory injunction but also administrative remedies of the grant of approval to make the conduct lawful in the future. Specialization facilitates a better appreciation of the nature and characteristics of environmental disputes and selection of the appropriate dispute resolution for each particular dispute. Availability of technical experts in land and environmental dispute resolution forum enables their involvement in conciliation, mediation and neutral evaluation, as well as improving the quality, effectiveness and efficiency of adjudication. Many land and environmental dispute resolution forums throughout the world now offer court-annexed and other ADR services to parties who wish to resolve their disputes without resorting to full-blown litigation. First, these non-adjudicative mechanisms can, in some circumstances, offer a more affordable source of justice than traditional litigation. Secondly, resolution of a dispute through ADR mechanisms will often be quicker. Thirdly, attempting to resolve a dispute through ADR can often create 'win–win' solutions for parties that could not be sanctioned by the adversarial legal system. Fourthly, parties will often prefer ADR to litigation on the basis that they have greater power over the outcome of the dispute resolution process. Finally, some forms of ADR may potentially enhance communication, develop cooperation and preserve existing relationships between parties that could otherwise be damaged through stressful and conflict based litigation.

4. Just, Quick, and Cheap Resolution of Proceedings

Introduce case management to facilitate just, quick and cheap resolution The Court is under a duty to give effect to the overriding purpose of facilitating the "just, quick and cheap resolution of the real issues" in the proceedings. The attainment of the overriding purpose necessitates active case management. In order to further the overriding purpose, proceedings are to be managed by the Court having regard to the following objects: "(a) the just determination of the proceedings, (b) the efficient disposal of the business of the court, (c) the efficient use of available judicial and administrative resources, (d) the timely disposal of the proceedings, and all other proceedings in the court, at a cost affordable by the respective parties. There is a degree of interrelationship between the goals of the just, quick, and cheap resolution of issues in proceedings. To act in accordance with the dictates of justice includes dealing with cases in a manner that is expeditious and timely, proportionate to their importance and complexity, and cost efficient to both private parties and public resources.

Lord Woolf identified a number of principles which a civil justice system should meet in order to ensure access to justice.[48] The system should aspire to: (a) be just in the results it delivers; (b) be fair in the way it treats litigants; (c) offer appropriate procedures at a reasonable cost; (d) deal with cases with reasonable speed; (e) be understandable to those who use it; (f) be responsive to the needs of those who use it; (g) provide as much certainty as the nature of particular cases allows; and (h) be effective: adequately resourced and organised. Some of these principles are outcomes of the justice system, notably ensuring a just result by fair means. They contribute to

5. Independent Judiciary

It is important that judges observe the limitations of their role, as they are servants of the law, not politicians, lawmakers, nor policymakers. Lord Woolf, then Lord Chief Justice of England and Wales, explained his view of the three roles of the law in relation to the environment: [49] First, law should ensure that the standards set down by policy makers are enforced fairly and efficiently. Second, law needs to ensure the policy maker's decision making process itself is of the highest standard. The decision-making process should be as open and accountable as possible, particularly where local interests are involved: it should allow relevant representations to be considered. Finally, the law has a responsibility to protect the fundamental rights of the individual even when they conflict with the policy choices of the democratic majority. Measures aimed at the protection of the environment, as well as those that threaten it, may impact on people's right to life, property, privacy, conscience and their right to a fair hearing. The law has the difficult task of balancing rights of the individual against the will of the majority as intended by Parliament. Thus, the responsibility of law is to ensure informed and transparent decision-making, fair and efficient enforcement of environmental laws, and a fair balance between public objectives and private rights.

6. Access for Public Participation

The Aarhus Convention can force governments to address the practical workings of their traditional legal systems so as to ensure effective access to justice. Kofi Annan, Secretary-General of the United Nations from 1997 to 2006, has said of the Convention: Although regional in scope, the significance of the Aarhus Convention is global. It is by far the most impressive elaboration of principle 10 of the Rio Declaration, which stresses the need for citizens' participation in environmental issues and for access to information on the environment held by public authorities. As such it is the most ambitious venture in the area of "environmental democracy" so far undertaken under the auspices of the United Nations.[50] In February 2009, the

[48] Harry Woolf, Access To Justice: Final Report To The Lord Chancellor On The Civil Justice System In England And Wales 2 (1996).
[49] Ibid.
[50] Working Grp. On Access To Envtl. Justice, Ensuring Access To Environmental Justice In England And Wales 15 (May 2008), available at http://www.wwf.org.uk/filelibrary/pdf/justice_ report_08.pdf. 24. Case C-427/07, Comm'n v. Ir., 2009 E.C.R. I-06277. 25. Id. ¶¶ 92-94.

Governing Council of UNEP proposed the extension of similar principles on an international basis, in the spirit of Principle 10 of the Rio Declaration. In the following year, the Governing Council adopted its Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters. The following Aarhus principles are becoming increasingly important in providing a strong legal platform for the assertion of individual environmental rights.[51]

1. Access to information — Citizens have the right to ready access to environmental information, and public authorities have a duty to collect and provide it.

2. Right to participate in environmental decision-making — The public must be informed of relevant projects and have the opportunity to participate in the decision-making process.

3. Access to justice — The public has the right of access to effective judicial or administrative procedures to challenge the legality of environmental decisions.

The Town and Country Planning Act 1976 can be amended to avail access to interested citizens and interest groups who may be able to represent the interest of the public and environment for the sake of the present and future generation. The Malaysian Courts can also learn something from their Asian neighbours. In the *Minors Oposa* case,[52] the Philippines Supreme Court recognised that a group of children have the right to uphold environmental rights for themselves and for the benefit of the future generations.

The Philippines Supreme Court by encouraging the plaintiff's right to sue on behalf of future generation has established the concept of intergenerational standing for environmental issues.[53] Relevant rules, procedures and guidelines to the Appeal Board in dealing with this type of matters in order to overcome these objections can be introduced.[54] Procedural infirmities may result in thwarting justice and it is therefore necessary that the procedures be reformed to effectively meet the needs of the society as it progresses. Law must be stable but at the same time it must be dynamic and accommodating to changes. The NGOs in Malaysia must be given rights to access to environmental justice. They play an important role in helping the people to obtain justice against environmental harm arising from land development activities.[55]

Concluding Remarks

---

[51] Convention on Access to Information, Public Participation in Decision making and Access to Justice in Environmental Matters, June 25, 1998, 2161 U.N.T.S. 447, 38 I.L.M. 517 [hereinafter Aarhus Convention].
[52] *Minors Oposa v Secretary of the Department of Environment and Natural Resources* (1994) (DENR) 33 ILM 173.
[53] Just, R.A., "Intergenerational Standing Under the Endangered Species Act: Giving Back the Right to Biodiversity after Lujan v Defenders of Wildlife" [1996] Tulane Law Review Vol.71(2) pp.297-249 at p.249.
[54] *Ibid*.
[55] The *Bakun Dam* case and the *Asian Rare Earth* case are very good example. The NGOs helped the affected citizens to seek redress from the court.

The goal of facilitating the just resolution of the real issues and proceedings is more difficult to measure. Lord Woolf identified a number of principles which a civil justice system should meet in order to ensure access to justice. The system should aspire to:[56]
(a) be *just* in the results it delivers;
(b) be *fair* in the way it treats litigants;
(c) offer appropriate procedures at a reasonable *cost*;
(d) deal with cases with reasonable *speed*;
(e) be *understandable* to those who use it;
(f) be *responsive* to the needs of those who use it;
(g) provide as much *certainty* as the nature of particular cases allows; and
(h) be *effective*: adequately resourced and organised.

The jurisdiction of the Planning Appeal Board need to be enhanced as a special forum can help promote achievement of sustainable development. The functioning of a specialist court has proved useful in resolving the disputes arising in the land and environmental areas. A specialist forum will be able to manage the special nature of the planning and environmental disputes as it involves scientific, geographical, and legal aspects. Involvement of experts from various disciplines is necessary to reach a fair and just decision. Disputes in the land planning and environment often involve government development policies. Disputes often arise when it is claimed that a public authority has exceeded its power, or the matter infringes on the individual rights of the citizen affecting their personal freedom or property. The Judges are put in a difficult position since they have to make sure they deliver the right decision for both the public and the government. Judicial creativity makes the function of the judge very important, since the judge's determination in a question of law is very important due to the effect that it will have on subsequent cases.[57] The prestige and legitimacy of the judiciary is being constantly called into dispute and unwillingly it is the ultimate arbiter in the area of democratic politics[58] and major contributor in environmental dispute resolution process. In availing justice by whatever method for resolving disputes in Malaysia, both the avenues discussed above are equally useful. The mediation system enjoys the tangible benefit of seeking a settlement acceptable to both sides, and it appears to be a procedural mechanism that can foster negotiation. The Land and Environmental Court and the various alternative dispute resolution mechanisms are equally beneficial.

[56] Harry Woolf, Access To Justice: Final Report To The Lord Chancellor On The Civil Justice System In England And Wales 2 (1996).
[57] Griffith, J.A.G., *The Politics of the Judiciary*, (London, Fontana Press, 1991).
[58] Coomaraswamy, R., "Towards An Engaged Judiciary," in Thiruchelvan, N.& Coomaraswamy, R.(eds.), *The Role of the Judiciary in Plural Societies*,(Great Britain, International Centre for Ethnic Studies, 1987) pp.1-19 at p.5.