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PUBLIC INTEREST GROUPS, PUBLIC INTEREST LAW AND DEVELOPMENT IN MALAYSIA

Andrew Harding*

In this article I would like to examine public interest law and the role played by public interest groups [referred to herein as non-governmental organizations: NGOs] in development issues in Malaysia from the particular perspective of the prospects for the 1990s.

I propose to examine first the legal and political position of the NGOs themselves, and secondly the extent to which the legal system allows them access to the courts in public interest cases, which for present purposes I define as cases in which legal action is taken by or on behalf of disadvantaged groups of persons. Here I want to take as an example a current cause celebre, the *Asian Rare Earth* case.

The Development of NGOs

Malaysian NGOs are essentially a phenomenon of the 1980s. Some important NGOs were formed in the middle or late 1970s, but it was only in the 1980s that their impact was felt. Three of the most important NGOs are situated in Penang rather than in the capital. This may be a significant fact: Penang has long regarded itself as the intellectual heartland of Malaysia, at least for the English-educated, non-Muslim, middle class intelligentsia. Two of these "big three," the Consumers' Association of Penang [CAP] and Sahabat Alam Malaysia [SAM] (the third is Aliran), have some overlapping membership and the same president, are it seems less willing to work with the other NGOs, have a more international approach to their work, and are funded to a large extent from abroad. They have been conspicuously successful in highlighting certain public interest issues as well as working

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successfully with disadvantaged communities. As examples, in 1976 CAP helped a fishing village, afflicted by river pollution caused by a new factory, to switch their economic activity from fishing to cockle production (the Kuala Juru affair); more recently they have been in the forefront of the campaign for law reform in relation to the rights of tenant farmers arising out of an incident in which developers of a housing estate were allowed to use force to bulldoze small farms in Panang, which had existed for many years, without the need for a court order; confrontation between the farmers and the police and developers resulted in the death of a woman. This affair also resulted in the fining for contempt of court of CAP lawyers who criticized the Supreme Court's decision (the *Thean Teik* affair).

Another interesting feature of the NGO scene in Malaysia is that many NGOs are easily identified with a particular individual or a small group of intellectuals, and there is comparatively little public involvement in NGOs.

To a certain extent, therefore, the issues they raise tend to be identified with individual advocates, and such divisions as there are between the NGOs can often be attributed to personality differences (and perhaps a little empire-building?), rather than to ideological differences. This is perhaps inevitable in a situation in which most NGOs have only a very small membership, typically only twenty to thirty. In this respect the NGOs in Malaysia do not afford any real evidence of the split along ideological lines noted by Daniel Lev in his study of Indonesian NGOs.¹

Malaysia NGOs can be grouped as follows:

- i) consumer groups
- ii) environmental groups
- iii) religious groups
- iv) social reform/analysis/'good government' watchdog groups
- v) women's groups

1. D.S. Lev, "Human Rights NGOs in Indonesia and Malaysia," paper presented at the Buffalo, New York, Conference on Human Rights in South East Asia, May 1988.

- vi) culture/education groups
- vii) human rights groups

All these are concerned in some way with development issues, but principally those in the first two categories. Naturally there is some overlap in the kinds of "public interest" with which these groups are concerned.

I should perhaps add one group which is *sui generis*, the Malaysian Bar Council, which, although a statutory professional body, behaves much as if it were a NGO. Its longstanding concern with human rights and constitutional issues qualifies it to join the human rights groups. It has always been independent of the government of the day, but the government has sought to undermine its independence somewhat by restrictive legislation.

There is substantial and interesting evidence that NGOs are capable, in spite of their different interests, of working together on certain issues. Notably, a large number of NGOs joined an action committee to campaign against amendments to the Societies Act in 1981; in 1986 a similar campaign was mounted against amendments to the Official Secrets Act; and in 1987-8 a support group for persons detained under the Internal Security Act in "Operation Lallang" was supported by a large number of NGOs, primarily because many "NGO-persons" were themselves detained. This support group has now evolved into a new human rights group, SUARAM. Similarly, a number of groups formed a Joint Tenancy Committee following the decision of the Supreme Court in the *Thean Teik* case.²

The emergence of Malaysian NGOs is undoubtedly a consequence of the creation of a new Malaysian middle class. Lev has shown very convincingly the processes leading to this phenomenon. To summarize: the creation of wealth by and largely for the new business and professional middle classes has

2. *Trustees of Leong San Tan Khoo Kongsi (Penang) Regd & Others v. Poh Swee Siang* [1987] 2 MLJ 611, SC; see also *Lim Khoo Eong v. Trustees of Leong San Tan Khongsi* [1987] 2 MLJ 621, and *Sidek bin Haji Muhamad & 461 others v. Government of the State of Perak* [1982] 1 MLJ 313.

gone hand-in-hand with legislative repression. At the same time, "society," says Lev, "has begun to generate more power as the private sector has grown and grated against the public prerogative. But there are serious tensions in this process of change."³ In the very month in which Lev's paper was delivered in the USA the constitutional crisis over the judiciary began.⁴ The result serves to illustrate Lev's point perfectly. The government's interference with a judiciary increasingly wedded to rule-of-law thinking (I have argued however that this thinking was Malaysian and not slavishly Western in origins and purpose) led to a serious split within the establishment itself. As a result eminent persons whom Lev would have regarded as, if anything, enemies of the NGO movement, or at least distant from it, have now joined it.⁵ The NGO movement has been temporarily united, as has happened before, over this issue. Nonetheless, there are still two viewpoints: NGO lawyers view 1988 as a deterioration from very bad to worse, whereas Bar Council officials and others regard it as a deterioration from not-too-bad to worse. The difference is between those who emphasize the public interest aspect of legal development, and those who emphasize the civil liberties aspect. Nonetheless, the opinion is generally shared among lawyers of both kinds that whatever the performance of the judges before 1988, they enjoyed an independence worth preserving.

The split in the establishment was apparent to me everywhere in Malaysia when I visited in December/January 1989/1990. The middle classes are on the move, lawyers are in the vanguard, and the universal though recent interest in the constitution and the law as an institution bears out Lev's proposition that the new middle class, or at least large portions of it, are ambitious to achieve access to political decision-making and are rooting for a rule-of-law, ideologically neutral state, or a *rechtsstaat*. Before a really

3. Above n.1, p 8.

4. See A.J. Harding, "The 1988 Constitutional Crisis in Malaysia" [1990] 39 ICLQ 57.

5. For example, Tunku Abdul Rahman, the founder of Malaysia; Tun Hussein Onn, the other surviving former Prime Minister; and Tun Mohamed Suffian, former Lord President of the Supreme Court.

effective public interest law or human rights law can be established, however, it would seem that there must be a return to the traditional constitutional norms of democratic freedoms and judicial independence. The preoccupations of this "semi-detached" middle class, for the moment, remind one of those of their 17th century equivalents in England and Holland, or their contemporary equivalents in Eastern Europe: whiggish rather than socialist.

From the point of view of the Malaysian poor, however, current proverbs express their position graphically. "When elephants fight, the grass is flattened"; to which the corollary is often added, "When elephants make love also, the grass is flattened." In other words, it makes little difference that the Malay community is split and the government is faced with a powerful opposition coalition for the first time, because the fundamental norms of politics and the economy will remain the same whoever is in power. This is also the view of most NGO-persons and NGO-lawyers. While current political questions, which are of a classical "civil liberties" variety, have allied NGOs with the professional classes, the future of public interest law will be a test of the existence of differing visions of the law for the 1990s.

Official Status of NGOs

The position of NGOs is not at present very clear, and that in itself makes the space which NGOs occupy somewhat larger than it might have been. There appears to be no real policy towards NGOs as such.⁶ There is no machinery for liaison between the

6. I should note a signal exception to this in Sabah, where the government commissioned a survey of NGOs in 1989, the only such survey to have been undertaken in Malaysia. The result is interesting. It was found that there were more than 800 NGOs in Sabah alone, with a membership of 100,000. Only one NGO claimed to have been consulted by the government. The survey report recommended the setting up of a NGO desk in each ministry; this has not been acted upon, but it seems that the Sabah government is more easily approached by NGOs than is the federal government.

government and NGOs. Initiatives by NGOs are generally met with silence from the government, and consultation of NGOs by the government is almost unknown. Although there are many laws which restrict their freedom to raise matters of public concern, these laws are only sporadically and arbitrarily enforced. There is certainly no attempt to snuff out the NGOs, as there has been in neighbouring Singapore, where no concept of the public interest apart from government policy of the moment appears to exist. The Malaysian government has even been known to include NGO-persons on policy-making committees, which reveals a bifurcated approach to the question of the status of NGOs.

The Societies Act of 1966 is the regime under which most NGOs operate. Its provisions are very detailed and onerous, and it is interesting to note that some of the more recently formed NGOs have found ways around the Act. They have tended either

- 1) not to register at all, which entails a de facto but illegal status, precarious, but, temporarily at least, convenient; or
- 2) to register as a business; or
- 3) to register as a company.

The last two options are, for the time being, speedier and somewhat less bureaucratic ways of achieving legal status.

During the period prior to the Internal Security Act detentions in October 1987 (Operation Lallang) government leaders fired a number of broadsides against NGOs, saying that they were undermining the government and going too far in their criticisms of government policy. The term "crypto-socialist" was also used, prompting UMNO youth to hold a demonstration against the Environmental Protection Society of Malaysia [EPSM], the first against a NGO, in 1986. Not surprisingly NGO-persons were a prime target when the government sought to cool racial tensions with a dragnet operation against a variety of dissidents, activists and others.

The government's wariness about NGOs appears to stem from economics more than from politics. Ministerial statements have stressed that NGOs tend to paint a negative image of the country,

which tends to discourage investment. In one instance, the highlighting by CAP of the problem of antibiotic-resistant bacteria in meat resulted in a 40% drop in the export of chickens to Singapore. The *New Straits Times* called for CAP's magazine to be banned, and refused to print CAP's reply to its editorial. There is also perhaps a distrust of spontaneous movements which cannot be controlled. In some areas the government tries to deal with this by itself setting up an NGO to hegemonize, as it were, the movement.⁷

For the time being NGOs enjoy the limited freedom which they have. Their main complaint is not the repressive legal regime for societies, but the fact that their activities are not reported in the press.⁸

The Asian Rare Earth Case

This case, which concerns the effect of low-level radioactive waste on the health of the population, was heard in late 1989/early 1990 at the High Court at Ipoh before Mr. Justice Peh Swee Chin. It is an interesting and fairly typical example of the effect which NGOs can have on development issues through the agency of law.

Local villagers in Papan and Bukit Merah in Perak became aware of the dumping of radioactive waste within a short distance of their villages by the ARE Company in 1982. The factory processing the waste had been set up in Malaysia in preference to Japan, where an environmental impact assessment would have been required, a fact which made the villagers suspicious about the environmental effects of the dumping. The history of the matter certainly gives cause for public alarm. Just one piece of evidence is the increase in the instance of cancer, leukemia, miscarriages

7. For example, the Federation of Malaysian Consumers' Association and the National Council of Women's Organization.

8. For example, a Bar Council seminar on Press Freedom in December 1989, which lasted for some eight hours and was attended by about 200 persons including many well known Bar Council and other speakers, merited only a short paragraph in the very newspapers whose freedoms the seminar sought to preserve.

and other similar misfortunes among the local population. I was able to visit one of the afflicted homes, a poor wooden hut with no electricity or running water, and saw a six-year-old boy who was deaf, dumb and unable to hold his head up straight; the villagers attributed his disabilities, not otherwise explained, to the fact that his mother had worked at the ARE site. Whether evidence of this kind can be translated into proof of causation in nuisance and negligence was for Mr. Justice Peh to decide, but the case and its social history are of considerable interest whatever the result.⁹

The principal settlement involved at present is the village of Bukit Merah, a very poor Hakka Chinese village of some 8,000 souls (2,000 have left the village in recent years) built at the beginning of the emergency in the late 1940s, and consisting mainly of wood and attap houses. Sanitation is poor and there is no electricity and little running water.

The villagers organized a committee of seventy-two persons (the numbers are now greatly depleted after Internal Security Act arrests of four activists in 1987). The leader of the group, called the Perak Radioactivity Action Committee, is a Chinese-educated pork-seller, Mr. Hew, a man of considerable determination, who was one of the ISA detainees, and is still under some restrictions. The ISA has not altered the resolve of the villagers, but has succeeded in reducing the number of actual activists, a phenomenon typical of Malaysian NGOs at present.

The committee, after failing to get any adequate response from the government or the Company concerning their fears, decided to take legal action. The case took the form of a traditional tort action brought by eight plaintiffs who are residents of Bukit Merah. But this is in reality a public interest case, because

9. After this article was written, the High Court finally decided in favour of the plaintiffs on 9 July 1992. An injunction was granted in terms which required the factory to be closed and the dumped material removed within fourteen days; the damages claim was, however, rejected. The defendants have appealed to the Supreme Court, and have in the meantime obtained a stay of execution pending the outcome of the appeal.

- i) the case is funded by the community itself;
- ii) public interest groups, principally SAM, EPSM, and the Canadian branch of WHO, have assisted the community with advice of various kinds (legal, medical, environmental, organizational, publicity) and the obtaining of medical and other experts; and
- iii) the case was argued by some of Malaysia's leading public interest lawyers.¹⁰

There have been a number of demonstrations, the latest of which, in April 1987, was the largest ever held in Malaysia, and led to detentions under Operation Lallang. The entire population of Bukit Merah defied the police and marched to the ARE site in an unlawful but peaceful demonstration. On the whole the police seem to have been remarkably cooperative, but this did not prevent the leaders from being later whisked into detention, along with many other NGO-persons. The villagers, in spite of the detentions, still show their discontent by unanimous support for the court case. Middle-aged ladies walked several kilometres to the High Court. Hundreds sat on the grass outside the Court. The public gallery was packed with villagers wearing supportive T-shirts, all listening with great attention to proceedings which few of them can have been able to follow; even the food-hawkers of Ipoh went on strike in sympathy. The Action Committee members were desperately keen to put their case to anyone who might listen and be of assistance.

The attitude of the villagers to the various means of raising their grievances is a most interesting comment on law and development. They have steadfastly refused to allow the politicization of the issue, and have cold-shouldered opposition politicians who have tried to take their cause. This in spite of the

10. The *Thean Teik* case mentioned earlier is also a case in this category; although it involved only one plaintiff, it was in essence a test case for the rights of the other 510 farmers on the estate, which the owners sought to develop for housing purposes. The Supreme Court's decision, upholding the owners' right to use reasonable force to eject the tenants on expiry of the notice to quit, is highly questionable.

fact that they vote for the opposition Democratic Action Party, which is generally seen as the main voice in Chinese opposition politics, in state and federal elections. The law offered them certainty if they could only get a favourable result. To them politics is uncertain and unfair in its verdicts, a matter of ambition and broken promises. The judiciary is held in respect, particularly the judge in this case, who is known as the judge who granted habeas corpus to an opposition public interest lawyer, Karpal Singh, who was detained in Operation Lallang. It was conceded, however, that, after the judiciary crisis in 1988, winning an appeal might be more difficult than securing a remedy in the High Court. The faith of the villagers in the processes of law was at the same time touchingly naive and shrewd business sense. They have also been astute in setting up their own NGO, raising money for the families who have suffered unexplained illnesses, and enlisting the support of other NGOs, without which their case would never have got off the ground.

The plaintiffs did succeed in obtaining an interlocutory injunction restraining the company from operating the factory save in a safe manner, but this has been circumvented by the imposition of certain safety requirements by the government. The plaintiffs brought a case for contempt of court, but this stands adjourned pending the outcome of the hearing on the merits. Since at the time of writing (February 1992) no decision has yet been made in the case in the High Court, it seems unlikely that the case, i.e. litigation, will prove to have been an effective remedy.

One other aspect of the case which is of interest is that the problem of the ARE site exists primarily because public opinion in Japan will not tolerate dumping of radioactive waste. In a real sense the strength of the concept of the public interest in the developed world may be the weakness of the same concept in the developing world. Lawyers concerned with development and the environment should beware of fighting a just cause only to see the problem passed to those less able to cope with it. NHK were in the process of filming a documentary about the case during my visit to Ipoh; the producer was unsure whether in view of the

interests involved (ARE is partly-owned by Mitsubishi) the programme would be shown.

The future of public interest law in Malaysia may well hang on the outcome of this case and another (on the vexed issue of native land rights) which is proceeding in Sarawak.¹¹ Conceivably in a year or two the subject will be either a short chapter in legal history or else the signpost to the future development of Malaysian law. There can be no doubt as to the determination of public interest groups and lawyers in Malaysia in pursuing public interest cases, and whatever legal regime emerges, their efforts will find some means of expression. The law schools display a keen interest in public interest law, and there has been what one might call an investment in the future of public interest law; it is hard to imagine that this investment will prove completely fruitless. My own opinion, for what it is worth, is that public interest law will emerge, but a restoration of civil liberties and other constitutional norms must first of all be achieved.

The legal regime itself is therefore at present in question. In the recent case of *Government of Malaysia v. Lim Kit Siang*¹² the Supreme Court refused standing to the leader of the opposition to seek an injunction to restrain the signing of a contract for the privatization of a major highway project, the North-South Highway, to a company in which he alleged that cabinet members and the ruling party had extensive interests. The case is a very complex one, doctrinally, and the government ultimately prevailed by the narrowest possible margin, the Supreme Court overturning by a 3-2 majority its own prior decision on an interlocutory application in the same case, in the teeth of a typically forthright judgment by Eusoffe Abdoolcader SCJ. Lawyers are still arguing about the decision. While the case does not represent a victory for public interest law, it should be noted that it was decided in circumstances in which the survival of the government itself was at

11. *Jau Jok Evong and Others v. Marabong Sdn Bhd and Another* [1990] 2 CLJ 625. The plaintiffs failed on the issue of limitation.

12. [1988] 1 MLJ 50, 2 MLJ 12; [1988] LRC (Const) 811.

stake,¹³ and might have succeeded before a different bench of the Supreme Court. It does not therefore offer a sure guide to the attitude of the courts to public interest cases in general. It can easily be distinguished in future cases as it involved that debateable remedy, the public interest injunction to enforce the criminal law.¹⁴ On the other hand recent changes in the judiciary and its relationship with the government perhaps indicate that the judges will be cautious in such cases.

In the most important standing case of a public interest variety prior to *Lim Kit Siang, Mohamed Ismail v. Tan Sri Haji Othman Saat*,¹⁵ standing was granted for a declaration that the alienation of state land to the Chief Minister of Johore and other dignitaries was unlawful, at the instance of a person who, along with others, had applied for the land and had heard nothing for eight years. The courts took a liberal approach to standing and the public interest in this case, but the issue is made very complex by the fact that Malaysian law does not have a single standing rule and the law is befogged with the notoriously futile, hair-splitting distinctions which befogged English law prior to 1977. A reading of the judgments in *Lim Kit Siang* (fifty-four pages in the Law Reports of the Commonwealth) will afford ample evidence of this.

It will be noted that these two cases both involved the particularly Malaysian problem of corruption. Other public interest cases which have been brought have tended to involve similar "abuse of power" issues, or else have been cases directly involving individuals, such as habeas corpus applications. The two current public interest cases, one in tort, one in public law, both involve an environmental element, and are more in the nature of conventional public interest cases in the sense of "public interest" known to Indian lawyers, in that they directly affect the interests of disadvantaged communities.

13. See my article cited above for the peculiar circumstances of the case.

14. It has exercised the the English courts too: see *Gouriet v. Union of Post Office Workers* [1978] AC 435 HL.

15. [1982] 2 MLJ 133. For public interest law in Malaysia prior to *Lim Kit Siang* see M.P. Jain, "Public Interest Litigation" [1984] 1 MLJ cvi, xcvi-ccxi.

Finally, I would like to note a development in legal practice which is interesting in itself and may point the way to future development of areas of legal practice. I refer to the operation of a law firm within the confines of a NGO. The classic case is CAP, whose capacious premises boast not only a CAP signboard but a brass plate announcing the presence of law firm subject to the governance of the Bar Council and the Legal Profession Act. The firm acts in essence as a department of CAP itself and furnishes legal advice to CAP rather like a Law Centre solicitor in England, but also represents clients of CAP and SAM, as in the *Asian Rare Earth* case and the Sarawak Land Rights case.

The general conclusions I have reached are

- i) that public interest groups are surprisingly effective in Malaysia, given the restrictions which are placed on them;
- ii) that they display sufficient solidarity to come together against the government when they are threatened by legislation or administrative action which affects all of them;
- iii) that public interest law is in the balance at the time of writing in that although there have been many public interest cases the attitude of the courts has not yet been clearly formulated; and
- iv) that the future of both NGOs and public interest law is deeply bound up with Malaysian politics and the outcome of the present power struggle within the ruling elite.

