

THE LEGAL FRAMEWORK FOR WATER POLLUTION IN MALAYSIA: AN ANALYSIS

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Abstract - Despite the increasing importance of water resources sustainability in the country, river pollution issues in Malaysia remain critical and unresolved. This paper focuses on the legal framework concerning water pollution in Malaysia as a means to identify some possible gaps since the Federal Constitution was drafted post-independence, albeit with latter revisions and amendments. Data were obtained from documents retrieved from primary and secondary sources. Analysis of data showed that serious water pollution issues can be dealt with through several options. First, to examine existing constitutional provisions, laws and policies and to identify the gaps, and where necessary, to address the shortfalls. For instance, to amend the constitution so that there is a clear definition of “environment”. Second, to consult the National Land Council in matters involving the State and Federal. This paper contributes to literature by offering insights into the possible measures in tackling water pollution issues, despite the gaps existing in the constitutional provision, which had not been explored in the same level of detail in existing literatures.

Keywords: Water; Federal Constitution; Environmental Quality Act 1974; Pollution; Environment

INTRODUCTION

Water supply disruptions have become a common phenomenon in Malaysia, caused by recurring river pollution.¹ In 2020, the state of Selangor, as an example, encountered nine incidents of river pollution and eight incidents of water supply disruptions, all of which affected many consumers in the state negatively.² In one of the water supply disruptions, the Selangor Water Treatment Plants 1, 2, 3 and the Rantau Panjang Water Treatment Plant were closed by the Selangor Water Management Authority (LUAS) due to pollution.³ This incident caused five million people in the Federal Territory of Kuala Lumpur, and some districts in the state of Selangor to be without water supply,⁴ the worst of its kind in the history of Selangor in 2020.⁵ Responding to this issue, the Environment and Water Minister emphasized that the Environmental Quality Act 1974 (EQA) would be amended so as to increase the penalty for such offences,⁶ among other steps taken.

Ironically, while the EQA is a Federal Act, river pollution as an issue of water resources management, rests with the State government. The Federal government regulates state water operators so that there is a continuous supply of water to the states. As a result, water supply and river pollution are distinct issues that fall under the jurisdiction of different governments. This paper aims to address

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¹ Jerry Choong. (2020). A history of water cuts in Selangor this year. Malay Mail. Retrieved from <https://www.malaymail.com/news/malaysia/2020/10/21/a-history-of-water-cuts-in-selangor-this-year/1914721>

² Bernama. (2020). Sorotan 2020: Selangor hadapi sembilan kali pencemaran. BH Online. Retrieved from <https://www.bharian.com.my/berita/nasional/2020/12/767741/sorotan-2020-selangor-hadapi-semilan-kali-pencemaran-air>

³ Nailah Huda. (2020). Pencemaran Sungai Selangor: 1,274 kawasan alami gangguan bekalan air. Astro Awani. Retrieved from <https://www.astroawani.com/berita-malaysia/pencemaran-sungai-selangor-1274-kawasan-alami-gangguan-bekalan-air-272145>

⁴ The Straits Times. (2020). Water flows again after shock disruption in KL and Selangor, but future remains unclear. The Straits Times. Retrieved from <https://www.straitstimes.com/asia/se-asia/water-flows-again-after-shock-disruption-in-kl-and-selangor-but-future-remains-unclear>

⁵ Above n.1

⁶ Above n.4



the issue by analyzing the key features in the current legal framework so as to identify any possible weaknesses or gaps which could have contributed to the present situation, a rather challenging and unacceptable issue. The outcome derived from this analysis would significantly contribute to the current water disruption phenomenon for the relevant literature.

1. Objectives of the Study

The main objective of this paper is to examine the key legal framework concerning water pollution in Malaysia as a means to identify some possible gaps since the Federal Constitution was drafted post-independence. It further identifies the gaps in existing constitutional provisions and where necessary, addresses these shortfalls.

2. Methodology

This paper employs content and critical analysis as an approach. As a qualitative research, data were sourced from publications noted in library research. It examines the relevant provisions of the Malaysian Federal Constitution which primarily governs water-related matters, and the EQA, which is a specific legislation that was enacted for the prevention, abatement, and the control of pollution followed by the enhancement of the environment.⁷

3. Modern Malaysia

After 160 years of British rule, the Federation of Malaya finally declared independence,⁸ known as *Merdeka* on 31 August 1957. The years following Malaysia's independence saw the enactment of the Federal Constitution of 1957 (FC) which served as the basis for the country's legal system. It is recognized as the highest law in the land. It also serves as a foundation for the creation of other legislations.⁹

Although the FC takes its inspiration from the Indian Constitution,¹⁰ it is mostly based on the Westminster Parliamentary form.¹¹ For the states of Sabah and Sarawak in East Malaysia, 16 September 1963 was the date they joined the Federation of Malaya to become a bigger federation. This was named as "Malaysia Day".¹² Historically, Malaysia comprised of the Malay States in peninsular, and Sabah and Sarawak in Borneo as well as Singapore until its departure in 1965 from the Federation.¹³

4. The Current Legal Framework Concerning Water

4.1 Water Provision under the Federal Constitution

After independence in 1957, distribution of legislative powers was stipulated under the FC.¹⁴ To examine such powers under the FC, it is essential to address the relevant constitutional provisions concerning water.

4.1.1 Subject Matter of the Federal and State

The *Yang di-Pertuan Agong* as the Head of State, is practically, a constitutional monarch who is chosen by the nine Malay Rulers in Peninsula for a five-year term.¹⁵ The Federation of Malaysia

⁷ Preamble of the Environmental Quality Act 1974

⁸ Cowan, C. D. (1961). *Nineteenth-century Malaya: The origins of British political control* (Vol. 11). Oxford University Press; Sadka, E. (1968). *The protected Malay states, 1874-1895*. Kuala Lumpur: University of Malaya Press.

⁹ Bari, A. A. (2003). *Malaysian constitution: A critical introduction*. Other Press.

¹⁰ *Ibid.* at 18

¹¹ Harding, A. (1996). Law, government and the constitution in Malaysia (Malayan Law Journal Sdn Bhd, Kuala Lumpur 1996) 48.

¹² Article 162 of the Federal Constitution 1957; the Malaysia Act 1963

¹³ Note that for a political appraisal of the withdrawal, see Sington, D. (1969). MALAYSIA AND SINGAPORE. *Asia Handbook*, 322, p.330; Fletcher, N. M. (1969). *The Separation of Singapore from Malaysia* (Ithaca, Southeast Asian Program, Department of Asian Studies, Cornell University).

¹⁴ Note that Malaysia is a common law jurisdiction with a legislative and judiciary similar to the English or Westminster model. Nevertheless, the difference is that it has a documented constitution.

¹⁵ Article 32 of the Federal Constitution 1957



comprises of 11 states in West Malaysia (peninsula),¹⁶ and two states in East Malaysia. While each of the states has its State Legislature, the supreme legislative power rests in the Federal Parliament.¹⁷ There are three main components in the Parliament namely the King (*Yang di Pertuan Agong* or the YDPA),¹⁸ the Senate (*Dewan Negara*),¹⁹ and the House of Representatives (*Dewan Rakyat*).²⁰ The Federal executive power vests in the YDPA, and it is exercised by him, any Minister authorized by the Cabinet or the Cabinet itself.²¹ The executive power of the Federal comprises matters in which the Parliament can enact laws, and the executive power of the State, on the other hand, comprises matters in which the State Legislature can enact laws.²² In other words, the Parliament, which is bicameral,²³ is the major law-making body that is responsible for enacting laws for the country. The State Legislatures are responsible for enacting laws on matters within their respective jurisdiction. These laws will be applicable to the respective states.

In this respect, article 74(1) and (2) of the FC provide that the Parliament can enact laws concerning matters mentioned in the Federal List (List I) or the Concurrent List (List III). In contrast, the State Legislature may enact laws regarding any matter as set forth in the State List (List II) or List III.²⁴ These lists are set forth in the Ninth Schedule.²⁵

Pursuant to Article 80(1) and Article 74(1) of the FC, it was observed that the distribution of the executive and legislative authority between the Federal and the State has been extended to the matters mentioned respectively in the Ninth Schedule of the FC.

4.1.2 Water-Related Matters Enumerated in the Legislative Lists

Prior to 2005, matters pertaining to water which includes water supplies, and canals and rivers, were within the State's jurisdiction. This means that the respective States had exclusive authority to legislate on subjects related to water. Nevertheless, in 2005,²⁶ the FC was amended resulting in "water supplies and services" from the State List being moved to the Concurrent List,²⁷ thereby allowing the Federal and the State to share power on the management of water supplies and services. Pursuant thereto, two Acts were passed by the Parliament. The first was the Suruhanjaya Perkhidmatan Air Act 2006 (SPAN), and the second was the Water Services Industry Act 2006 (WSIA). Briefly, the SPAN established the Suruhanjaya Air Negara, empowering it to regulate sewerage and water supply services as well as to enforce water supply laws while the WSIA governs the regulation of sewerage and water supply services.

The WSIA is an Act enacted pursuant to article 74(1) and article 80(2) of the FC, conferring executive authority on the Federal for matters regarding water supply systems and services.²⁸ The WSIA is another statute that stipulates penalties in cases of water pollution. This also applies to watercourses including rivers.²⁹

Thus far, the WSIA is the only environment-related legislation that imposes death penalty for an

¹⁶ Malaysia consists of 13 states and 3 federal territories. Peninsula Malaysia comprises of 11 states and 2 federal territories. The 11 states are Perlis, Kedah, Penang, Perak, Selangor, Negeri Sembilan, Malacca, Johor, Kelantan, Terengganu and Pahang. The two federal territories are Kuala Lumpur, the capital of Malaysia and Putrajaya, the federal administrative capital. East Malaysia consists of 2 states and 1 federal territory. The 2 states are Sarawak and Sabah. Labuan is the one and only federal territory in East Malaysia.

¹⁷ Mustafa, M. (2019). *Environmental law in Malaysia*. Kluwer Law International BV

¹⁸ Article 32 of the Federal Constitution 1957

¹⁹ Article 45 of the Federal Constitution 1957

²⁰ Article 44 of the Federal Constitution 1957

²¹ Article 39 of the Federal Constitution 1957

²² Article 80(1) of the Federal Constitution 1957

²³ Article 44 of the Constitution 1957. For better understanding on Parliament, see Bari, A. A., & Shuaib, F. S. (2004). *Constitution of Malaysia: Text and commentary* (Pearson Prentice Hall).

²⁴ Article 74(1) and (2) of the Federal Constitution 1957

²⁵ Ninth Schedule of the Federal Constitution 1957

²⁶ Effective 21 March 2005. See the Constitution (Amendment) Act 2005. See also Afroz, R., Masud, M. M., Akhtar, R., & Duasa, J. B. (2014). Water pollution: Challenges and future direction for water resource management policies in Malaysia. *Environment and urbanisation ASIA*, 5(1), 63-81.

²⁷ The Constitution (Amendment) Act 2005

²⁸ Article 74(1) and article 80(2) of the Federal Constitution 1957

²⁹ The Water Services Industry Act 2006, s.2



offence of contamination or acts causing contamination with the intention to cause death, or with the knowledge that the act would result in death or endangers a person’s life. In accordance with section 121(2) of the WSIA, there are three possible penalties for violating the provisions of section 121(1), including death or a term of imprisonment that may last up to 20 years, in cases where the act had resulted in death. If death was not the result of the violation, the offender is also subjected to whipping. However, it was observed that such as provision had not been enforced since its enactment.

Following the 2005 amendment, the legislative power over water became listed under List I, List II, and List III of the FC. For ease of reference, Table 1 summarizes the Legislative Lists over water as specified in the Ninth Schedule.

Table 1: Summary of the Legislative Lists Over Water as specified in the Ninth Schedule of the Federal Constitution

List I – Federal List	List II – State List	List III – Concurrent List	List IIA – Supplement to State List for States of Sabah and Sarawak	List IIIA – Supplement to Concurrent List for States of Sabah and Sarawak
Item 9(a) 9. Shipping, navigation and fisheries, including- (a) Shipping and navigation on the high seas and in tidal and inland waters;	Item 6 & 6(c) 6. State works and water, that is to say: (a)... (b)... (c) Subject to the Federal List, water (including rivers and canals but excluding water supplies and services); control of silt; riparian rights...	8. Drainage and irrigation 9D. Subject to the Federal List, water supplies and services.	15. Ports and harbors, other than those declared to be federal by or under federal law; regulation of traffic by water in ports and harbors or on rivers wholly within the State, except traffic in federal ports or harbors; foreshores.	13. The production, distribution, and supply of waterpower and of electricity generated by waterpower.
Item 10(d) and (e) 10. Communications and transport, including- (a)... (b)... (c)... (d) Regulation of traffic by land, water and air other than on rivers outside harbor areas wholly within one State: (e) Carriage of passengers and goods by land, water and air;	Item 12 12. Turtles and riverine fishing		20. Subject to the Federal List, water supplies and services.	
Item 11(b) 11. Federal works and power, including- (a)... (b) Water supplies, rivers, and canals except those wholly within one State or regulated by an agreement between all the States concerned; production, distribution and supply of waterpower;				

The Ninth Schedule of the FC (as reflected in Table 1 above), when read together with article 74(1) and article 74(2) of the FC and article 80(1) of the FC, showed that the Legislative and Executive powers on most matters regarding rivers and water come under the State’s jurisdiction whose scope of power was broader. Meanwhile, the Legislative and Executive powers that were vested on the Federal with regards to water and river matters were limited to those involving shipping, navigation and fisheries, communications, and transportation (regulation of waterways). They also cover federal works (supplies and water services) in river areas that were not entirely in one state. Both the State and Federal governments have equal legislative rights over water supplies and services. Legislative powers over water for the states of Sabah and Sarawak are wider since it extends to the regulation of water traffic in harbors and ports, or on rivers that are located entirely in the State. Their concurrent jurisdiction over water includes the supply, production, and distribution of waterpower and electricity generated by waterpower.

4.1.3 Rivers that Cross Two State Boundaries

Where river flows are not entirely within one state, the Federal is empowered to legislate for two purposes. Firstly, to regulate transport and communication on such rivers.³⁰ Secondly, to carry out the Federal works and powers which may consist of water supply, and rivers and canals provided that

³⁰ Item 10(d) of List I of the Ninth Schedule of the Federal Constitution 1957



no agreement had been concluded between the States concerned for the purpose of regulating such rivers³¹

Unlike the Federal, the State is empowered to legislate for purposes of State works and water, and other purposes than those included in the Federal List. This may include canals and rivers (except water supplies and services), riparian rights, and control of silts.³² Such a purpose is in line with the Reid Commission Report which stipulated that the control of inland waters may include water storage and supplies. All rivers and streams were exercisable by the states. Therefore, they be state subjects. However, they may be subjected to special provisions and navigational rights which may involve the interests of some states or the Municipality of Kuala Lumpur.³³

4.1.4 Does the Federal Have Any Power to Legislate for the State?

In certain circumstances, the FC authorizes the Federal to make laws on subjects that are under the State's jurisdiction. The Federal may implement treaties, agreements, or conventions which involved the Federation and other countries. It may also be involved in the decisions of international organizations where the Federation is a member, pursuant to article 76(1)(a) of the FC.³⁴

The Federal Government is empowered to enter an international agreement with foreign countries³⁵ so as to implement international agreement, treaties and conventions, and to make them functional within the country domestically.³⁶ Currently, the functions and powers of the Federal Minister concerning water are within the responsibility of the Ministry of Natural Resources, Environment and Climate Change as set forth in the Ministers of the Federal Government Order 2023.³⁷

However, before becoming a party to the treaty, the Federal must first determine its capability in complying with the stipulated obligations since every treaty is binding on its parties, and must be performed in good faith.³⁸ The Federal must first of all ensure that the relevant existing domestic laws are sufficient or appropriately amended, if not to enact new laws. For instance, the Parliament enacted the Continental Shelf (Amendment) 2009,³⁹ following the United Nations Convention on the Law of the Sea 1982 (UNCLOS). Second, the Federal may make laws for the State so as to promote the uniformity of the law, set forth by virtue of article 76(1)(b) of the FC.

Nonetheless, if those laws made by the Federal are subject matters as mentioned under List II which is the State's List, then those laws, made under either article 76(1)(a) or article 76(1)(b) of the FC, are still subjected to limitations, under article 76(3) of the FC. The legislation is not enforceable in a State unless and until it is adopted by way of a legislation enacted by the State Legislature. Once the legislation is adopted, it shall become a state legislation. At this point, the State Legislature will have the competence to repeal or amend the legislation. As an example, the National Forestry Act 1984, and the Land Conservation Act 1960.

The above must be differentiated with the following clause, which is article 76(4). This is because laws made under this provision are for the purpose of ensuring uniformity of policy and law. Hence, article 76(1)(b), and article 76(3) are not applicable to article 76(4). The laws enacted under article 76(4) of the FC are not bound by the limitation set forth under article 76(3) of the FC. In this regard, there is no requirement for these laws to be accepted and then adopted by the states, prior to their implementation. An example of this is traced to the Local Government Act 1976(LGA), and the National Land Code 1965.

In general, these provisions can be invoked by the Parliament for the purpose of legislating environmental laws, particularly the EQA. Based on this, there is thus a need to refer to the position

³¹ Item 11(b) of List I of the Ninth Schedule of the Federal Constitution 1957

³² Item 6(c) of List I of the Ninth Schedule of the Federal Constitution 1957

³³ Paragraph 102 of the Reid Commission Report

³⁴ Art 76(1)(a) of the Federal Constitution 1957; item 1(a) and 1(b), List I, Ninth Schedule of the Federal Constitution 1957

³⁵ Noor, M. (2011). Environmental law and policy practices in Malaysia: an empirical study. *Australian Journal of Basic and Applied Sciences*, 5(9), 1248-1260.

³⁶ See also *The Government of The State of Kelantan v The Government of The Federation of Malaya and Tunku Abdul Rahman Putra Al-Haj* [1963] 1 MLJ 355

³⁷ [P.U.(A) 27/2023]

³⁸ Article 26 of the Vienna Convention on the Law of Treaties

³⁹ The Continental Shelf (Amendment) 2009



in India so as to understand how its Central Government applied the provisions in its Constitution when enacting laws related to the environment. This is despite the fact that such laws dealt with the subject matter of the State.

Article 253 of the Indian Constitution empowers the Parliament to enact laws for implementing India's international obligation as well as any decision made at an international conference.⁴⁰ Some writers were of the view that with the broad range of issues addressed at international conventions, article 253 clearly gave the Parliament adequate power to enact laws, virtually on any entry contained in the State List.⁴¹ The Air (Prevention and Control of Pollution) Act 1981,⁴² and the Environmental (Protection) Act 1986⁴³ are given as examples. The preamble of each Act states that it seeks to implement the decisions at the United Nation Conference on the Human Environment held at Stockholm in 1977.

Based on the above, it is argued that article 253 was similar to article 76(1)(a) of the FC. Thus far, Malaysia has participated in numerous international environmental conventions, including the Stockholm Conference, which called upon all nations to curb environmental pollution, and to ensure that the environmental dimension is considered alongside with the environment.

4.2 Water Pollution Control

The EQA is the main legislation for water pollution in Malaysia. The United Nations Conference on Human Environment (UNCHE) also known as the Stockholm Convention was held in 1972 specifically to consider problems of the environment.⁴⁴ Malaysia participated in the UNCHE, and it signed the 26 principles of the Stockholm Declaration and Action Plan.⁴⁵ Malaysia then enacted the EQA.⁴⁶

4.2.1 The Environmental Quality Act 1974

The Federal Parliament enacted the EQA in 1974. It was considered as the primary and most significant federal law on pollution control⁴⁷ because it was enacted when the Federal began to recognize the importance of addressing environmental degradation seriously in the 1970s.⁴⁸ Its goal was to boost economic growth and to protect society's health and resources from inefficient management.⁴⁹

The EQA has existed as a federal law for more than 45 years, and it indirectly deals with water pollution issues. The EQA came into force on 15 April 1975, and is applicable throughout all the states in Malaysia.⁵⁰ Its enactment was based on the "trade", "commerce and industry", and "health" headings in List I of the Ninth Schedule of the FC.⁵¹

Unlike the two Indian legislations mentioned above, there are no preambles in the EQA which clearly

⁴⁰ For in depth discussion of legislative provisions under the Indian Constitution in relation to environmental laws, see Desai, B. (1990). *Water Pollution in India: Law and Enforcement*. Lancers Books; Divan, S., & Rosencranz, A. (2022). *Environmental Law and Policy in India: Cases and Materials*. Oxford University Press.

⁴¹ Desai, B. (1990). *Water Pollution in India: Law and Enforcement*. Lancers Books, chapter 2.

⁴² No. 14 of 1981

⁴³ No. 29 of 1986

⁴⁴ Seyfang, G. (2003). Environmental mega-conferences—from Stockholm to Johannesburg and beyond." *Global Environmental Change*, 13(3), 223-228.

⁴⁵ Hezri, A. A., & Nordin Hasan, M. (2006, February). Towards sustainable development? The evolution of environmental policy in Malaysia. In *Natural Resources Forum* (Vol. 30, No. 1, pp. 37-50). Oxford, UK: Blackwell Publishing Ltd, 40.

⁴⁶ Muhamad Rizal Razman, Carolyn Melissa Payus, and Jamaludin Md Jahi. (2010). "Kawalan Pencemaran Sungai Dalam Melindungi Ekologi Dan Habitat Manusia: Tinjauan Perundangan Di Malaysia." *SARI: Jurnal Alam Dan Tamadun Melayu* 28(1)

⁴⁷ Above n.17

⁴⁸ Arifin, M. (2019). Enforcement of environmental pollution control laws: a Malaysian case study. *International Journal of Public Law and Policy*, 6(2), 155-169.

⁴⁹ Official Statement, Senate, Third Parliament, Third Parliamentary Term, Volume III. No.28. 15 Feb 1974,2447 in p.2451. Presented by the Honorable Minister of Special Duties (Mr. Michael Chen Wing Sum).

⁵⁰ The Environmental Quality Act 1974, s.1

⁵¹ Mottershead, T. (2002). *Environmental law and enforcement in the Asia-Pacific rim*. Sweet & Maxwell Asia.



state the EQA was enacted upon the Stockholm decisions.⁵² It was submitted that the EQA lacked a preamble which states the purpose of invoking article 76(1)(a) of the FC which requires the Federal Government to implement treaties, agreements, or conventions involving the Federation and other countries as well as decisions made by international organisations of which the Federation is a member.⁵³

If it can be proven that the EQA's concept and philosophy were comparable to those proposed by the Stockholm Convention, and that its objective was to carry out such a decision, then article 76(1) may reasonably be used to justify the passing of the EQA. As mentioned earlier in this paper, the Federal government may not generally legislate on water for the states. If it does, the applicability of the law is still limited by the provisions of article 76(3). Nevertheless, the EQA is different in that it is a federal law that indirectly deals with water.

Apart from the EQA, there are also other legislations which do not specifically deal with water pollution control although they may contain provisions related to such control. Examples can be traced to the LGA,⁵⁴ the Street, Drainage and Building Act 1974,⁵⁵ the Town and Country Planning Act 1976,⁵⁶ the Land Conservation Act 1960,⁵⁷ and other laws pertaining to pig rearing.⁵⁸

4.2.2 The Establishment of the Department of Environment

The EQA had led to the formation of the Department of Environment (DOE) in 1976;⁵⁹ it is overseen by the Ministry of Science, Technology and Environment.⁶⁰ Under the EQA, the Director-General (DG) of the DOE is empowered to both administer the Act, and to function as the licensing authority.⁶¹ The DG is appointed from those serving as public service officers⁶² by the relevant Minister. Currently, the enforcement of the EQA is under the DOE which is within the Ministry of Natural Resources, Environment and Climate Change as set forth in the Ministers of the Federal Government Order 2023.⁶³

4.3 State Laws Related to Water Pollution in Sabah and Sarawak

The EQA is the primary legislation that deals with environmental protection and enforcement in Malaysia. Apart from the EQA, Sabah and Sarawak have their respective legislations that regulate environmental matters. In these two states, both the EQA and the respective state legislations may apply.

⁵² For instance, the preamble of the India's Environmental (Protection) Act 1986 clearly states that the Act is legislated upon decisions taken at the United Nations Conference on the Human Environment held at Stockholm in June 1972, in which India participated, to take appropriate steps for the protection and improvement of human environment; and it is considered necessary to further implement the decisions aforesaid in so far as they relate to the protection and improvement of environment and the prevention of hazards to human beings, other creatures, plants and property. The preamble of the Air (Prevention and Control of Pollution) Act 1981 also contains similar provisions but with regard to the preservation of the quality of air and control of air pollution.

⁵³ Art 76(1)(a) of the Federal Constitution 1957; item 1(a) and 1(b), List I, Ninth Schedule of the Federal Constitution 1957

⁵⁴ The Local Government Act 1976

⁵⁵ The Street, Drainage and Building Act 1974

⁵⁶ The Town and Country Planning Act 1976

⁵⁷ The Land Conservation Act 1960

⁵⁸ Babjee, A. M. H., Yap, T. C., & Chee, Y. S. (1983). Proposal for the abatement of pollution from piggery waste in Peninsular Malaysia [swine]. See also the Control of Rearing Pigs Enactment of Negeri Sembilan 1980, the Rearing of Pigs Enactment of Johor 1975, the Rearing of Pigs Enactment of Malacca 1980, the Rearing of Pigs Enactment of Perlis 1987, the Rearing of Pigs Enactment of Terengganu 1976 and the Control of Pigs Farming Enactment of Selangor 1991.

⁵⁹ Abdul Rani Abdullah. (1995). Environmental pollution in Malaysia: trends and prospects. *TRAC trends in analytical chemistry*, 14(5), 191-198.

⁶⁰ Mustafa, M. (2011). The Environmental Quality Act 1974: A significant legal instrument for implementing environmental policy directives of Malaysia. *IJUM Law Journal*, 19(1), 1.

⁶¹ The Environmental Quality Act 1974, s.3

⁶² Ibid.

⁶³ [P.U.(A) 27/2023]



4.3.1 Sarawak

The Natural Resources and Environment Ordinance is a pre-Malaysia statute formerly known as Natural Resources Ordinance. It was enacted in 1949 when Sarawak was governed by the British colonial administration that succeeded the Brook administration of 1946.⁶⁴ Sarawak amended its Natural Resources Ordinance 1949 to become the Natural Resources and Environment Ordinance in 1993 (NREO).⁶⁵ It was based on the legislative powers stated under Article 77 of the FC which encompass the residual power of States, pertaining to issues not listed in any of the Lists,⁶⁶ such as “environment” which was not enumerated in any of the Legislative Lists of the FC. As a result, this matter came under the “residual” category of the state’s jurisdiction.

The NREO oversees the management of natural resources and the environment, particularly those items listed in the State List, namely, land use, forestry, agriculture, and inland water resources. To exercise the powers conferred under the NREO, certain Orders, Regulations, and Rules can be made.⁶⁷ The NREO established the Natural Resources and Environment Board (NREB) so that it can enforce the Ordinance. The NREO⁶⁸ is empowered to take necessary measures to prevent, abate, or stop any river pollution within the jurisdiction of any water authority established under the Water Ordinance 1994.

The Water Ordinance 1994 (WO)⁶⁹ was enacted for the purpose of regulating the conservation, protection, development, and management of water resources, and the supply and distribution of water in the state of Sarawak. The WO provides for the establishment of the Sarawak Water Resources Council. No one shall abstract groundwater, cause or permit any person to abstract any such water from any source of supply or within a catchment area except in the pursuance of a licence granted by the State Water Authority, and in accordance with the terms and conditions imposed on such licence.⁷⁰ In exercising the powers conferred under the WO, certain Orders, Rules and Regulation can be made.⁷¹

4.3.2 Sabah

Both the State and Federal environmental laws are applicable to Sabah, depending on areas of jurisdiction stipulated under the Environment Protection Enactment 2002 (EPE) which comes under the Environment Protection Department and the EQA, overseen by the Federal Department of Environment.

The EPE was enacted for protecting the environment, a term used as a reference to the external physical surroundings and conditions influencing the development and growth of people, animals or plants, including the social, living or working conditions, all natural and physical resources, ecosystems and their constituent parts including people and communities, and amenities, aesthetics and cultural values.⁷²

5 Findings

Although the EQA comes under the Federal law, it deals with water pollution that may fall under the State’s jurisdiction, thereby causing a conflict of jurisdiction between the State and the Federal law. In this regard, a reference is made to Article 75 of the FC which generally stipulates that a state law is void if it conflicts with the Federal law.⁷³ Nevertheless, this is not the case with “environment” as it is not clearly stated anywhere in the Federal Constitution.⁷⁴

⁶⁴ Memon, P. A. (2000). Devolution of environmental regulation: environmental impact assessment in Malaysia. *Impact Assessment and Project Appraisal*, 18(4), 283-293, 287.

⁶⁵ The Natural Resources and Environment Ordinance 1993

⁶⁶ Above n.65 at 287

⁶⁷ The Natural Resources and Environment Ordinance 1993 (Chapter 84), s.11A, s.18(h), s.10 and s.18(f)

⁶⁸ The Water Ordinance 1994 (Chapter 13), s.5(c)

⁶⁹ The Water Ordinance 1994 (Chapter 13)

⁷⁰ The Water Ordinance 1994, s.3

⁷¹ The Natural Resources and Environment Ordinance 1994 (Chapter 84), s.11A, s.18(h), s.10 and s.18(f)

⁷² The Environment Protection Enactment 2002, s.2

⁷³ City Council of George Town v Govt. of Penang [1967] 1 MLJ 169; See also Nordin Salleh v State Legislative Assembly, Kelantan [1993] 3 MLJ 344

⁷⁴ Ling, S. T. Y. (2013). The Reid Constitutional Commission: The Lost Environmental Proposals for Malaysia. *Asia Pac. J. Env'tl. L.*, 16, 195. Nevertheless, the term “environment” is defined in the Environmental Quality Act

5.1 Absence of the Provision That Recognises the Right to Clean Water Under the Federal Constitution

As discussed above, some Malaysian legislations were enacted so as to prevent activities that may cause water pollution, particularly on inland water pollution under the EQA.⁷⁵ Despite this, there is no specific provision in Malaysia that recognises the public's right to clean water. The right to life that is provided in Article 5 of the FC⁷⁶ had been judicially interpreted to some extent to encompass pollution-free environment and the right to clean water. In the case of *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor*,⁷⁷ Gopal Sri Ram J said in obiter that article 5(1) comprises the right to live in a reasonably healthy and pollution-free environment.⁷⁸

Similarly, in *Sinuri bin Tubar v Syarikat East Johor Sawmills Sdn Bhd*,⁷⁹ which was basically a claim for damages for personal injuries sustained by the infant plaintiff at the defendant's sawmill, the case did not discuss Article 5. Subsequently, the High Court made an observation which recognised the right to clean water and clean air as the birth rights of every human being.⁸⁰

While both the abovementioned cases indicate the court's willingness to recognise the right to clean water and clean air as part of the right to life, it must be noted that both observations were made in obiter. Based on this it is deduced that if indeed the right to life under Article 5 of the FC include the right to clean water and clean air, then the right to both clean air and clean water would be guaranteed as a fundamental right of every person in Malaysia. Sadly, there was no clear legal decision to imply that these rights were fundamental.

The above argument is in line with the recommendation of the former Chief Justice, the Honourable Tun Arifin Zakaria.⁸¹ He proposed that the Federal Constitution be amended to include the right to a healthy environment and clean water. He highlighted the case of *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor*.⁸²

5.2 The Effect of the Bakun Case on Environmental Cases

In the landmark case of *Ketua Pengarah Jabatan Alam Sekitar & Anor v. Kajing Tubek & Ors and Other Appeals (Bakun case)*,⁸³ the court addressed the issue of whether the Federal Parliament had any jurisdiction to enact the law for the states. In this case, the respondents were the Sarawak natives who lived near the Bakun Hydro-Electric Project. The dispute was whether the Bakun Dam was considered to be under the EQA or was it to be regulated by Sarawak's State law, the Natural Resources Ordinance 1949(NRO). The Court of Appeal decided that based on the Federal and State relations, the Parliament was expected not to encroach into any matters regarding the State's constitutional authority under a federation.

The court further held that "environment" refers to a multi-dimensional and multi-faceted concept as it brings different meanings based on the context in which it is used. In this regard, the "environment" in which the project had an impact was "water" and "land" both of which was where the power had to be generated. The "environment" in question was under item 2(a) of List II, and item 13 of the Concurrent List (Supplement to Concurrent List for the states of Sabah and Sarawak (List IIIA)) which is within the constitutional province and legislative power of Sarawak. The court held that under such circumstances, the applicable statute was the NRO, not the EQA.

1974, s.2 as physical factors surroundings the human beings including atmosphere, water, land, climate, odour, taste, sound, the biological factors of plants and animals and the aesthetics social factor.

⁷⁵ There are also some remedies in law which could be used to seek redress for harm caused by water pollution, such as those under the tort of strict liability and public nuisance.

⁷⁶ Article 5 of the Federal Constitution 1957

⁷⁷ *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 2 CLJ 771, at 801

⁷⁸ *Ibid.* at 801.

⁷⁹ *Sinuri bin Tubar v Syarikat East Johor Sawmills Sdn Bhd* [1987] 1 MLJ 315, at 5

⁸⁰ *Ibid.* at 5

⁸¹ Koshy, S. (2017). *Make clean environment a clear right in the Constitution, say CJ*. The Star. Retrieved from <http://www.thestar.com.my/news/nation/2017/01/13/make-clean-environment-a-clear-right-in-the-constitution/>.

⁸² *Ibid.*

⁸³ [1997] 3 MLJ 23 [CA]; [1997] 4 CLJ 253



Taking the Bakun case into consideration, this would mean that the EQA was completely not applicable throughout the states in Malaysia. In the case of *Malaysian Vermicelli Manufacturers (Melaka) Sdn. Bhd. v Pendakwa Raya*,⁸⁴ there was a discharge of effluent into inland waters (the Malacca river), contrary to regulation 8(1)(b) of the Environmental Quality (Sewage and Industrial Effluents) Regulation. This offence came under the EQA but the question arose as to whether the enforceability of the EQA in Malacca was limited to the items under the Federal List. The counsel argued that the Minister was empowered to enact regulations pursuant to section 51 of the EQA, specifically on matters mentioned in the Federal List.

In this case, it was decided that the “environment”, which was the land and inland waters, was under Malacca’s jurisdiction. However, as the Regulations were actually “pith and substance”⁸⁵ a law regarding item 7 under List III (the Concurrent List, which was also under the legislative power of the Federal Government), an unintentional transgression by the Regulations into the entries in item 6(c) and item 2 of the State List, had not affected the power of the Federal Government in enacting the Regulations. Consequently, the Environmental Quality (Sewage and Industrial Effluents) Regulations was applicable in this case.

Based on the Bakun case, it can be seen that in the event the legislation of the State is in conflict with the Federal, the former would be considered as null and void, to the point of conflict. However, this is not the case with “environment”, particularly when a state has a law on a similar subject matter.

6 Suggestions

To address the issue of jurisdiction between the State and Federal governments regarding water issues, some recommendations were thus proposed.

6.1 “Environment” can be made a subject matter in List III of the Federal Constitution

Firstly, it is argued that for the Federal Government to implement the EQA successfully, it is necessary to have a clear jurisdiction of environmental powers which clearly states the responsibility of protecting the environment as imposed upon States. In this respect, the Indian Constitution is similar to the Malaysian Constitution in that it did not spell out the term “environment” in any of its three legislative Lists even though items relating to this subject can be found in each of the three Lists. Additionally, there were provisions in the Indian Constitution which permit it to make laws on State matters. For instance, under Article 252(1), the Indian Parliament may enact laws on State subject matters for States whose legislatures had consented to central legislations. As a result, the government then legislated the Water (Prevention and Control of Pollution) Act 1974 as a central law although water is a state subject matter.⁸⁶

Currently, the Indian Constitution has also incorporated specific environmental protection provisions. With the enactment of Article 49-A, every state in India must improve and protect the environment. Furthermore, under clause (g) of article 51(A), the environment is currently a fundamental duty of every citizen of India. These two provisions are read together in environmental cases.⁸⁷ It is deduced that this would be a good move for Malaysia to emulate as the public’s knowledge of the importance of environmental protection in Malaysia grows over time. In fact, most provisions incorporated into the FC were derived from the Indian Constitution.⁸⁸

⁸⁴ [2001] MLJU 359. See also *PP v Ta Hsin Enterprise Sdn. Bhd* [1998] 6 MLJ 748

⁸⁵ For further understanding, refer *Mamat Bin Daud & Ors v Government of Malaysia* [1988] 1 MLJ 119 where the provision of section 298A of the Penal Code (an act enacted by the Parliament) is ultra vires article 74 (1) of the Federal Constitution because the subject matter of the law was within the scope of the State Legislature. The subject matter in this case is Islamic religion that is classified as a state matter under Article 11(4) and item 1 of the State List of the Federal Constitution 1957. The Supreme Court held that section 298A of the Penal Code pretends to be a legislation concerning public order when in pith and substance, it is a law concerning religion. Hence, section 298A was declared as invalid, null and void and of no effect.

⁸⁶ Entry 17, Seventh Schedule of the Indian Constitution

⁸⁷ *T.N. Godavarman Thirumalpad v Union of India & Ors.*, (2002) 10 SCC 606, where the Court read Article 48-A and Article 51-A together as laying down the foundation for a jurisprudence of environmental protection and held that “Today, the State and the citizens are under a fundamental obligation to protect and improve the environment, including forests, lakes, rivers, wild life and to have compassion for living creatures”. See also *In State of W.B. & Ors. v Sujit Kumar Rana*, (2004) 4 SCC 129

⁸⁸ Tsen-Ta, J. L. (1995). *Rediscovering the Constitution. Sing. L. Rev.*, 16, 157.



Alternatively, “environment” can be made a subject matter in the List III of the FC⁸⁹ so as to provide the clarity and flexibility required in such a division of powers.⁹⁰ Similar to water supplies and services, this would empower both the State and the Federal governments to legislate on matters regarding the “environment”.⁹¹ Alternatively, this can also be considered for “water” as this will enhance better government cooperation when dealing with water pollution cases.

6.2 Observing the Ruling in the Tasmanian Case?

Following the decision of the Bakun case, activities requiring an EIA report under the EQA do not apply to the State, such as Sarawak which has similar State laws. The scope and implementation of the EQA have been narrowed down in this case as the “environment” in which the project had an impact was “water” and “land” both of which fell within the constitutional province and legislative power of Sarawak and not the Federal. Hence, the next issue to consider is whether the court can decide on a sentence based on international environmental policies and public safety instead of this jurisdictional limitation.⁹²

In the 1983 case involving the Tasmanian Dam,⁹³ the judge had considered the negative impact of the dam’s construction on the environment so as to save the Franklin and Gordo rivers from submersion under the Tasmanian hydro-electric scheme.⁹⁴ The government, in this case, succeeded in stopping the large hydroelectric dam which was proposed to be constructed in South-West Tasmania. The High Court then decided, among other matters, that the government had the power under article 51(29) of the Australian Constitution to stop the dam’s construction. This decision was based on Australia’s international obligations under the World Heritage Convention.⁹⁵ According to Fisher, this power indicates the Commonwealth’s opportunity to harmonise international norms with domestic laws so as to give effect to the external standards of fairness and justice.⁹⁶ The growth of the external affairs power in Australia was an expected development, in light of the steady expansion of Federal powers that had occurred since federation.⁹⁷

Taking into account the constitutional framework of Malaysia which follows the dualist model, it appears that the power to give effect to international conventions domestically rests in the Parliament, and not the court. Strict dualism was adopted in the Malaysian law.⁹⁸ The significance of international human rights law was addressed in the controversial 1981 case of *Merdeka University Berhad v. Government of Malaysia*.⁹⁹ The issue in question was the proposed formation of a university where Chinese would be used as the language of instruction. Pursuant to the Universities and University Colleges Act of 1971, the government rejected the proposal. Herein, the applicants claimed that it was constitutionally wrong; it violated Article 26 of the UDHR that guaranteed equal access to education. The High Court, which took a strict dualist stance, determined that the UDHR was not binding, thus not a part of the Malaysian legislations.

⁸⁹ Note that List III refers to the Concurrent List under the Ninth Schedule of the Federal Constitution 1957. See also Sharom, A. (2008). *Environmental laws in Malaysia: Time to walk the walk*; Saleem, M. Y. (2005). *Environmental issues in a federation: The case of Malaysia*. *Intellectual Discourse*, 13(2).

⁹⁰ Above n.26 at 63-81; Harding, A. (Ed.). (2007). *Access to environmental justice: a comparative study* (Vol. 11). Martinus Nijhoff Publishers, 129.

⁹¹ *Malaysian Vermicelli Manufacturers (Melaka) Sdn. Bhd. v Pendakwa Raya* [2001] MLJU 359 at page 27

⁹² Nijar, G. S. (1997). The Bakun Dam case: A critique. *The Malayan Law Journal*, 3, ccxxix-cclii.

⁹³ *Commonwealth v Tasmania* (1983) 158 CLR 1

⁹⁴ Lee, E. (2016). Aboriginal cultural heritage protection in Tasmania: The failure of rights; the restorative potential of historical resilience. *The Right to Protect Sites: Indigenous Management in the Era of Native Title*, 315-341.

⁹⁵ *Commonwealth v Tasmania* (1983) 158 CLR 1

⁹⁶ Fisher, G. F. (1985). External Affairs and Federalism in the Tasmanian Dam Case. *Queensland Inst. Tech. LJ*, 1, 157.

⁹⁷ Byrnes, A. C. (1985). The implementation of treaties in Australia after the Tasmanian Dams case: the external affairs power and the influence of federalism. *BC Int'l & Comp. L. Rev.*, 8, 275.

⁹⁸ Neo, J. L. (2018). Incorporating human rights: Mitigated dualism and interpretation in Malaysian courts. In *Asian Yearbook of International Law* (pp. 1-37). Brill Nijhoff.

⁹⁹ [1981] 2 *Malayan Law Journal* 356



This strong dualist approach was also maintained in the 2005 case of *Beatrice a/p Fernandez v Sistem Penerbangan Malaysia*¹⁰⁰ where the Federal Court appeared to view CEDAW as an irrelevant source of law. In this case, a pregnant air stewardess was required to resign from her position, failing which the Malaysian Airlines would have the power to contractually terminate her employment. The complainant in this case, however, refused to resign. Consequently, her employment was terminated by the corporation. She filed a lawsuit seeking a declaration of reinstatement and damages. Fernandez used the CEDAW treaty as support for her constitutional claim as pregnancy discrimination was prohibited by article 11 of CEDAW. When dismissing Fernandez's case, neither the Federal Court nor the Court of Appeal below it mentioned CEDAW nor did they even consider the applicable provisions of CEDAW.

6.3 The National Land Council

The National Land Council (Land Council) was established under the FC.¹⁰¹ It consists of members that include the Minister as Chairman, one representative from every state in Malaysia (including Sabah and Sarawak) who are appointed by the *Yang di-Pertua Negeri* or the Ruler, and other Federal government representatives.¹⁰²

The Land Council can convene a meeting whenever necessary, or at least once a year.¹⁰³ The Land Council was empowered by the FC to formulate a national policy for controlling and promoting land use throughout the federation for agriculture, forestry and mining, and to administer any related laws by consulting the State governments, the National Finance Council, and the Federal Government.¹⁰⁴ It appears that this practice was in line with the recommendation of the Federation of Malaya Constitutional Proposal.¹⁰⁵

In this regard, the word "land" includes matters concerning water as outlined in section 5 of the National Land Code 1965 which states that "land" includes-

- (a) that surface of the earth and all substances forming that surface;
- (b) the earth below the surface and all substances therein;
- (c) all vegetation and other natural products, whether or not requiring the periodical application of labour to their production, and whether on or below the surface;
- (d) all things attached to the earth or permanently fastened to anything attached to the earth, whether on or below the surface; and
- (e) land covered by water. (emphasis is mine)

The word "land" refers to anything attached or fastened to anything attached to the earth either below or on the surface, and land covered by water.

In the case of *The Shell Company of the Federation of Malaya Ltd v Commissioner of Federal Capital of Kuala Lumpur*, Judge Ong J, in defining the meaning of land, stated that:

"In my view, these tanks are land. The definition of "land" is given in Section 2 of the Land Code as including things attached to the earth or permanently fastened to anything attached to the earth. Just as "real property" in English law...land includes things either attached to the earth or permanently fastened to anything attached to the earth...in Black's Law Dictionary (4th Edition), appears this definition of land in the United States of America:

"Land" includes not only the soil or earth but also things of a permanent nature affixed thereto or found therein, whether by nature as water, trees, herbage, other natural or perennial grass, products, growing crops or trees, mineral under the surface, or by the hand of man, as buildings, fixtures, fences, bridges, as well as works constructed for use of water, such as dikes, canals"¹⁰⁶

As pointed out above, Judge Ong J had referred to the English law and Black's Law Dictionary (4th Edition). He concluded that "land" means the ground, soil, or anything permanently attached to or found in it like water. Hence, water is considered part and parcel of land.

¹⁰⁰ [2005] 3 Malayan Law Journal 681

¹⁰¹ Article 91(1) of the Federal Constitution 1957

¹⁰² Article 91(1) of the Federal Constitution 1957

¹⁰³ Article 91(3) of the Federal Constitution 1957

¹⁰⁴ Article 91(5) of the Federal Constitution 1957

¹⁰⁵ Paragraph 30 of the Federation of Malaya Constitutional Proposal (Government White Paper).

¹⁰⁶ [1964] 1 MLJ 30



Consequently, it is safe to say that the jurisdiction of the Land Council extends to matters pertaining to water. Since the Land Council was constitutionally established, any decision or policy made by it on a dispute over water between the Federal and State is binding upon both governments.¹⁰⁷ The other two Councils that are constitutionally established are the National Council for Local Government and the National Finance Council. Thus, both the State and the Federal should consistently cooperate¹⁰⁸ in referring any issues on water pollution to the Land Council. This is necessary due to the cross-cutting nature of the activities that constitute water pollution which might involve coordination between the State and the Federal.

At present, it is observed that the administration of subject matters regarding water and the Land Council is under the same ministry,¹⁰⁹ namely, the Ministry of Natural Resources, Environment and Climate Change which made it easier for this suggestion to be implemented. Unlike the previous order which stated that while the functions and powers of the Federal Minister concerning water are under the Ministry of Environment and Water, the Land Council was under the Ministry of Energy and Natural Resources as stipulated in the Schedule of the Ministers of the Federal Government (No.3) Order 2021.¹¹⁰ Interestingly, apart from being constitutionally established pursuant to the FC, the Land Council's meeting which is held annually, is chaired by the Prime Minister or Deputy Prime Minister, and attended by the Head of State Governments of Malaysia. In 2021, the Land Council held its 79th meeting since its establishment.

CONCLUSION

In the Malaysian context, water is currently a subject matter that generally falls under the State legislative jurisdiction pursuant to the FC. Nevertheless, certain circumstances allow the Federal to legislate for the State, such as stipulated under article 76(1)(a) and (1)(b) of the FC. The EQA was enacted by the Federal in accordance with its legislative competence,¹¹¹ after the Stockholm Convention.¹¹² It deals with water and environmental issues which are within the state's jurisdiction. This practice has resulted in a conflict of jurisdiction between the State and the Federal law, as was illustrated in the Bakun case. Nevertheless, the EQA is currently the main legislation used for water pollution control. Therefore, to deal with environmental issues concerning water pollution, it is argued that apart from amending the FC, the Land Council can be used since its jurisdiction extends to matters involving not only land but also water. Most importantly, the Land Council's decisions are binding upon both governments.

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¹⁰⁷ The other councils constitutionally established under the Federal Constitution 1957 are the National Council for Local Government pursuant to Article 95A and the National Finance Council pursuant to Article 108.

¹⁰⁸ Ismail, H., Hussain, T. P. R. S., & Subhan, M. (2020). The impact of spatial development on water pollution: a comparative assessment of river water quality in two municipalities in Malaysia. *International Journal of Environment and Sustainable Development*, 19(4), 333-342; Khairil, A. M., & Maizatun, M. (2012). Effect of federal constitutional framework to marine environmental law, policy and administration in Malaysia. *Australian Journal of Basic and Applied Sciences*, 6(11), 130-136; above n.92.

¹⁰⁹ [P.U.(A) 27/2023]

¹¹⁰ [P.U.(A) 383/2021]

¹¹¹ Above n.52

¹¹² Muhamad Rizal Razman, Carolyn Melissa Payus, and Jamaludin Md Jahi. 2010. "Kawalan Pencemaran Sungai Dalam Melindungi Ekologi Dan Habitat Manusia: Tinjauan Perundangan Di Malaysia." *SARI: Jurnal Alam Dan Tamadun Melayu* 28(1).

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