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A Study on Criminal Law and Precautionary Principle Towards Environmental Sustainability

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Abstract: Criminal law and precautionary principle hand in hand play essential roles in environmental sustainability. The used of the Criminal law and precautionary principle in environmental sustainability is largely in respond to the inevitability of every individual to protect environment from being polluted in their surroundings. Therefore, this study examines the used of the Criminal law and precautionary principle hand in hand with relation to environmental sustainability from the legal approach by identifying actions and cases which deal with environmental sustainability in order to achieve sustainable development.

Key words: Criminal law, precautionary principle, environmental sustainability, legal approach, surroundings

INTRODUCTION

Law governs the relationship of the individuals with the state and also with one and another. An easy approach to examine how it operates in the legal system is to classify it in the light of its relationships (Beatrix and Wu, 1991). Law may be classified into two parts. There are Private Law and Public Law. Private law, also known as civil law, governs the relationship between an individual and another individual and as for Public Law governs the relationship between the state and the individual (Beatrix and Wu, 1991; Sulaiman and Razman, 2010).

Both above mentioned laws play an important role in relation to human habitat and environmental protection. The development of the law on human habitat and environmental protection is not solely based on private law alone; anyway, Public law has also made contribution to serve similar function in protecting the human habitat and environment (Razman and Azlan, 2009; Razman *et al*., 2010a).

The law of tort is an example of private law. Law of tort is a law that laid down the responsibilities of an individual or group of individuals to ensure that the acts and omissions of their actions will not cause any harm and/or detrimental to other individual or other group of individuals (Sulaiman and Razman, 2010). Failure to comply with these responsibilities, the said individual or the said group of individuals who suffered injuries, damages and/or losses may bring the claim to the court of law against the party who fails to comply with those obligations (Razman *et al*., 2009a). In private law which include the law of tort, the party that initiate the legal proceeding is known as Plaintiff and the other party that being sued known as the Defendant (Razman and Syahirah, 2001). It is clearly that under the private law which include the law of tort, concerned with the law governs the relationship between individuals.

Next, an example of Public law in is the Criminal law. Criminal law is a law which states and explains all the acts and omissions which are considered criminal actions. Criminal law laid down all types of acts and omissions that constituted as offences done individuals against the States (Razman and Syahirah, 2001). The Criminal law aims to combat and punish the criminals (Razman and Syahirah, 2001). In Criminal law, the Public Prosecutor who will represent the state to prosecute the individuals that have been accused to commit criminals actions (Razman and Syahirah, 2001). There are two main elements of a crime, wrongful act known as actus reus and wrongful mind known as "mens rea" (Lee, 1998). Therefore, the Public Prosecutor is required to proof to the court of law both of elements beyond reasonable doubt (Lee, 1998; Razman and Syahirah, 2001). It is clearly that the Criminal law is a law that regulating and governing of a state and an individual or group of individuals. Thus, Criminal law is classified as Public law.

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PRIVATE AND PUBLIC LAW IN THE CONTECT OF ENVIRONMENTAL SUSTAINABILITY

Private and Public law play an essential role in the context of environmental sustainability. Development of laws for environmental sustainability is not only to Public law but also includes private law (Ball and Bell, 1995; Razman *et al*., 2010b).

Private law also plays an important role in the context of environmental sustainability. Inter alia, the law of tort. The law of tort can be divided into several sections. There are negligence, nuisance, trespass and strict liability. This is based on the rights, actions and remedies are made by claimants who suffer injury, damage and/or loss. While the Public laws that emphases on environmental protection are as follows:

- Environmental Quality Act, 1974 (Act 127)
- Street, Drainage and Buildings, 1974 (Act 133)
- Factories and Machinery Act, 1967 (Act 139)
- Town and Country Planning Act, 1976 (Act 172)
- Local government Act, 1976 (Act 171)
- Occupational Safety and Health Act, 1994 (Act 514)
- National Land Code, 1965 (Act 56)
- Wildlife Protection Act, 1972 (Act 76)
- National Forestry Act, 1984 (Act 313)
- Criminal law through the Penal Code (Act 574)

All the laws mentioned above are laws that are classified as a Public law because these laws regulated and governed the relationship between the state and an individual or group of individuals. Therefore, this study examines the used of the Criminal law with relation to environmental sustainability from the legal approach by identifying actions and cases which deal with environmental sustainability in order to achieve sustainble development.

CRIMINAL LAW

Crime is an act or omission of any act against the public. Party has done the act or omission is to be writ to the Court by the State through the Public Prosecutor following the criminal procedure. Criminal conviction, the person will be punished in accordance with the provisions of the Criminal law statutes (Hussin, 1988; Koh *et al*., 1989). Statute that provides for the substantive law of Criminal law in Malaysia is the Penal Code (Act 574). In the Penal Code, it is divided into 23 parts. Only two parts of the Penal Code (under the part XIV and XVII of the Penal Code) having provisions relating to the control of environmental pollution.

Part XIV of the Penal Code relating to criminal offences involving public health, public safety, public convenience, decency and morality. There are 27 sections that subjected to this part XIV of the Penal Code, starting from section 268 until section 294 of the Penal Code. Meanwhile, under part XVII of the Penal Code is focusing on criminal offenses against property. Sections involved under part XVII of the Penal Code are section 378 until section 462.

THE BURDEN OF PROOF

There is an expression from legal maxim on Criminal law that is "actus non fecit reum nisi menssit rea" which means any act committed by an act shall not be convicted unless there is intention of the character of evil intent (Hussin, 1988). Thus, the prosecution must prove to the court two important things, first, the existence of the act or omission of acts which are considered under the Penal Code of actus reus and the second is the existence of faith-based elements of crimes of "mens rea" (Razman and Syahirah, 2001). When the prosecution can prove the two items mentioned above, the court will pass sentence on the accused accordingly on the basis of provisions in the Penal Code.

The burden of proof is typically referred to prove a fact or facts (Aun, 1987). According to section 101 (a) Evidence Act, 1950 (Act 56) provides that anyone who wants to give the court any decision of any rights or obligations of law, depending on the existence of the facts that had been claim, must prove that the facts that exist. While section 101 (2) Evidence Act, 1950 (Act 56) is also provided when a person is bound to prove the existence of the facts, it is intended that the burden of proof is to the persons who bring in the facts. In the trial relating to Criminal law, the prosecution is responsible for bringing the facts or the facts that prove the accused committed the act or omission of acts which are considered under the Penal Code of "actus reus" and are characterized by the evil intentions of "mens rea".

Accordingly, the burden of proof in Criminal law relating to environmental pollution control is based on the shoulders of the prosecution. The prosecution must prove two important things that the "actus reus" and "mens rea" in addressing issues of environmental pollution. Regarding the "actus reus", it is not a problem for the prosecution to prove to the court that the accused had violated the provisions of relevant legislative control of environmental pollution with the facts or the facts show the accused had failed to comply with set standards to prevent pollution environment (Ball and Bell, 1995).

As for proof of mens rea is quite controversial and problematic issue. Given under Criminal law, the prosecution must prove the accused guilty of

environmental pollution with the intention of the nature of evil. In other words, the accused must be aware that the act of polluting the environment is an offense that would endanger the public but most cases of pollution caused by negligence, lack of knowledge, lack of capacity, lack of observation or lack of competence by the accused in an action (Wolf and White, 1995; Webb, 1997).

These conditions clearly complicate the prosecution in cases of environmental pollution under the Criminal law. Accordingly, the court had taken a resolution that all prosecutions in cases of environmental pollution under the Criminal law, elements of proof of "mens rea" that is proof against the accused is guilty of environmental pollution with the intention of the evil nature, no longer needed. Given the cases of environmental pollution under the Criminal law is now regarded as a liability where the elements of hard evidence "mens rea" is not necessary. This is clear in the case of Alphacell v Woodword (1972) AC 824 where Lord Wilberforce has pointed out that the cases of environmental pollution under the Criminal law which assumed strong element of proof "mens rea" is no longer required. It is clearly shown that the Criminal law heading for the concept of environmental sustainability.

THE CONCEPT OF ENVIRONMENTAL SUSTAINABILITY

The concept of environmental sustainability has been defined by the World Commission on Environment and Development as development that meets the needs of the present generation without compromising the ability of the future generations to meet their own needs. The above-said concept covers two essential scopes, i.e., environment and social aspects. This concept of environmental sustainability has been highlighted in the 1992 United Nations Conference on Sustainable Development in Rio de Janeiro, as the results, Agenda 21 and Rio Declaration has been established. According to Sands (1995), Agenda 21 emphasises the following matters which include sustainable human settlement, population, consumption pattern, poverty and human health. On the other hand, Mensah (1996) stated that the Rio Declaration addresses on mankind entitlements and rights which include health and productive life.

Basically this concept of environmental sustainability has been an element in the international legal framework since early as 1893. According to the case of United States of America v Great Britain (1893) 1 Moore's Int. Arb. Awards 755, well known as Pacific Fur Seals Arbitration where in this case the United States of America has stated that a right to make sure the appropriate and lawful use of seals and to protect them for the benefit of human beings, from meaningless destruction (Razman *et al*., 2009b, 2010c; Emrizal and Razman, 2010).

Sands (1995) indicated that this concept of environmental sustainability is perhaps the greatest contemporary expression of environmental policy, commanding support and presented as a fundamental at the Rio Summit, Rio Declaration on Environment and Development in year 1992.

According to Article 33 of the Lome convention 1989 states that in the framework of this convention, the protection and the enhancement of the environment and natural resources, the halting of deterioration of land and forests, the restoration of ecological balances, the preservation of natural resources and their rational exploitation are basic objectives that the African-Caribbean-Pacific (ACP) states concerned shall strive to achieve with community support with a view to bring an immediate improvement in the living conditions of their populations and to safeguarding those of future generations (Razman *et al*., 2009c; Emrizal and Razman, 2010). The Article 33 also introduces into legal framework the concept of environmental sustainability with one of the approach under the precautionary principle.

THE PRECAUTIONARY PRINCIPLE

This study also concentrate and discuss one of the general principles of law which is the precautionary principle. The precautionary principle gives direction and assistance in the development and appliance of the environmental law where there is scientific doubt (Sands, 2003; Razman and Azlan, 2009; Razman *et al*., 2010c). This principle derived from the traditional approach in dealing with global environmental protection. According to the traditional approach where all parties concerned have been called and these parties created their institutions in order to adopt and apply decisions that are found upon scientific evidences or knowledge and information accessible at that particular occasion (Sands, 1995; Razman *et al*., 2010b). This traditional approach has been highlighted in the following global conventions that have been listed down.

List of Global Conventions that required scientific evidence in taking actions:

- Global Whaling Convention, 1946
- Antarctic Seals Convention, 1972
- World Heritage, 1972
- London Convention, 1972
- Bonn Convention, 1979

Basically this traditional approach put forward that act shall only be taken where there is scientific findings

that noteworthy environmental harm is taking place and on other hand, in the absence of the scientific evidence, therefore, no action may be necessary. However, in middle 1980s where a change of the traditional approach has been shown. Example of a change of the traditional approach has been shown include Ministerial Declaration of Global Conference on the Protection of the North Sea, 1984 which allows states to take action without the scientific evidence of damaging effects since the damage of the marine environment cannot be remedial or irreversible for a short period (Sands, 2003; Razman *et al*., 2010b; Sulaiman and Razman, 2010).

In addition the Montreal Protocol, 1987 which applies precautionary principle approach rather than the traditional approach where allows states to take action without the scientific evidence of damaging effects in dealing with controlling emission of (chlorofluorocarbon) CFCs. In 1990, the Bergen Ministerial Declaration on Sustainable Development in Economic Commission for Europe (ECE) region was the first instrument to link with the sustainable development principle and the precautionary principle (Mensah, 1996; Sands, 1995; Razman *et al*., 2010a). According to paragraph 7 of the Bergen Ministerial Declaration on Sustainable Development, 1990 states that:

> In order to achieve sustainable development, policies must be based on precautionary principle. Environmental measures must anticipate, prevent and attack the causes of environmental degradation. Where there are treats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation

Since, the Declaration, there are a number of the environmental treaties that have adopted the precautionary principle into those instruments. In 1991, Bamako Convention has linked and put together the precautionary principle and the traditional approach where this formulation in Bamako Convention does not need to be irreversible or serious and lesser the entrance at which scientific proof might need action. According to the Article 4 (3) (f) Bamako Convention, 1991 states that:

> The preventive, precaution approach to pollution which entails, inter alia, preventing the release into the environment of substances which may cause harm to humans or the environment without waiting for scientific proof regarding such harm. These parties shall co-operate with each other in taking the appropriate measures to implement the precautionary principle to pollution prevention through the application of clean production method

As for parties involved in the Transboundary Watercourses Convention, 1992 agreed upon to adopt the same approach in Bamako Convention, 1991. Based on the Article 2 (5) (a) of the Transboundary Watercourses Convention, 1992 provides that:

> By virtue of which action to avoid the potential transboundary impact of the release of the hazardous substances shall not be postponed on the ground the scientific research has not fully proved a causal link between those substances, on the other hand, and the potential transboundary impact on the other hand

Some environmental treaties do not specifically express in adopting the precautionary principle as part of their instruments but these environmental treaties noted the precautionary principle in their Preamble. For an example, the Biodiversity Convention, 1992 does not expressly specifically adopt the precautionary principle but in the Preamble of the Biodiversity Convention, 1992 provides that:

> Where there is a threat of significant reduction or loss of biological diversity, lack of full there is a scientific certainty should not be used as a reason for postponing measures to avoid or minimize such a threat

Moreover, the Earth Summit at Rio de Janeiro in the year 1992 has adopted the precautionary principle. It is clearly that shown and highlighted in the Principle 15 of the Rio Declaration. The principle 15 of Rio Declaration states that:

> Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as reason for postponing cost-effective measures to prevent environmental degradation

ROLE OF CRIMINAL LAW AND PRECAUTIONARY PRINCIPLE TOWARDS ENVIRONMENTAL SUSTAINABILITY

Based on the earlier discussion, according to paragraph 7 of the Bergen Ministerial Declaration on Sustainable Development, 1990 states that inter alia:

> Where there are treats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation

It is clearly that the above-said provision tries to emphasize to adopt precautionary principle by using the words of should not be.

On the other hand, the principle 15 of the Rio Declaration provides that inter alia:

> Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as reason for postponing cost-effective measures to prevent environmental degradation

This provision of the Rio Declaration has highlighted that the application of the precautionary principle as mandatory based on the words of shall not be.

An additional essential transformation would be adopted by an interpretation of the precautionary principle, increasingly extensively held that would shift the burden of proof (Sands, 1995; Razman *et al*., 2009a, Sulaiman and Razman, 2010). Based on the current approach that is the precautionary principle approach would shift the burden of proof and need the project proponent who intends to develop a project to bring evidences which the-said project will not cause harm to the environment in order to attain sustainable development (Sands, 1995; Razman *et al*., 2010c). Whereas, the traditional approaches indicate that the burden of proof is on the shoulder of the party who oppose a development project. Later the oppose party to the said development project is required to bring evidences to proof that the said development project is likely to cause harm to the environment (Sands, 2003; Razman *et al*., 2010b).

As for Malaysia is concerned, the Environmental Quality Act, 1974 has adopted the precautionary principle approach, especially based on section 34A of the Environmental Quality Act, 1974. According to section 34A (2) of the Environmental Quality Act, 1974 states that:

> Any person intending to carry out any of the prescribed activities shall, before any approval for carrying out such activity is granted by the relevant approving authority, submit a report to the Director General. The report shall be in accordance with guidelines prescribed by the Director General and shall contain an assessment of the impact such activity will have or is likely to have on the environment and the proposed measures that shall be undertaken to prevent, reduce or control the adverse impact on the environment

Clearly that the above-said provision requires the project proponent to bring evidences in the form of a report which indicate that the development project will not cause harm to the environment in order to achieve sustainable development and if the project is likely to harm the environment, the project proponent is required to proposed measures that shall be undertaken to prevent, reduce or control the adverse impact on the environment (Razman and Azlan, 2009; Razman *et al*., 2010a).

According to Malaysian experience on environmental impact assessment which also Islamic Banking in Malaysia also looking at this provisions in considering the project proponent loan application where it is clearly shown as the state practice to attain sustainable development. The state practice has adopted precautionary principle approach in order to achieve sustainable development. Based on Article 38 (1) (b) of the Statute of the International Court of Justice identifies state practice as the international customary law and this international customary law being classified as one of the sources of the international law. Finally, the precautionary principle approach may be considered as one of sources of the international environmental law as the principle position as a general principle of law and also an international customary law in order to attain sustainable development which include urban region where the Banking Institutions as well as Islamic Banking also taking part on regards this matter.

CONCLUSION

Criminal law is one of Public law that has been used to protect human habitat and to achieve environmental sustainability. When criminal cases have been brought to the court, the traditional basic principles of actus reus and "mens rea" will be prevailed. However, court cases related to the protection on human habitat and environmental sustainability under Criminal law, the court has taken a resolution that all prosecutions in cases of environmental pollution under the Criminal law, elements of proof of "mens rea" that is proof against the accused guilty of environmental pollution with the intention of the evil nature, no longer needed. Given the cases of environmental pollution under the Criminal law is now regarded as a liability where the elements of hard evidence "mens rea" is not necessary. This is clear in the case of Alphacell v Woodword (1972) AC 824 where Lord Wilberforce has pointed out that the cases of environmental pollution under the Criminal law which assumed strong element of proof "mens rea" is no longer required which consistent with the precautionary principle approach. In conclusion, the above mentioned discussions have laid down the support with a view to bring an immediate improvement in the living conditions of their populations and to safeguarding those of future generations by applying the precautionary principle in order to acheive environmental sustainability.

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