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Research paper

National and International Policies Governing Haze in Malaysia: a Move Forward towards a Greener Future

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Abstract

Haze crisis is one of the worst disaster that ever-hit Malaysia and the neighboring countries: Singapore and Indonesia. Haze pollution caused harm to the economy and public health of the three countries. The transboundary haze caused by Indonesian forest fires constitutes regional and international harm. According to the Association of Southeast Asian Nations (ASEAN), the haze poses a security risk to states and human. Oil palm boom in Indonesia has sparked transboundary haze in Southeast Asia where Malaysia as one of the world largest producers of palm oils also invest in Indonesia. There have been suggestions to put up legal redress in facing the haze crisis. The suggestion of shared responsibility in cases of transboundary air pollution should be enforced by all parties for the sake of public interest. This paper examines the roles of state responsibility in dealing with air pollution and the roles of ASEAN countries in dealing with transboundary air pollution. It concludes with suggestion that the companies as key players in the palm oil industry also play a pivotal role in keeping the environment safe from pollution.

Keywords: *Policy, Haze Pollution, Environment*

1. Introduction

Haze pollution has become common in Malaysia and Southeast Asia with recurring incidents recorded since 1997. The tradition of clearing lands by fire has been practiced since before colonial rule and carried out blatantly to clear massive size of forest land and also for replanting. There has been considerable public concern about transboundary haze crises experienced every year ever since late 1990s (Varkkey 2011; Varkkey 2013; Forysth, 2014). Haze has not only impact the social, health and economy of the three countries but also the diplomatic ties. The cost of fire casualty and haze that took place in 1998 was around USD4.5 billion (Cotton, 1999) excluding the long-term cost of health problems. The loss caused to the environment can never be accurately estimated as unique environment can never be replaced. The haze has caused an average annual economic loss valued at RM 273,000 ($91,000 USD) due to the inpatient health impact. (Jamal Othman, *et. al*, 2014). More than 22,000 cases of acute respiratory tract infection have been recorded in Sumatra while more than 1.5 million children are affected when schools were ordered to be closed for health reasons (Hamid, 2015). Haze is an environmental disaster which 'tests the spirit of law at the Southeast Asian countries' (Palanissamy, 2013). It creates not only tensions and uneasiness in the diplomatic ties of the three countries in facing the disastrous effects (Cotton, 1999) but also the spirit of ASEAN relationship. After some serious incidents of the man- made disaster, which caused severe air pollution in Malaysia, the government introduced prudent policies to deal and manage the matter while working hand in hand with ASEAN members (Haron, 1997; *Bernama*, 1997; Cotton, 1999; Varkkey 2013). This paper discusses the prominent regional environmental crisis: the issues of transboundary air pollution conflict in ASEAN countries, namely the haze, the state responsibility under the International law, and the roles of non-state actors, i.e. the corporations in facing the challenging issue of transboundary air pollution.

2. Problem Statement

Clean and safe air are essential elements of human health but with the advancement of trade and business, human wants quick solution hence they adopt practices that maybe quick in producing results but unfortunately with far reaching devastating effect to the environment. Business entities and individuals resort to forest burning because the method is cheaper and quicker. However, the negative effect of deforestation through burning is highly destructive to the environment and wellbeing of the people and caused various collateral problems to the extent that neighboring countries are affected. Malaysia, Indonesia and Singapore are badly affected by the haze pollution that recurs since 1997. Several efforts have been initiated by Malaysian government as well as the neighboring states but the result is very slowly materialising. Now that haze does not seriously hit Malaysia in 2016 and 2017, we would like to think that the effort has finally takes effect, so it is time to reflect on what has been done and what should be done to keep haze at bay.

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3. Literature Review

Despite the argument that developed countries has caused damage to environment due to the emission of greenhouse gas, attempt have been made to include developing countries in environmental issues. In the recent decade, the issue of global environment has emerged, and the language of rights also has pushed the right to a health environment (Boyds, 2012). It was only in 1972, during the United Nations Conference on the Human Environment –the first UN summit on the environment that really put the issue on the global political agenda. Despite the disagreement on many issues, there was a mutual agreement each country had a duty not to pollute others, and international protection is needed to safeguard endangered species (Black 2012). Since then, there have been extensive agreements on environment such as the UNECE (United Nations Economic Conventions on Europe) Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, also known as the Aarhus Convention came into picture in 1988. The Aarhus Convention provides that the public has the right to obtain environmental information from public authorities and the right of participation in the decision making affecting the environment. Besides international law, international environmental agreements and protocols have been produced at the international level. The Kyoto Protocol that comes into force in 2005, is an extension of the 1992 United Nation Framework Convention on Climate Change (UNFCC). It is an agreement that binds industrialised countries to reduce emissions of greenhouse gases. It must be noted that pollution to the environment covers vast areas of issues on environment from the issue of air, water, fish and wildlife to plants. The Protocol seems idealistic as there are hindrances in implementing the protocol.

During the United Nations Conference on Environment and Development (Earth Summit) in Rio in 1992 a declaration was made on the need to stop damage and pollution to the planet by transforming the attitude and behavior of mankind. , , In 1992, the Rio made public statement on sensitive issues related to environment. It is clear that environmental issues are not easily tackled as it depends on the state itself to respond to such problem. Hoffman (1976) claimed that due to pressure at the international level, there are two ways in tackling environmental issues, firstly, by way of international law, secondly, by way of rules of state responsibility. Nevertheless, reliance on the rules of state responsibility was proved to be ineffective.

Forest fires have caused transboundary haze and affected Indonesia, Singapore, and Malaysia from 1997 to 2013. On June 10, 2002, the ASEAN member nations signed the ASEAN Agreement on Transboundary Haze Pollution in Kuala Lumpur, Malaysia. Aimed at mitigating and preventing haze pollution through concentrated intercountry efforts and increased regional and worldwide cooperation, the first regional proposal in the world however, lacks measurable obligations and implementations (Nazeer and Furukao, 2017). The agreement was largely ineffective despite the fact that all ASEAN member countries ratified the instrument including Indonesia in January 2015. This is because the mechanisms of the agreement are too weak to contribute significantly in reducing the problem of haze pollution in the region. The non binding nature of the agreement, a uniquely ASEAN way of doing things, is based on the principles of state sovereignty and non-intervention (Heillman, 2016). The failure to enforce what has been agreed is due to various problems faced by Indonesia. Several normative constraints, organizational customs, and domestic politics have hampered the treaty and cooperation (Nguitiragool, 2002). This demonstrates that health and environmental protection are not top priorities within ASEAN states (Campbell, 2005).

Singapore's new Transboundary Haze Pollution Act came into operation on 25 September 2014 and thus a statute with extra-territorial effect was established. The Act imposes xtra-territorial liability for entities involved in setting fires out of Singapore that cause transboundary haze pollution in the republic. Severe transboundary haze pollution that struck Singapore in June 2013 had triggered the enactment of the act. Nonetheless , there is uncertainty in terms of its application and effectiveness to handle environmental issues such as transboundary haze. Despite a growing number of treaty ratifications, compliance with standards remains elusive. As a result, it places great pressure to ASEAN itself (Davies, 2014). Although the Charter of ASEAN states that one of its purposes is "to promote sustainable development as to ensure the protection of the region's environment, the sustainability of its natural resources, the preservations of its cultural heritage and the high quality of life of its peoples", it has been challenging for each ASEAN states to tackle issue of the region's environment, which lead each government to have its own styles and measures in facing this. (ASEAN, 2007). In Malaysia and Indonesia, control and prevention of transboundary haze arising out of the undertakings of foreign vested agricultural companies cannot be realized by domestic laws due to its inadequacy and thus, an international mechanism might be a good alternative to inflict the accountability of haze polluters. (Hanim Kamaruddin and Cecep Aminuddin, 2015). Translating those words into actions are not easy for developing countries in ASEAN regions. Yet, the future for greener environment might not be achieved if everyone remains silent to environmental issues. Next, this paper will discuss on environmental issues under the constitution as well as the Malaysian Environmental laws and policies.

4. Environmental Issues under the Constitution

As the highest authority of the law of the land, the Constitution of each country provides basic principles of freedom to the citizen as well as the non-citizen. As pointed by Richard P. Hiskes (2009) that "*Constitutions where societies that are to guide political and social discourse for generations to come, and also where these values are protected by incorporating them as* constitutional obligations or rights" Portugal was the first country to include *'the right to to a healthy and ecologically balanced human living environment and the duty to defend it'*. (Article 66 of the Portuguese Constitution). It imposes the state with the duty to act within the framework of sustainable development including the responsibility to control and prevent pollution. As for Malaysia, Article 5 of the Federal Constitution guarantees the right to life and liberty and in the case of *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan* (1996) 1 MLJ 261, the Court of Appeal followed the trend in the Indian Courts decision that recognizes that 'life' incorporates all facets of life itself and the substances that constitute the quality of life, which means the appellant right to continue his public service is included. However, in the case of *Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan* [2002] 3 MLJ 72, the Federal Court explained that it would be inaccurate to give a broad and liberal meaning to the term 'personal liberty' as the term right to life means personal liberty only. Hence, there is no clear provision that guarantees the right to a healthy and unpolluted environment in the Federal Constitution. Due to the shortfalls of the government in handling environmental issues, the communities have no other choice but to protect the environment themselves. Constitutional protection of fundamental rights requires a balanced approach between safeguarding the interests of the state and the needs of the people. Without definite guideline on how far constitution can safeguard the public on environmental issues it may lead to uncertainty in the implementation of environmental rights in the society.

5. Malaysian Environment Laws and Policies

Malaysia's environmental laws and policies seem to have fell far short of their promise, despite the time consumed in producing

such laws and policies (Sahabat Alam Malaysia, 2005). Organisations like Sahabat Alam Malaysia (SAM) and Consumers' Association of Penang (CAP) have been trying to build the capacity of the Malaysians in facing environment issues in the society. The Malaysian government also has ratified several international conventions relating to the protection of environment. After the amendment in 2007, section 43 of the Environmental Quality Act 1974 (EQA) through its Amendment in 2007 invokes Section 43 to extend liability or punishment for offences against the EQA to any person who at the time of commission of the offence was a director, chief executive officer, manager, or other similar officer or a partner of the company, firm or society or other body of persons. However, the enforcement of this provision is limited to officers within a local registered company that carries out activities within Malaysian boundary and not beyond (Hanim Kamaruddin and Cecep Aminuddin, 2015). Thus, at ASEAN levels, negotiation among the states rather than legal action is a more viable option.

6. Environmental Law at the ASEAN Level

At ASEAN level, the cooperation in the aspect of environmental protection has deepened among the countries. Yet, the transboundary haze pollution is perhaps one of the most controversial issues as regard to ASEAN environmental cooperation (Chandra and Astriana, 2015). According to Varkey (2017), three themes can be deduced from the issue of haze, namely, the ASEAN Way is very much about sovereignty and non-interference, but issues of transboundary pollution clearly challenges these time-honoured regional norms. The second theme is Regional haze governance also brought about new academic considerations about legality in ASEAN and finally, the source of the haze-producing fires has led to a closer investigation of the political economy of the region which lead to hard issues. It seems that the traditional positivism view of international law as state-oriented remains as dominant in matters in cases of climate change (Hall, 2010). This is unfair to the victims to environmental pollution who suffer a lot due to the change and it raised the question of victimology due to environmental harm (William, 1996; Hall, 2010).

The effects of haze pollution affected not only the health of the public but also daily activities of the members of society. On 19th October 2015, due to the impact of choking smoke from Indonesia for weeks, Malaysia closed schools in several states (*Business Times*, 2016). Hence, it begs us to ask whether the victims of haze pollution have the right to be protected from polluted environment. Article 18 of the Declaration of the Basic Principle of Justice for Victims of Crime and Abuse of Power (hereinafter known as the UN Declaration) states the rights to environmental victims as follows:

"Person(s) who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment for their fundamental rights, through acts or omissions that do not yet constitute violations of national criminal laws but of intentionally recognized norms relating to human rights"

The above-mentioned article is a non-binding soft-law instrument that highlights the importance of the rights of the victims to have access to justice, fair-treatment and of compassion and respect for their dignity. The victims who are affected by the smoke and haze are not given the right to seek justice for themselves. The application of human rights law in environmental law remains underdeveloped (Hall, 2010). In early 2000, victims in cases of environment rarely receive attention from the Malaysian courts as compared to other criminal cases where, the rights of victims will get better guarantee and protection. As pointed by Sahabat Alam, it is a sad scenario that the members of judiciary deny Malaysians the right to clean, healthy and safe environment even though there is right to life in the Federal Constitution. In addition, it seems like there is still lack of political will to change. A proper policy, standards and enforcement are needed to instil the culture of greater accountability and responsibility not only from individuals but also from private sector (Sahabat Alam Malaysia, 2005).

The legal awareness on legal environment can be seen in 2013, the Court hikes fine for company for flouting environmental laws. The Department of Environment ("DOE") is a government agency responsible for ensuring compliance with the provisions of the EQA and initiating enforcement proceedings in the event of a breach. One of the roles of the DOE is to conduct annual checks on factories which discharge industrial effluents. Thus, the power and responsibility granted to the department should be widened to assist them in the investigation and enforcing the law.

7. Conclusion

The preceding discussion shows that Malaysia and the other ASEAN countries need to practice proactive and defensive approach in protecting the environment. It takes almost 20 years of concerted effort to deal with haze issues before the region can really see the result.

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