KAJING TUBEK & 2 ORS.

v.

EKRAN BHD. & 4 ORS.

HIGH COURT MALAYA, KUALA LUMPUR
DATO' JAMES FOONG J
[ORIGINATING SUMMONS NO. S5-21-60-1995]
19 JUNE 1996

ADMINISTRATIVE LAW: *Remedies - Declaration - Discretion and jurisdiction of court to grant - Whether matter justiciable - Alternative remedies available - Whether declaratory relief precluded - Extent of Court's power to make declaration.*

ADMINISTRATIVE LAW: *Exercise of administrative powers - Environmental Quality Act 1974, s. 34A - Whether Minister has power to disprescribe prescribed activities - Whether order issued has retrospective effect - Whether public has vested rights under Act - Whether Handbook a piece of subsidiary legislation.*

ADMINISTRATIVE LAW: *Remedies - Declaration - Enforcement of public duty supported by penal sanction - Environmental Quality Act 1974, s. 34A (8) - Whether private individual can bring action to enforce criminal law - Exceptions.*

CIVIL PROCEDURE: *Declaration - Locus standi - Whether interests substantially affected - Whether there is genuine interest in having legal position declared.*

STATUTORY INTERPRETATION: *Retrospective operation - Interpretation Acts 1948 & 1967, s. 20 - Whether Minister's order effective retrospectively - Whether retrospective intention clear - Whether s. 34A of Environmental Quality Act 1974 provides retrospective powers.*

STATUTORY INTERPRETATION: *Interpretation Acts 1948 & 1967 - Effect of s. 30 (1) - Whether amendment order issued by Minister valid.*

This was an application by the plaintiffs for declarations that: (1) the Environmental Quality (Prescribed Activities) (Environmental Impact Assessment) Amendment Order 1995 was invalid; and (2) the first defendant, Ekran Bhd ('Ekran'), has to comply with the Environmental Quality Act 1974 ('the EQA'), including s. 34A of the EQA and/or the guidelines and regulations prescribed by the second defendant, the D-G of Environmental Quality ('the D-G'), before it could carry out the prescribed activities concerned.

The plaintiffs were residents of longhouses situated within the seventh division of Sarawak at which the Bakun Hydroelectric Project ('the Project') was proposed. They claimed that the Project would involve the destruction of their longhouses, ancestral burial sites, as well as land and forests from which they sought shelter, livelihood, food, and medicine.

Under the EQA, the activities prescribed by the Minister can only be carried out with the approval of the D-G. Section 34A of the EQA imposes a duty upon the person intending to carry out a prescribed activity to submit a report ('EIA') to the D-G. The Handbook of Environmental Impact Assessment Guidelines ('the Guidelines') requires a detailed EIA to be made available to the public. Under the Guidelines the public is invited to make comments to a Review Panel which will then formulate its recommendations to the D-G.

By the Environmental Quality (Prescribed Activities) (Environmental Impact Assessment) Order 1987 ('the 1987 Order'), the Minister had prescribed a number of activities as falling within the EQA. On 27 March 1995 however, the Minister issued the Environmental Quality (Prescribed Activities) (Environmental Impact Assessment) Amendment Order 1995 ('the Amendment Order') which, essentially, 'disprescribed' the activities prescribed under the 1987 Order. The Amendment Order was to apply retrospectively as from 1 September 1994.

Notwithstanding the EQA, a Natural Resource Board ('Sarawak Board') created under s. 11A (1) of the Natural Resources Ordinance (Cap 84) of Sarawak ('the Sarawak Ordinance') can prescribe certain activities and require them to be approved by itself. On 5 July 1994, the Sarawak Board issued the Natural Resources and Environment (Prescribed Activities) Order 1994 ('the Sarawak Order') by which it prescribed certain activities, and also required an EIA to be submitted by the proponent of a project for its consideration.

The fundamental difference between the Sarawak Order and the Guidelines is that the former has no provisions on the public's entitlement to an EIA or comments to a review panel. Subsequently, the D-G declared that the EIA prepared by Ekran was subjected to the Sarawak Order and not the Federal Government regulations, and that it was within the Sarawak Board's purview to review and approve the prescribed activities, which it did.

Consequently, the plaintiffs claimed that they had been deprived of their accrued or vested rights to obtain a copy of the EIA, and to be heard and to make representations.

Held:

[1] The plaintiffs had the *locus standi* to bring the action as their interests were substantially affected and they had a genuine interest in having their legal position declared. There had never been any unqualified rule of

practice that forbade the making of a declaration even when some of the persons interested in the subject of the declaration were not before the Court. Numbers are not a criterion in the granting or refusal of a declaratory relief.

[2] The Court agreed that where the enforcement of a public duty is supported by a penal sanction, as is the case with s. 34A (8) of the EQA, the general rule is that no private individual can bring an action to enforce the criminal law, either by way of an injunction, a declaration, or damages. However, there are two exceptions to this general rule, ie: (1) where it is apparent that the obligation or prohibition was imposed for the benefit or protection of a particular class of individuals; and (2) where the statute creates a public right and a particular member of the public suffers 'particular, direct, and substantial damage other and different from that which was common to all the rest of the public.'

[3] The plaintiffs could not fall within the first exception as the EIA is only a regulatory system without any reference to any class or body of persons; it certainly does not grant protection to any class of the public, but only to the public at large. However, the plaintiffs came within the second exception as they have suffered specific, direct, and substantial damage which is different and apart form what the other members of the public would suffer as a result of the Project.

[4] The instant application did not involve the determination of the jurisdictional aspect between the State Legislature and the Federal Parliament. Irrespective of whether there is a State law existing concurrently with a Federal law, the Court shall not be hampered in its determination to grant or refuse a declaratory relief if it is justiciable to do so. The nucleus of the plaintiff's case was the validity of the Amendment Order, specifically the procedural aspect of its enactment. This was a real and substantial controversy which the Court had jurisdiction to determine, ie, it was a justiciable matter.

[5] By necessary and practical implication, the Minister also has the power under s. 34A (1) of the EQA to 'disprescribe' or 'unprescribe' any prescribed activities.

[6] There is no express provision in the EQA permitting the Minister to make any amendments retrospectively. Thus, the Minister could acquire no right under s. 34A of the EQA to issue the Amendment Order retrospectively. If he wished to avail himself of the powers in s. 20 of the Interpretation Act 1967 ('the IA') to give effect to the retrospectivity of the Amendment Order, he must have said so expressly.

[7] The public's entitlement to a copy of the EIA and to make representations are embodied in the Guidelines which became a piece of subsidiary

legislation when it was published by the D-G. Thus, the plaintiffs were entitled to such rights the denial of which would be contrary to the legal provisions of the EQA and its subsidiary legislation. Consequently, since the Amendment order was a piece of legislation that repealed a written law, and since the rights of the plaintiffs were affected by its effectiveness, s. 30 (1) of the IA also prohibited it from being valid.

[8] The Court would not refuse the plaintiffs' application solely on the ground that an alternative remedy, ie, mandamus, could be available. The Court will consider granting the form of relief most likely to resolve the dispute between the parties.

[9] The power of the Court to make a declaration is almost unlimited, except by its own discretion. It must weigh the advantage of granting declaratory relief as against the disadvantages. The minimum requirement must be to achieve justice between the litigants.

[Application allowed. Declarations granted.]

Cases referred to:
The Government of Malaysia v. Lim Kit Siang [1988] 2 MLJ 12 ***(foll)***
Tan Sri Hj. Othman Saat v. Mohamed bin Ismail [1982] 2 MLJ 177 ***(foll)***
Ibeneweka v. Eqbuna [1964] 1 WLR 219 ***(foll)***
Lonrho Ltd. v. Shell Petroleum (No. 2) [1982] AC 173 ***(refd)***
Salijah bte Ab. Lateh v. Mohd Irwan Abdullah [1996] 1 SLR 63 ***(cit)***
Petaling Tin Bhd. v. Lee Kian Chen [1994] 1 MLJ 657 ***(refd)***
Howe Yoon Chong v. Chief Assessor, Property Tax, Singapore [1978] 2 MLJ 87 ***(foll)***
Chief Assessor, Property Tax, Singappore v. Howe Yoon Chong [1979] 1 MLJ 207 ***(refd)***
R v. Secretary of State, ex p Al-Mehdawi [1989] 1 All ER 777 ***(refd)***
Wong Pot Heng v. Kerajaan Malaysia [1992] 2 MLJ 885 ***(foll)***
Phillips v. Eyre [1870] LR 6 QB1
Yew Bon Tew & Anor. v. Kenderaan Bas Mara [1983] MLJ 1 ***(cit)***
Penang Development Corporation v. Teoh Eng Huat & Anor. [1993] 2 MLJ 97 ***(cit)***
Yamaha Motor Co. Ltd v. Yamaha Malaysia Sdn. Bhd. & Ors. [1983] 1 MLJ 213 ***(refd)***
Hanson v. Raddiff Luban District Council [1992] 2 Ch. 490 ***(refd)***

Legislation referrred to:
Environmental Quality Act 1974, s. 34A
Environmental Quality (Prescribed Activity) (Environmental Impact Assessment) Amendment Order 1995
Environmental Quality (Prescribed Activity) (Environmental Impact Assessment) Order 1987
Interpretation Acts 1948 & 1967 ss. 3, 20
National Resources and Endvironment (Prescribed Activities) Order 1994 (Sarawak)
Sarawak Resources Ordinance, 1949 (Cap. 84) s. 11A(1)

Other sources referred to:
Judicial Review of Administrative Actions, de Smith, Woolf & Jouell, 5th Edn. p. 753

For the plaintiffs - G.S. Nijar (Meenakshi Raman & Thayalan with him); M/s. Meena, Thayalan & Partners
For the first defendant - Shafee Abdullah (C.G. Oh with him); M/s. Shafee & Co.
For the second & third defendants - Stanley Isaac SFC; (Abu Bakar Jais with him)
For the fourth & fifth defendants - Dato' J.C Fong; (Attorney General, Sarawak)

JUDGMENT

James Foong J:

The plaintiffs in this action are residents of longhouses of Long Bulan, Uma Daro and Naku Kalo, in the district of Belaga, the seventh division of Sarawak. Sometime in September 1993, the Federal Cabinet of Malaysia announced its approval of the proposed development of a hydroelectric project in the seventh division of Sarawak, an area known as Bakun covering approximately 69,640 hectares of land to meet the long-term power and energy requirements of the nation. It involves three stages. The creation of a reservoir, construction of a dam, and the transmission of the generated electric power from Sarawak in East Malaysia to Peninsular Malaysia by transmission cables which will, for a greater part be submerged across the South-China Sea. This project which is commonly termed as Bakun Hydroelectric Project (Bakun HEP for short) will, according to the plaintiffs, directly and adversely involve the destruction of their longhouses, ancestral burial sites, as well as land and forests from which they seek shelter, livelihood, food and medicine, all of which they claim to have a strong cultural attachment.

Under the Environmental Quality Act of 1974 (EQA for short) which was passed by the Federal Parliament of Malaysia and became law on 15 April 1975, certain activities to be prescribed by the Minister charged with the responsibility for environment protection (the Minister for short) can only be carried out with approval of the Director-General of Environmental Quality (Director-General for short) who is the 2nd defendant in this action. This, as the long title of the EQA specifies is for the "prevention, abatement, control of pollution and enhancement of the environment and the purpose connected therewith." Section 34A of the EQA imposes a duty upon any person who carries out any of the prescribed activities to submit a report to the Director-General in accordance with the guidelines prescribed by the Director-General. This report should contain an assessment of the impact of such activity which is proposed to be carried out will have or is likely to have on the environment, and a proposal of measures that shall be undertaken to prevent, reduce or control any adverse impact on the environment. (This report is short shall be known as EIA).

According to paragraph 3.4.7 of the Handbook of Environmental Impact Assessment Guidelines (Guidelines for short), passed and approved by the Director-General, a detailed EIA prepared by the proponent of the project must be made available to the public. And under 4.5 of the Guidelines, the public

are invited to comment on the proposed project to a Review Panel, which is an independent body of experts or representative of interested organisations appointed with the prime task of reviewing a detailed EIA, and to evaluate the environmental, development costs and benefits to the community. This Review Panel will formulate its recommendation to the Director-General for this consideration and decision on its approval.

By an Order known as 'The Environmental Quality (Prescribed Activity) (Environmental Impact Assessment) Order 1987 numbered as PU(A) 362 (PU(A) 362 for short) which came into effect on 1 April 1988, the Minister prescribed a number of activities to be 'prescribed activities' falling within the EQA. One such activity in item 13 (B) is;

> Power Generation and Transmission
>
> (b) Dams and hydroelectric power schemes with either or both of the following:
>
> (i) dams over 15 meters high and ancillary structures covering a total area in excess of 400 hectares;
>
> (ii) reservoirs with a surface area in excess of 400 hectares.

However, on 27 March 1995, the Minister purportedly "in exercise of the powers conferred by s. 34A of the EQA", by an Order known as "Environmental Quality (Prescribed Activities) (Environmental Impact Assessment) Amendment Order 1995," numbered as PU(A) 117 (PU(A) 117 for short), "disprescribe" or "unprescribe" (Terms used by Counsel for the 1st defendant) *inter alia* item 13(b) of the prescribed activity made by him in PU(A) 362. This PU(A) 117 was gazetted on 20 April 1995. The mode used in s. 2 of this amendment Order reads as follows:

> 2. The Environmental Quality (Prescribed Activities) (Environmental Impact Assessment) Order 1987 is amended by inserting, after paragraph 2, the following paragraphs:
>
> 3. In relation to the State of Sarawak, this Order shall not apply in respect of prescribed activities listed in the First Schedule of the National Resources and Environment (Prescribed Activities) Order 1994 published under Part 11 of the Sarawak Gazette dated 11 August 1994, save that if there are any inconsistencies between the two Orders, this Order shall prevail.
>
> 4. Notwithstanding paragraph 3, the prescribed activities listed in Items 2, 5(a) and (b), 8, 9, 10, 12, 13(a) (c) and (d), 15, 16 and 18 in the schedule shall continue to apply in respect of the State of Sarawak.

One of the most controversial provisions of this amendment Order is that it "shall be deemed to have come into force on 1 September 1994." In short, the provisions herein are made to apply retrospectively.

Sarawak, as early as 1949, before she joined Malaysia had a legislation known as Natural Resources Ordinance Cap. 84 (The Sarawak Ordinance for short). under s. 11A(1) of this Sarawak Ordinance, a State Natural Resources Board, (the Sarawak Board for short) created under this Ordinance could prescribe certain activities, which *inter-alia,* "may injure, damage or have adversed impact on the quality of the environment or the natural resources of the State" to require the approval of the Sarawak Board before it can be implemented. On 15 July 1994, the Sarawak Board by an order known as "the Natural Resources and Environment (Prescribed Activities) Order 1994 (Sarawak Order for short), besides prescribing certain activities which requires the Sarawak Board's approvals, also lays down procedure for the application for such approvals. In respect of procedure, it requires the project proponent to submit to the Sarawak Board an EIA for the Board's consideration. The fundamental difference between this Sarawak Order and Guidelines is essentially the entitlement to a copy of the EIA by the public, and the subsequent public comments to the Review Panel before an approval can be granted by the Director-General. The Sarawak Order does not contain such provisions. This, basically is the discontentment of the plaintiffs. Of course, one of the prescribed activities in the Sarawak Order includes under item 4(ii) the "Construction of dams, artificial lakes or reservoirs with a surface area of 50 hectares for impounding water," and under s. 2(2) of the same Order, measurement of area shall be construed to mean the minimum area prescribed..."

The 1st defendant is the project proponent of the Bakun HEP. The plaintiffs claimed that on 7 March 1994, the EIA for Bakun HEP was commissioned, and subsequent to this there were various public pronouncements by Government leaders that the EIA will be made available to the public for their comments and views before approval. Through the exhibits annexed to the 1st plaintiff's affidavit are also letters from the Minister assuring certain public interest groups that all EIA procedures under the EQA for this project have to be complied with and the public views will be considered. Suddenly, on 1 April 1995, the press reported that 1st defendant's chairman had claimed that the first segment of the EIA submitted by his company had been approved by the Director-General, and with this, the 1st defendant would be able to start preparatory works at the lower end of the reservoir, which involves clearing of 69,000 hectares of forest. A few days later, on 7 April 1995, the Director-General in Press release, clarified that the EIA prepared by the 1st defendant is "subjected to the Sarawak Order and not the Federal Government regulations. All prescribed activities relating to the development of land, water, forestry, agriculture and other natural resources in Sarawak are subject to the Order (Sarawak Order), including the construction of hydroelectric dams...; since Ekran Bhd's (1st defendant) submission was made after the Order (Sarawak Order) came into force, it is within the Board (Sarawak Board) purview to review and approve it. The first part of the EIA submitted by Ekran Bhd (1st defendant) two months ago was accordingly considered and approved on 27

March" - New Straits Times Press on 7 April 1995 as found in exhibit 'E' of the 1st plaintiff's affidavit affirmed on 5 May 1995. It is pertinent at this stage to note that the Sarawak Order though made on 15 July 1994 was also enacted to be effective retrospectively to 1 September 1994.

By these acts of the defendants, the plaintiffs claim they have been deprived of their accrued/vested rights to obtain a copy of the EIA, to be heard and make representations before the EIA is approved. They are seeking "a declaration that before the 1st defendant carries out the prescribed activity, *viz* the construction of the Bakun HEP, the 1st defendant has to comply with the EQA including s. 34A of the said Act and/or the guidelines prescribed by the 2nd defendant under s. 34A of the said Act and the Regulations made thereunder."

The 3rd defendant is the Government of Malaysia while the 4th and 5th defendants were added into these proceedings upon the suggestion of this Court and agreed upon by all parties then present, principally for the reason that the subject matter concerns and involves them.

As expected, the plaintiffs' application brought a barrage of objections from all the defendants which raised numerous legal issues. For the sake of clarity, this Court shall deal with each of them under separate headings.

Locus standi

The defendants submit that the plaintiffs have no *locus standi* to bring this action; in short they have suffered no specific, direct or substanstial damage, other and different from that which was common to all the rest of the public.

The learned Attorney-General of Sarawak enlightens this Court of the fact that there are over 9,000 inhabitants in the area that would be flooded as a result of the creation of the reservoir for the Bakun HEP, plus another 2,000 people residing in the proposed water catchment area. This totals approximately 10,000 natives affected by the Bakun HEP and any damage so caused by this project is not peculiar or special to the plaintiffs alone. In any event, any loss of their land, houses, crops, will be compensated in accordance with the provisions of the Land Code of Sarawak and not to be remedied by a declaration that the 1st defendant must comply with the EQA.

The law on *locus standi* in a public action has been extensively and comprehensively detailed in the learned judgments of Salleh Abas LP in *The Government of Malaysia v. Lim Kit Siang* [1988] 2 MLJ 12 @ page 20. There is no necessity for this Court to repeat them except to proceed straight into the elaboration of the principles expounded. It was agreed by two (Salleh Abas LP and Hashim Yeop Sani SCJ) of the there majority Judges in the above mentioned case that the best approach to the determination of *locus*

standi is the proposition pronounced by the Supreme Court in the case of *Tan Sri Hj Othman v. Mohamed bin Ismail* [1982] 2 MLJ 177 which is as follows:

> The sensible approach in the matter of *locus standi* in injunction or declaration would be that as a matter of jurisdiction, an assertion of an infringement of contractual or proprietary right, the commission of tort, a statutory right or the breach of a statute **which affects the plaintiffs' interest substantially or where the plaintiffs have some genuine interest in having his legal position declared**, even though he could get no other relief, should suffice. (The emphasis is that of this Court).

A perusal of the plaintiffs' affidavits, without any creditable evidential challenge form the defendants, confirms that he plaintiffs are natives to the area affected by the Bakun HEP. They have claimed that their homes and land will be destroyed, their lives uprooted by the project, and they will suffer far more greatly and directly than other members of the public. To them, "our land and forest are not just a source of our livelihood but constitute life itself, as they are fundamental to our social, cultural, and spiritual survival as native people." This itself, in the opinion of this Court, is sufficient to justify the plaintiffs having a substantial or genuine interest to have a legal position declared.

The plaintiffs may be just three members of a community of 10,000 affected by the Bakun HEP, but as Lord Radcliffe in *Ibeneweka v. Egbuna* [1964] 1 WLR 219 aptly put:

> there had never been any unqualified rule of practice that forbade the making of a declaration even when some of the persons interested in the subject of the declaration were not before the Court. Where, as here, the appellants had decided to make themselves the champions of the rights of those represented - the Obosi people - had fought the case on that basis, and where, as here, the trial Judge took the view that the interested parties are represented were in reality fighting the suit, so to say, from behind the hedge, there was no principle in law which disentitled the Judge from making a declaration of title in the respondent's favour.

Enforcement of a public duty on which a penal sanction is provided.

Section 34A of the EQA imposes a duty on any person who carries out any of the prescribed activities to submit a EIA to the Director-General. When a project proponent proceeds with the project without the approval from the Director-General of the EIA, he commits a breach of s. 34A of the EQA, and under s. 34(A)(8) of the EQA he:

> shall be guilty of an offence and shall be liable to a fine not exceeding ten thousand ringgit or to imprisonment for a period not exceeding two years or both and to a further fine of one thousand ringgit for every day that the offence is continued after a notice by the Director-General requiring him to comply with the act specified therein has been served on him.

By this decree, the defendants claim that the EQA has provided a provision for criminal prosecution on a penal offence in the event of contravention or breach of s. 34A of the EQA. When such penal remedy is created by statutory provision, a declaration sought for by the plaintiffs as private individuals cannot be entertained. This is supported by the Supreme Court decision in the *Government of Malaysia v. Lim Kit Siang supra*, where Abdul Hamid CJ (as then was) held that:

> With all due respect to the learned Judge, my view is clear in that fundamentally where a statute creates a criminal offence by prescribing a penalty for the breach of it but not providing a civil remedy - the general rule is that no private individual can bring an action to enforce the criminal law, either by way of injunction or by a declaration on or by damages. I am inclined to the view that it should be left to the Attorney-General to bring an action either of his own motion or at the instance of member of the public who "relates" the facts to him; see *Gouriet* case."

The reason behind this is best put by Salleh Abas LP in the same case as follows;

> It is unacceptable that criminal law should be enforced by means of civil proceedings for a declaration when the Court's power to grant that remedy is only at the discretion of the Court. Jurisdiction of criminal Court is fixed and certain. The standard of proof in a criminal case is different from that required in a civil case and moreover the Attorney-General is the guardian of public interest and as the public prosecutor, he, and not he Court, is in control of all prosecution. How can a prosecution of this nature be done behind his back? These are some of the most serious objections to the exercise by a civil Court of its discretionary power relating to declaratory and injunctive remedies. Our system requires the public to trust the impartiality and fair mindedness of the Attorney-General. If he fails in his duty to exhibit this sense of fairness and to protect public interest of which he is the guardian the matter can be raised in Parliament or elsewhere.

However, there can be two exceptions to this rule as pointed out by the learned Attorney-General of Sarawak acting for the 4th and 5th defendants. This is expounded in the judgment of Lord Diplock in *Lonrho Ltd. v. Shell Petroleum* (No. 2) [1982] AC 173 which is consistent with *Government of Malaysia v. Lim Kit Siang*. The exceptions are:

> The first is where upon the true construction of the Act it is apparent that the obligation or prohibition was imposed or the benefit or protection of a particular class of individuals as in the Factories Act and similar legislation...
>
> The second exception is where the statute creates a public right (i.e. right enjoyed by all Her Majesty's subjects who wish to avail themselves of it) and a particular member of the public suffers what Bratt J in *Benjamin v. Storr* [1874] LR 9 CP 400, 407 described as "particular, direct and substantial" damage "other and different from that which was common to all the rest of the public.

Even on these exceptions, the learned Attorney-General of Sarawak contends that the plaintiffs have failed to satisfy the first. The EQA, he submits, is for *inter-alia*, "the prevention, control of pollution an enchancement of the environment and to regulate prescribed activities." In short, it is only a regulatory system for environmental quality control and the enchancement, without reference to any class or body of persons for whom such control or enhancement is to benefit; such an Act is not for the protection of any class of the public, but for the public generally.

Mr. Nijar arguing for the plaintiffs disagrees. He submits that by looking at the EQA it is apparent that the obligations for public participation in an EIA before approval as provided by 3.4.7 and 4.5 of the Guidelines are imposed for the benefit of the interested public. Though this Court may agree that it may be for the benefit of the interested public, but it is without reference to any particular class or body. It certainly does not grant protection to any class of the public but only to the public at large. For this, in the opinion of this Court, the plaintiffs do not fall within this particular exception.

On the second exception, this Court finds the circumstances of this case more applicable, particularly, to the findings of this Court under the heading of *locus standi.* The plaintiffs are natives to the location where the Bakun HEP is to be carried out. Operations of this project involve cutting down trees, diverting natural water flow and submerging large tracts of land with water. This obviously involves the destruction of the plaintiffs' homes and land and they would have to be relocated as admitted by the defendants. When the forest which is an integral part of the plaintiffs' lives is destroyed, such a deprivation would certainly uproot and immensely affect their lives. These sufferings and damages definitely are "particular, direct and substantial" to the plaintiffs themselves which are obviously different and apart from what other members of the public would suffer. The plaintiffs may only be three of a community of 10,000, but as uttered earlier, numbers is not the criteria for the granting of refusal of declaratory relief. What is fundamental, is that the plaintiffs themselves have in this case suffered specific, direct and substantial damages caused by the Bakun HEP. Within this exception, this Court finds that the plaintiffs are entitled to seek declaration prayed for in this application, eventhough statutory provision in this case subscribes a criminal offence which provides for a penal remedy.

Justiciable and the Power of the State Legislature to make Laws.

In quoting the Singaporean case of *Salijah bte Ab. Lateh v. Mohd Irwan Abdullah* [1996] 1 SLR 63 @ 69, the learned Attorney-General of Sarawak points out that the power to make declaratory judgment is confined to several principles, one of which is that it must be restricted "to matters which are justiciable in the High Court." With the assistance of the learned Senior Federal Counsel acting for the 2nd and 3rd defendants, they explain that environment

per se is an abstract thing. It is multi-dimensional so that it can be associated with anything surrounding human beings. The power to legislate on environmental matters would therefore necessarily depend on specific activity to which the environmental matter relates. In this respect, both Parliament and the State Legislatures of Sarawak are competent to make laws on environmental impact provided that they are confined to activities which are identified in the Constitution as belonging to their respective legislative jurisdiction. For this, the following provisions on the legislative jurisdiction, between States and the Federal authority needs to be elaborated.

(1) Under Article 73 of the Federal Constitution, while Parliament may make laws for the whole or any part of the Federation, the Legislature of the State may make laws for the whole or any part of the State.

(2) Under Article 74 of the Federal Constitution, Parliament's power to make laws is in respect of matters enumerated in the Federal list or the Concurrent list (that is to say, the List I or List III as set out in the Ninth Schedule of the Federal Constitution).

(3) Under Article 77 of the Federal Constitution, the legislature of the State has power to make laws with respect to any matters not enumerated in any of the list set out in the Ninth Schedule, not being a matter in respect of which Parliament has the power to make laws. This power is called the residual power of legislation and it is preserved for the State Legislature.

(4) Article 95B of the Federal Constitution accords special legislative powers to the States of Sabah and Sarawak. The supplement to List III (known as List III A) in the Ninth Schedule is deemed to form part of the Concurrent List (List III) and the matters enumerated in that list is deemed not to be included in the Federal List (List I). In this supplement to the Concurrent List is the power of the State of Sarawak to make laws on "the production, distribution and supply of water power and of electricity generated by water power" (List III A 13).

(5) In addition to the express powers given under the Ninth Schedule of the Federal Constitution to the State of Sarawak to make laws, the Yang Di-Pertuan Agong acting Article 95C read together with Article 76A of the Federal Constitution has given powers to the State of Sarawak to make laws *inter alia*, on electricity and distribution of gas." This is under the Borneo States (Legislative Powers) Order 1963 LN 17.5.

(6) Under the State List (List II), and supplementary list to the List III (List IIIA) of the Ninth Schedule of the Federal Constitution, together with the additional express powers made under Borneo States (Legislative Powers) Order 1963 LN 17.5, the State of Sarawak has exclusive jurisdiction to make laws affecting land use, foresty (which includes the removal of

timber and biomass), impounding of inland water, diversion of rivers, electricity and the production of electricity generated by water, including the removal of burial sites.

(7) In respect of environmental impact, it is neither in the Federal List (List I), or the Concurrent List (List III), and the defendants claim that under Article 77 of the Federal Constitution, the State of Sarawak is lawfully entitled to legislate over such matters, as seen to be carried through the Sarawak Ordinance and the Sarawak Order.

From the above, the learned Senior Federal Counsel points out that in respect of the Bakun HEP, the State of Sarawak has competent and exclusive jurisdiction to govern the relevant activities involved. The Minister recognising this fact, and removing any inconsistency between Federal and State jurisdiction, PU(A) 117 excluded the application of EQA on certain relevant prescribed activities to the State of Sarawak. The operation of the Sarawak Order, he claims, is never dependent upon PU(A) 117; the Minister has prescribed the material activities, the most relevant of which is the construction of dams and hydroelectric power schemes in PU(A) 362/87, at a time when the Sarawak Ordinance had not been amended yet to include a new s. 11A for Sarawak to assume identical powers and jurisdiction as in s. 34A of the EQA. To grant the declaration sought for by the plaintiffs, in the opinion of the learned Attorney-General of Sarawak would mean, "the Court is seeking to enforce on the State of Sarawak, laws and regulations which Parliament did not have legislative authority to enact, or the constitutionality of such law is questioned, and with regard to which, there are already State laws and regulations for environmental protection and enhancement." These are matters not justiciable for this Court to consider.

The response from the plaintiffs contained in Mr. Nijar's reply is that the environment has increasingly become a subject matter of international concern and the Malaysian Government, since the Stockholm Conference in 1972 has participated in international conferences, entered into treaties, been signatories to international conventions, and agreed to be internationally bound by protocols relating to environment. The country has carried out these actions as part of its obligations in external affairs. To effect these international commitments, the Federal Government must have power at national level to pass laws relating to matters located within the States, otherwise its external affairs obligations will be impaired. He cites the convention on Biological Diversity, which Malaysia is signatory, that imposes binding obligations on the Government to pass laws for the preservation and sustainable use of all the rich flora and fauna within the country. Matters concerning the environment is therefore an external affairs power which the Federal legislature has power under the Federal List (List 1) to enact laws.

Before one embarks upon this issue, it is relevant to determine the definition and meaning of the word 'justiciable'. Edgar Joseph Jr SCJ in *Petaling Bhd v. Lee Kian Chen* [1994] 1 MLJ 657 @ 672 has undertaken this task, and found in *Blacks Law Dictionary* (5th Edition), 1983) at page 1004, on the meaning of the term 'justiciability':

> The term refers to real and substantial controversy which is appropriate for judicial determination, as distinguished from disputes or difference of contingent, hypothetical or abstract character, *Gui-marin & Doan, Inc v. George Town Textile Mfg Co* 249 SC 561, 155 SE 2d 618, 621.

To begin with, this Court wishes to reiterate that the issue before it is not what is the appropriate legal measures to safeguard the environment; which seems to be the undertone of Mr. Nijar's reply, and if followed to proceed further would completely blur the relevant issues before this Court. Basically, from the arguments and a scrutiny of the plaintiffs' application, the nucleus of the plaintiffs' challenge is on the validity of PU(A) 117, in relation to the procedural aspect of its enactment. This does not involve the determination of the jurisdictional aspect between State legislation and the Federal Parliament concerning who has the legislative power on various matters, either listed or not listed in the Ninth Schedule of the Federal Constitution. In any event, if there such a challenge, this Court is not the proper forum for under Article 128(1) and (2) of the Federal Constitution, only the Federal Court to the exclusion of any other Court can decide any question whether a law made by Parliament or by the legislature of the State is valid. There certainly is no application of such nature before this Court.

Irrespective of whether there is a State Law existing concurrently with a Federal Law, this Court shall not be hampered in its determination to grant or refuse a declaratory relief, if found justifiable to do. If there is any inconsistency or conflict of the laws, then it is up to the respective executive authority or its relevant legislation to resolve such matters in accordance with the correct and appropriate procedure as laid down by law. One does not expect an individual (whose right is affected either by a State or Federal Legislation), in attempt to enforce his right granted either by a State or Federal Legislature to be defeated by a claim from the respective executive, each claiming they have the rights and powers to enact the martial piece of law and doing nothing to resolve this. If the executive from either the State or Federal body has chosen to ratify and resolve such conflicts, the least he can do is to do it correctly according to the law. If it is carried out incorrectly or no action ever taken at all, the Courts should not stand idly by to allow the concerned parties involved to take advantage of this situation. In a declaratory relief, which is an all purpose remedy used in an extraordinary variety of cases, the Court will weigh the advantages of granting a declaratory relief against the disadvantages, with the minimum requirement to achieve justice to deal with the aggrieved party's claim at hand. In this case, the issue before this

Court concerns the validity of PU(A) 117 in its procedural aspect of its enactment. This is real and substantial controversy which this Court has jurisdiction to determine, irrespective of whether there exists a State Law or a Federal Legislature governing a similar underlying subject matter. For this, this Court finds that the matter to be determined is justiciable for this forum.

Ultra Vires

(a) Power to 'disprescribe'

The plaintiffs claim that under s. 34A of the EQA, the Minister's power is restricted to prescribing of activities to fall under the EQA. He has no power to suspend the application of PU(A) 362 to the State of Sarawak for this does not fall within the terms of the enabling provisions of s. 34 of the EQA.

Section 34A(1) of the EQA provides;

> The minister, after consultation with the Council, may by order prescribe any activity which may have significant environmental impact as prescribed activity.

By implication, it is the opinion of this Court that he too has corresponding power to, (borrowing the words of Mr. Shafee, Counsel for the 1st defendant), "disprescribe" or "unprescribe" any prescribed activities. This approach is necessary to give full effect to the objective of the EQA, which in the long title spells out as "An Act relating to the prevention, abatement, control of pollution and enhancement of the environment and for the purposes connected therewith." As society progresses environmental characteristics and values also change, caused either by human attitude, depletion of the subject matter or the inapplicability of a prescribed activity. Environmental matters do not remain static, and the constant change in its character requires the Minister to prescribe as well as disprescribe to move with times. When Parliament has delegated the Minister with power to prescribe any activity it would be unjustifiable for him to return to the distinguished house on every single activity he wishes to disprescribe, which in his opinion has become unnecessary or inapplicable. To interpret s. 34A(1) EQA strictly is to tie the hands of the Minister when change has come and is needed. This would create an impractical approach which certainly is not the intention of Parliament.

(b) Retrospectivity

PU(A) 117, though in a from of an Order by the Minister, is a subsidiary legislation according to s. 3 of the Interpretation Acts, 1948 and 1967 (Interpretation Acts for short). Section 20 of the Interpretation Act permits this piece of subsidiary legislation to be made retrospective, deeming it to come into force on 1 September 1994 when it was only gazetted on 20 April 1995. However, Mr. Nijar points out that though PU(A) 117 can be made retrospective, it was not done so under s. 20 of the Interpretation Act. Instead, PU(A) 117 was expressly made, "In exercise of the powers conferred by s.

34A of the EQA 1974." Again s. 34A of the EQA, he claims, has never provided the Minister with a power to amend the law retrospectively. If the Minister wishes to avail himself of the provision of s. 20 of the Interpretation Act which empowers him to amend retrospectively, he must cite this provision explicitly, but this is not apparent in PU(A) 117. In support of this contention, he quoted the case of *Howe Yoon Chong v. Chief Assessor, Property Tax, Singapore* [1978] 2 MLJ 87 where Rajah J at page 90 held that:

> The Minister in this matter exercises his powers under s. 63 of the Act; if he had wished to exercise his powers under the Interpretation Act he should have said so in his declaration, which he did not. He has exercised his powers only under s. 63 of the Act, and s. 63, as can be seen from the plain reading of it, gives him no power to levy fees.

Though the Senior Federal Counsel was quick to point out that the above case was overruled by the Singapore Court of Appeal reported in *Chief Assessor, Property, Singapore v. Howe Yoon Chong* [1979] 1 MLJ 207, the Court of Appeal did not make any specific comments to above proposition. As rationally held by the English Court of Appeal in the case of *R v. Secretary of State, ex p Al-Mehdawi* [1989] 1 All ER 777 at page 781, where an Appellate Court (the House of Lords in this case) expressed no view on the soundness or other wise of the reasoning of the Court below, the decision of the Court below has a "powerful persuasive influence on that particular issue."

This Court is certainly influenced by the proposition of Rajah J above, and to a greater extent by the decision of Eusoff Chin J (as he then was) in *Wong Pot Heng v. Kerajaan Malaysia* [1992] 2 MLJ 885, where the learned Judge, with clarity and precision has this to say:

> Section 20 of the Interpretation Act does not apply to emergency regulations made under s. 2 of the 1979 Act (Emergency (Essential Powers) Act 1979). Since s. 2 of the 1979 Act itself does not contain any provision empowering the Yang Di-Pertuan Agong to make emergency regulations with retrospective effect, I hold that both the new regs 9B and 13 (2) inserted into regulations by the amending regulations are invalid in so far it purports to operate retrospectively.

Similarly in our case, there is no express provision in EQA to permit the Honourable Minister to make any amendments retrospectively. Section 34A(1) of the EQA empowers the Minister to prescribe any activities as prescribed activities including, as this Court has ruled, making of amendments thereto to cater for changes, but these changes are in anticipation of the future and not for the past. The Minister explicitly stated in the operative part of PU(A) 117 that he enacted this Order in exercise of his powers conferred by s. 34A of the EQA, but when the purported enacting provision does not provide him with a right to make amendments retrospectively, he in turn acquires no such right to do so under that particular provision of the statute. A perusal of other sections in the EQA also reveals no provision for the Minister to amend subsidiary legislation retrospectively. If he wished to avail himself of the powers

in s. 20 of the Interpretation Act to give effect to the retrospectivity of his Order, he must, as stated above, say so expressly. But no utterance was ever made, nor is there any strong indication that he did so in this amending Order.

The proposition in *Wong Pot Heng's* case has been critised by the defendants for relying too heavily on Indian and English authorities where no similar provision such as our s. 20 of the Interpretation Act exists in both those countries. This contention is completely unjustified, when the rational of strict interpretation of this section is based on the equitable and general principle that legislation should:

> deal with future acts, and ought to change the character of past transactions carried upon the faith of the existing law ... Willes J in *Philips v. Eyre* [1870] LR 6 QB1.

It is pertinent at this point to also refer to s. 30 of the Interpretation Act, which provides under sub-section (1)(b) that:

> The repeal of written law in whole or in part shall not affect any right, privilege, obligation or liability acquired, accrued or incurred under the repealed law;
>
> and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing law had not been made.

The essential element of this provision for the purpose of this case centers upon the question of whether the plaintiffs have acquired any rights. The defendants of course, have strenuously argued that the plaintiffs have acquired no right nor been granted any under the EQA and the subsidiary legislation related thereto. On the other hand, the plaintiffs have insisted upon a vested and/or an accrued right to a copy of the EIA and to be heard and make representation.

Thus, in order to decide on this matter, the EQA and its subsidiary legislation must be examined.

To start off with, s. 34A(2) of the EQA provides that the EIA "shall be in accordance with the guidelines as prescribed by the Director-General ..." With this, the Guidelines become a subsidiary piece of legislature when published by the Director-General. Under paragraph 1.4.5, 1.6.1, 3.4.7 and 4.5 of the Guidelines, public participation in the form of obtaining a copy of the EIA, commenting thereto and making representation is explicitly provided, and in fact encouraged for a "responsible, interested and participating public is important in environmental management." All these are to be complied with before the Review Panel makes its recommendation to the Director-General, who in turn takes into consideration these recommendations before arriving at a decision. This process is therefore mandatory and any decision made by the Director-General without the above procedure being adhered to will be against the legal

provisions of the EQA and its subsidiary legislature. With this, the entitlement to a copy of the EIA, commenting thereon by the public becomes a right, and for this the plaintiffs are entitled to such rights. Denial of these rights would be contrary to the legal provisions and therefore should be rejected. Consequently, since PU(A) 117 is a piece of legislation that repeals a written law, and since the rights of the plaintiffs are affected by its effectiveness, s. 30(1) of the Interpretation Act also prohibits it from being valid.

Encik Shafee then argues that, in the alternative, PU(A) 117 did not extinguish any vested/accrued rights of the plaintiffs; it merely amended the procedure for the approval of the EIA from the Director-General to the Sarawak Board under the Sarawak Ordinance. This line of approach could be related to the principle expressed by Lord Brightman in *Yew Bon Tew & Anor v. Kenderaan Bas Mara* [1983] 1 MLJ 1 where;

> No person has vested right in any particular course of procedure, but only a right to prosecute or defend a suit according to the rules for the conduct of an action for the time being prescribed.

In the opinion of this Court, this argument is most unattractive for all intent and purposes. PU(A) 117 is not about a transfer of procedure, but the extinction of the EQA in its application on certain material activities in the State of Sarawak. The Sarawak Ordinance and the Sarawak Order by far is completely different piece of legislation, of which, from the arguments of the learned Attorney-General of Sarawak and the Senior Federal Counsel, stands on its own footing, separate and apart from the EQA. Though it may regulate on a similar prescribed activity as the EQA, it is based on its own enactment with separate and distinct procedures. Where a right to prosecute an action exists, as in this case for the plaintiffs, it is no longer procedural but substantive.

Usefulness

The learned Attorney-General of Sarawak questions the usefulness of this declaration sought for by the plaintiffs. He emphasises that after the EIA was submitted by the 1st defendant, it was deliberated and approved by the Sarawak Board which consisted also of the Director-General as one of its members. Under such circumstances, what useful purpose would it serve by ordering the 1st defendant to re-submit an EIA to comply with s. 34A of the EQA? For after all, the Director-General will similarly approve it as he did as a member of the Sarawak Board.

This submission is rather insubstantive as it is elementary that it is not the Director-General who approved the EIA in Sarawak, but the Sarawak Board. He may be a constituent of the Sarawak Board but, it is not in his capacity as the Director-General under the EQA to approve the EIA. The Sarawak Board and the Director-General under the EQA are two separate institutions, each guided by its own set of legal procedures, and the most notorious

difference is the absence in the Sarawak Order of the right of the public to a copy of the EIA, and the right to be heard and make representation before the approval of the EIA is granted. This difference may change the whole course of things as input through public participation as provided by the Guidelines may cause the approving authorities under the EQA to take an entirely different cause of action, or to impose certain conditions that may be beneficial to the project and the public as a whole. The very essence of EQA is to formulate "measures that shall be taken to prevent, reduce or control the adverse impact on environment." To achieve this, as laid down under the Guidelines, public participation is necessary, for after all, the interaction between people and their environment is fundamental to the concept of impact. Thus, it is relevant and indeed mandatory for the authorities to hear the views of the public first, before granting its approval. Even if the views of the public are rejected, of which they are entitled to do, at least the law as promulgated by the elected representatives of the people is being followed. It makes a mockery of the whole issue to say that, the EIA can be approved first and if the public has any constructive ideas, they can submit later. This certainly is illogical, deprivation of good sense and sound reasoning.

Motives

The 4th and 5th defendants question the motive of the plaintiffs in applying for the declaration sought. They feel that the underlying objective of the plaintiffs is to avoid losing their land, crops, houses, and ancestral burial sites if Bakun HEP is to proceed. The plaintiffs' concern, they add, "is not about environment *per se,* but about matters which can only be resolved under the provision of the Land Code of Sarawak; by their actions, the plaintiffs can bolster their case against imminent extinguishment of their rights over State land occupied by them under native customary tenure.

Indeed the plaintiffs are apprehensive that their land, crops, houses and ancestral burial sites will be devastated if Bakun HEP is to proceed. But this does not extinguish their vested rights to make representation and to be heard before the EIA is approved by the Director-General under the EQA and its lawful subsidiary legislation. Relevant provisions of the Land Code of Sarawak may deal and settle the affairs of the plaintiffs relating to their land, but these are matters to be of concern only after the relevant approval is granted to the 1st defendant under the EQA. The rights of the plaintiffs under the EQA are distinct and separate from the rights under the Land Code of Sarawak, which, this Court is confident, also provides adequately for the plaintiffs. But this does not mean that just because the plaintiffs wish to enforce their rights under the EQA they posses a sinister motive as claimed. In any event, the affidavits of the plaintiffs disclose their genuine concern of the environmental impact of the Bakun HEP, and all they wish, is to be granted a right to obtain a copy of the EIA, be heard and make representation before the EIA is approved. Being people directly and peculiarly effected, the plaintiffs would authoritatively

be able to contribute some constructive views for consideration by the authorities; after all the concept of environmental impact is the interaction between people and their environment.

Proper Procedure

(A) Mandamus

The 1st defendant complains that the plaintiffs are seeking a declaration to compel them to comply with the EQA, but however, upon closer scrutiny, the substance of the plaintiffs' grievances are actually against the 2nd and 3rd defendants for the purported abdication of its statutory powers. Thus, the appropriate procedure is an order of Mandamus against the 2nd defendant to exercise its statutory duty under O. 53 High Court Rules and not by way of this declaration.

In the opinion of this Court, this conception is rather restrictive in modern times when there is a dynamic development of declaratory Order in the field of administrative law. The appropriate approach should be those expressed by the authors 'de Smith, Woolf and Jouell in *Judicial Review of Administrative Actions*', (5th Edition) at page 753:

> Normally a Court will not be deterred from the granting of a declaration because some alternative remedy is available. The fact that on application for judicial review an applicant could have obtained an order of Mandamus or Prohibition is no reason for refusing declaratory relief. The Court in practice will adopt an entirely pragmatic approach and having taken into account the wishes of the parties will grant the form of relief most likely to resolve satisfactorily the disputes between the parties.

Based on this, this Court will refuse the plaintiffs' application solely on the ground that an alternative remedy is available. Instead, this Court will consider the granting of the form of relief most likely to resolve the disputes between the parties.

(B) Collateral Attack

The learned Attorney-General of Sarawak has accused the plaintiffs of mounting a collateral when there is no jurisdictional defeat visible on the face of PU(A) 117. He supported this allegation with the case of *Penang Development Corporation v. Teoh Eng Huat & Anor.* [1993] 2 MLJ 97, where the dictum suggests that a collateral attack is not permissible when, *ex facie* the order does not include obvious jurisdictional defeat. The illustration from Wade on *Administrative Law*, 6th Edition at page 333 was adopted by the learned Judge in the *Penang Development Corporation* case to explain the situation where collateral attack is allowed in cases when the order is bad on the face of it. An example of such a case is where action for damages is brought against Magistrates and Judges of inferior Courts on account of orders made by them

outside their jurisdiction. Such orders being bad on the face of it could be treated by the Court as invalid and the Court shall proceed directly to hear the claim for damages. PU(A) 117 as it stands, claims the learned Attorney-General of Sarawak has no obvious *ex facie* jurisdictional defeat which would entitle the plaintiffs to skip an initial claim to invalidate this Order first, before proceeding onto a request for an order to compel the 1st defendant to comply with the EQA. In short, this submission is that, the plaintiffs should have mounted a direct attack.

Mr. Nijar, in his reply immediately explains that it was not the motive of the plaintiffs to carry out a collateral attack. He narrates the change of events caused by the executive in altering the law which now makes the plaintiffs' application appear like a collateral attack. He gives the following chronology of events to explain his position.

> On 20 April 1995, the plaintiffs filed this application consequent to the Director-General's disclosure on 7 April 1995 that the Bakun HEP was no longer under this jurisdiction.
>
> On 20 April 1995, the same date as this application was filed PU(A) 117 was gazetted with retrospective effect from 1 September 1994, which is the same day as the coming into force of the Sarawak Order.

With this change, the nature of the plaintiffs' claim appears to be a collateral attack when, it was not at the time of filing for s. 34A of the EQA, PU(A) 362/87 and the Guidelines were all effective and operational, to the whole of Malaysia. To remedy this, Mr. Nijar now seeks an amendment to his first prayer in this application with the inclusion of "... and that the Environment Quality (Prescribed Activities) (Environmental Impact Assessment) Amendment Order 1995 is invalid."

Firstly this Court finds these explanations tendered by the plaintiffs acceptable to explain the approach undertaken by them which now appears to be in the form of a collateral attack. To overcome such procedural objections, the amendments sought should be allowed, as it has answered all the questions positively posted in the proposition stated in *Yamaha Motor Co. Ltd v. Yamaha Malaysia Sdn Bhd & Ors.* [1983] 1 MLJ 213, regarding amendments.

On the first question of whether the plaintiffs' application is *bona fide,* this Court, after evaluating the explanation given by Mr. Nijar on the change of circumstances caused by the retrospective nature of the relevant legislation, and the contents of the submissions by all parties, finds no other cause for the plaintiffs to make this application except with *bona fide* intention. For the second question of whether prejudice will be caused to the defendants by this amendment, this Court finds none, for throughout the entire argument of the parties, the nucleus is whether this amendment Order PU(A) 117 is valid. The defendants have, in fact based their entire submissions on this point, and covered

practically all angles of this issue. This amendment will not prejudice them but will deal with the actual issue so raised by all parties. In respect of the final question of whether the amendment would not in effect turn the plaintiffs' claim from one character into another and inconsistent character, this Court finds in the negative. The plaintiffs' claim is for a declaration to compel the 1st defendant to comply with a specific provision of the EQA, but to do so now, in view of the purported amendments made through PU(A) 117, it is necessary to mount a direct attack lest it be accused of being in the nature of a collateral attack. The main characteristic of the original prayer has not been changed by this proposed amendment, for it is the continued insistence of the plaintiffs that the EQA still applies. In order to do so now, it is only appropriate that the amendment be included so that it will be comprehensive. However, for the sake of correct order this Court hereby allows the proposed amendment to take precedent rather subsequent to the existing words contained in prayer 1. This would put all matters squarely in its proper prospective.

Conclusion

The power of this Court to make a declaration is almost unlimited except, "limited by its own discretion" (Stendale MR in *Hanson v. Raddiff Luban District Council* [1992] 2 Ch 490 @ 507). However, as cautiously warned by Edgar Joseph JR SCJ in *Petaling Tin Bhd v. Kee Kian Chan & Ors.* [1994] 1 MLJ 657;

Decided cases still afford guidance, at the very least, as what factors the Courts have in the past regarded as relevant when exercising their discretion as to whether to grant or refuse declaratory relief. Broadly stated, the Court must weigh the advantage of granting declaratory relief as against the disadvantages. The minimum requirement must be to achieve justice between litigants and that is 'a subject on which experience may teach the Courts of one generation to take what they may regards as a wider or more liberal view than that of their predecessors' (see *Brickfield Properties v. Newton* [1971] 3 All ER 328 per Sach LJ at page 335 speaking of the rules of practice and procedure).

From the facts and arguments presented, it is understandable why the plaintiffs are aggrieved. The Legislature of Malaysia has enacted the EQA to be applicable on the entire nation. Subsidiary legislations relating thereto were made by the executive delegated with powers to do so. This obviously is to give full effect to the meaning and purpose of the EQA. Under the Guidelines prescribed by the Director-General, as provided for under the EQA itself, a valid assessment of an EIA prepared by the project proponent of the prescribed activities cannot be made without some form of public participation (1.54.5) of the Guidelines). This is essential, for interaction between people and their environment is fundamental to the concept of environmental impact (1.6.1 of the Guidelines). For this, a right is vested on the plaintiffs to obtain and be supplied with a copy of the EIA coupled with the right to make representation

and be heard. While waiting to exercise their rights, and being assured by executives through their leaders, including those directly in charge that the relevant procedures of the EQA will be adhered to, the Minister suddenly strikes a mortal blow by gazetting PU(A) 117. Though it is claimed by the defendants that this amendment Order only alters the procedure in the evaluation of the EIA on Bakun HEP, in substance and in fact and visible to all, it tantamounts to the removal of the entire rights of the plaintiffs to participate and to give their views before the EIA is approved. This Court shall not stand idly by to witness such injustice especially when the plaintiffs have turned to this institution to seek redress. If the minimum requirement for the granting of a declaration is to achieve justice, then basing on the facts and law of this case, the plaintiffs amply qualify. For these, this Court hereby grants:

(i) a declaration that the Environmental Quality (Prescribed Activities) (Environmental Impact Assessment) Amendment Order 1995 is invalid;

(ii) and a declaration that before the 1st defendant carries out the prescribed activity, *viz* the construction of the Bakun Hydroelectric Project, the 1st defendant has to comply with the Environment Quality Act 1974 including s. 34A of the said Act and/or the Guidelines prescribed by the 2nd defendant under s. 34A of the said Act and the Regulations made thereunder;

(iii) and costs to the plaintiffs.

Reported by Gan Peng Chiang