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CHAPTER 20

The need for an express right to clean, healthy environment

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Abstract: This paper examines the growing recognition of the right to a safe, clean, healthy and sustainable environment and the implications of this development for Malaysia's constitutional framework. Recent developments, including the 2025 ICJ Advisory Opinion on Climate Change, UNGA Resolution 76/300, and the ASEAN Declaration on the Right to a Safe, Clean, Healthy and Sustainable Environment, reflect an emerging expectation that states recognise and give effect to environmental rights within their domestic legal systems. In Malaysia, environmental rights remain implicit and are primarily derived through judicial interpretation of Article 5(1) of the Federal Constitution. While Malaysian courts have recognised that the right to life encompasses the right to live in safe and healthy environment, such protection remains dependent on judicial interpretation and is therefore inherently fragile. The absence of an express constitutional guarantee creates legal uncertainty, weakens environmental governance, and put Malaysia at the risk of misalignment with international and regional developments. Malaysia must move beyond implied recognition and expressly recognise the right to a safe, clean, healthy and sustainable environment within its constitutional framework, supported by complementary statutory reforms.

INTRODUCTION

The escalating environmental crisis—manifested through climate-induced floods, toxic pollution, biodiversity collapse, and the degradation of Malaysia's remaining forests—has placed unprecedented pressure on the country's legal and institutional frameworks.

In recent years, a wave of global, regional and judicial developments has crystallised one central proposition: the right to a safe, clean, healthy and sustainable environment is a fundamental human right, essential to the enjoyment of life, health, equality and dignity. The recognition of this right, which was once considered aspirational, has now hardened into a legal obligation, reinforced by the International Court of Justice (ICJ), the United Nations General Assembly (UNGA), and most recently, the Association of Southeast Asian Nations (ASEAN).

Yet within Malaysia, this right remains implicit, inferred from Article 5(1) of the Federal Constitution, rather than expressly protected. Without express constitutional recognition, environmental protection becomes vulnerable.

The Right to a Clean and Healthy Environment In International Law

The recognition of a right to a clean, healthy, and sustainable environment under international law is no longer aspirational rhetoric. It has crystallised into a recognised right through judicial pronouncement at the ICJ and multilateral consensus, thus transforming it into a normative standard that demands domestic constitutional expression.

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The most authoritative articulation of this development came recently from the ICJ in its Advisory Opinion of 23 July 2025 on the *Obligations of States in Respect of Climate Change*. For the first time, the world's highest court provided a comprehensive and authoritative synthesis of states' legal obligations in relation to climate change. The Court did not merely describe the state of international law; it clarified the standard of conduct expected of states moving forward.

In doing so, the Court affirmed that climate change constitutes an urgent and existential threat to humanity, ecosystems, and global stability. This characterisation is significant, as it elevates environmental protection from a matter of policy discretion to one engaging the highest level of state responsibility. The Court further recognised that states owe obligations *erga omnes* to prevent environmental and climate harm. These obligations, owed to the international community as a whole, reinforce the collective interest in environmental protection and underscore that breaches are not confined to bilateral disputes between states.

Importantly, the Court articulated the substantive content of these obligations. It emphasised that states are required to undertake "deep, rapid and sustained" reductions in greenhouse gas emissions. This formulation is prescriptive in nature: it establishes a standard of conduct that is immediate, continuing, and incapable of being deferred on grounds of convenience or competing priorities. In parallel, the Court made clear that states must regulate fossil fuel activities, including by adopting environmental impact assessment regimes that account for full life-cycle emissions. This reflects an expectation that domestic regulatory frameworks must be sufficiently robust to address the systemic causes of climate harm, rather than merely its downstream effects.

Crucially, the Court also affirmed that the right to a clean, healthy and sustainable environment is intrinsic to the enjoyment of other fundamental human rights, including the rights to life, health, and equality. This recognition situates environmental protection within the broader architecture of international human rights law. In turn, the Court observed that a state's failure to take adequate climate action, or its adoption of measures that exacerbate environmental harm, may give rise to international responsibility, including obligations to make reparation. This introduces a clear legal consequence for inaction or regression, reinforcing that environmental obligations are enforceable rather than merely aspirational.

For Malaysia, the implications of the ICJ's Advisory Opinion are both direct and unavoidable. As a member of the international community, Malaysia is required to organise its domestic legal and institutional framework in a manner that enables compliance with these obligations. It is no longer sufficient for domestic law to passively accommodate environmental considerations. Rather, it must actively facilitate environmental protection by embedding enforceable standards that guide state conduct and constrain executive discretion.

This trajectory was already evident prior to the ICJ's pronouncement. In July 2022, the UNGA adopted Resolution 76/300, formally recognising "the human right to a clean, healthy and sustainable environment". Although the Resolution is not legally binding, its significance lies in its articulation of the content of the right and the expectations placed upon states. It calls for the strengthening of environmental laws and standards, the protection of biodiversity, the reduction of pollution, and the guarantee of public participation and access to justice. It also situates environmental protection within the broader context of the "triple planetary crisis" of climate change, biodiversity loss, and pollution. These elements collectively demonstrate that the right to a healthy environment is both substantive and procedural in nature, requiring not only outcomes but also processes that ensure accountability and inclusivity.

Critically, the Resolution recognises that environmental rights are interdependent and indivisible with all other human rights. Malaysia voted in favour of the Resolution alongside 160 other countries.

More importantly, Resolution 76/300 contributes to the formation of *opinio juris*, reflecting a growing belief among states that the recognition and protection of environmental rights are matters of legal obligation rather than political preference. This is further reinforced by developments at the regional level. On 26 October 2025, ASEAN Member States adopted the ASEAN Declaration on the Right to a Safe, Clean, Healthy and Sustainable Environment at the 47th ASEAN Summit in Kuala Lumpur, marking a significant achievement in the evolution of regional human rights norms. This is a historic milestone: ASEAN now formally recognises this right as part of its regional human rights architecture.

The Declaration is notable as the ASEAN Declaration affirms the right to a clean, healthy, and sustainable environment as a universal human right within the regional context, aligning Southeast Asia with broader international developments. It also incorporates key procedural guarantees, including access to environmental information, public participation in decision-making, and access to justice. These procedural rights are not merely ancillary; they are essential mechanisms through which substantive environmental rights are realised. Without them, environmental protection risks remaining illusory, lacking the means of enforcement and accountability.

Both Resolution 76/300 and the ASEAN Declaration, while not directly binding, are evidence of *opinio juris* [a]. Taken together, the ICJ Advisory Opinion, Resolution 76/300, and the ASEAN Declaration reflect a converging body of international norms that collectively point towards the recognition of a right to a clean, healthy, and sustainable environment.

THE POSITION IN MALAYSIA

In this context, the question for Malaysia is no longer whether such a right exists at the international level. Rather, the more pressing question is whether Malaysia's domestic legal framework, and in particular its Federal Constitution, is adequately equipped to give effect to that right. The absence of an express constitutional guarantee represents a gap between Malaysia's international commitments and its domestic laws.

Malaysia does not yet provide express constitutional protection for environmental rights. Courts have suggested that the right to a clean and healthy environment is implied into Article 5(1) of the Federal Constitution [b]. This reliance on implication renders the right precarious, subject to the vagaries of judicial interpretation.

Judicial and extra-judicial recognition of the right

In this regard, whilst the Federal Court has not had the direct opportunity to consider this matter, such right has been recognised by both the Malaysian High Court and the Court of Appeal as implicit from the right to life under Article 5(1) of the Federal Constitution.

A leading authority in this respect is *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261, where Gopal Sri Ram JCA adopted a purposive and liberal interpretation of Article 5(1). His Lordship held that the expression "life" does not

[a] Draft Conclusions on Identification of Customary International Law (Final Outcome) (International Law Commission [ILC]) UN Doc A/73/10, para.65, GAOR 73rd Session Supp 10, 119

[b] Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 1 MLJ 261; Raub Australian Gold Mining Sdn Bhd v Hue Shieh Lee [2016] MLJU 1781; Public Prosecutor (Sarawak Forestry Corporation) v Toh Tung Kit @ Tou Tung Kit [2022] MLJU 2819

refer to mere existence, but encompasses those facets that give life its quality and meaning. In particular, His Lordship expressly recognised that the right to life includes the right "to live in a reasonably healthy and pollution free environment".

In another Court of Appeal case, David Wong Dak Wah JCA observed in *obiter* that the right to life, as developed in Malaysian jurisprudence, includes the right to live in a safe and healthy environment. This line of reasoning has been carried forward and articulated with even greater clarity in a more recent High Court authority. In *Public Prosecutor (Sarawak Forestry Corporation) v Toh Tung Kit @ Tou Tung Kit* [2022] MLJU 2819, the court expressly affirmed that the constitutional guarantee of "life" under Article 5(1) has been interpreted broadly to encompass environmental protection, drawing on earlier authorities such as *Tan Tek Seng*. The force and clarity of Christopher Chin Soo Yin J's reasoning in *Toh Tung Kit* is such that it bears reproduction in full:

> ***"In Malaysia, "life" in Article 5(1) of the Federal Constitution has been interpreted broadly to include the right to the environment.***
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> *Human beings cannot exist in a void. We exist in this world only because of the natural environment which supports our existence. This environment is in a delicate balance.* ***When the biodiversity is upset by the culling of wild animals, the balance is upset and with it comes the threat to our own survival.*** *The death of a protected animal for profit is a death of part of our eco system and a breach to our delicate biodiversity which supports us. Put bluntly, stealing from the forests is stealing from humankind.*
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> ***The degradation of the environment adversely affects all and not an isolated segment of society, both for the present and for time to come.*** *It is a given that the term "environment" must include by definition, our entire natural environment encompassing the air, earth, sea, forests all of which we need to stay alive and flourish, and which is kept in balance by the flora and fauna that nurture and sustain them.* ***There is "privity" in the legal sense amongst all mankind in this respect for the simple reason being that we stay on and share a single earth."***

The court in *Toh Tung Kit* further drew on extra-judicial reflections by former Chief Justice Tun Arifin Zakaria (2017), who articulated the concept of environmental rule of law as comprising three essential elements: a comprehensive legal framework regulating environmentally impactful human activity; consistent application of such laws, and; effective and impartial enforcement irrespective of status or influence. These elements collectively underscore that environmental protection must be systemic, principled, and non-discriminatory. Crucially, the High Court noted the former Chief Justice's views of the role of the judiciary to "*uphold our constitutional guarantees which must include the right to a clean environment both for the present generation and the future unborn generations …*"

Indeed, the recognition of the right was also reinforced by another extra-judicial observation by the former Chief Justice Tengku Maimun Tuan Mat. In a speech delivered in 2020, her Ladyship, citing *Tan Tek Seng*, affirmed in clear terms that the right to life and personal liberty under Article 5(1) does not denote mere animal existence, but encompasses the broader conditions necessary for meaningful human life (Tengku Maimun Tuan Mat 2020). Importantly, Her Ladyship expressly recognised that this includes the right to a clean environment.

It is also worth noting, in support of the broader interpretive approach, that Article 5(1) of the Federal Constitution is materially similar to Article 21 of the Constitution of India, both of which guarantee the right to life. The Indian Supreme Court has adopted a markedly expansive interpretation of Article 21, recognising that the right to life includes the right to a clean and healthy environment [c]. While decisions of the Indian courts are not binding on Malaysian courts, they are highly persuasive, particularly given the pari materia nature of the constitutional provisions.

Notwithstanding judicial and extra-judicial recognition of the rights outlined above, the argument that Article 5(1) encompasses a right to a clean and healthy environment is not without difficulty. A central challenge lies with certain arguments that Article 5(1) should be construed narrowly and not "*those facets that are an integral part of life itself and those matters which go to form the quality of life*" [d]. In this context, the reliance on implication alone is therefore inherently precarious.

Malaysia's international law commitment

The argument that Article 5(1) of the Federal Constitution encompasses a right to a clean and healthy environment is further strengthened when viewed through the lens of Malaysia's established approach to the interpretation of domestic law in light of international obligations. Malaysian courts have consistently affirmed that, where ambiguity exists, domestic law should be construed in a manner that accords with, rather than departs from, international law.

This principle was clearly articulated by the *Court of Appeal in CAS v MPPL & Anor* [2019] 4 MLJ 243, where Nallini Pathmanathan JCA emphasised that where statutory language is ambiguous, courts are under a duty to interpret it in conformity with international law. This includes not only the interpretation of statutes, but also the development of the common law by reference to statutory policy informed by international norms. The Court of Appeal's approach reflects a broader judicial recognition that domestic law does not operate in isolation, but must be situated within Malaysia's international legal commitments.

This interpretive principle has been reiterated and refined in *Sundra Rajoo a/l Nadarajah v Menteri Luar Negeri, Malaysia & Ors* [2021] 5 MLJ 209, where the Federal Court affirmed that, in a dualist system such as Malaysia's, international law does not automatically override domestic legislation. However, where domestic law is ambiguous and admits of more than one plausible interpretation, courts ought to prefer the interpretation that places the state in compliance with its international obligations. Conversely, courts should avoid adopting an interpretation that would put the state in breach of international law, whether arising from treaty commitments or customary international law. This reflects a principled judicial reluctance to attribute to Parliament an intention to legislate in violation of Malaysia's international obligations, absent clear and express language to that effect.

The same approach is evident in *Noorfadilla bt Ahmad Saikin v Chayed bin Basirun & Ors* [2012] 1 MLJ 832, where the High Court held that, in interpreting constitutional guarantees under Article 8(2), the court must take into account Malaysia's international commitments, including obligations under conventions such as CEDAW (Convention on the Elimination of All Forms of Discrimination against Women). The court went so far as to state that it had "no choice" but to refer to such instruments in clarifying the meaning and scope of constitutional rights.

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[c] *Virender Gaur v. State of Haryana* (1995) 2 SCC 577; *M.C. Mehta v Kamal Nath* (2000) 6 SCC 213; *Karnataka Industrial Areas Development Board v C. Kenchappa* (2006) 6 SCC 371

[d] *Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan* [2002] 3 MLJ 72, 101

However, this line of reasoning must be approached with caution in light of a divergent strand of authority that underscores the limits of reliance on international law within Malaysia's dualist legal system. In *AirAsia Bhd v Rafizah Shima bt Mohamed Aris* [2014] 5 MLJ 318, the Court of Appeal took a more restrictive view, emphasising that international conventions such as CEDAW do not have the force of law in Malaysia unless and until they are expressly incorporated into domestic legislation. Ratification alone, the Court held, does not render treaty provisions enforceable in municipal law. The Court further observed that the Federal Constitution is silent on the primacy of international law *vis-à-vis* domestic law, and that in the event of conflict, domestic legislation prevails. This reflects the orthodox dualist position: international law may inform interpretation where ambiguity exists, but it cannot override clear domestic provisions.

In a later case, the Federal Court in *Letitia Bosman v Public Prosecutor and other appeals* (No 1) [2020] 5 MLJ 277 reaffirmed the Rafizah Shima's orthodox dualist position that international instruments do not form part of Malaysian law unless and until they are incorporated into domestic legislation. The Court emphasised that international norms should not be used as a guide to interpret the Federal Constitution. The "ultimate touchstone of constitutionality", the Court reiterated, is the Constitution itself, and not external principles or unincorporated international standards. The Court further underscored that where domestic provisions are clear and unambiguous, there is no scope to resort to international instruments to interpret or modify their meaning. In such circumstances, international law cannot be invoked—whether directly or indirectly—to introduce rights or obligations that have not been adopted by Parliament.

This reinforces the central thesis of this article. The recognition of environmental rights through judicial interpretive techniques remains inherently fragile. It is susceptible to doctrinal retrenchment and dependent on the interpretive disposition of the courts.

IMPORTANCE OF EXPRESS CONSTITUTIONAL RECOGNITION OF THE RIGHT

Notwithstanding the emerging judicial recognition outlined above, the absence of an express constitutional right to a clean and healthy environment remains a fundamental weakness within the Malaysian legal framework. The current position, where such a right is implied through judicial interpretation of Article 5(1), is inherently fragile, incomplete, and raises various issues as outlined below.

First, the reliance on implication leaves environmental protection vulnerable to shifting judicial attitudes. As the legal cases discussed above demonstrate, the recognition of environmental rights under Article 5(1) is the product of an expansive and purposive interpretive approach. However, this approach is not settled. In the absence of an express provision in the Federal Constitution, there is no guarantee that future courts will maintain, let alone develop, this broader understanding of the existence of such right implicit in Article 5(1).

Secondly, the lack of a clearly articulated constitutional right allows environmental protection to be treated as subordinate to competing policy considerations, most notably economic development. Within a purely statutory or policy-driven framework, environmental concerns are often balanced against and frequently outweighed by short-term economic priorities. Without a constitutional recognition of the right, there is no principled baseline against which such trade-offs are to be assessed. An express right would recalibrate this balance by requiring that environmental protection be treated as a fundamental consideration for governmental policy-making and actions.

Thirdly, this lacuna undermines Malaysia's ability to effectively discharge its obligations under international and regional law. As outlined earlier, developments at the level of the ICJ, the UNGA, and ASEAN reflect a converging expectation that states will recognise and give effect to environmental rights within their domestic legal systems. The absence of an express constitutional right places Malaysia at risk of normative misalignment, where its domestic legal framework does not adequately reflect the standards it has endorsed at the international and regional levels. This, in turn, may weaken the coherence and credibility of Malaysia's legal position in cross-border and transnational environmental matters.

Fourthly, an express recognition of the right would provide a unifying interpretive principle across the fragmented body of environmental legislations. Statutes such as the Environmental Quality Act 1974, the National Forestry Act 1984, and the Wildlife Conservation Act 2010 currently operate separately. An express constitutional right would enable courts to interpret these statutes coherently, guided by a common objective of safeguarding environmental integrity. This would reduce inconsistencies and ensure that legislative provisions are construed in a manner that advances, rather than undermines, environmental protection.

Fifthly, constitutional recognition would strengthen the standards of judicial review in environmental-related cases. Courts would be empowered to evaluate whether state action substantively complies with constitutional environmental obligations. This would enable a more rigorous form of review, particularly in cases involving large-scale or irreversible environmental harm.

Lastly, an express constitutional right would impose positive obligations on the federal and state governments. Environmental protection would cease to be merely a matter of restraint (i.e., avoiding harm), and would instead require proactive measures to protect ecosystems, preserve biodiversity, and address climate change. This aligns with emerging international norms, which increasingly recognise that states must take active steps to prevent environmental degradation and ensure ecological sustainability.

Taken together, these considerations demonstrate that the absence of an express constitutional right is a deficiency with real legal and practical consequences. It leaves environmental protection uncertain and misaligned with international norms.

DOMESTIC LEGISLATIVE REFORM: CONSTITUTIONAL AND STATUTORY PATHWAYS

The most direct and principled approach is to amend the Federal Constitution to expressly recognise that every person has the right to a safe, clean, healthy, and sustainable environment. Such an amendment would bring Malaysia into alignment with a growing number of jurisdictions that have constitutionalised environmental rights, and would give clear and unequivocal expression to a principle that Malaysian courts have already begun to recognise.

However, constitutional reform—while necessary—may not be immediate. Pending such reform, Malaysia must at minimum take steps to incorporate this right within its legislative framework, particularly through the anticipated National Climate Change Bill. This presents a critical opportunity to embed environmental rights within primary legislation, thereby establishing a rights-based foundation for climate governance.

In parallel, there must be a systematic review and recalibration of existing environmental statutes to ensure consistency with a rights-based approach. This includes, but is not limited to the Environmental Quality Act 1974; National Forestry Act 1984;

Wildlife Conservation Act 2010; Town and Country Planning Act; and other relevant state enactments. Such a review should not be limited to technical amendments. It must be guided by the objective of transitioning from a purely regulatory model to a rights-based framework, where environmental protection is not merely permitted or managed, but required and enforceable.

Ultimately, while statutory reform can mitigate some of the deficiencies in the current framework, it cannot substitute for constitutional recognition. Legislation remains subject to amendment, repeal, and political compromise. Only a constitutional right can provide the permanence, clarity, and normative force necessary to ensure that environmental protection is treated as a fundamental and enduring legal obligation.

CONCLUSION

At the international level, the recognition of a right to a clean, healthy, and sustainable environment has moved decisively from aspiration to normative expectation, as reflected in the pronouncements of the ICJ, the UNGA, and regional developments within ASEAN. These developments establish not only that such a right exists in principle, but that states are increasingly expected to give it meaningful effect within their domestic legal systems. At the domestic level, through decisions such as *Tan Tek Seng, Raub Australian Gold Mining Sdn Bhd v Hue Shieh Lee* [2016] MLJU 1781, and *Public Prosecutor (Sarawak Forestry Corporation) v Toh Tung Kit @ Tou Tung Kit* [2022] MLJU 2819, the judiciary has already recognised implicitly that environmental protection is intrinsic to the constitutional guarantee of life under Article 5(1). Extra-judicial statements from the apex court further affirm that this right is both conceptually embedded within the Constitution and normatively necessary. Yet, it leaves room for argument that the right is unentrenched in our Federal Constitution as it is dependent on judicial interpretation. The consequence is a legal dissonance, where Malaysia has, on the one hand, aligned itself with international and regional developments recognising environmental rights; on the other, its domestic legal framework has yet to recognise the same. The central thesis of this article is that this gap must now be resolved. The question is no longer whether a right to a clean and healthy environment can be recognised within Malaysian law. The question is whether that recognition will remain implicit, or whether it will be given clear and durable constitutional expression. In this regard, an express right would consolidate existing jurisprudence, align Malaysia with the trajectory of international law, and provide a coherent normative foundation for environmental governance domestically. It would transform environmental protection from a matter of policy and regulation into a matter of constitutional obligation that binds all branches of government and endures beyond shifting political and economic priorities. More fundamentally, constitutional recognition is about safeguarding the conditions necessary for human life itself. As the courts have already acknowledged, human beings do not exist in a vacuum; our survival depends on a functioning and balanced ecosystem. To recognise a right to life, while failing to protect the environment that sustains it, is to render that right incomplete.

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