TRaNS: Trans –Regional and –National Studies of Southeast Asia Vol. 7, No. 2 (November) 2019: 233–269.
 doi:10.1017/trn.2019.9

Achieving Goal 16 of the Sustainable Development Goals and Environmental Lessons for Malaysia

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Abstract

On September 2015, countries around the world pledged to end poverty, protect the planet, and hit specific developmental targets within fifteen years at the signing of th|e United Nations 2030 Agenda. Within the 2030 Agenda are seventeen Sustainable Development Goals (SDG). Goal 16 of the SDG contains twelve targets; of these, Target 16.3 is aimed at ensuring equal access to justice for all and Target 16.10 at ensuring public access to information. Malaysia as a signatory has pledged its commitment to fulfilling these SDGs. This paper's primary focus is on the fulfilment of Targets 16.3 and 16.10 within Malaysia's legal environmental framework. At present, there are provisions that ensure equal access to justice and those that ensure public access to information; however, it is suggested that these are insufficient, uncommon, and limited. This paper proposes an amendment to the Federal Constitution to include the express right to a clean environment, and demonstrates, through comparative study, the success similar provisions have had on the environmental protection laws of other countries such as India, the Philippines, South Africa, Nepal, the Netherlands, and Nigeria. It then considers what possible lessons Malaysia could glean from these national experiences in fulfilling its goals for Targets 16.3 and 16.10 before concluding with the proposition that Malaysia should consider an express constitutional right to a clean environment if she intends to meet her SDG goals.

Keywords: Sustainable Development Goals, Goal 16, Goal 16.3, Goal 16.10, Constitutional environmental protection, Environmental justice

Introduction

The United Nations 2030 Agenda for Sustainable Development and its seventeen SDGs were adopted universally by world leaders via a United Nations Resolution passed on 25 September 2015[1] at a historic UN Summit. The 2030 Agenda recognised the need the take bold and transformative steps to "shift the world on to a sustainable and resilient path"[2] through a plan of

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[1]Resolution adopted by the General Assembly on 25 September 2015, A/RES/70/1, http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/70/1&Lang=E (last accessed on 7 July 2017).

[2]"Transforming our world: the 2030 Agenda for Sustainable Development", see the Preamble. http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/70/1&Lang=E.

action "for people, planet, and prosperity".[3] This plan of action is a goal, a pledge by nations to focus on the eradication of poverty, the protection of the planet, and the prosperity of all peoples over a fifteen-year period. It calls to action all nations to end poverty, acknowledging that this can only be achieved together with the promotion of economic growth, strategies that address social needs, and protection of the environment.

Malaysia is a signatory to the UN Resolution adopting the 2030 Agenda and has accepted the seventeen SDGs, also known as Global Goals, which came into force on 1 January 2016.[4] These SDGs include no poverty (Goal 1), sustainable cities and communities (Goal 11), climate action (Goal 13) and peace, justice, and strong institutions (Goal 16). While the SDGs are not legally binding, it is a persuasive document under international law[5] and governments present are expected to take ownership of it and to translate these goals into national efforts (Dixon 2007: 47–49). These seventeen goals are *interconnected* and as such, success requires that efforts be holistic; success must be reached for *all* seventeen goals without exclusion.

Malaysia has begun her journey to achieving the seventeen goals identified; in fact, she began as early as the 1970s with the government's introduction of the New Economic Policy (NEP). The NEP was introduced primarily for the eradication of poverty.[6] From the NEP to the present version, the eleventh Malaysia Plan (2016–2020), policies and initiatives has been implemented. Some success has been recorded and much progress has been made towards achieving several of the SDGs; however, for a period of time, attention was accorded unequally favouring economic development. If sustainable development and the SDGs are to be achieved, each interconnected goal must be prioritised without fear or favour, and a holistic national agenda is required. It is this disproportionality and, in particular, the lack of focus on Goal 16,[7] that the present article addresses.

Goal 16 is titled Peace, Justice, and Strong Institutions. These three elements recognise and affirm that "the rule of law and development have a significant interrelation and are mutually reinforcing, making it essential for sustainable

[3]"Transforming our world: the 2030 Agenda for Sustainable Development", see the Preamble. http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/70/1&Lang=E.

[4]The Prime Minister of Malaysia made his commitment during UN General Assembly in 2015 that Malaysia will adopt the 2030 Agenda for sustainable development and its implementation. See 'Voluntary National Review for Malaysia' at https://sustainabledevelopment.un.org/content/documents/15173Malaysia.pdf (last accessed on 10 July 2017).

[5]A Resolution passed by the United Nations is not binding and does not create law, however its text are material and evidential sources and have (among others) accelerated the formation of customary international law or provided evidence of opinio juris.

[6]Its second goal was "accelerating the process of restructuring the Malaysian society to correct economic imbalance, so as to reduce and eventually eliminate the identification of race with economic function" see Malaysia, Mid-Term Review of the Second Malaysian Plan, 1971–1975 (Kuala Lumpur: Government Press, 1973).

[7]This is not to suggest that no work has gone into developing Goal 16.

https://doi.org/10.1017/trn.2019.9 Published online by Cambridge University Press

development at the national and international level".[8] This is a clear acknowledgement that, in order for sustainable development and the objectives of the 2030 Agenda to succeed, this inter-connected tri-partite relationship must be nurtured. It has been recognised as the goal that "underpins the other sixteen SDGs".[9] Following this, twelve targets were identified. Some of these targets are to: end abuse, exploitation, trafficking, and all forms of violence against and torture of children; promote the rule of law at the national and international levels and ensure equal access to justice for all; develop effective, accountable, and transparent institutions at all levels; and ensure responsive, inclusive, participatory, and representative decision-making at all levels.[10]

In response to this, a number of Malaysian policies and plans have been implemented and identified as supporting this goal. Among these are[11] the eleventh Malaysia Plan's Strategic Trusts 1 and 2,[12] Chapter 9 on "Transforming Public Service for Productivity",[13] the National Policy on Children and its Plan of Action,[14] the ASEAN Regional Plan of Action on the Elimination of Violence Against Women and Children,[15] and the Plan of Action on Child Online Protection (PTCOP). These national actions have been identified as supporting and corresponding to targets under Goal 16. While these national policies and plans apply across the board (to all ministries, institutions, and aspects within a national framework—be it economic or social)—this paper will only focus on the effect of Goal 16 on the environmental framework.

From this (environmental) point of view, it can be observed (even at a cursory level) that the national policies and plans identified above as corresponding to the targets set under Goal 16 only contain some *indirect* positive effect on existing

[8]This statement was issued under the 2030 Agenda, among others. See the UN website - http://www.un.org/sustainabledevelopment/peace-justice/ (last accessed 14 July 2017).

[9]Goal 16: Advocacy Toolkit, (TAP Network: 2017), p.8. Available online at http://tapnetwork2030.org/goal-16-advocacy-toolkit/goal16toolkitdownload/ (last accessed on 7 August 2017).

[10]Those identified were Targets 16.2; 16.3; 16.6 and 16.7.

[11]For the full list see Malaysia: Sustainable Development Goals Voluntary National Review 2017, (EPU: Malaysia), 2017, p. 50, at https://sustainabledevelopment.un.org/content/documents/15173Malaysia.pdf (last accessed on 17 July 2017).

[12]These are - Enhancing inclusiveness towards an equitable society (thrusts 1) and Improving well-being for all (thrust 2).

[13]See "Transforming Public Service for Productivity", http://www.epu.gov.my/sites/default/files/Chapter%209.pdf (last accessed on 17 July 2017).

[14]See the Statement by H.E. Ambassador Hussein Haniff, the Permanent Representative Of Malaysia on Agenda Item 65: Promotion And Protection of the Rights Of Children at the Third Committee, 67th Session of The United Nations General Assembly, New York, 18 October 2012. Available at https://www.un.int/malaysia/sites/www.un.int/files/Malaysia/67th_session/2012-10-18_rights_of_children.pdf (last accessed on 17 July 2017).

[15]See The ASEAN Regional Plan of Action on the Elimination of Violence against Women (ASEAN RPA on EVAW), http://www.asean.org/storage/images/2015/November/27th-summit/ASCC_documents/ASEAN%20Regional%20Plan%20of%20Action%20on%20Elimintation%20of%20Violence%20Against%20WomenAdopted.pdf (last accessed on17 July 2017).

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environmental standards.[16] Most efforts have been targeted at the protection of children, with *no direct* effect on existing legal environmental challenges. It is from this perspective that the article will proceed.

Malaysia has its share of environmental challenges, challenges that could be minimised or eliminated with the adoption of specific targets under Goal 16. For the purposes of this article, the objectives under Targets 16.3 and 16.10 are discussed. Target 16.3 specifies access to justice for all, while Target 16.10 promotes public access to information. Although Malaysia currently has provisions that generally promote these targets, they are insufficient. Present laws in place *do allow* for appeals, access to information, and the right to review existing decisions that have environmental impacts. Yet, many draconian laws—those that promote a lack of transparency in decision-making or those that restrict access to the courts—remain, limiting the potential of these laws. As a result, it is proposed that an amendment to the Federal Constitution be implemented to include the express constitutional right to a clean environment; an environmental right can assist Malaysia in achieving these targets.[17] In several other jurisdictions, the introduction of a constitutional environmental provision has resulted positively in increasing the protection of environmental rights, access to information, and access to justice, the very objectives upheld by Goal 16's Targets 16.3 and 16.10. It is this outcome that the article proposes.

The article will be divided into several parts, the first being the Introduction, which sets out Malaysia's commitment to the 2030 Agenda, the targets under Goal 16, and, in particular, Targets 16.3 and 16.10, while establishing the parameters of the paper. Part II will then set out the existing legal framework and policies that Malaysia has put in place to meet the objectives of Targets 16.3 and 16.10 for the environment. It will also explain briefly the Malaysian framework of environmental law while identifying present key legal challenges. Part III will consider the possibility of a constitutional environmental provision, and the role such a provision has played in the protection of the environment in the Philippines, Nepal, and South Africa. These countries were selected given their disparate legal systems, cultures, histories, and geographical distance. Examples were also drawn from India, Nigeria, and the Netherlands. Although brief, this survey demonstrates how crucial a role that constitutional provisions

[16]The introduction of the 11th Malaysia Plan and its strategic Trusts 1 and 2 does indirectly affect and promote present environmental standards in Malaysia through its efforts to enhance inclusiveness towards an equitable society while improving the well-being for all. The 11th Malaysia Plan was formulated with people as the centre of all development efforts, and serves as an overarching and guiding policy towards a common goal. Thrusts 1 identified the need to enhance inclusiveness towards an equitable society. This is a commitment to ensure that all citizens – regardless of gender, ethnicity, socio-economic level, and geographic location - participate in, and benefit from the country's prosperity. An inclusive society is one of the objectives under Goal 16.

[17]While the paper recognises that an express constitutional provision would certainly assist and affect *all* targets under Goal 16, this paper will only emphasize and discuss the effects such a constitutional provision could have on Targets 16.3 and 16.10.

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have played in shaping present environmental frameworks. Part IV will consider the possible advantages such a constitutional provision could have on existing environmental challenges in Malaysia and the effect this could have towards fulfilling its commitment under Goal 16; and finally, Part V will offer conclusions.

The Existing National Legal Environmental Framework

Malaysia has an extensive national legal framework of environmental laws and policies. This network is patterned primarily by intersecting legislations (both at the federal and state levels), case laws, and government plans and policies, and is preceded by the Federal Constitution. As a Federation, Malaysia has both federal and state government systems.[18] The power to legislate matters is thus divided under Article 74 of the Federal Constitution.[19] Under Article 74, the federal Parliament will legislate matters enumerated under Schedule Nine, List I (also known as the Federal List) and matters under List III, the Concurrent List. All other matters falling under List II and any matters enumerated under List III are legislated by the state.[20] This division indicates that while there are certain subject matters each government legislates and has absolute authority over, there are other subject matters that are shared. Environmental matters, often described as natural resource-related subject matters, are itemised under Schedule Nine, including lands, agriculture, turtles, and forests. These examples, all recorded under List II, fall within the legislative powers of the state, whereas subjects such as development of mineral resources, water supply, and controlling agricultural pests and plant diseases fall within federal jurisdiction. Apart from this, the protection of wild animals, wild birds, and national parks fall under Concurrent List III, allowing for both federal and state governments to legislate these issues. While separation of legislative power suggests a neat division, the reality is otherwise. Given the nature of environmental issues and the multi-faceted wide-ranging effects created, this division has had the "most profound effect on environmental law" (Sharom 2002: 859) in Malaysia.

Apart from Article 74, several other articles under the Federal Constitution have had a direct effect on the environment;[21] one such article is Article 5(1),

[18]In Malaysia, there are three levels of government; apart from the federal and state government, there is also a local government. However, the powers of the local government are not listed under Article 74 and as such, were not discussed.

[19]Article 74 (1) states, "Without prejudice to any power to make laws conferred on it by any other Article, Parliament may make laws with respect to any of the matters enumerated in the Federal List or the Concurrent List"; Article 74 (2) states, "Without prejudice to any power to make laws conferred on it by any other Article, the Legislature of a State may make laws with respect to any of the matters enumerated in the State List…or the Concurrent List".

[20]See Article 74 (2) of the Federal Constitution.

[21]See also Articles 74, 76, 80, 81, 92 and 92 of the Federal Constitution, to name a few.

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which recognises the right to life.[22] It is under Article 5(1) that an implicit right to a clean environment was first recognised;[23] given that the Federal Constitution does not provide for an express right to a clean environment, this was viewed as a positive step in the right direction (Tan 2013: 197–198). Regardless, it has been noted that "case law is contradictory regarding recognition of an implicit constitutional right to a healthy environment".[24]

Apart from the Federal Constitution, this framework of environmental laws and policies also includes federal statutes, state enactments (or ordinances), and corresponding subsidiary legislations. A number of key environmental legislations include the Environmental Quality Act 1974 (EQA 1971) and its subsidiary legislations and guidelines, the Wildlife Conservation Act 2010, and the Forestry Act 1984 together with its subsidiaries and guidelines. Environmental treaties also have a role within this framework, influencing federal policies and legislation "to jump-start" (Kiss *et al*. 2004: 71–72) positive actions that have safeguarded much of Malaysia's natural resources. As an example, the EQA 1974 was created after the Stockholm Conference of 1972, while the Convention on Biological Diversity, signed by Malaysia at the Rio Earth Summit in 1992 and ratified domestically two years later, influenced creation of the National Policy on Biological Diversity in 1998. This was subsequently revised for the latest national policy, introduced in 2016, to guide the nation through 2025.[25] Other recent international and regional commitments on climate change have also resulted in policy changes and efforts at a national level. Notwithstanding the influence of legislation on the framework of environmental laws, governmental policies add a significant weave in its tapestry. In Malaysia, multiple five-year economic plans have recognised and provided for environmental management, beginning with the Third Malaysia Plan (1976–1980) to the present Eleventh Malaysia Plan. Similarly, the National Policy on the Environment passed in 2002 has guided governmental plans through its eight principles that are intended to "harmonise economic development goals with environmental imperatives".[26]

This framework of environmental laws, while extensive, suffers from a number of key challenges. One key effect the constitutional division of legislative authority has had on the existing environmental framework of laws is that it has increased uncertainty concerning jurisdiction between the federal and state

[22]Article 5 (1) reads, "No person shall be deprived of his life or personal liberty save in accordance with law".
[23]See *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan* (1996) 1 MLJ 261.
[24]This was so given the subsequent case of *Ketua Pengarah Jabatan Alam Sekitar & Anor v. Kajing Tubek & Ors* (1997) 3 MLJ 23. See http://davidrichardboyd.com/wp-content/uploads/Implicit-R2HE.pdf (last accessed on 18 August 2017).
[25]For the National Policy on Biological Diversity 2015–2025, see http://www.nre.gov.my/ms-my/PustakaMedia/Penerbitan/National%20Policy%20on%20biological%20Diversity%202016-2025%20Brochure.pdf (last accessed on 8 August 2017).
[26]See the National Policy on the Environment (Malaysia: Ministry of Science, Technology and the Environment 2002), p. 4.

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governments and its agencies, and it has also resulted in the creation of complex structures of decision-making on any singular matter concerning the environment (Tan 2011: 63–86). This has resulted in an uncoordinated system of environmental management with environmental legislations that define the parameters of jurisdiction only in accordance with the subject matter, giving scant consideration to other inter-related aspects and resulting in grey areas that are unregulated. It is suggested that this division of legislative power has further given the federal government constitutional power to override and interfere in state laws (Mohammad Agus Yusoff, 2006: 70) and law making, resulting in potential conflicts and strained relations that can result in poor cooperation, weak working relationships, and, thus, deficient or mediocre levels of environmental management and protection.

This framework of laws and policies (regardless of its multiple challenges) upholds and supports the present environmental management and resources in Malaysia. In so far as environmental legislations are concerned, there are "… no less than thirty-eight statutes and ordinances, as well as a sizable quantity of subsidiary legislation".[27] The abundance of legislation suggests a growing awareness of environmental needs and of the co-relation between environmental protection and a myriad of issues - economic, social and political. However, in this context, it is important to ask if these laws promote the ideals under Goal 16, primarily under Targets 16.3 and 16.10.

Goal 16: Peaceful and Inclusive Societies

The overall objective of Goal 16 is to "promote peaceful and inclusive societies for sustainable development; provide access to justice for all; and build effective, accountable, and inclusive institutions at all levels."[28] Goal 16 is based on the understanding that "there can be no sustainable development without peace and no peace without sustainable development",[29] and has been identified as being critically important, "underpinning overall development and peace-building efforts"[30] proposed under the 2030 Agenda. This understanding recognises the established link between environmental, social, and economic needs and a peaceful, just, and inclusive society—that a safe environment free of fear and

[27]See point 33, Chief Justice's Speech for the Opening of the Legal Year 2017, Friday, 13 January 2017, available at http://www.kehakiman.gov.my/sites/default/files/document3/Teks%20Ucapan/OLY2017.pdf.
[28]See Goal 16 SDG.
[29]Charmaine Rodrigues, "Goal 16: Advocacy Toolkit", Transparency, Accountability and Participation for 2030 Agenda (TAP Network), 2016. See https://sustainabledevelopment.un.org/content/documents/9935TAP%20Network%20Goal%2016%20Advocacy%20Toolkit.pdf.
[30]Charmaine Rodrigues, "Goal 16: Advocacy Toolkit", Transparency, Accountability and Participation for 2030 Agenda (TAP Network), 2016. See https://sustainabledevelopment.un.org/content/documents/9935TAP%20Network%20Goal%2016%20Advocacy%20Toolkit.pdf, at p. 8.

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violence *requires* inclusive and effective public institutions to uphold principles of good governance, transparency, and accountability.[31] These ideals are embodied within the twelve targets and each acts as part of a whole. They "…are recognised as prerequisites to ensuring and enabling an environment in which people are able to live freely, securely, and prosperously".[32] The link between the two has long been recognised in multiple international instruments. The Universal Declaration on Human Rights is a common standard of achievement that respects not only basic rights and freedoms, but urges for "…progressive measures, national and international"[33] to secure the recognition of these rights and freedoms. Likewise, the Rio Declaration inspires sustainable development while acknowledging the relationship between economic development,[34] the eradication of poverty,[35] the protection of basic rights and freedoms,[36] and environment needs for present and future generations. The Aarhus Convention in 1998 similarly recognised the need to protect, preserve, and improve the state of the environment and to ensure sustainable and environmentally sound development via guarantees for the rights of access to information, public participation in decision-making, and access to justice in environmental matters.[37] This is equally reiterated in the Guidelines for the Development of National Legislation on Access to Information, Public Participation, and Access to Justice in Environmental Matters, also more commonly known as the Bali Guidelines.[38] The Phnom Penh Regional Platform for Sustainable Development for Asia and Pacific 2001, also recognises that issues and priorities for sustainable development in the region cut across environmental, economic, and social spheres, and that in order to "address these multifarious issues and priorities will require promoting economic growth and social development, making globalization a positive force for all the world's people, giving particular emphasis on

[31]See "Peace, Justice and Strong Institutions: Why they Matter", UN Sustainable Development Goals website, at https://www.un.org/sustainabledevelopment/wp-content/uploads/2017/01/16-00055p_Why_it_Matters_Goal16_Peace_new_text_Oct26.pdf (last accessed on 28 Sept 2018).
[32]See footnote 29.
[33]See the Preamble to the Universal Declaration of Human Rights.
[34]As an example, Principle 3 and 4 of the Rio Declaration.
[35]As an example, Principle 5 and 6 of the Rio Declaration.
[36]See Principle 10 which states that "Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided".
[37]The Aarhus Convention is available online at http://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf.
[38]See Bali Guidelines at https://wedocs.unep.org/bitstream/handle/20.500.11822/11182/Guidelines%20for%20the%20Development%20of%20National%20Legislation%20on%20Access%20to%20information%2c%20Public%20Participation%20and%20Access%20to%20Justice%20in%20Environmental%20Matters.pdf?sequence=1&isAllowed=y (last accessed on 1 October 2018).

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poverty eradication, environmental protection and management, and good governance, as described in paragraph 13 of the Millennium Declaration, public participation and human development".[39] The Yangon Resolution on Sustainable Development recognises that ASEAN needs to establish a community that ensures "enduring peace, stability, and shared prosperity"[40] in the hopes of attaining effective environmental and natural resource management.

These examples demonstrate the importance of the relationship between sustainable development and peace, a link established through principles of good governance and effective public institutions. Without freedom of information, accountability, and transparency, democracy will not thrive;[41] it will be "bereft of all effectiveness"[42] and certainly, any peace. Similarly, May suggests that "sustainability and environmental constitutionalism share a past, present, and future".[43] In other words, constitutional provisions bridge the gap between international principles and ideals with domestic laws. These ideas will be further explored below.

Under Goal 16, two specific targets are identified for discussion, Targets 16.3 and 16.10. Target 16.10, is one that "reflects the fact that freedom of information is the touchstone of all other human rights and underpins the achievement of all the SDGs. Access to information is crucial…"[44] The right to information not only impacts the capacity of people to participate in decision-making on environmental issues that affect their community, it also threatens their human dignity.[45] This right has not only been enshrined in numerous international and regional conventions, it is "now entrenched in three dozen constitutions".[46] Yet, it is reported that this right continues to be under threat.[47] Without free access to information, it would be difficult for affected individuals or communities to obtain access to justice.

As a result, Target 16.3 focuses on "ensuring that countries have effective, fair, and accessible laws and justice systems that ensure security and protection for all

[39]See https://iefworld.org/wssd_ap.htm (last accessed on 1 October 2018).
[40]See https://cil.nus.edu.sg/wp-content/uploads/formidable/14/2003-Yangon-Resolution-on-Sustainable-Development.pdf (last accessed on 1 October 2018).
[41]Toby Mendel, "Freedom of Information as an Internationally Protected Human Right", article 19, at https://www.article19.org/data/files/pdfs/publications/foi-as-an-international-right.pdf (last accessed on 1 October 2018).
[42]Abid Hussain, the UN Special Rapporteur on Freedom of Opinion and Expression, see article by Toby Mendel above at footnote 41, p. 1.
[43]May, James R., "Sustainability and Global Environmental Constitutionalism", Erin Daly et al. (Eds.), *New Frontiers in Environmental Constitutionalism*, UNEP: Kenya, 2017, p. 310.
[44]See Target 16.10.
[45]Daly, Erin, "An Environmental Dignity Rights Primer", Erin Daly et al. (Eds.), *New Frontiers in Environmental Constitutionalism*, UNEP: Kenya, 2017, p. 112.
[46]Boyd, David, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment*, UBC Press: Toronto, 2012, pp. 106 and 234.
[47]See Knox, J., "Report of the Independent Expert on the issue of Human Rights Obligations relating to the Enjoyment of a safe, Clean, Healthy and sustainable Environment", A/HRC/28/61 (3 February 2015), pp. 11–12.

people, and enable meaningful avenues for redress for criminal and civil wrongdoings…"[48] Access to laws and a justice system is arguably one of the most important tools that push policy-makers to make politically unpopular decisions in support of environmental causes. While technology has developed rapidly to counter many pressing environmental issues, research has shown that lawsuits have been the deciding 'push' for governments to take concrete action.[49] Given that many actors well positioned to address environmental concerns may also be primarily responsible for causing them, giving affected individuals access to courts can encourage inaction or actions not compatible with stated rights to be questioned.

A look through the corpus of law demonstrates that there are legislations and policies in Malaysia that do support these goals; the issue is, to what extent?

A. Target 16.10: Laws Promoting Access to Information and the Challenges Surrounding it

Target 16.10 recognises that freedom of information is crucial to the achievement of all 19 SDGs and the multiple targets set under the 2030 Agenda. Given that breaches of this right to information may give rise to a cause of action, requiring access to justice, Target 16.10 will be discussed before Target 16.3. This freedom is a by-product of a general right to information, which has long been recognised as a fundamental human right and an integral part of the right to the freedom of expression. It is a right that is guaranteed under multiple universal, multilateral, and regional agreements. As discussed above, some examples are Article 19 of the Universal Declaration on Human Rights,[50] Article 19 of the International Covenant on Civil and Political Rights,[51] UN Resolution 59(I),[52] Principle 10 of the Rio Declaration,[53] Article

[48]See Target 16.3.

[49]"The Status of Climate Change Litigation: A Global Review", UNEP: Nairobi (2017): 7–8.

[50]Article 19 states that "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers".

[51]Article 19.1 states that "Everyone shall have the right to hold opinions without interference" and 19.2 states that "Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice".

[52]In the very first session in 1946, the UN General Assembly adopted Resolution 59(I), which states that "Freedom of information is a fundamental human right and … the touchstone of all the freedoms to which the United Nations is consecrated." See Toby Mendel, "Freedom of Information as an Internationally Protected Human Right", available at https://www.article19.org/data/files/pdfs/publications/foi-as-an-international-right.pdf (last accessed 15 August 2017).

[53]Principle 10 states that "Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided".

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1 of the Aarhus Convention 1998,[54] the Bali Guidelines,[55] the Phnom Penh Regional Platform for Sustainable Development for Asia and Pacific 2001,[56] and the Yangon Resolution on Sustainable Development 2003.[57] While Malaysia has affirmed its general support for and commitment to the protection of human rights, especially the rights to freedom of expression and information, the agreements listed above do not create a binding obligation for Malaysia to grant freedom of information or its derivative under international law.[58]

What is binding, however, is Article 10 of the Federal Constitution of Malaysia which states that, subject to the limitations expressed, "every citizen has the right to freedom of speech and expression…"[59] This fundamental right is regrettably not an absolute one. The limitations expressed under Article 10(2)(a)[60] are both widely defined and broadly interpreted. This has resulted in legislation such

[54]Article 1 states that "In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention." Available online at http://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf (last accessed on 15 August 2017).

[55]Also known as the Guidelines for the Development of National Legislation on Access to Information, Public Participation, and Access to Justice in Environmental Matters – these include 7 Guidelines under the heading of Access to Information that define what this right means. Available online at http://www.unep.org/about/majorgroups/bali-guideline-implementation-guide-published (last accessed on 15 August 2017).

[56]The Ministers and heads of delegations from States of the United Nations Economic and Social Commission for Asia and the Pacific, met at Phnom Penh on 28 and 29 November 2001 at the High-level Regional Meeting for the World Summit on Sustainable Development to review the progress in the implementation of Agenda 21 in the region. A joint platform was issued stating the party's common goals towards access to information and the need to enhance the flow of information between them. See in particular Points 3–5. http://www.iefworld.org/wssd_ap.htm (last accessed on 17 August 2017).

[57]The Association of Southeast Asian Nations (ASEAN) has from time to time issued declarations that have (though not directly) promoted the ideals of freedom of information – here, this Resolution called for collaboration, dialogue with partner states, the need to enhance collaboration in environmental issues (within ASEAN and the ASEAN +3 network), and to continue to inculcate regular programmes of comment interest. https://cil.nus.edu.sg/rp/pdf/2003%20Yangon%20Resolution%20on%20Sustainable%20Development-pdf.pdf (last accessed on 17 August 2017).

[58]Although, it can be argued that much of the general ideas of freedom of information may already be encompassed under customary international law. For judicial opinions on human rights guarantees in customary international law, see, for example, Barcelona Traction, Light and Power Company Limited Case (Belgium v. Spain) (Second Phase), ICJ Rep. 1970 3 (International Court of Justice); Namibia Opinion, ICJ Rep. 1971 16, Separate Opinion, Judge Ammoun (International Court of Justice); and generally in Toby Mandel, "Freedom of Information: A Comparative Legal Survey", 2nd Ed. Paris: UNESCO, 2008), available online https://law.yale.edu/system/files/documents/pdf/Intellectual_Life/CL-OGI_Toby_Mendel_book_%28Eng%29.pdf (last accessed on 15 August 2017).

[59]See Article 10(1)(a) Federal Constitution, Laws of Malaysia.

[60]It states that "in the interest of the security of the Federation or any part thereof, friendly relations with other countries, public order or morality and restrictions designed to protect the privileges of Parliament or of any Legislative Assembly or to provide against contempt of court, defamation or incitement to any offence…"

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as the Sedition Act of 1948 and the Official Secrets Act in 1972 that are contrary in spirit to the ideals of freedom of speech and expression.

Regardless of these general limitations, a number of federal environmental legislative bills have promoted such a right, directly or indirectly. One example is the EQA of 1974. Under the EQA, the Director General of Environmental Quality is bound to execute his duties as listed under section 3; these include the need to ensure that an annual report on environmental quality is published together with other relevant reports and information[61] and the need to provide information and education to the public regarding the protection and enhancement of the environment.[62] This requirement to make available reports is also found under the National Forestry Act of 1984, among others.[63] Apart from merely ensuring that general information is disbursed, reports on Environmental Impact Assessments (EIA) must also be made available[64] to the public. Under section 34A of the EQA,[65] for certain prescribed activities (as listed under the 2015 Order[66]) an EIA must be conducted and a report sent to the Director General before any activity is carried out.[67] Under EIA Guidelines, public participation is deemed an 'essential' step and is part of the assessment process in determining whether proposed projects should be recommended for approval.[68] Other environmental legislations also contain specific provisions allowing for the public to have access to information in restricted instances, one example of which is found under sections 60 (1) and (2) of the Biosafety Act 2007, whereby certain information relating to the application, approval, granting, or notification of application to import or undertake any activity involving living, modified organisms may be made available to the public. In the Town and Country Planning Act of 1976 (TCPA)[69] a number of provisions expressly require the state to make available to the public both draft structures[70] and local plans[71] and to allow presentations of these plans be made to the State Director. Further, when an application for planning permission in respect to a development is made under the circumstances listed, the local planning authority is under statutory duty to write to the owners of affected lands and allow them

[61]listed under section 3(1)(i) EQA 1974.
[62]See section 3(1)(l) EQA 1974.
[63]See section 4(f) National Forestry Act1984.
[64]See "A Handbook of Environmental Impact Assessment Guidelines", Department of Environment, Ministry of Science, Technology and the Environment, Kuala Lumpur.
[65]Specifically look at section 34A(2) EQA 1974.
[66]This is in reference to the Environmental Quality (Prescribed Activities)(Environmental Impact Assessment) Order 2015 which lists down the prescribed activities requiring an EIA.
[67]See section 34A(6) EQA 1974.
[68]See "A Handbook of Environmental Impact Assessment Guidelines", Department of Environment, Ministry of Science, Technology and the Environment, Kuala Lumpur.
[69]Act 172.
[70]See section 9(1) and (2) TCPA.
[71]See section 12 and 13 TCPA.

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time to state any objections.[72] These examples demonstrate that within the environmental framework of legislation, there are laws promoting access to information.

While Malaysia does not have federal legislation on the freedom of information, a number of states in Malaysia, in particular Selangor[73] and Penang,[74] have in the last few years enacted such legislation, with reports suggesting that more states may soon follow.[75] Thus, while there are laws promoting access to information, many challenges remain.

Some challenges

There remain many challenges to information being available and accessible to the public. One such challenge is the Official Secrets Act of 1972 (OSA). It is a broadly worded legislation that entrenches all matters relating to public administration in a culture of secrecy. The Preamble itself indicates that it is an Act to revise and consolidate the law relating to the protection of official secrets. What amounts to an official secret is widely drafted under section 2 to mean any document (including photograph, picture, film, tape or sound track[76]) that is specified in the Schedule[77] or any information or document classified as being 'top secret' by a Minister, Head of State, or public officer appointed under section 2B to certify such documents.

The provisions under the OSA come with extensive powers of arrest, and section 18 (1) is an excellent example of the width of those powers stating "if any person is found committing an offence under this Act or is reasonably suspected of having committed, or has attempted to commit, or is about to commit, such an offence, he may be arrested without a warrant." Police have special powers of investigation under section 20, and section 16 substantially reverses the burden of proof. Beyond these onerous terms, anyone who is approached by another to supply or obtain for him/her any official secret is duty bound to report it to a police officer immediately, failure of which could result in a substantial jail term.[78] The OSA has been used in relation to a

[72]See section 21(1)-(6) TCPA.

[73]See Freedom of Information (State of Selangor) Enactment 2011. Available online at https://right2knowmy.files.wordpress.com/2016/08/selenak0172y2011_enakmen_kebebasan_maklumat_negeri_selangor_2011.pdf (last accessed on 16 August 2017).

[74]See Penang Freedom of Information Enactment 2010 at http://www.cljlaw.com/?page=sbep012010&mode=desktop (last accessed on 16 August 2017).

[75]It is suggested that Kelantan has a draft legislation of the same. See "Freedom of Expression and Right to Information in ASEAN Countries: A Regional Analysis of Challenges, Threats and Opportunities" (2014), p. 48. Available online https://www.internews.org/sites/default/files/resources/InternewsEU_ASEAN_FoE_and_RTI_Study_2014.pdf (last accessed on 16 August 2017).

[76]See section 2 interpretation section, Official Secrets Act 1972.

[77]Under the Schedule, these are listed - Cabinet documents, records of decisions and deliberations including those of Cabinet committes; State Executive Council documents, records of decisions and deliberations including those of State Executive Council committees; Documents concerning national security, defence and international relations.

[78]See section 7A(1) and (2) Official Secrets Act 1972.

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number of environmental incidents; the Bakun Dam's EIA report and the API 1997/8 Haze Crisis[79] are examples of its use. Apart from the OSA, other legislation that restricts the disbursement of information in Malaysia include the Printing Press and Publications Act of 1984 (amended in 2012), the 1998 Communications and Multimedia Act, and the powers granted to the Malaysian Communications and Multimedia Commission that have, to an extent, restricted information made available to the public.[80]

As a result, while there are numerous examples of environmental legislation that promote the ideals set out under Target 16.10, ensuring transparency and empowering the public to engage more effectively in their own development, there are equally as many limitations placed on this freedom.

In order for Malaysia to meet its SDGs, the UNDP has identified several key areas that need to be addressed moving forward.[81] Among them are highlighted the demands for public participation and social trust.[82] This acknowledges that public participation is an integral and important aspect of inclusiveness since people and their voices must be present in deciding the forms and nature of development pursued. To achieve this, public participation must be present at all levels of decision-making, and mechanisms promoting it should be made available to harness the public's contributions.

B. Target 16.3: Laws Promoting Access to Justice for All and Existing Challenges

As recently as 2011, one of the many arguments presented to suggest that environmental protection was lacking in Malaysia was the non-existence of a court specialising in environmental matters (Looi 2002: 290–291). This point-of-view was rendered moot on 14 January 2012 when the (then) Chief Justice announced the creation of the Environmental Court following the ASEAN Chief Justices' Roundtable on the Environment in Jakarta in 2011.[83] The announcement and subsequent establishment were heralded by some as a 'beacon of hope' towards the protection of the environment[84] and the court began hearing cases in September 2012. In November of the same year, it was reported that the "…judiciary is actively training judges and magistrates in handling cases related

[79]See A Haze of Secrecy, Article 19 and Centre for Independent Journalism, 2007, at p. 50.
[80]See Freedom of Expression and Right to Information in ASEAN Countries: A Regional Analysis of Challenges, Threats and Opportunities", footnote 94, at p. 46.
[81]Although the report considered the objectives established under the Millennium Development Goals, its outcomes and aims are similar to the SDGs.
[82]See 'About Malaysia' at http://www.my.undp.org/content/malaysia/en/home/countryinfo/ (last accessed on 17 August 2017).
[83]See Chief Registrar Practice Direction No. 3 of 2012, Setting up of Environmental Court. Circular No. 189/2012, available online at the Malaysian Bar's website – http://www.malaysianbar.org.my/index.php?option=com_docman&task=doc_details&gid=3844&Itemid=332 (last accessed on 9 August 2017).
[84]See "Malaysia: Environment court opens", AECEN, 10 September 2012, http://www.aecen.org/stories/malaysia-environment-court-opens (last accessed 9 August 2017).

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to the environment in order to prepare them in terms of proceedings and meting out penalties".[85] The environmental courts had six main objectives, and these were to expand and improve access to environmental justice; to provide expeditious disposal of environmentally related cases; to harness expertise relevant to the specialised field; to monitor environmental cases closely and to ensure that such cases are taken seriously; to ensure uniformity of decision-making in environmental cases; and to increase public participation and confidence.[86] At present, there are 42 designated Sessions courts and 53 Magistrate's courts[87] geographically dispersed that make up the 'green courts' that hear only selected criminal matters.[88] Immediately after its inception, statistics on the performance of these courts[89] for the years 2012 and 2013 indicate that high percentages (often in the 90%) of environmental cases were disposed of within 6 months.

On 1 January 2016, a Special Environmental Court for civil matters was announced and subsequently established in all 13 states. At present, the drafting of the Environmental Rules of Court, an exercise that is expected to contribute further towards increasing access to justice for environmental cases, is on-going.[90]

A judicial attitude towards environmental protection is also a key point to note in the Chief Justice's speech for the opening of the legal year 2017, when he acknowledged the role of the judiciary in protecting the environment and implementing the environmental rule of law. He said that their "…core duty is to safeguard and uphold our constitutional guarantees, which must include the right to a clean environment both for the present generation and the future of unborn generations, not forgetting our wildlife and other life systems which form part of our eco-system…"[91] Accepting that while there is no express constitutional right to a

[85]See Harith, "Malaysia established Green Court since September 3", 10 November 2012, Malaysian Digest. Available online at http://www.malaysiandigest.com/archived/index.php/12-news/local2/19531-malaysia-established-green-court-since-september-3 (last accessed on 9 August 2017); a Judicial Academy has also since been set up to bring judges closer to nature and to encourage greater awareness of the environment and its challenges.

[86]See Raus Sharif, footnote 35, at p. 9.

[87]Environmental court on right track', Saturday, December 13, 2014, Daily Express. Available online at http://www.dailyexpress.com.my/news.cfm?NewsID=94996 (last accessed 8 August 2017).

[88]Specifically, the scope of their enforcement function is limited to 38 Acts and Ordinances and 17 Regulations, rules and Orders only.

[89]Raus Sharif, "The Concept of Environmental Rule of Law and its Importance for Sustainable Development", 1st Asia and Pacific International Colloquium on Environmental Rule of Law: Defining a new Future for Environmental Justice, Governance and Law, 11–12 December 2013, Putrajaya, Malaysia. Available at http://www.kehakiman.gov.my/sites/default/files/document3/Penerbitan%20Kehakiman/2ND%20Hon.%20Tan%20Sri%20Raus.pdf (last accessed on 10 August 2017).

[90]See Chief Justice's Speech for the Opening of the Legal Year 2017, Friday 13 January 2017, available at http://www.kehakiman.gov.my/sites/default/files/document3/Teks%20Ucapan/OLY2017.pdf (last accessed on 9 August 2017).

[91]Point 29 in the Chief Justice's Speech for the Opening of the Legal Year 2017, Friday 13 January 2017, available at http://www.kehakiman.gov.my/sites/default/files/document3/Teks%20Ucapan/OLY2017.pdf (last accessed on 9 August 2017).

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clean environment at present, it has been acknowledged through judicial interpretation, ancient wisdom, and cultural expression that this right would be 'ideal' for the Federal Constitution to reflect with an amendment.[92]

There is a global trend towards establishing specialised environmental courts or tribunals (Pring and Pring 2009; Rottman 2000) and much has been reported and published on the advantages and positive effects a specialised court may engender for environmental protections (Pring and Pring 2009, 2015; Sharma 2008). While a specialised court makes justice more accessible, Target 16.3 considers not only whether justice systems are accessible to the people, but also that substantive laws that allow for that access are effective and fair.

In the past, one of the primary hurdles to public access to environmental justice was the archaic rule of *locus standi*—in this instance, the test for threshold *locus standi*. The 1988 decision of the *Government of Malaysia v Lim Kit Siang*[93] (which followed English common law decisions in *Boyce v Paddington*[94] and *Gouriet v Union of Post Office Workers*[95]) recognised that as a general rule a private citizen cannot sue in respect to interference with a public right; however, the citizen is entitled to sue if there is interference with a private right, or if the public right interfered with will inflict special damage on the private citizen[96]. This "severely limited" (Harding 2007: 136) the rules of standing, making public interest litigations and the test for standing extremely difficult to establish in subsequent cases.[97] For environmental litigation, the question becomes, *who* then is able to stand and demonstrate a special interest in or have suffered peculiar damage over and above others? In situations where environmental damage occurs, for example, the pollution of rivers or degradation of air quality, who would be able to bring about action? This is particularly pertinent given that affected communities are often minority groups with weak economic power and poor support systems or are simply unaware of their rights (Nijhar 2017). Furthermore, public-spirited individuals would also be unable to stand on behalf of these affected communities[98] with *locus standi* tests being so restrictive.

[92]See Points 19–32 in the Chief Justice's Speech for the Opening of the Legal Year 2017, Friday, 13 January 2017, available at http://www.kehakiman.gov.my/sites/default/files/document3/Teks%20Ucapan/OLY2017.pdf (last accessed on 9 August 2017).

[93]*Government of Malaysia v Lim Kit Siang, United Engineers (M) Bhd v Lim Kit Siang* [1988] 1 MLJ 50, [1988] 2 MLJ 12. See also *Majlis Peguam Malaysia v Raja Segaran* [2005] 1 MLJ 15, p. 94.

[94]*Boyce v Paddington Borough Council* (1903) 1 Ch 109.

[95]*Gouriet v Union of Post Office Workers* [1977] 3 All ER 70.

[96]For a full discussion on the common law position of locus standi and how it has evolved in Malaysia see, Gopal Sri Ram, "Lim Kit Siang, Order 53, the Future of Locus Standi in Public Interest Litigation" (2017), *University of Malaya Law Review* 1: 1–23.

[97]See cases of *Abdul Razak Ahmad v Ketua Pengarah, Kementrian Sains, Teknologi dan Alam Sekitar* [1994] 2 MLJ 297; *Abdul Razak Ahmad v Majlis Bandaraya Johor Baru* [1995] 2 AMR 1174, *Lee Freddie v Majlis Perbandaran Petaling Jaya* [1994] 3 MLJ 640.

[98]Having said that, many NGOs in Malaysia have long since offered assistance, be it in the form of legal advice or other assistance in environmental public interest litigation, see the history of *Woon Tan Kan v Asian Rare Earth* (1992) 4 CLJ 2207.

This position expanded beginning in 2006 with the case of *QRS Brands Bhd v Suruhanjaya Sekuriti*[99] when the Court of Appeals decided that –

> There is a single test of threshold *locus standi* for all the remedies that are available under the Order [here reference was made to Order 53 Rules of Court 2012]. It is that the applicant should be 'adversely affected'. The phrase calls for a flexible approach… [further it went on to say]… public interest litigation is usually entertained by a court for the purpose of redressing public injury, enforcing public duty, protecting social rights, and vindicating public interest. The real purposes of entertaining such an application are the vindication of the rule of law, effective access to justice for the economically weaker class, and meaningful realisation of fundamental rights…

This was subsequently approved of in the Federal Court decision of *Malaysian Trade Union Congress*[100] (commonly known as the MTUC case). In MTUC, Justice Hasan Lah ruled that in order for an applicant to satisfy the 'adversely affected' test, a real and genuine interest in the subject matter had to be present. There was no need to show an established infringement of a private right or the suffering of special damage.[101]

What this suggests is that the decision of *Lim Kit Siang* is no longer relevant to the issue of *locus standi* in public law proceedings, and that no statute or rule can impede an individual from his/her fundamental right of access to justice. It has been suggested that there should be "unrestricted threshold standing",[102] especially where a public official or body has committed some wrong. In a recent decision of the Federal Court in *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat & Another*,[103] the independence of the judiciary, among others, was affirmed. The result of that decision has wide-ranging effects that could assist a potential litigant when bringing environmental public interest litigation to court. Among these are:

> Firstly, ouster clauses in any legislation — which remove the jurisdiction of the courts to review specific matters within the legislation — are now open to fresh challenge, as Parliament cannot completely remove such jurisdiction, if judicial power rests with the Judiciary. Secondly, provisions in the law that bind Judges to the decisions, rulings, or directions of non-judicial bodies could also now be challenged.[104]

[99] *QRS Brands Bhd v Suruhanjaya Sekuriti* [2006] 3 MLJ 164.
[100] *Malaysian Trade Union Congress v Menteri Tenaga, Air dan Komunikasi* [2014] 3 MLJ 145.
[101] To read more see, Qishin Tariz, "Federal Courts Rules Genuine Interest is Enough for Locus Standi", The Star Online, 12 February 2014, available at http://www.thestar.com.my/news/nation/2014/02/12/court-ruling-of-locus-standi/#Jof5kzwiC7xTkVOr.99 (last accessed on 15 August 2017).
[102] See Gopal Sri Ram, footnote 53, at p. 18.
[103] [2017] 1 LNS 496, dated 20 April 2017.
[104] George Varughese, Press Release: An Independent Judiciary is Indispensable to the Rule of Law, 8 May 2017. Available online http://www.malaysianbar.org.my/press_statements/press_release_%7C_an_independent_judiciary_is_indispensable_to_the_rule_of_law.html (last accessed on 15 August 2017).

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These decisions have demonstrated that post-2016, there has been a relaxation of the rules of locus standi and a strengthening of the role of the judiciary in Malaysia. There has also been advancement towards satisfying the two key elements set out under Target 16.3 that consider not only whether justice systems are present, but that they are accessible to the people, and that substantive laws allowing for this access are effective and fair. While the practical effect of these decisions on public interest litigation and, more specifically, on environmentally related litigation is yet to be seen (at the time of writing), in general, there is much positive response.

Existing challenges

Regardless, several key challenges remain that restrict the full effect of Target 16.3, one of which is the issue of limitation. The law of limitation, in essence, defines a time limit in which actions can be brought.[105] In West Malaysia, the principal statute governing this is the Limitation Act of 1953 and in Sabah and Sarawak, it is the Limitation Ordinance (Cap 49 and 72, respectively). Within each statute, specific time limits apply to specific situations. Environmental offences are often classified as statutory/criminal or civil law offences. In the former, prosecuting a wrong-doer for criminal breach is ordered by the Attorney General or relevant authorities. In the latter, where applicants are seeking compensation under private acts (typically a tort), the limitation period is six years.[106] This limitation period is calculated from the time or date of the commission of the relevant unlawful act. However, in many environmental matters, the calculation of time is not quite as straightforward.

For torts reliant on proof of actual damage, the computation of time may be uncertain. This is primarily due to the uncertainty surrounding the date when damage was actually suffered.[107] For environmentally related damage or exposure, such as toxic or radiation-related accidents where effects are often latent, injuries may take years to manifest and prospective plaintiffs may not even be aware that they have suffered loss or injury.[108] In such cases, determining when damage has occurred is a challenge.

This challenge might be exacerbated if a potential defendant is also a public authority. When an applicant wishes to ask for a judicial review of a public authority's decision, any suit, action, or proceeding is bound by provisions under the Public Authorities Protection Act of 1948. Under section 2(a) of this Act, the limitation period is capped at 36 weeks after an act, neglect, or default is complained of. This period acts as a protection accorded to "…any person for any act done in

[105]Hashim Yeop A Sani expounded on the rationale for having a limitation period. See *Fong Tak Sing v Credit Corporation (M) Bhd* [1991] 1 MLJ 409.
[106]Section 6(1)(a) Limitation Act 1953.
[107]See *Chin Sin Motor Works v Arosa Development Sdn Bhd* (1992) 1 MLJ 23.
[108]See the case of *Woon Tan Kan (Deceased) v Asian Rare Earth Sdn Bhd* (1992) 4 CLJ 2299.

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pursuance or execution or intended execution of any written law or of any public duty or authority or in respect of any alleged neglect or default in the execution of any such written law, duty, or authority…"[109] Unfortunately, these widely drafted words have been open to judicial interpretation and dissention[110]; difficulty has arisen in issues from determining whether defendants fell within this category and could be accorded protection under this Act,[111] to whether such protections could be accorded to contractual relationships with a public authority.[112]

As a result, while national progress has been made towards achieving the goals stated under Target 16.3 with the creation of specialised courts and an affirmation of the judiciary's independence, legislation that limits standing, particularly in cases where a public authority is a party to the proceedings, continues to curb access to justice.

A Constitutional Addition and Some Comparative Lessons

It is clear at this point that the ideals enumerated under Targets 16.3 and 16.10 are reflected in the existing environmental framework of laws and policies in Malaysia, though only in part. While Malaysia's Federal Constitution does not contain express terms for the right to a clean environment, would a constitutional amendment contribute to, or accelerate, Malaysia's efforts towards this end? Part III will consider this question.

The idea of constitutionalism lies in the realisation that "in framing a government which is to be administered by men over men, the greatest difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself…"[113] Simplistically, the formula for creating a government of law, not of men, recognises that limitations must be placed upon the powers of government.[114] The idea of effective restraint contains several features; among these is the principle that a constitution is a source of legal rights and is pre-eminent,[115] that respect of law or 'the rule of law' guides every decision, and that it recognises the needful balance between power and

[109]Section 2 Public Authorities Protection Act 1948.
[110]See generally, Sujata Balan, "The Public Authorities Protection Act 1948 – A Case for Repeal" (2007), *Journal of Malaysian and Comparative Law* 34: 127–158.
[111]What acts would fall within acts done "pursuance or execution or intended execution of any written law or of any public duty or authority" were considered by English Courts without laying down firm rules, see *Bradford Corporation v Myers* [1916] 1 AC 242 and *Griffiths v Smith* [1941] AC 170.
[112]See *Government of Malaysia v Lee Hock Ning* (1974) AC 76.
[113]Alexander Hamilton, *The Federalist* (John Hopkins University Press, 1966), p. 337.
[114]See generally, Francis Wormuth, *The Origins of Modern Constitutionalism* (Harper & Brothers, 1949).
[115]See *Marbury v Madison* (1803) 5 US (1 Cranch) 137, p. 177.

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responsibility.[116] Therefore, at the very root of constitutionalism are the concepts of restraint, respect for law, and responsible government. To achieve constitutionalism and its ideals, a federal constitution and its provisions must remain the "chart and compass, the sail and anchor of the nation's endeavor".[117] This tension between power and responsibility is present in every system of government, at present and in the past, and Malaysia is no exception.[118] It has been observed that "the strongest threat to constitutionalism in Malaysia is the growth of executive power and the decline of the institutions which are central in limiting excesses of that executive power…"[119] In light of this view and the need to protect the environment, the question of a constitutional environmental provision for Malaysia becomes imperative if she is determined to meet her SDGs.

It has been reported that "…more than 140 countries have amended their constitutions to require environmental protection, including 98 countries that recognise a constitutional right to live in a healthy environment".[120] Taking the present number of member states in the United Nations, this demonstrates that approximately 72.5 per cent of member states[121] have constitutional environmental protections. This is a clear global trend suggesting that environmental rights have "become a common, but not yet universal, fixture among national constitutions".[122] There are multiple reasons that contribute to its popularity,

[116]Vile notes that 'the great theme of the advocates of constitutionalism…has been the frank acknowledgement of the role of government in society, linked with the determination to bring that government under control and to place limits on the exercise of power"; M Vile, *Constitutionalism and the Separation of Powers* (Oxford: Clarendon Press, 1967), p. 1; see also Colin Turpin, *British Government and the Constitution: Text, Cases and Materials*. 2nd Ed. (London, 1990), p. 75 where he notes that it is akin to an 'obligation to explain and justify decisions made or actions taken'; see also generally Shad Saleem Faruqi, *Document of Destiny: the Constitution of the Federation of Malaysia* (Malaysia: Star Publications, 2008) where he outlines several other features such as the internationalization of values, respect for human rights and controls over discretionary powers.

[117]*Ibid*. Shad Saleem Faruqi, p. 39.

[118]In the UK, the growth of the prime ministerial government has been considered a threat to constitutionalism, see Benn, T., "The Case for a Constitutional Partnership", *Parliamentary Affairs* 33 (1980), p. 7 and Brazier, R., "Reducing the Power of the Prime Minister", *Parliamentary Affairs* 44 (1991), 453.

[119]Johan S Sabaruddin, "Constitutionalism – Concept and Application in the Federal and State Governments of Malaysia" (2006), *Journal of Malaysian and Comparative Law* 26, p. 64; see also Rais Yatim, *Freedom under Executive Power in Malaysia*, (Kuala Lumpur: Endowment Publications, 1995) where he lists other key reasons, causing the escalation of Executive powers. Among them, the Malay tradition of loyalty and the dominance of the political party United Malays National Organization (UMNO).

[120]David Boyd, "The Importance of Constitutional Recognition of the Right to a Healthy Environment", 2013, David Suzuki Foundation, at http://davidsuzuki.org/publications/2013/11/DSF%20White%20Paper%201–2013.pdf (last accessed on 17 August 2017).

[121]This number was achieved taking 193 as the total number of member states in the United Nations.

[122]Chris Jeffords and Joshua C. Gellers, "Constitutionalizing Environmental Rights: A Practical Guide", *Journal of Human Rights Practice*, 9, 2017, pp. 136–145.

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one of which is the idea that a constitutional provision provides a 'safety net' for resolving 'new areas' of law, or areas not provided for within existing legislation[123]. Given the deficiency and the continually evolving and rapidly increasing body of scientific knowledge that constantly challenges existing mindsets, and the speed of legislation amended or introduced to keep up with new and evolving environmental challenges, this notion of a constitutional safety net is appealing, especially so for countries still developing their own environmental framework.

Second, having an express provision in the national constitution will ensure that environmental issues take priority and are accorded the protection and rights they deserve. In Malaysia, the government has long recognised the need to protect the environment while maintaining its economic growth. This is evidenced from as early as the third Malaysia Plan (1976 -1980) to the present eleventh Malaysia Plan (2016–2020), where multiple five-year economic plans chart national growth towards its 2020 goals.[124] Yet the idea of unlikely bed fellows, development and the environment, held at balance, both equal in influence, is a questionable perspective.[125] This uncertainty can be put to rest with a constitutional environmental provision that elevates environmental issues from simply being a case to a fundamental right. The entrenchment of such a right or provision for protection would also make environmental concerns less susceptible to the winds of political change and more likely to endure;[126] it would also place environmental concerns as a consideration on the agenda of every governmental decision-making policy and practice.[127]

In a number of jurisdictions, a constitutional right or provision ensuring environmental protection has had positive effects for the surrounding environment.

[123]See Carl Bruch, *Constitutional Environmental Law: Giving Force to Fundamental Principles in Africa*, 2nd Ed. (Environmental Law Institute, 2007).

[124]An overview of multiple Malaysia Plans demonstrate that the environmental protection accorded in these economic plans have progressively evolved into a more holistic manner. See also "Environmental Management and Sustainable Development in Malaysia", the Malaysian-Danish Country Programme for Cooperation in Environment and Development (2002–2006), 4 December 2013.

[125]Ainul Jaria Bt Maidin, "Challenges in Implementing and Enforcing Environmental Protection Measures in Malaysia", 2005, The Malaysian Bar, 4 December 2013 – where he strongly states that "the indifferent attitude of the Malaysian policy makers towards a long-term development in preference to short-term economic gains has contributed immensely to the environmental woes of the country"

[126]Having a constitutional provision would also make any amendments or revision to it more difficult to achieve and as such it 'guarantees some degree of environmental protection that is free from daily politics', see Bruckerhoff, Joshua J., "Giving Nature Constitutional Protection: A Less Anthropocentric Interpretation of Environmental Rights" (2008), *Texas Law Review* 86: 615; see also Tim Hayward, *Constitutional Environmental Rights* (Oxford: Oxford University Press, 2005), p. 129 where he notes that a constitutional provision would 'set them above the vicissitudes of everyday politics…'.

[127]This is particularly pertinent in Malaysia given that historically much of the constitution has been amended 'by pressure of political events', see R. H. Hickling, *The Constitution of Malaysia its Development: 1957–1977* (Oxford University Press, 1978), p. 6; see generally also Dworkin, *Taking Rights Seriously* (London: Duckworth, 1978).

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It also directly or indirectly strengthened the jurisdictions' laws and policies for greater public participation in decision-making processes, access to justice, and freedom to information.[128] Two jurisdictions will be discussed below.

South Africa

In the 1996 Constitution, South Africa introduced 34 articles under Chapter 2: Bill of Rights. Under this Chapter, Section 24 states that "everyone has the right to an environment that is not harmful to their health or wellbeing; and to have the environment protected, for the benefit of present and future generations…."[129] Chapter 2 also contains a provision affirming every citizen the right to access the courts[130] and ensures that anyone may approach "a competent court alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief…"[131] As a result, persons acting not on their own behalf, but on that of another person aggrieved by an environmental harm or in the public's interest, may bring forth an action to protect their right to a clean environment[132]. It is noteworthy that prior to these constitutional rights, many of the requirements for standing and the rules of *locus standi* for public and private law matters were strongly based on strict English common law principles;[133] it is the partly a result of the "enshrinement of a constitutional right"[134] that environmental concerns have come to the forefront and judges have accepted that with "…the change in ideological climate must also come a change in our legal and administrative approach to environmental concerns".[135]

[128]See David Boyd, "The Constitutional Right to a Healthy Environment", Environment, Science and Policy for Sustainable Development, July-August 2012, 4 December 2013. Available at http://www.speaktothewild.org/wp-content/uploads/2013/11/Right_to_a_Healthy_Environment_David_Boyd_2013.pdf (last accessed on 17 August 2017).

[129]See The Constitution of the Republic of South Africa 1996, http://www.justice.gov.za/legislation/constitution/SAConstitution-web-eng.pdf (last accessed on 21 August 2017).

[130]Article 34 titled Access to courts, states that – 'Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum. See Constitution under footnote 126.

[131]See Article 38.

[132]This right is extended to NGO's and public spirited individuals as well, see *Wildlife Society of Southern Africa v Minister of Environmental Affairs and Tourism of the Republic of South Africa* (1996) (3) SA 1095 (TkS) at 1106. However, any persons who are not litigating on an environmental issue based on his/her constitutional right, but are litigating (as an example) from a tortious or common law point of view, the strict requirements of standing remain. See Murombo Tumai, "Strengthening Locus Standi in Public Interest Environmental Litigation: Has Leadership moved from the United States to South Africa?" (2010), *Law, Environment and Development Journal (LEAD)* 6(2): 163, http://www.lead-journal.org/content/10163.pdf (last accessed on 21 August 2017).

[133]See footnote 132 above, Murombo Tumai, "Strengthening Locus Standi in Public Interest Environmental Litigation: Has Leadership moved from the United States to South Africa?"

[134]See footnote 132 above, Murombo Tumai at p. 172.

[135]See *Director: Mineral Development: Gauteng Region and Another v Save the Vaal Environment and Others* [zRPz] 1999(2) SA 709 (SCA) Para 20, per Oliver J.A.

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Subsequent to this, much legislation was passed recognising the right to protect the environment. One example is the National Environmental Management Act No. 107 of 1998; its provisions accord legal standing and affirm the constitutional environmental right to allow persons acting in the public's interest to bring an action wherein private prosecution is limited, and in such instances the Attorney General will not interfere.[136] Other legislative actions expanding on this right include the Promotion to Access to Information Act (Act 2 of 2000) establishing a detailed system allowing for access to information by public and private bodies; a citizens guide to the law was also produced.[137] The Promotion to Access to Information Act was drafted not only to give effect to the constitutional right of access to information but to ensure that "a secretive and unresponsive culture in public and private bodies which often led to an abuse of power and human rights violations" in the past would no long occur.[138]

Philippines

In the 1987 Philippine Constitution, under Article II, a provision under Section 16 reads, "The state shall protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature". This provision establishes that there is a fundamental right to the protection of the environment. Further, the Philippine Environmental Policy also mandates that it is the "duty and responsibility of each individual to contribute to the preservation and enhancement of the Philippine environment".[139] The express right and subsequent declaration provoked a series of statutes that further backed up this right, such as the Philippine Environmental Code that established management policies and quality standards for the protection of the environment from a holistic point of view,[140] the Pollution Control Law,[141] and, more recently, the Freedom of Information Order, signed July 2016.[142]

This constitutional top-down authority has also influenced judicial activism and strengthened environmental common laws by encouraging and assisting non-governmental organisations and public spirited individuals when bringing issues to the foreground via public interest litigation and by assisting those who are not able to afford justice.[143] Judges have expanded their list of remedies to

[136]See section 32 and 33, South Africa's National Environmental Management Act No. 107 of 1998 http://www.kruger2canyons.org/029%20-%20NEMA.pdf (last accessed on 21 August 2017).
[137]See section 10 Promotion of Access to Information Act No. 2 of 2000, available at http://www.justice.gov.za/legislation/acts/2000-002.pdf (last accessed on 21 August 2017).
[138]*Ibid*. See the preamble to the Promotion of Access to Information Act.
[139]Presidential Decree No. 1151 (1977), sec.1.
[140]See Presidential Decree No. 1152 (1977).
[141]Presidential Decree No. 984 (1976), this legislation is aimed at controlling pollution of water, air and land.
[142]President Rodrigo Duterte signed Executive Order No. 2, that established the very first Freedom of Information law in the Philippines.
[143]See Abdul Haseeb Ansari, "Right to Healthful Environment as a means to Ensure Environmental Justice: An Overview with Special Reference to India, Philippines and Malaysia" (1998),

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include a writ of continuing mandamus[144] to ensure that its decisions would not be "put to naught by bureaucratic administrative indifference or inaction".[145] In 2010, the Supreme Court adopted special rules of procedure adopting the continuous mandamus as one of the remedies that may be sought by an applicant in an environmental case.[146]

The Courts have also made other momentous decisions that have expanded the principles under Section 16 of Article II of the Constitution. In *Oposa v Factoran,*[147] the Supreme Court recognised the principle of intergenerational equity, a responsibility to protect the environment for the present and future generations, recognising future generations as legal persons and their right in future to a healthy environment. More recently, in 2015, in the case of *Resident Marine Mammals v Secretary Angelo Reyes,*[148] the Supreme Court once again upheld this principle and allowed the petitioners to represent their interests, as well as the interests of future generations.

From a cursory consideration of the jurisdictions discussed above, it is apparent that there *is* a direct consequence between a constitutional environmental right and the expansion of laws supporting environmental protection. Regardless of the difference in culture, geography, or legal systems between these jurisdictions, the effect of a constitutional protection for the environment has unanimously resulted in stronger laws and policies that have encouraged public participation in decision-making processes, and opened more access to justice and freedom to information. These are objectives enumerated under Goal 16 and its various targets, in one form or another.

While these are positive indicators, objectively the question asked is, have constitutional influences been universally positive? Constitutions commonly utilise words such as 'healthy', 'healthful', 'safe', or 'balanced' to describe the environment or an environment suitable for development.[149] Countries such as Brazil, Mongolia, and the Philippines make reference to ecological equilibrium or some form of balance, while Spain makes reference to an environment that

Malayan Law Journal 4: xxv, xlii; see also generally *Minors Oposa v Secretary of State of the Department of Environment and Natural Resources* (1994) 33 ILM 173 where the Supreme Court liberalized the test of locus standi.

[144]In the case of *Metropolitan Manila Development Authority, MMDA v Concerned Citizens of Manila Bay*, G.R. Nos. 171947-48, December 18, 2008, 574 SCRA 661 a writ of continuing mandamus, the judiciary's very first, was introduced to force government bodies to clean up the Manila Bay and to submit quarterly progress reports to the court. This writ has also been utilized in India, see the cases of *M.C. Metha v Union of India*, 4 SCC 463 (1987).

[145]Presbiero Velasco, "The Manila Bay Case – The Writ of Continuing Mandamus" (remarks made at the Aian Judges Symposium on Environmental Decision Making, the Rule of Law and Environmental Justice, Manila, Philippines: 28029 July 2010.

[146]See footnote 145 above, Presbiero Veasco.

[147]*Oposa et al. v Fulgencio S. Factoran, Jr. et al* (G.R. No. 101083), 30 July 1993.

[148]G.R. No. 180771, 21 April 2015.

[149]See Jan Hancock, *Environmental Human Rights: Power, Ethics and Law* (Ashgate Publishing Ltd, 2003), p. 79.

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is "suitable for the development of the person".[150] These formulations are not sufficiently comprehensive and their effectiveness subject to interpretation. In South Africa, the question was recently asked if Section 24 has, in fact, promoted environmental justice and improved the lives of its citizens as well as the environment. Kidd concluded that in many cases a "substantial gap between the reality and the ideal" remained, with the concept of sustainable development being an "internal modifier" that limits Section 24's effectiveness.[151] The principle of sustainable development though embedded within the constitution as well, has been argued to have "little practical effect".[152]

Alternatively, should environmental rights be constitutionalised? Environmental protection could just as easily be provided for legislatively or via governmental policies and practices. Critics unconvinced that the granting of a constitutional right is beneficial list opposing arguments; that the potential effects of such a right is too uncertain,[153] that an absolutist right will arise making any "compromise and deliberative discussion"[154] on environmental issues polarised and difficult, that it undermines democracy transferring powers to the court[155] are among the many concerns raised. Yet, Tim Hayward's extensive research on this point contends that the *status* of these two is what sets them apart—the former being a directly justiciable individual right while the latter is merely a social right interpreted as a manifestation of a political program not necessarily enforceable by the courts.[156] There are clear differences between the two: weightage, legal protection, and enforceability. Regardless of the struggles associated with an express right, it is acknowledged that the adoption of constitutional rights has been "associated with stronger environmental laws and more environmental litigation".[157] Boyd in his research similarly

[150]See Section 45 of the Spanish Constitution. Available at http://www.congreso.es/portal/page/portal/Congreso/Congreso/Hist_Normas/Norm/const_espa_texto_ingles_0.pdf (last accessed on 18 September 2018).

[151]An example given is the idea that Sustainable Development requires a line to be drawn between acceptable pollution and justifiable social development versus the conservation of natural resources for the present and future generations. In order to alleviate poverty and inequality, the best that section 24 can do is to preserve the right to an environment that is not 'unreasonably' harmful. See Michael Kidd, "Transformative Constitutionalism and the interface between environmental justice, human rights and sustainable development", Erin Daly et al. (Eds.), *New Frontiers in Environmental Constitutionalism*, UNEP (2017), pp. 117–125.

[152]See Kotze, "Arguing Global Environmental Constitutionalism" (2012), *Transnational Environmental Law*, 9(1): 199–233.

[153]Pevato, P.M. (1999). "A Right to Environment in International Law: Current Status and Future Outlook", *Review of European Community and International Environmental Law* 8(3): 309–21.

[154]Lazarus, R. (2004). *The Making of Environmental Law*, Chicago: University of Chicago Press, p. 28.

[155]Waldron, J. (1993). "A Rights-Based Critique of Constitutional Rights", *Oxford Journal of Legal Studies* 13: 18–51.

[156]Tim Hayward, *Constitutional Environmental Rights*, Oxford University Press, 2005.

[157]Chris Jeffords and Joshua C. Gellers, "Constitutionalizing Environmental Rights: A Practical Guide", *Journal of Human Rights Practice*, 9, 2017, pp. 136–145 at p. 137.

concluded that having such a right is a "…major benefit to environmental legislation in that courts appear more likely to defend environmental laws and regulations…"[158] Together with this, he observed an increase in environmental justice, public involvement, and accountability in nations with a constitutional environmental provision.[159]

Could similar results be emulated in Malaysia? Should she amend her constitution to provide constitutional protection? Part IV will consider this.

Possible Environmental Effects a Constitutional Provision Could Provide for Malaysia and Existing Challenges

The Federal Constitution under Article 159 provides for constitutional amendments. Constitutional amendments can be made with the support of two-thirds of Parliament, and an amendment Act. It has been suggested by Professor Shad Saleem Faruqi that since its independence in 1957, there have been more than 51 amendment Acts, and of these, about 700 changes or "strokes of the pen"[160] have been made. History suggests that Malaysia is familiar with and reasonably receptive to constitutional changes. As a result, should Malaysia amend its federal constitution to provide for a clean environment, a number of possible effects could result that would contribute tremendously towards achieving Targets 16.3 (for access to justice) and 16.10 (freedom of information).

A. Possible Effects on Target 16.3

At the end of Part II. A., it was established that, regardless of the existence of a special court in Malaysia, the extension of the principle of legal standing, and the strengthening of judicial independence, access to justice continues to be hampered by the rules of limitation. *Prima facie*, an express constitutional term for a clean environment, would unlikely affect the substantial laws on limitation directly. Certainly, the possibility of an express term in the Federal Constitution extending the limitation period is possible; however, where this is not explicitly provided for, it is not likely that a new constitutional environmental term would extend the time period for an applicant to bring action. While much has been written on the disadvantages of unlimited periods for environmental

[158]David Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment*, UBC Press: Toronto (2012), p. 234.
[159]See footnote 158 above, David Boyd, pp. 233–244.
[160]Cindy Tham, "Major changes to the Constitution", 17 July 2007. Available at the Malaysian Bar website, at http://www.malaysianbar.org.my/echoes_of_the_past/major_changes_to_the_constitution.html (last accessed on 8 November 2018).

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claims,[161] could there be exceptions where a constitutional environmental provision is in place and applications are made to enforce a fundamental right.

In Nigeria, such an exception was found. Under the Fundamental Rights (Enforcement Procedure) Rules 2009 (2009 Rules), the rule of court was simplified to remove the time limitation for applicants to appear in court for the purpose of 'enforcing a fundamental right' (environmental rights are recognised as being a fundamental constitutional right in Nigeria). What this suggests is that potential litigants can now apply at any time to the court wherein an alleged damage or injury breaches a fundamental right. It was suggested that the 2009 Rules could be regarded as being "…the single most important factor in kick-starting environmental activism within the legal area. Such activism will in turn translate to the fostering of an extensive and innovative jurisprudence on environmental rights as presently being experienced in other developing countries…"[162]

What is noteworthy is that the Nigerian Constitution shares a similar trait with Malaysia's: neither has a fundamental right to a clean environment. What they do have is a provision protecting substantive rights (such as, the Right to Life) that has been judicially interpreted to include environmental rights.[163] What Nigeria has is a state policy within its Constitution, making it mandatory for the government to ensure that its policies are in line with its environmental objective, and this was sufficient to encourage the passing of the 2009 Rules. Apart from extending limitation periods, constitutional protections also encourage more relaxed limitation periods when it comes to environmental issues,[164] and states with constitutional environmental provisions continue to demonstrate that there are exceptional circumstances in which the courts have considered expanding limitation periods.[165]

[161]It has been argued that an unlimited period may not necessarily achieve protection for an applicant or legal right or justice for those who have suffered. It has also often been suggested that with the passing of time, memories may fade, witnesses may have died or become untraceable, evidence may not be available and many other practical difficulties could arise. See generally, Barry Weintraub, "The Application of Limitation Periods to Environmental Issues", RSB Lawyers, 11 December 2013; Sujata Balan, "The Public Authorities Protection Act 1948 – A Case for Repeal" (2007) 34 JMCL 127–158.

[162]Emeka P Amechi, "Litigating Right to Healthy Environment in Nigeria: An Examination of the Impacts of the Fundamental Rights (Enforcement Procedure) Rules 2009, in Ensuring Access to Justice for Victims of Environmental Degradation" (2010), *Law, Environment and Development Journal* 6/3: 320.

[163]See the case of *Jonah Gbemre v Shell Petroleum Development Company of Nigeria*, Unreported Suit No. FHC/B/CS/53/05, Delivered on 14 November 2005 where the federal court held that the constitutional right to life and dignity of person included the right to a healthy environment. See paras 3–4.

[164]One good example is India. See Jona Razzaque, *Public Interest Environmental Litigation in India, Pakistan, and Bangladesh* (UK: Kluwer Law, 2004), p. 193, see also the FAP20 case [Dr. M Farooque v Bangladesh (1996) 48 DLR 438].

[165]In Belgium and Switzerland (both states having constitutional provisions for environmental protection), this question has been raised by the courts as being in violation of Article 6(1) of the

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B. Possible Effects on Target 16.10

Part II. B established that while there were numerous examples of environmental legislative acts in Malaysia promoting the ideals set out under Target 16.10 (to enlarge and protect public access to information), there were equally as many limitations placed on this freedom. Limitations came in the form of stringent legislations that limit the disbursement of information and primarily from the lack of a Freedom of Information (FOI) law.

An FOI can have a tremendous effect on the success of Target 16.10 for Malaysia. Lessons from different jurisdictions demonstrate the positive effects a constitutional provision has had on enhancing environmental protection and supporting the right of access to information, effects that could be transplanted to Malaysia.

In the jurisdictions discussed above, South Africa and the Philippines, the introduction of a freedom of information law was a natural extension of a constitutional provision. In India, a similar influence was achieved. While the Indian Constitution did not explicitly provide for an express right to a clean environment, the 42nd amendment (passed in November 1976) included a new directive principle of state policy[166] and added an additional fundamental duty with the insertion of article 51A (g),[167] which had a tremendous effect on the environment. These provisions "…played an important role in the emergence of environmental law in India".[168] From this point on, the courts adopted a bolder approach[169] to environmental protection; legislation was passed supporting the

ECHR. See cases of *L'Erablière A.S.B.L. v. Belgium* (application no. 49230/07) and *Howald Moor and Others v Switzerland* (application nos. 52067/10 and 41072/11).

[166]Article 48A titled - protection and improvement of environment and safeguarding of forests and wildlife – reads "the state shall endeavor to protect and improve the environment and to safeguard the forests and wildlife".

[167]Article 51A(g) states that "it shall be the duty of every citizen of India to protect and improve the natural environment including forests, lakes, rivers and wildlife and to have compassion for living creatures".

[168]See generally, Dharmadhikari, D.M., "Development and Implementation of Environmental Law in India", in *Judges and the Rule of Law: Creating Links: Environment, Human Rights and Poverty*, Thomas Greiber (Ed.), IUCN Environmental Law Programme (ELP), 3rd IUCN World Conservation Congress (WCC) held in Bangkok, Thailand, 17–25 November 2004 (2006), pp. 23–40.

[169]The Courts really began to take more aggressive steps after the infamous Bhopal incident on 2–3 December 1984. It was suggested that more than the courts, '…environmentalists, social workers, the general public and government institutions woke up to a new awareness…they start thinking about new ways and means of preventing similar tragedies in future', see Leelakrishnan P, *Environmental Law in India* (India: Butterworths, 1999), p. 125; see also generally Sharma Raghav, "Green Courts in India: Strengthening Environmental Governance?" (2008), *Law, Environment and Development Journal* 4/1: 50; see also the cases of Municipal Council, Ratlam v Vardhi Chand (1980) AIR SC 1622, *Nagarjuna Paper Mills Ltd v Sub-Divisional magistrate and Divisional Officer, Sangareddy* [1987] Cr LJ 2071, *Anthony v Commissioner, Corporation of Cochin* [1994] (1) KLT 169 where the courts continued to demonstrate their concern for the environment, in essence shifting what began as an environmental 'duty' under the constitution, to a 'right' under common law.

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protection of the environment, such as the 2005 Right to Information Act and a National Green Tribunal was established in 2010.[170] While these might seem like disparate acts, the 2014 Goldman Environmental prize winner for Asia, Ramesh Agrawal,[171] offers an excellent example of a successful convergence of the principles of access to justice and freedom of information, for a village in India and for a community suffering from toxic effluents without which, a similar outcome may not have been possible. The enforcement of environmental rights requires a judicial system that is proactive and independent. India's judicial leadership boasts environmental advocates such as Supreme Court Judges PN Bhagwati and VR Krishna Iyer who were committed to advancing this cause.

In June 2015, in a climate liability suit *Urgenda Foundation v the State of Netherlands,*[172] it was reported that the Dutch court determined that states had an obligation towards their citizens, and thus the Dutch government had to reduce its emissions by at least 25 per cent by the end of 2020 (compared to 1990 levels). This meant that the Dutch government would now have to take more effective action towards meeting its climate reduction commitments.[173] It was described as "the first case in the world in which human rights are used as a legal basis to protect citizens against climate change."[174] Such a landmark decision would not have been possible without constitutional provisions recognising the citizens right to a habitable environment:[175] provisions that secure the right to personal integrity,[176] the rights to health,[177] and in particular, the right of its citizens to access information on governmental affairs.[178] All of the rights listed above are protected within the Constitution of the Netherlands and the advantage is ground-breaking decisions such as this.

In June 2018, it was reported that nine Indonesian and international environmental groups filed an *amici curiae* brief against the Governor of Bali Province at

[170]The Green Tribunal was set up under the National Green Tribunal Act 2010.
[171]See http://www.goldmanprize.org/recipient/ramesh-agrawal/ (last accessed on 22 August 2017).
[172]C/09/456689/ HA ZA 13-1396, June 24, 2015.
[173]See https://www.theguardian.com/environment/2015/jun/24/dutch-government-ordered-cut-carbon-emissions-landmark-ruling (last accessed on 22 August 2017).
[174]See http://www.urgenda.nl/en/climate-case/ (last accessed on 22 August 2017). Note also generally that, in September 2015, the Dutch government announced its decision to appeal this historic verdict.
[175]Article 21, The Constitution of the Kingdom of the Netherlands 2008, states that "It shall be the concern of the authorities to keep the country habitable and to protect and improve the environment". This constitutional obligation was particularly pertinent in the court's ruling, see generally Roger Cox, "A Climate Change Litigation Precedent: Urgenda Foundation v The State of the Netherlands", CIGI Papers, No. 79, November 2015, Canada. Available at https://www.cigionline.org/sites/default/files/cigi_paper_79.pdf (last accessed on 23 August 2017).
[176]Article 11, states that "Everyone shall have the right to inviolability of his person, without prejudice to restrictions laid down by or pursuant to Act of Parliament".
[177]Article 22(1) state that "The authorities shall take steps to promote the health of the population".
[178]Article 110 states that "In the exercise of their duties government bodies shall observe the right of public access to information in accordance with rules to be prescribed by Act of Parliament".

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the Denpasar Administrative Court.[179] The brief requested that the court review international laws and best practices on the need to include climate change impacts in environmental impact assessments, in particular in the Celukan Bawang Coal Fired Power Plant expansion project. It contended that this expansion does not comply with its laws[180] and undermines Indonesia's climate change commitments. Although reports in August 2018 indicated that the court has rejected this application on grounds of *locus standi*, an appeal is said to be on its way.[181] The initiation of such legal action demonstrates the availability of access to environmental justice in Indonesia, as one example of the influence of Article 28H of its Constitution, which recognises that "every person shall have the right to live in physical and spiritual prosperity, to have a home, and to enjoy a good and healthy environment."[182]

Research by Jeffords and Gellers on the origins of constitutional environmental rights and the factors associated with it, have concluded that (among others) countries were influenced to some extent by the actions of their immediate neighbours and their domestic political conditions. In situations where other countries with similar cultural or historical identities have promulgated such rights, or where there exists a desire to right the wrongs perpetuated by a previous regime, these factors could affect the likelihood of a right being instantiated into the constitution.[183]

From 2002–2010, it has been reported that Malaysia has shown a continuous downward trend as a country within ASEAN struggling to expand their freedom of expression and right to information.[184] In 2017, Malaysia was ranked 144 out of 180 nations globally by Reporters without Borders (RSF),[185] suggesting that the ability for citizens to express themselves freely and openly without fear and to have access to independent information is diminishing. Yet in the same year, Malaysia reported 'achievements' under Goal 16.[186] While these statistics take a broad brush stroke at laws and policies limiting such freedoms, they do not

[179]Case No: 2 / G / LH / 2018 / PTUN.DPS regarding the State Administration Lawsuit on Nullification of Bali Governor's Decree No.660.3 / 3985 / IV-A / DISPMPT About Environmental Permits for the Development of Steam Power Plant (PLTU) Given To Celukan Bawang Coal Fired Power Plant in the Village located in the Gerokgak District, Regency Of Buleleng.

[180]Environmental Law No.32 of 2009.

[181]See https://www.eco-business.com/news/indonesian-court-rejects-bid-to-stop-coal-power-plant-expansion/ (last accessed on 18 September 2018).

[182]See https://www.ilo.org/wcmsp5/groups/public/—ed_protect/—protrav/—ilo_aids/documents/legaldocument/wcms_174556.pdf (last accessed on 18 September 2018).

[183]Chris Jeffords and Joshua C. Gellers, "Constitutionalizing Environmental Rights: A Practical Guide", *Journal of Human Rights Practice*, 9, 2017, 136–145, see pp. 137–139.

[184]https://www.internews.org/sites/default/files/resources/InternewsEU_ASEAN_FoE_and_RTI_Study_2014.pdf.

[185]https://rsf.org/en/ranking_table.

[186]See Voluntary National Review 2017 Report at the UN Sustainable Development Knowledge Platform. https://sustainabledevelopment.un.org/index.php?page=view&type=30022&nr=375&menu=3170 (last accessed on 28 September 2018).

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specifically address such freedoms where environmental information is concerned. They do, however, suggest that obtaining information for the latter is equally as challenging.

In the multiple international agreements that Malaysia has signed, many of them contain the right and obligations to freedom of information; while Malaysia has tacitly endorsed it at the international level, there remains no federal FOI legislation. The right to information and to obtaining public information is "the touchstone of all human rights…is crucial to ensuring transparency…and a means of empowering the public to more effectively engage in their own development".[187] Without such rights, empowering the public to effectively engage in their own environmental development would be arduous. At present, non-governmental organisations within Malaysia are working towards changing this lack.[188] Campaigns are on the way towards spreading awareness on the importance of FOI in clean governance.[189]

May 2018 heralded a 'new' Malaysia that seemed to suggest a revival of freedoms and basic liberties. Post-election, it has been reported that the new government will consider "environmental protection very seriously and would do its best to conserve the environment" and is "committed" to protecting and conserving the environment.[190] The government has since unblocked independent news websites[191] and lifted the travel ban on critics of the government,[192] suggesting a growing acceptance of free speech and expression. The government also recently announced that it is committed to implementing a national Freedom of Information Act and has since repealed the Anti-Fake News Act.[193] It has also stated its commitment to reviewing draconian laws such as the Official Secrets Act of 1972.[194] The appointment of the new Chief Justice has been

[187]Words taken from a description of Target 16.10, see Goal 16 Advocacy Toolkit, at footnote 13, p.11.

[188]See generally, the C4 Centre and their Right 2 Know MY campaign, the Sinar Project at https://sinarproject.org/en (last accessed on 23 August 2017).

[189]See C. Gabriel and S. Singam, "What Malaysians should know about Freedom of Information", Malaysiakini, 13 May 2016, at https://www.malaysiakini.com/news/341344 (last accessed on 23 August 2017).

[190]Tharanya Arumugam, "Govt expected to announce environment minister by end-June", June 2, 2018, New Straits Times. https://www.nst.com.my/news/nation/2018/06/375923/govt-expected-announce-environment-minister-end-june (last accessed on 20 September 2018).

[191]The Sarawak Report and Medium are two such examples.

[192]One such example is the lifting of the travel ban on political cartoonist Zunar.

[193]Hemananthani Sivanandam, Martin Carvalho, Rahimy Rahim, and Loshana K. Shagar, "Parliament Passes Bill to Repeal Anti-Fake News Law", The Star Online, Thursday, 16 Aug 2018. https://www.thestar.com.my/news/nation/2018/08/16/parliament-passes-bill-to-repeal-anti-fake-news-law/ (last accessed on 8 November 2018).

[194]Rahimy Rahim, "Freedom of Information Act will be done in stages says Nurul Izzah", the Star Online, 18 August 2018. Available at https://www.thestar.com.my/news/nation/2018/08/18/freedom-of-information-act-will-be-done-in-stages-says-nurul-izzah/ (last accessed on 8 November 2018).

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regarded as an "improvement to people's access to justice"[195] and his involvement in environmental activities and the enhancement of environmental courts has been reported widely.[196] The growing public narrative on the position of ouster clauses and the need for checks and balance is also a positive sign.

However, in July of the same year, investigations into a lawyer[197] blogging about the monarchy has suggested that, to the contrary, the right to expression is still an illusion.[198] Similarly access to information via a free press remains uncertain given the continual limitations within the Printing Presses and Publications Act, 1984 (which should be reviewed and potentially repealed) and the Communications and Multimedia Act, 1998. Other national security laws, such as the Sedition Act of 1948, and the Internal Security Act of 1960 that limit freedoms of the press remain in action.

Conclusion

Rights enshrined in a constitution become an integral part of a country's moral code. A constitution and its provisions are the apex of law in any country and it influences every facet of government, people, and life. For Malaysia, the lack of an express constitutional term providing for a clean environment has slowed down environmental progress the nation could have made towards satisfying Goal 16 and particularly Targets 16.3 and 16.10.

Malaysia has demonstrated its commitment to meeting the objectives under the 2010 Agenda and the SDGs by issuing the Voluntary National Review Report 2017.[199] Institutional mechanisms for SDG implementations have been established and three phases have been identified for specific focus towards full implementation of all seventeen goals[200] in 2030. With such levels of commitment, introducing a constitutional provision for the environment should simply be another consideration, a logical next step towards establishing a legal mechanism for achieving its SDGs. Yet, this clarion call has in recent years been echoed

[195]Shad Saleem Faruqi, "Improving the people's access to justice", 19 July 2018, the Start Online, available at https://www.thestar.com.my/opinion/columnists/reflecting-on-the-law/2018/07/19/improving-the-peoples-access-to-justice-the-appointment-of-the-new-chief-justice-honours-judicial-in/ (last accessed on 8 November 2018).

[196]Muguntan Vanar, "Malanjum a 'strict judge but down-to-earth'", the Star Online, 13 July 2018, https://www.thestar.com.my/news/nation/2018/07/13/malanjum-a-strict-judge-but-downtoearth/ (last accessed on 8 November 2018).

[197]Lawyer and activist Fadiah Nadwa Fikri is presently under police investigation for allegedly posting seditious content online.

[198]See Kua Kia Soong, "Freedom of expression in new Malaysia", the Sun epaper, 12 July 2018. Available at http://www.thesundaily.my/news/2018/07/12/freedom-expression-new-malaysia (last accessed on 8 November 2018).

[199]As indicated by the Prime Minister himself, see Forward under "Malaysia: Sustainable Development Goals Voluntary National Review 2017" report, at footnote 4.

[200]See "Malaysia: Sustainable Development Goals Voluntary National Review 2017", pp. 42–58 at footnote 4.

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without much success.[201] The change of government in May 2018 has generated much optimism, though untested at present. Given the state of the global environment and the continued degradation of its own backyard, perhaps it is time for Malaysia to respond to this call.

Acknowledgements

Some of the ideas here were discussed and presented in the Tuanku Jaafar Conference & Workshop 2017, "Governance towards sustainable development goals," UKM, Malaysia, November 2017.

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[201]In the speech by YAA Tun Arifin bin Zakaria, Chief Justice of Malaysia, at the Opening of the Legal Year 2017 he called for the federal constitution to be amended to provide for an express right to a clean environment, see http://www.aseanlip.com/plusnews/industryupdates/malaysia/speech-by-yaa-tun-arifin-bin-zakaria-chief-justice-of-malaysia-at-the-opening-of-the-legal-year-2017/ANP10308/1, 6 February 2017 (last accessed on 23 August 2017); see also Gurdial Singh Nijar, "The Need for an Enlighted Judiciary" February 2017, at http://www.malaysianbar.org.my/legal/general_news/need_for_an_enlightened_judiciary.html?date=2017-06-01 (last accessed on 23 August 2017).

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