

# Environmental Federalism and Land Development in Malaysia: Constitutional Tensions and Lessons From Kajing Tubek

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## Abstract

This article examines the constitutional tensions between federal environmental regulation and state authority over land development within the Malaysian federal system. Although land and natural resources are constitutionally placed under state jurisdiction pursuant to Article 74(2) and the State List of the Ninth Schedule of the Federal Constitution, the expansion of federal environmental legislation, particularly through the Environmental Quality Act 1974 (Act 127), has increasingly blurred the boundaries of legislative and executive competence. The problem addressed in this study concerns the absence of a clear constitutional allocation of environmental powers and the resulting conflict between federal supremacy and state autonomy, especially in relation to Environmental Impact Assessment (EIA) requirements imposed on land-based development projects. Accordingly, the objectives of this study are threefold: first, to examine the constitutional framework governing the division of powers relating to land development and environmental regulation in Malaysia; second, to analyse the judicial reasoning in *Director General of Environment & Anor v. Kajing Tubek & Ors* [1997] 3 MLJ 23 and its implications for Malaysian federalism; and third, to evaluate whether Malaysia's existing constitutional arrangement reflects a coherent model of cooperative environmental federalism through comparative analysis with India, Canada, and Australia. This study adopts a qualitative doctrinal legal methodology based on the analysis of primary legal sources, including the Federal Constitution, the Environmental Quality Act 1974, and relevant judicial authorities. The doctrinal analysis is supplemented by comparative and critical legal approaches to assess the evolving relationship between federal and state powers in environmental governance. The findings demonstrate that Malaysian courts have generally adopted a purposive interpretation favouring federal environmental regulation, thereby legitimising an incremental expansion of federal authority into areas traditionally reserved for states, particularly land and natural resources. The Kajing Tubek decision illustrates how environmental governance has been judicially framed as a matter of national concern, notwithstanding the constitutional protection of state autonomy and

residual powers under Article 77. Comparative analysis further reveals that other federations have developed clearer constitutional or judicial mechanisms for balancing environmental protection with regional autonomy. The article concludes that Malaysia requires a more principled framework of cooperative environmental federalism through constitutional clarification, judicial development, and intergovernmental coordination to reconcile environmental sustainability with the federal balance established under the Constitution

**Keywords:** Federal Constitution, Environmental Regulation, Federalism, Land Development, Kajing Tubek

### **Introduction**

Malaysia's federal structure, as enshrined in the Federal Constitution, is founded upon a carefully balanced distribution of legislative and executive powers between the federal and state governments (Federal Constitution of Malaysia, art. 74). This constitutional arrangement emerged from the historical compromise reached during the drafting of the Constitution, whereby the Federation was entrusted with matters of national importance such as defense, external affairs, finance, and internal security, while the states retained authority over matters closely associated with local identity and administration, including land, forestry, religion, and local government (Simandjuntak, 1969; Hussain, 1988). Federalism in Malaysia was therefore intended to preserve state autonomy while maintaining national unity, consistent with classical federalist principles articulated by Wheare (1964) and Watts (1966), both of whom emphasized the need to reconcile diversity with effective central governance within a federation (Watts, 2008).

Among the most constitutionally significant aspects of this arrangement is the allocation of powers over land and natural resources. Article 74(2) of the Federal Constitution, read together with Item 2 of the State List in the Ninth Schedule, expressly confers legislative authority over land and land development upon the states, a position reinforced by Article 80(2), which vests executive authority over such matters in the respective State Governments. Historically, land has occupied a uniquely sensitive position within the Malaysian constitutional order. Prior to independence, control over land was regarded as an essential attribute of the sovereignty of the Malay rulers, and even during the colonial period, the states retained substantial authority over land administration (Abdul Aziz, 2003). This constitutional allocation remains a cornerstone of Malaysian federalism, particularly in Sabah and Sarawak, where additional constitutional safeguards were negotiated under the Malaysia Agreement 1963 to protect native land rights and state control over natural resources (Faruqi, 2008; Wee Chong Hui, 2023).

However, the growing prominence of environmental protection and sustainable development during the late twentieth century has significantly complicated this constitutional division of powers. With the enactment of the Environmental Quality Act 1974 (EQA 1974), Parliament established a federal framework for environmental governance, justified primarily on grounds of pollution control, public health, industrial regulation, and international obligations (Sharom, 2008). The EQA 1974 empowers federal authorities, particularly the Department of Environment, to regulate activities that may adversely affect the environment, including activities directly related to land use, forestry, mining, and natural resource exploitation. These developments have generated increasing constitutional uncertainty concerning the relationship between federal environmental regulation and the

states' constitutionally protected authority over land and natural resources (Penang Institute, 2025).

### *Problem Statement and Rationale of the Study*

Despite the constitutional allocation of land and natural resources to the states under the Ninth Schedule of the Federal Constitution, the expansion of federal environmental regulation has increasingly blurred the boundaries of legislative and executive competence in Malaysia. In practice, large-scale development projects such as hydroelectric dams, logging concessions, mining operations, and plantation schemes frequently require approvals from both state land authorities and federal environmental agencies. This overlapping regulatory framework has generated persistent constitutional tensions, particularly where federal environmental requirements appear to restrict or condition the exercise of state powers over land development and natural resources (K. F. Sulaiman et al., 2025).

The constitutional uncertainty is further complicated by the absence of "environment" as an expressly enumerated subject within any of the three legislative lists under the Ninth Schedule. Unlike jurisdictions such as India, where environmental protection has been constitutionally incorporated into a framework of shared legislative competence, Malaysia lacks a clear constitutional allocation of environmental authority. Consequently, federal intervention through the Environmental Quality Act 1974, particularly through Environmental Impact Assessment (EIA) requirements under section 34A, raises unresolved constitutional questions regarding the extent to which Parliament may regulate activities intrinsically connected to land, forestry, rivers, and natural resources that constitutionally fall within state jurisdiction.

This constitutional ambiguity carries important legal, political, and practical implications. States, particularly Sabah and Sarawak, have consistently regarded control over land and natural resources as fundamental components of state autonomy and the federal bargain embodied in the Malaysia Agreement 1963. Federal environmental regulation, while intended to ensure minimum national standards and promote sustainable development, is therefore sometimes perceived as an indirect encroachment upon constitutionally protected state powers (Wee Chong Hui, 2023). The issue becomes especially contentious when federal regulatory mechanisms affect indigenous customary lands and development policies administered at the state level.

Although previous studies have examined environmental governance, sustainable development, and indigenous rights in Malaysia, comparatively limited scholarly attention has been devoted to the constitutional dimensions of environmental federalism and the judicial expansion of federal authority through environmental legislation. Existing literature frequently approaches environmental regulation from administrative or policy perspectives without critically examining how judicial interpretation has reshaped the constitutional balance between federal supremacy and state autonomy. In particular, insufficient attention has been given to the constitutional implications of the Court of Appeal's reasoning in *Director General of Environment & Anor v. Kajing Tubek & Ors* [1997] 3 MLJ 23 and its broader implications for Malaysian federalism.

Accordingly, this study seeks to address this gap by critically examining the constitutional tensions arising from the interaction between federal environmental regulation and state control over land development in Malaysia. By analysing constitutional provisions, statutory frameworks, and judicial decisions, particularly the *Kajing Tubek* case, this article evaluates whether the existing legal framework reflects a coherent model of cooperative federalism or whether it has contributed to an incremental centralization of power in favour of the Federation. The study further situates Malaysia's experience within comparative federal systems to identify possible constitutional and institutional reforms capable of balancing environmental protection with state autonomy.

One of the clearest manifestations of these constitutional tensions arises in the context of Environmental Impact Assessments (EIAs). Introduced through section 34A of the EQA 1974, inserted by the Environmental Quality (Amendment) Act 1996 (Act A953), EIAs require federal approval before certain prescribed activities—often involving land clearing, logging, mining, plantation development, or dam construction—may proceed (Environmental Quality (Prescribed Activities) (Environmental Impact Assessment) Order 1987; Environmental Quality (Prescribed Activities) (Environmental Impact Assessment) Order 2015). While this mechanism serves the important objective of promoting sustainable development and environmental accountability, it frequently overlaps with state jurisdiction because the states retain constitutional authority over land, forests, and watercourses under the State List of the Ninth Schedule (Federal Constitution of Malaysia, Ninth Schedule, List II). This overlap has generated continuing friction between the federal government's pursuit of uniform environmental standards and the states' constitutional rights to regulate land and natural resources within their territories (Hussain, 1988; Faruqi, 2008).

A landmark judicial exposition of this constitutional tension is found in *Director General of the Department of Environment & Another v. Kajing Tubek & Others* (1997). The case arose from the Bakun Hydroelectric Project in Sarawak and brought into sharp focus the conflict between federal environmental regulation and state authority over land and natural resources. Indigenous respondents challenged the validity of federal EIA procedures on the basis that the project, located entirely within Sarawak and involving state land and rivers, fell exclusively within the jurisdiction of the Sarawak Natural Resources and Environment Ordinance. The Federal Government, however, maintained that the EQA 1974 applied uniformly throughout Malaysia, including Sarawak. The litigation consequently became a constitutional battleground for determining the limits of federal and state authority in environmental governance (Abdul Aziz, 2003; Faruqi, 2008; Aziz, 2011).

This constitutional contest reflects a broader doctrinal ambiguity within the Malaysian federal framework. Since "environment" is not expressly enumerated in the Ninth Schedule, questions continue to arise as to whether environmental regulation falls within residual state powers under Article 77 or may instead be justified incidentally under federal legislative authority relating to public health, trade, industry, and international obligations (Federal Constitution of Malaysia, arts. 74–77). Malaysian courts have generally adopted a purposive approach favouring federal competence in environmental matters, though critics argue that such interpretations risk weakening the constitutional autonomy of the states and undermining the original federal bargain (Sharom, 2008; Abdul Aziz, 2003; Kerajaan Malaysia v Tay Chai Huat, 2012).

The tensions experienced in Malaysia mirror broader debates within other federal systems. In India, environmental protection has been constitutionally reinforced through Article 48A and Article 51A(g), thereby providing the central government with a firm constitutional basis for environmental legislation and judicial intervention (*Vellore Citizens' Welfare Forum v. Union of India*, 1996). Similarly, in Canada, environmental regulation is treated as an area of shared jurisdiction, with the Supreme Court recognizing federal authority to establish minimum national standards where issues of national concern arise, as illustrated in *References re Greenhouse Gas Pollution Pricing Act* (2021). These comparative experiences demonstrate that environmental governance within federal systems often requires mechanisms of cooperative federalism capable of reconciling national environmental objectives with regional autonomy.

Against this backdrop, this article argues that while federal intervention in environmental matters may be justified by national interests and international obligations, such intervention must nevertheless remain consistent with the constitutional structure of Malaysian federalism and the autonomy guaranteed to the states. Through doctrinal analysis and comparative perspectives, the article advocates the development of a principled framework of cooperative environmental federalism capable of balancing environmental sustainability, constitutional integrity, and the protection of indigenous and state interests.

Accordingly, this article pursues three main objectives. First, it examines the constitutional framework governing the division of powers relating to land development and environmental regulation in Malaysia. Second, it analyses the judicial reasoning in *Director General of Environment & Anor v. Kajing Tubek & Ors* [1997] 3 MLJ 23 and its implications for Malaysian federalism. Third, it evaluates whether Malaysia's existing constitutional arrangement reflects a coherent model of cooperative environmental federalism by drawing comparative lessons from other federal jurisdictions such as India, Canada, and Australia.

### **Methodology**

This study employs a qualitative doctrinal legal approach, emphasizing analysis of constitutional provisions, federal statutes, and relevant case law. Primary sources include the Federal Constitution of Malaysia, the EQA 1974, and judicial decisions such as *Kajing Tubek and City Council of Georgetown v Government of the State of Penang* (1967). The study also considers academic literature to contextualize the evolving federal-state dynamics. This doctrinal research is supplemented by a critical legal analysis to explore the broader constitutional implications of federal encroachment on land matters.

### **Results**

#### *Constitutional Framework and Division of Powers*

The Federal Constitution of Malaysia establishes a federal system of government that divides legislative and executive authority between the federal and state governments. This structure is laid out in detail in Articles 74 to 80, supported by the Ninth Schedule, which contains the Federal List, State List, and Concurrent List of legislative subjects. The design reflects an intentional distribution of powers: the Federal List covers matters of national concern such as defense, foreign affairs, finance, and internal security, while the State List preserves local autonomy over land, forestry, religion, and local government. The Concurrent List represents

a shared domain, including subjects such as health, education, and social welfare (Federal Constitution of Malaysia, Ninth Schedule).

#### *Historical Underpinnings of Federalism in Malaysia*

Malaysia's federal model evolved from the Federation of Malaya Agreement of 1948 and was shaped by the recommendations of the Reid Commission during the drafting of the 1957 Constitution. The framers were influenced by classical federalist theory, where federalism requires both division of powers and constitutional supremacy, ensuring neither level of government can unilaterally encroach upon the other's sphere. Livingstone (1974) emphasized that federations are dynamic, requiring constant adjustment to political, social, and economic realities. In Malaysia, this dynamism has been visible in the evolving tension between federal authority and state autonomy, especially over land and natural resources (Simandjuntak, 1969; Hussain, 1988).

The inclusion of Sabah and Sarawak in 1963 further reinforced the federal nature of the Constitution. Both states negotiated special constitutional safeguards, including control over land, forests, and immigration (Malaysia Agreement 1963; Faruqi, 2008). These safeguards highlight the centrality of land and natural resources in the federal bargain, making environmental regulation particularly sensitive in East Malaysia.

#### *Division of Legislative Powers*

Article 74 is the foundation of legislative competence. Under Article 74(1), Parliament may make laws with respect to matters in the Federal List and Concurrent List. Article 74(2) provides that State Legislative Assemblies may make laws for matters in the State List or Concurrent List. Item 2 of the State List explicitly includes land tenure, landlord-tenant relations, land development, land conservation, mining rights, Malay Reserve Land, and native reserves in Sabah and Sarawak. This provision confirms that land governance—including development and conservation—is a matter of exclusive state jurisdiction, except in the Federal Territories.

However, Parliament retains a conditional power to legislate on State List matters under Article 76. Specifically, Article 76(1) authorizes federal legislation on State List subjects for the purpose of implementing international obligations, promoting uniformity of law, or at the request of a State Legislative Assembly. Article 76(4) clarifies that laws made under Article 76 do not strip states of their executive authority unless expressly accepted by state resolution. This mechanism allows limited federal intrusion but preserves the principle of state autonomy.

The Federal Court in *East Union (Malaya) Sdn Bhd v. Government of Johore & Government of Malaysia* (1980) emphasized that Article 76(4) must be interpreted strictly. The court ruled that Parliament may legislate on matters in the State List only to achieve uniformity of law and policy, and any deviation from this purpose would be unconstitutional. This decision underscores the constitutional safeguard against arbitrary federal encroachment on state powers.

### *Federal Supremacy and Article 75*

While states enjoy autonomy over matters in the State List, Article 75 introduces a supremacy clause: where a state law conflicts with a federal law on the same subject, the federal law prevails, provided Parliament has legislative competence. This clause strengthens federal dominance but is limited by the constitutional allocation of powers. Parliament cannot legislate on matters constitutionally reserved for states unless justified under Article 76. This delicate balance illustrates what Wheare (1964) described as the “federal principle,” where both central and state governments are co-ordinate and independent within their respective spheres.

The courts have generally supported federal supremacy in cases of conflict. In *City Council of Georgetown v. Government of the State of Penang* (1967), the Federal Court held that local government powers must be exercised consistently with federal law, highlighting the extent to which federal authority can override state legislation. However, this supremacy operates only where Parliament is constitutionally empowered to legislate in the first place. Where Parliament acts ultra vires by intruding into the State List without justification, such laws risk being declared unconstitutional.

### *Residual Powers of the States*

Article 77 of the Federal Constitution provides that residual legislative powers—those not enumerated in the Federal, State, or Concurrent Lists—belong to the states. This allocation departs from federations such as Canada, where residual powers belong to the central government (Strong, 1966). The rationale was explained in the Reid Commission Report, which emphasized the importance of preserving state sovereignty over unforeseen matters (Abdul Aziz, 2003). The Commission noted that if a subject could not be categorized within any of the legislative lists, it would automatically fall under state jurisdiction (Reid Commission Report, 1957, art. 121).

The residual powers clause has particular significance in environmental matters. Since “environment” is not mentioned in any list, states may claim exclusive competence under Article 77. However, federal legislation such as the EQA 1974 has occupied much of this field, raising questions of constitutional overreach (Sharom, 2008). The judiciary has not squarely resolved this ambiguity, but cases such as *Kajing Tubek* (1997) demonstrate the judiciary’s tendency to uphold federal regulation where environmental issues intersect with matters of national concern.

### *Executive Powers of Government*

Article 80 mirrors the legislative division by allocating executive powers. The federal government exercises executive authority over matters in the Federal List, while states exercise executive authority over matters in the State List. In practice, however, federal agencies frequently engage in areas touching upon state jurisdiction, especially where cooperative schemes or shared funding are involved. For example, under Article 80(3), federal officers may assist in the administration of state matters, provided agreements are reached on financial arrangements. This framework resembles what Watts (1966) described as “executive federalism,” where federal and state governments share implementation responsibilities, often requiring negotiation and cooperation. Yet in Malaysia, as Faruqi

(2008) observes, federal dominance in administrative capacity often tilts the balance, leaving states with limited practical autonomy despite constitutional guarantees.

### *Constitutional Tensions in Practice*

The division of powers, though clearly delineated in text, has led to persistent disputes in practice. Land development projects, particularly those involving logging, mining, or dam construction, are often regulated simultaneously by state laws on land and by federal laws on environmental quality (Abdul Aziz, 2003; Sharom, 2008). This overlap creates uncertainty for developers, indigenous communities, and government agencies alike. For instance, in *Tenggara Gugusan Holidays Sdn Bhd v. Public Prosecutor* (2006), the High Court upheld the conviction of a developer for commencing a project without EIA approval under section 34A of the EQA 1974. The case affirmed that federal environmental requirements apply to private actors irrespective of state land ownership. However, it left unresolved the broader constitutional question of whether such federal requirements encroach upon exclusive state powers. Similarly, in *Kajing Tubek* (1997), the Court of Appeal upheld the applicability of the EQA 1974 to the Bakun Hydroelectric Project in Sarawak, reasoning that environmental regulation could not be confined within state boundaries. Critics argue that such reasoning undermines Article 77 and erodes state autonomy (Hussain, 1988; Faruqi, 2008).

### *Comparative Perspectives*

Comparative federal experiences provide useful insights into Malaysia's constitutional framework. In India, the environment has been explicitly incorporated into the Constitution, enabling Parliament to legislate centrally on environmental protection (*Vellore Citizens' Welfare Forum v. Union of India*, 1996). The Indian judiciary has reinforced central authority by elevating environmental principles such as sustainable development and intergenerational equity to constitutional norms. In Canada, environmental regulation is treated as a matter of shared jurisdiction. The Supreme Court has recognized overlapping competences, permitting both federal and provincial governments to legislate depending on the subject matter (*Friends of the Oldman River Society v. Canada*, 1992). In *References re Greenhouse Gas Pollution Pricing Act* (2021), the Court upheld federal carbon pricing legislation under the "national concern" doctrine, affirming federal competence in matters of transboundary environmental significance. These comparative examples highlight the fluidity of environmental federalism and underscore the need for Malaysia to develop its own principled doctrine to manage federal-state tensions. Without such clarity, disputes over land and environmental regulation will continue to destabilize intergovernmental relations and undermine policy effectiveness (Sharom, 2008; Faruqi, 2008).

## **Environmental Quality Act 1974 and Federal Encroachment**

### *Legislative Background of the EQA 1974*

The EQA 1974 represents Parliament's first comprehensive effort to legislate on environmental matters in Malaysia. The Act was enacted in the wake of increasing industrialization and growing public awareness of pollution and environmental degradation in the early 1970s (Sharom, 2008). Its Long Title declares its objective "to prevent, abate, control pollution and to enhance the environment," framing it as a public health and quality-of-life measure rather than as an encroachment upon land regulation.

Initially, the Act's provisions were directed toward regulating pollutants, licensing emissions, and establishing mechanisms for waste management (Faruqi, 2008). Its focus was primarily preventive, granting the Director General of Environmental Quality (DG) broad powers to impose conditions on industries, regulate emissions, and respond to incidents of environmental harm (EQA 1974, ss. 21–24). At this stage, federal encroachment into state jurisdiction was relatively limited, as pollution control could be justified under federal competencies in public health and industry (Federal Constitution of Malaysia, Ninth Schedule, List I).

However, as amendments expanded the Act's scope, especially with the insertion of section 34A through the Environmental Quality (Amendment) Act 1996 (Act A953), the balance of power began to shift. Section 34A introduced Environmental Impact Assessments (EIAs), making federal approval mandatory for certain prescribed activities that could significantly affect the environment. Unlike earlier provisions targeting pollution, EIAs encompass land development projects such as logging, agriculture, aquaculture, and dam construction (EQA 1974, s. 34A; Environmental Quality (Prescribed Activities) (Environmental Impact Assessment) Order 1987; Environmental Quality (Prescribed Activities) (Environmental Impact Assessment) Order 2015). This shift brought the Act directly into conflict with state jurisdiction over land and natural resources.

#### *Environmental Impact Assessments and Federal Authority*

Section 34A requires that an EIA be prepared by a qualified person for any prescribed activity, and that the report be submitted to and approved by the DG before the activity commences. Non-compliance is a criminal offence punishable by fines, imprisonment, or both. The Minister is empowered to prescribe activities requiring EIAs, leading to the enactment of subsidiary legislation such as the EIA 1987 and its replacement, the EIA 2015.

The EIA orders list a wide range of activities. Under the EIA 2015, First Schedule activities include land development schemes exceeding 500 hectares, aquaculture involving 50 hectares or more, and man-made lakes exceeding 200 hectares. Second Schedule activities, which require public participation, include large-scale agriculture exceeding 500 hectares, conversion of forests to other uses, mining in environmentally sensitive areas, and dam construction exceeding 15 meters in height. Many of these activities are inherently tied to state matters such as land, agriculture, and forestry.

This raises the constitutional question: can Parliament, under the guise of regulating pollution, impose federal approval requirements on land development activities falling squarely within state jurisdiction? Sharom (2008) and Abdul Aziz (2003) argue that such measures amount to indirect federal encroachment. Faruqi (2008), however, notes that environmental concerns often transcend state boundaries, making some degree of federal oversight inevitable.

#### *Judicial Treatment of Section 34A*

The judiciary has upheld the enforceability of section 34A, though without fully resolving the constitutional tension. In *Tenggara Gugusan Holidays Sdn Bhd v. Public Prosecutor* (2006), the High Court affirmed the conviction of a developer who commenced a tourism project without EIA approval. The court held that liability under section 34A attaches to "any person"

undertaking a prescribed activity, regardless of land ownership or the state's position. The judgment underscored the strict liability nature of EIA compliance, reinforcing federal control over development projects.

In *Kajing Tubek* (1997), the Court of Appeal upheld the applicability of the EQA 1974 to the Bakun Hydroelectric Project in Sarawak, even though the project involved state land and was authorized under state laws. The court reasoned that environmental protection, while not explicitly enumerated in the Federal List, could be justified as incidental to federal powers in public health, industry, and international obligations. This reasoning effectively legitimized federal encroachment, though critics argue it weakens Article 77, which grants residual powers to the states (Abdul Aziz, 2003; Hussain, 1988).

### *Constitutional Concerns*

The constitutional concerns surrounding section 34A and its subsidiary orders can be analysed under three main provisions. First, Article 74(2)-Exclusive State Powers over Land. Land, forestry, and natural resources are explicitly assigned to the State List. Federal EIAs covering such activities appear to intrude directly into state jurisdiction; secondly, Article 76(1)-Federal Power to Legislate on State Matters. Federal encroachment may be justified where uniformity of law is required or where Malaysia's international obligations demand federal action. However, in practice, Parliament has often legislated unilaterally, without seeking state resolutions as required under Article 76(1)(c); and thirdly, Article 77-Residual Powers of the States. Since "environment" is not listed, residual power arguably belongs to the states. Yet federal courts have interpreted environmental regulation as incidental to federal subjects, eroding Article 77's relevance (Faruqi, 2008).

This doctrinal ambiguity has led to calls for clearer constitutional delineation. Abdul Aziz (2003) suggests that Malaysia should explicitly allocate environmental matters either to the Concurrent List or create a new "Environment List," as India did by inserting environmental provisions into its Constitution.

### *Comparative Federalism and Environmental Regulation*

Comparative perspectives shed light on Malaysia's challenges. In India, the Supreme Court has consistently upheld central authority in environmental governance. The landmark case of *Vellore Citizens' Welfare Forum v. Union of India* (1996) recognized the precautionary and polluter pays principles as part of Indian environmental law, binding on all states. The constitutional insertion of Articles 48A and 51A(g) explicitly empowers Parliament to legislate on environmental protection, eliminating ambiguity.

In Canada, environmental regulation is treated as a shared jurisdiction, with both federal and provincial governments competent to legislate depending on the subject matter. In *Friends of the Oldman River Society v. Canada (Minister of Transport)* (1992), the Supreme Court held that EIAs could be mandated under federal jurisdiction over fisheries and navigation, despite overlapping with provincial land powers. More recently, in *References re Greenhouse Gas Pollution Pricing Act* (2021), the Court upheld federal carbon pricing under the "national concern" doctrine, affirming federal competence in matters of national and transboundary significance.

Malaysia lacks equivalent constitutional or judicial doctrines. The courts have not articulated a “national concern” doctrine or cooperative federalism framework, leaving the division of powers unsettled. This vacuum exacerbates tensions between federal authority and state autonomy, especially in resource-rich states such as Sarawak and Sabah (Hussain, 1988; Sharom, 2008).

#### *Policy and Governance Implications*

The federal encroachment through Act 127 has practical implications for governance and development. Developers face overlapping regulatory requirements, needing approvals from both state land authorities and federal environmental agencies. Indigenous communities in Sarawak and Sabah, whose livelihoods depend on customary land, encounter legal uncertainty as federal EIAs impose procedures not always aligned with native land rights (Faruqi, 2008). State governments often perceive federal encroachment as undermining their constitutional autonomy and political bargaining power (Abdul Aziz, 2003).

At the same time, federal oversight is critical for ensuring minimum environmental standards across the country. Without such mechanisms, weaker states may prioritize short-term economic gains over sustainability, creating externalities that harm neighboring states or the nation as a whole. This tension reflects what Watts (1966) called the “federal dilemma”: the need to reconcile state diversity with national unity.

#### *The Way Forward*

Addressing federal encroachment requires both constitutional and institutional reforms. One approach is to explicitly include “environment” in the Concurrent List, thereby recognizing its shared nature. Another is to develop cooperative mechanisms, such as intergovernmental councils on environment, where both federal and state representatives jointly review and approve major projects. Judicial clarification is also essential. The Malaysian courts could adopt principles from comparative federal systems, such as India’s cooperative federalism or Canada’s national concern doctrine, to balance federal and state interests (Vellore Citizens’ Welfare Forum v. Union of India, 1996; References re Greenhouse Gas Pollution Pricing Act, 2021)

### **The Kajing Tubek Case: Facts, Arguments, and Constitutional Implications**

#### *Background and Procedural History*

The *Director General of the Department of Environment & Another v. Kajing Tubek & Others* case (1997) arose from the controversial Bakun Hydroelectric Project in Sarawak. The project, developed by Syarikat Ekran Bhd in the 1990s, involved the construction of one of the world’s largest dams on the Balui River, a tributary of the Rajang River. It required the displacement of thousands of indigenous people, mainly Kayan, Kenyah, and Penan communities, and the flooding of large tracts of native customary land (Faruqi, 2008).

The respondents—Kajing Tubek and others—were indigenous villagers directly affected by the project. They sought judicial review in the High Court, challenging the validity of the Environmental Quality (Prescribed Activities) (Environmental Impact Assessment) (Amendment) Order 1995 (“Amendment Order”), which had altered EIA requirements for the project. Their central claim was that the project had proceeded without compliance with section 34A of the Environmental Quality Act 1974 (Act 127), particularly the requirement to

prepare and circulate an Environmental Impact Assessment (EIA) report for public participation (Sharom, 2008).

The High Court initially sided with the respondents, granting declarations that the Amendment Order was invalid and that compliance with the EQA 1974 was mandatory before the project could proceed. The court emphasized that procedural safeguards, including public participation, could not be bypassed (Abdul Aziz, 2003). The appellants—including the Director General of Environmental Quality, the Federal Government, the Sarawak State Government, and Syarikat Ekran Bhd—appealed the decision.

On appeal, the Court of Appeal overturned the High Court ruling, upholding the validity of the Amendment Order and the applicability of the EQA 1974 to the project. The decision became a landmark precedent in Malaysian constitutional law, particularly in relation to the division of federal and state powers in environmental governance (Faruqi, 2008).

#### *Respondents' Arguments*

The respondents contended that the Amendment Order could not lawfully exclude the operation of the Environmental Quality (Prescribed Activities) (Environmental Impact Assessment) Order 1987 in Sarawak with retrospective effect. They argued that section 34A of the EQA 1974 did not confer authority for any order made thereunder to operate retrospectively, and that applying the Amendment Order in such a manner was therefore ultra vires the parent statute. In their view, the failure to comply with the procedural safeguards embedded in the 1987 Order, particularly the requirement to prepare and circulate an environmental impact assessment report, amounted to a serious breach of statutory obligations (Sharom, 2008). The respondents further argued that this omission violated principles of natural justice because it denied them the opportunity to be heard on matters directly affecting their lives and livelihoods. As indigenous communities whose ancestral lands were threatened by the Bakun Hydroelectric Project, they asserted that the lack of consultation amounted to a deprivation of property without due process, contrary to Article 13 of the Federal Constitution (Abdul Aziz, 2003). For the respondents, the case was therefore not merely about statutory compliance but also about the protection of constitutional rights and the preservation of fundamental fairness in the regulatory process.

#### *Appellants' Arguments*

The appellants, led by the Federal Government and the Sarawak State Government, advanced several counterarguments. They first contended that although EQA 1974 expressly states that it applies throughout Malaysia, its provisions could not extend to the Bakun Project because the land in question fell under the exclusive jurisdiction of the Sarawak State Government. Under Article 74(2) of the Federal Constitution and the Ninth Schedule, land belongs exclusively to the State List, and the doctrine of enumerated powers confines federal authority to the Federal and Concurrent Lists (Faruqi, 2008). The appellants also emphasized that “environment” is not an enumerated subject in any of the three legislative lists. Rather, it is a multi-dimensional concept linked to land, water, and air. Since the project concerned land and rivers wholly within Sarawak, they argued that the Sarawak Natural Resources and Environment Ordinance, and not the federal EQA 1974, governed the matter (Hussain, 1988). In addition, they submitted that Parliament must be presumed not to have intended to intrude into state legislative powers when enacting EQA 1974. Determining whether the Act

or the Sarawak Ordinance applies, they argued, must depend on the facts of each case, with preference given to state authority in matters relating to land (Abdul Aziz, 2003). Collectively, these arguments framed the case not merely as a matter of statutory compliance but as one concerning constitutional federalism and the boundaries of state autonomy.

### *The Court's Reasoning*

The Court of Appeal adopted a purposive approach, focusing on the broader objectives of environmental regulation rather than a narrow textual interpretation of constitutional powers. It first acknowledged that "environment" is not explicitly enumerated in the Ninth Schedule but reasoned that the absence of a specific entry does not preclude federal competence. Instead, the environment must be understood as a cross-cutting subject that intersects with multiple legislative areas, including public health, industry, and international obligations (*Kajing Tubek*, 1997). The court further held that Parliament could legislate on environmental matters as incidental to its enumerated powers in the Federal List. For example, pollution control is directly linked to public health, while the requirement for environmental impact assessments can be tied to industrial regulation and the implementation of international environmental treaties. In addition, the court emphasized that the EQA 1974 was intended to establish minimum national environmental standards applicable uniformly across all states. Allowing states to opt out of these requirements would undermine the Act's effectiveness, a conclusion reinforced by Article 75, which stipulates that federal law prevails in cases of conflict with state law (Faruqi, 2008). Finally, the court downplayed the respondents' concerns about retrospective application, characterizing the EIA requirements as procedural safeguards designed to ensure environmental protection. As long as the federal framework provided sufficient avenues for oversight, the Amendment Order could not be regarded as invalid (Sharom, 2008)

### *Implications of the Judgment*

The *Kajing Tubek* decision carries significant constitutional and policy implications. Most prominently, it legitimized the expansion of federal power into environmental governance, even in circumstances where the activities in question directly involved land and natural resources that are constitutionally reserved to the states. By construing the environment as an integrated subject that overlaps with federal powers, the Court of Appeal effectively diluted the protection afforded to state residual powers under Article 77 of the Federal Constitution (Abdul Aziz, 2003). This outcome had particular resonance for Sarawak and Sabah, where state autonomy over land and natural resources is not only constitutionally entrenched but also politically sensitive, given the historical assurances provided under the Malaysia Agreement 1963 (Faruqi, 2008).

The judgment also signaled the judiciary's willingness to endorse a model of federal supremacy in environmental regulation. By adopting a purposive approach that prioritized national objectives, the court reinforced the view that environmental protection requires uniform standards across the federation, even at the expense of exclusive state powers. Critics, however, argue that this interpretive choice undermines the federal bargain and weakens the principle of coordinate sovereignty that is supposed to underpin Malaysia's federal structure (Hussain, 1988).

Equally significant was the court's treatment of indigenous rights and participatory claims. The respondents' assertion that the absence of an environmental impact assessment violated their right to be heard was largely dismissed, reflecting a reluctance to integrate procedural fairness and indigenous consultation into constitutional reasoning. Unlike jurisdictions such as Canada, where indigenous consultation has been constitutionally entrenched and judicially enforced (*Friends of the Oldman River Society v. Canada*, 1992; *Haida Nation v. British Columbia*, 2004), Malaysian courts have historically approached such claims through a narrow statutory lens rather than through constitutional principles (Sharom, 2008).

Taken together, these implications suggest that the *Kajing Tubek* case reaffirmed the supremacy of federal environmental law, but at the cost of weakening state autonomy and marginalizing the participatory rights of affected communities. The decision reflects a broader judicial tendency to privilege national policy objectives over explicit constitutional allocations of power, thereby reshaping Malaysia's federal balance in favor of the center.

### *Comparative Lessons*

The decision can be contrasted with federal experiences abroad. In India, the Supreme Court has embraced doctrines such as the precautionary principle and sustainable development, empowering the central government to regulate environmental matters even in state domains (*Vellore Citizens' Welfare Forum v. Union of India*, 1996). In Canada, the courts have upheld federal intervention where environmental issues transcend provincial boundaries, as in *References re Greenhouse Gas Pollution Pricing Act* (2021). Both systems reflect a trend toward cooperative federalism, where environmental protection is treated as a shared responsibility.

Malaysia, however, has not developed equivalent doctrines. Instead, *Kajing Tubek* reflects a pragmatic, purposive judicial approach that privileges federal law without articulating a clear theory of cooperative federalism. This leaves unresolved the structural tension between state autonomy and federal environmental objectives (Faruqi, 2008; Sharom, 2008; Watts, 2008).

### *Critical Evaluation*

Scholars have critiqued the decision on several grounds. Abdul Aziz (2003) argues that the court erred by failing to give full effect to Article 77, which was designed to protect state sovereignty. Sharom (2008) contends that the judgment undermines democratic principles by minimizing public participation in environmental decision-making. Faruqi (2008) highlights the risk of constitutional instability when courts allow purposive interpretations to override explicit constitutional allocations of power.

At the same time, the decision underscores the challenges of modern federalism. As Watts (1966) observed, federal systems must adapt to emerging national and global concerns, and the environment is one such concern. The question is not whether federal involvement is necessary, but how it can be reconciled with state autonomy.

### **Critical Analysis and Comparative Perspectives**

The *Kajing Tubek* decision invites a deeper reflection on the nature of Malaysian federalism and the evolving role of the judiciary in mediating between federal and state powers. The Federal Constitution is designed around a dual sovereignty model, whereby both the federal

and state governments draw their authority directly from the constitutional text. This model presumes a degree of exclusivity in legislative competence, with land, forestry, and local government explicitly reserved to the states under the State List of the Ninth Schedule. Yet, in practice, judicial interpretation has blurred these boundaries, often leaning toward an expansion of federal authority. In *Kajing Tubek*, the purposive interpretation of the EQA 1974 confirmed that environmental regulation could extend into domains traditionally safeguarded as matters of state sovereignty. This outcome reflects what Abdul Aziz (2003) characterizes as a process of judicial centralization, a development at odds with the assurances of autonomy embedded in the Malaysia Agreement 1963 (Wan Arfah Hamzah, 2010). Wheare (1964) long cautioned that federal systems risk instability when central authority expands without clear constitutional checks, and Malaysia provides an illustration of this dynamic.

The absence of “environment” as an enumerated subject in the Ninth Schedule compounds the constitutional uncertainty. While environmental issues were not a priority at the time of drafting, modern realities demand comprehensive approaches that transcend jurisdictional boundaries. Sharom (2008) argues that the very nature of environmental harm—whether in relation to rivers, forests, or air pollution—makes it inherently transboundary, raising questions about whether leaving environmental matters exclusively within state competence is workable. Nonetheless, the judiciary’s endorsement of federal supremacy without simultaneously articulating a principled doctrine of shared jurisdiction risks generating ambiguity and political contestation. Hussain (1988) notes that such ambiguities often fuel tension in federal systems, particularly in resource-rich states like Sarawak, where control over land and natural resources is central to identity and economic development.

The court’s reliance on incidental federal powers to justify environmental legislation further illustrates this shift. While incidental powers are a recognized feature of federalism, their use must remain limited to prevent the hollowing out of state authority (Strong, 1966). Malaysian jurisprudence, however, has tended toward expansive readings, as illustrated in *East Union (Malaya) Sdn Bhd v. Government of Johore & Government of Malaysia* (1980). There, the Federal Court upheld Parliament’s power to legislate for uniformity even on State List matters, provided the stated purpose was harmonization. Extending this logic to environmental regulation risks entrenching what Faruqi (2008) describes as creeping centralization, whereby national policy goals overshadow the federal principle of coordinate autonomy.

Comparative experiences offer useful insights into alternative models (Reference re Securities Act, 2011 SCC 66; *Canadian Western Bank v Alberta*, 2007). In India, the 42nd Constitutional Amendment of 1976 resolved ambiguity by explicitly inserting “environment” into the Concurrent List, thereby giving both central and state governments the authority to legislate. Judicial activism in India has gone further, with the Supreme Court constitutionalizing environmental protection as an aspect of the right to life under Article 21, and introducing doctrines such as the precautionary principle and the polluter pays principle (*Vellore Citizens’ Welfare Forum v. Union of India*, 1996). By contrast, Malaysia’s courts have not recognized environmental protection as a fundamental right, treating it instead as a matter of statutory policy (Sharom, 2008).

In Canada, the judiciary has treated the environment as an area of shared jurisdiction, recognizing that it intersects with federal powers over fisheries, navigation, and criminal law as well as provincial powers over property and natural resources. In *Friends of the Oldman River Society v. Canada (Minister of Transport)* (1992), the Supreme Court held that environmental assessment requirements could fall under federal jurisdiction when linked to federal subjects. More recently, in *References re Greenhouse Gas Pollution Pricing Act* (2021), the court upheld national carbon pricing as a matter of national concern, illustrating how doctrines of cooperative federalism can balance central authority with provincial autonomy. Australia, meanwhile, has adopted a more restrained approach, allowing federal involvement primarily where environmental issues intersect with international treaty obligations, as in the Tasmanian Dam Case (*Commonwealth v. Tasmania*, 1983). Absent such obligations, environmental regulation remains predominantly within state hands, thus preserving a stronger role for state governments compared to the Malaysian model (Zines, 1997).

Scholarly commentary reflects the contested nature of the Malaysian approach. Abdul Aziz (2003) criticizes *Kajing Tubek* for eroding state sovereignty, while Sharom (2008) emphasizes its democratic deficit in sidelining public participation. Faruqi (2008) acknowledges the practical need for federal involvement but warns that doctrinal ambiguity undermines constitutional clarity. Hussain (1988) situates these developments within a broader historical trajectory of central dominance, which has weakened Malaysia's federal bargain. Collectively, these perspectives underline the necessity of reform.

Moving forward, several pathways for reform present themselves. Malaysia could adopt the Indian approach by amending the Constitution to place "environment" in the Concurrent List, thereby clarifying shared jurisdiction. Alternatively, the judiciary could develop doctrines akin to Canada's national concern test, limiting federal intervention to cases where environmental harm clearly transcends state boundaries. A further option is to institutionalize cooperative federalism through intergovernmental agreements, requiring consultation and coordination before federal environmental laws are applied to state matters (Watts, 1966). Without such reforms, conflicts over jurisdiction will persist, particularly in East Malaysia, where sensitivities over land, resources, and indigenous rights remain acute (Simandjuntak, 1969; Penang Institute, 2025).

In sum, the *Kajing Tubek* case underscores the absence of a principled framework for environmental federalism in Malaysia. The judiciary's purposive approach privileged national environmental objectives but did so at the expense of constitutional clarity and state autonomy (*Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat*, 2017). Comparative experiences demonstrate that federal systems can reconcile these competing imperatives through explicit constitutional amendments, judicial doctrines, or intergovernmental cooperation. Unless Malaysia develops a similar framework, federal-state disputes over land development and environmental regulation are likely to recur, threatening both constitutional stability and sustainable governance.

## Conclusion

The *Kajing Tubek* case represents a turning point in Malaysian constitutional law and environmental governance, illustrating the profound tensions between federal supremacy and state autonomy. At its core, the case raised the question of whether Parliament, through

the EQA 1974, could legitimately regulate development projects involving land and natural resources that fall squarely within the State List under the Ninth Schedule of the Federal Constitution. The Court of Appeal's purposive interpretation in favor of federal applicability reveals both the necessity and the risks of centralizing environmental regulation.

From a constitutional perspective, the decision affirmed that federal law may extend to matters indirectly related to environmental protection, even when those matters overlap with state subjects such as land, forestry, and water. This approach effectively widened the scope of federal competence by construing "environment" as an integrated subject that cannot be confined to a single legislative list (Kajing Tubek, 1997). By prioritizing environmental protection as a national concern, the court elevated federal authority at the expense of the clear textual guarantees of state autonomy under Article 77.

This judicial trend toward centralization is consistent with prior cases such as *East Union (Malaya) Sdn Bhd v. Government of Johore & Government of Malaysia* (1980), where the Federal Court upheld Parliament's power to legislate for uniformity across states. However, unlike in *East Union*, where the law's purpose was explicitly harmonization, *Kajing Tubek* went further by endorsing federal control over procedural requirements for land-related development projects. Critics argue this represents a departure from the principle of enumerated powers and undermines the delicate federal balance envisioned at Malaysia's founding (Abdul Aziz, 2003; Hussain, 1988).

Beyond constitutional law, the case has significant implications for environmental governance. By legitimizing federal EIA requirements, the court ensured that minimum environmental standards apply uniformly across Malaysia. This is critical given the transboundary nature of environmental harm (Sharom, 2008). However, uniformity must be balanced against respect for local autonomy, particularly in Sarawak and Sabah, where constitutional safeguards under the Malaysia Agreement 1963 guarantee special control over land and natural resources (Faruqi, 2008). The erosion of these safeguards risks exacerbating political tensions and undermining trust in the federal system.

Comparative perspectives reinforce the complexity of the issue. In India, the insertion of "environment" into the Concurrent List through the 42nd Constitutional Amendment provided a clear constitutional basis for shared jurisdiction, thereby avoiding the ambiguities that plague Malaysia (Indian Constitution, art. 48A; *Vellore Citizens' Welfare Forum v. Union of India*, 1996). In Canada, the Supreme Court has embraced doctrines such as "national concern" to justify federal intervention, while still affirming the principle of cooperative federalism (*Friends of the Oldman River Society v. Canada*, 1992; *References re Greenhouse Gas Pollution Pricing Act*, 2021). Australia similarly allows federal involvement primarily through the external affairs power, particularly when international obligations are at stake (*Commonwealth v. Tasmania*, 1983). These models illustrate that environmental governance in federations often necessitates shared responsibility, but the legal and institutional mechanisms for balancing powers vary.

Malaysia, by contrast, has yet to articulate a coherent doctrine of cooperative environmental federalism. Instead, courts have relied on ad hoc purposive reasoning that privileges federal authority without providing principled limits. This leaves open the risk of constitutional

instability, as states may resist perceived encroachments, particularly when indigenous rights and customary land are implicated (Abdul Aziz, 2003; Sharom, 2008).

The *Kajing Tubek* case also highlights the judiciary's reluctance to engage with issues of participatory rights and indigenous consultation. Unlike Canada, where indigenous consultation is constitutionally entrenched (*Haida Nation v. British Columbia (Minister of Forests)*, 2004), Malaysian courts have largely treated such rights as secondary to statutory compliance. This narrow approach risks marginalizing affected communities and undermines the legitimacy of environmental governance (Sharom, 2008).

Moving forward, three key reforms are necessary. First, Malaysia should consider a constitutional amendment inserting "environment" into the Concurrent List, thereby formally recognizing shared jurisdiction. This would align Malaysia with international practice and provide a clearer legal basis for federal-state collaboration (Faruqi, 2008). Second, the judiciary should develop interpretive doctrines of cooperative federalism, limiting federal intervention to cases where environmental harm clearly transcends state boundaries or implicates national obligations. Such doctrines would preserve state autonomy while ensuring effective national standards (Watts, 1966). Third, Parliament should strengthen mechanisms for intergovernmental consultation, requiring federal-state agreements before applying federal environmental laws to areas like land development. This would institutionalize cooperation and reduce litigation (Livingstone, 1974).

In conclusion, the *Kajing Tubek* case reveals the unresolved constitutional tensions at the heart of Malaysian federalism. While environmental protection demands national coordination, the centralization of power must not come at the expense of state sovereignty and indigenous rights. Achieving balance requires not only judicial prudence but also legislative reform and political commitment to cooperative federalism. Without such reforms, Malaysia risks recurring conflicts that undermine both constitutional stability and environmental sustainability. The challenge, therefore, is to craft a federal framework that protects the environment while honoring the federal bargain—a task that remains urgent in an era of rapid development and ecological crisis (Cheryl Saunders, 1997).

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