

## TOWARDS GOOD WATER GOVERNANCE IN MALAYSIA: ESTABLISHING AN ENABLING LEGAL ENVIRONMENT<sup>1</sup>

by

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*"The water crisis is mainly a crisis of governance."* - Global Water Partnership<sup>2</sup>

This paper is not about water strategies, policies and action plans. There is already an explosion of such material since the World Water Forum<sup>3</sup> came into place. This paper focuses on water governance. Good water governance was identified at the 2nd World Water Forum at The Hague in 2000 as one of the main challenges facing governments in attaining water security.<sup>4</sup> Water governance refers to the range of political, social, economic and administrative systems that are in place to regulate the development and management of water resources and provision of water services at different levels of society.<sup>5</sup> This paper looks at the water question from the angle of state powers. It attempts to address the uneasy balance of powers and control over water in Malaysia's federal set-up.

### **Jurisdiction Over Water: The Constitutional Dimensions**

A constitution allocates powers and sets down principles for the exercise of public powers. There are two dimensions to the allocation of powers under the constitution, one being functional and the other, territorial.<sup>6</sup> The functional dimension is where the constitution identifies bodies with the same territorial sweep but with different powers (e.g. the executive, legislative and judicial powers). The territorial dimension addresses the division of powers between the federal government and the state governments.

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1 Paper presented at the Asia Law Institute (ASLI) Inaugural Conference, 27-28 May 2004 at the National University of Singapore.

2 See "Dialogue on Effective Water Governance: Learning From the Dialogues", 2003, ch.1, available at <http://www.gwp.forum.org>.

3 This is a series of forums proposed and organized together with the World Water Council to support the deepening discussions towards the solution of international water issues in the 21st century. The first forum was held in Morocco in 1997, the second at *The Hague*, Netherlands and the third was held in March 2003 in Kyoto, Japan.

4 Ministerial Declaration of *The Hague* on Water Security in the 21st Century, March 2001, available at <http://www.worldwaterforum.net/>

5 UNDP Water Governance at <http://www.undp.org/water/index.html>, Introduction.

6 Graham, *Regulating Public Utilities: A Constitutional Approach* (Hart Publishing, Oxford-Portland, Oregon, 2000) at 2.

In the issue of water in Malaysia, both dimensions come into play. It is proposed to discuss the territorial dimension first.

*Territorial Dimension*

Malaysia today, has a strong federal government and the constitutional framework fortifies this by allocating the more important powers of government<sup>7</sup> to the federal government in the Federal List.<sup>8</sup> Despite this however, the federal government's hands seem to be tied where water management is concerned. Being a federation<sup>9</sup>, Malaysia's Federal Constitution underlines the division of legislative powers between the federal government and the state governments. When Malaysia's constitution was being drafted 47 years ago, the commission that was set up to draft Malaysia's Federal Constitution (the 'Reid Commission'<sup>10</sup>) had observed in their report that:

"At present, control of inland waters, including all rivers and streams, water supplies and storage is exercised by the States and, *subject to rights of navigation and to special provisions where the interests of two or more States or the interests of the Municipality of Kuala Lumpur are concerned*, we recommend that they should be State subjects." <sup>11</sup>

The Reid Commission however reserved water power (hydroelectric) as a Federal subject as it was viewed as an important area that has still not been developed.

- 7 Examples are external affairs, defence, internal security, the machinery of government, finance, trade, commerce and industry, communications, transport, etc. see the Federal List in the Ninth Schedule to the Federal Constitution.
- 8 One of the terms of reference of the Reid Commission, see below, was "the establishment of a strong central government with the States and Settlements enjoying a measure of autonomy", see Harding, *Law, Government and the Constitution in Malaysia* (Malayan Law Journal Kuala Lumpur, 1996) at 30.
- 9 Federalism implies the existence of co-ordinate sets of government operating at two different levels in two different spheres, see Livingston, *Federalism and Constitutional Change* (Greenwood Press Publishers, 1974) at 10. There are three characteristics of a federation type government. First, the Constitution is the supreme law and overrides all other law. Second, the legislative and executive powers of the federal government and state governments have been clearly demarcated. Third, all conflicts between the federal government and the state government must be decided upon by the Federal Court. See Art. 4(1), Art. 74, 9th Schedule and Article 128. See also Hashim Yeop Sani, *Our Constitution* (Malaysian Law Publishers, 1980) at 159 and R.H. Hickling, *An Introduction to the Federal Constitution* (Malaysian Law Publishers, 1985) at 16.
- 10 This commission that was headed by Lord Reid was appointed by the British government and Malay Rulers in 1956 to study and propose a federal constitution for the Federated Malay States to be implemented upon achieving Independence.
- 11 Para. 102, *Report of the Federation of Malaya Constitutional Commission 1957* (Government Printers, 1957).

Under the Federal Constitution today, water is mentioned, both under the Federal List and the State List.<sup>12</sup> By virtue of Item 11(b) of the Federal List, the federal government has power over: "water supplies, rivers and canals, *except those wholly within one State or regulated by an agreement between all the States concerned*; production, distribution and supply of water power." The effect of this provision is that the federal government's power over water is limited only to water which flows through the boundaries of two states or more. In matters dealing with shared rivers, the Constitution allows the federal government to intervene only when the states cannot agree with one another.<sup>13</sup> Under the State List, the state has power 'subject to the Federal List' over water (including water supplies, rivers and canals); control of silt and riparian rights. Hence, where the water source is wholly within the territory of a state, the state has full powers. The state is also given the power to receive receipts in respect of water supplies, including water rates.<sup>14</sup>

Although having very much to do with water, the constitution treats drainage and irrigation under a separate heading. In view of the importance of developing agriculture and the pivotal role played by irrigation and drainage in this respect, the Reid Commission recommended that it should be held concurrently between the federal and the states. According to the Reid Commission<sup>15</sup>:

"Irrigation and drainage require separate treatment. At present, small works are undertaken by the States, but the States cannot afford to pay for large and expensive schemes, and they do not have either the technical staff to plan them or the heavy plant and equipment necessary to carry them out. They need financial aid from the Federation and technical assistance from the Federal Drainage and Irrigation Department... We recommend that drainage and irrigation should be placed in the Concurrent List of subjects. This will allow the Federation, by Act of Parliament, to assume direct technical and financial responsibility for these matters to such extent as may be enacted, to assume powers necessary to maintain works which they have provided, and to levy rates from those receiving benefit from such works."

Although water as a subject matter is also mentioned in the Federal and Concurrent lists of the Federal Constitution, the balance of powers lean toward the state rather than the federal government. The above demonstrates clearly that in Malaysia, water is substantively within the territorial dimension of the states and the states have paramountcy over water.

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12 See the 9th Schedule of the Federal Constitution where water is in Item 6 of the State List.

13 Salmah Zakaria, "Integrated River Basin Management", paper delivered at a seminar on 'Water Environmental Planning: Technologies of Water Resource Management' at International Islamic University Malaysia in April 2002.

14 Part III of the 10th Schedule, Federal Constitution.

15 Para. 103, n.10 above.

*Functional Dimension*

Article 74 of the Federal Constitution expressly divides the legislative powers of Parliament and the State Legislative Assembly. Parliament may legislate with respect to any matters enumerated in the Federal List and Concurrent List whilst the State Legislative Assembly may legislate on matters under the State List as well as the Concurrent List. Article 80(1) provides for the executive authority of the federation and the states and this is similarly divided according to the respective lists as in Article 74. The federal government cannot exercise executive authority over matters within the Concurrent List unless the laws specifically provide for it.<sup>16</sup> The effect of these constitutional provisions is that Parliament cannot pass any law that touches upon the states' jurisdiction over water and the federal government cannot exercise executive authority over water that comes under state jurisdiction. The states have exclusive legislative authority over water. It can be deduced that the functional dimension of the Federal Constitution favours the states in the allocation of legislative and executive powers over water.

The law also grants ultimate proprietary rights over water to the states. Several legislations provide to the effect that water running through a state belongs to the State Authority. The Waters Act, 1920 stipulates to the effect that the entire property in and control of all rivers in the State is and shall be vested solely in the Ruler of the State.<sup>17</sup> Under the National Land Code 1965, 'land' includes land covered by water and the entire property in all State land is vested solely in the State Authority.<sup>18</sup>

**Present Federal Role in Water Resources Management**

Although Parliament may not legislate on water, there are several federal Acts of Parliament that indirectly concern water. These statutes deal with matters that are within the Concurrent List like town planning<sup>19</sup> and drainage and irrigation<sup>20</sup>; as well as matters that are in the Federal List like fisheries<sup>21</sup>, public health<sup>22</sup>, sanitation<sup>23</sup> and the prevention of diseases, transport<sup>24</sup> and trade<sup>25</sup> and industry. There are also federal statutes on land<sup>26</sup> and forestry<sup>27</sup> (thus also involving water catchment areas, rivers, etc.) that are matters within the State List but these Acts of Parliament had been

16 See Art. 80(2) Federal Constitution

17 s.3

18 See s.5 and s.40 of the National Land Code 1965. See also the Mining Enactment 1929 and s.12 of the Sarawak Land Ordinance 1958.

19 Street, Drainage and Building Act 1974 (ss.86-90)

20 Irrigation Areas Act 1953

21 Fisheries Act 1985

22 Food Act 1983 (s.34)

23 Environmental Quality Act 1974 (ss.3, 21, 25, 34), Sewerage Services Act 1993 (s.19)

24 Road Transport Act 1987 (ss.2,120)

25 Exclusive Economic Zone Act 1984 (s.2)

26 Land Conservation Act 1960 (ss.3,4,6,8,11), Land Acquisition Act 1960 (s.8), National Land Code 1965

27 National Forestry Act 1984 (s.83(3)(b))

promulgated through the exception under Article 76(4) and 76(1)(b) of the Federal Constitution respectively which makes the achieving of uniformity in laws and policies as an exception to the rule that Parliament may not legislate on state matters.

This means that within the government's administrative machinery, water is not wholly within the exclusive purview of the states. Several ministries and federal departments have been playing an active role in an advisory and supervisory capacity with regard to water resources management. These are the Public Works Department in the Ministry of Public Works, the Department of Environment in the previous Ministry of Science, Technology and Environment<sup>28</sup> and the Ministry of Health. The Public Works Department advises the states on water resources<sup>29</sup> and the Department of Environment advises the states on abstraction limits. The Ministry of Health monitors river water quality at abstraction points and regulates drinking water quality<sup>30</sup>. The Federal Auditor General audits the accounts of the state water supply departments.<sup>31</sup>

The federal government through the Public Works Ministry has also been instrumental in initiating several measures towards improved water governance. Five initiatives have been outlined as follows:<sup>32</sup>

- 1) Establishing the National Water Resources Council
- 2) Preparing a National Water Resources Master Plan Study
- 3) Drafting a National Water Policy
- 4) Establishing A National Water Commission
- 5) The Introduction of the Integrated River Basin Management Concept

Only the first two have been achieved thus far.<sup>33</sup> The third initiative is still at its final draft stage. The federal government through the newly formed Ministry of Energy, Water and Communications is presently entrusted with the task of setting up the proposed commission. The

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28 Since April 2004, the Department of Environment comes under the newly created Ministry of Natural Resources and Environment.

29 This was undertaken by the Water Supply Branch under the PWD but this branch is now put under a new ministry created since April 2004, namely the Ministry of Energy, Water and Communications.

30 There is no legislation concerning the quality of drinking water but the Ministry of Health has issued a National Guidelines for Drinking Water Quality in 1990 where the qualitative standard is not less than the World Health Organisation standard.

31 See State Water Supply Fund (Financial and Accounting Procedure) Act 1980.

32 Keynote address by Works Minister, Dato' S. Samy Vellu at the 'Civil Society Discussion on the Commodification and Privatisation of Water Resources in the WTO Environment' on 8th March 2003.

33 See discussion on the National Water Resources Council below at 11. A National Water Resources Study (2000-2050) was undertaken by SMHB Sdn Bhd in association with Ranhill and Perunding Zaaba in 1998.

challenge is to obtain the cooperation and consensus of state governments and other stakeholders in the water industry. The fifth initiative may only be implemented successfully when the Water Commission has been set up.

### State Water Management: Decentralisation?

The water management set up in the states has always been sectoral based according to domestic use, industrial use, irrigation, fisheries, forestry, recreation, navigation as well as flood control and management. This sectoral approach is further delineated by administrative and political boundaries.<sup>34</sup> Some of the characteristics of this approach are as follows<sup>35</sup>

- i. It is local government or administration area based.
- ii. The approach is mono-functional and fragmented.
- iii. It is heavily subsidized.
- iv. Technical and management practices are outdated.
- v. There is minimal stakeholders' participation.

Some of the negative impacts of this current state of affairs are as follows:<sup>36</sup>

- \* The deterioration of water quality and bio-diversity of flora and fauna;
- \* Frequent floods due to rapid urbanization and development;
- \* The fragmentation of institutions and legislation;
- \* The absence of a dedicated fund for the environmental management of water resources and the river basin.

The existence of multiple legislations applicable to water management in the various states may hamper efforts to implement any holistic national water policy. An enabling legal environment could be created by establishing a central body to suggest the streamlining of state water enactments. The table below shows the respective state water authorities and the legislation applicable in each state.

State	Water Authority	Legislation
Perlis	PWD	Perlis Water Supply Enactment, 1952 <sup>a</sup>

34 Each sector is under the responsibility of different government departments and agencies, e.g irrigation is within the power of the Department of Drainage and Irrigation (DID) whilst fisheries is under the Fisheries Department.

35 Ir. Hj. Rahmat bn Hj. Mohd. Sharif, "Policy and Legislative Development in Water Resources Management Paradigm- A Case Study of Selangor Waters Management Authority (SWMA)", paper presented at a seminar on 'Water Environmental Planning: Technologies of Water Resource Management' at International Islamic University Malaysia in 2002.

36 Above at 14.

Kedah	PWD	Kedah Water Supply Enactment, 1991
Penang	Penang Water Authority	1. Waters Act, 1920 <sup>b</sup> 2. Penang Water Supply Enactment, 1998 <sup>c</sup>
Perak	Perak Water Board	Waters Act, 1920
Selangor	Perbadanan Urus Air Selangor (PUAS)	1. Waters Act, 1920 2. Selangor Water Supply Enactment, 1997 <sup>d</sup>
Negri Sembilan	WSD	1. Waters Act, 1920 2. Negri Sembilan Water Supply Enactment, 1997 <sup>e</sup>
Melaka	Melaka Water Board	Waters Act, 1920
Johor	Syarikat Air Johor	Johor Water Supply Enactment, 1993 <sup>f</sup>
Pahang	WSD	1. Waters Act 1920 2. FMS Water Supply Enactment (Cap.203)
Terengganu	Syarikat Air Terengganu	Terengganu Water Supply Enactment, 1998 <sup>g</sup>
Kelantan	Kelantan Water (M) Sdn. Bhd.	Kelantan Water Supply Enactment 1995 <sup>h</sup>
Sabah	PWD	Sabah Water Supply Ordinance, 1961
Sarawak	1. PWD 2. Kuching Water Board LAKU) 3. Sibu Water Board	Water Supply Ordinance (Cap. 141) 1959
Federal Territory	PWD	1. Waters Act, 1920 2. Water Supply (Federal Territory of Kuala Lumpur) Act, 1998 <sup>i</sup>

a. En.2/1952 (Am: Ord.44/55)

b. Act 418

c. En.3/1998

d. En.1/1997

e. En.6/1997

f. En. No.14/1993

g. En.2/1998

h. En.4/1995

i. Act 581

PWD – Public Works Department

WSD – Water Supply Department

The Waters Act, 1920 is a federal statute passed before the Federal Constitution came into being and regulates states' powers over rivers within their boundaries. It prohibits the obstruction and interference with any river including the felling of trees that may fall into the river and the building of any bridge, jetty or landing stage over or beside any river.<sup>37</sup> The latter is an authorization regime to prohibit indiscriminate construction of waterworks that may affect or interfere with any river or banks thereof and to protect the availability of water to existing waterworks.<sup>38</sup> These acts may however be proceeded with if a license is obtained from the District Officer. The Act also prohibits the diversion of water from rivers from its natural course except under license.<sup>39</sup> There is also provision to prohibit the pollution of rivers except under terms and conditions of a license.<sup>40</sup>

A number of states have revised their water laws<sup>41</sup> to cater for the changing trend towards corporatisation<sup>42</sup> and privatisation<sup>43</sup> of water authorities. The regulating element that can be found in most enactments relate to the licensing function of the state water authority. Under the current state water supply enactments, the State Authority will appoint a Director of Water Supply and other officers to exercise functions and duties, amongst which are<sup>44</sup>:

- i. the issuance of licenses to operate a water supply system including abstraction, treatment, distribution and billings;
- ii. regulating the water supply service including determining performance standards and standards of facilities and services;
- iii. promoting efficiency in water supply;
- iv. ensuring optimum supply of wholesome water at reasonable charges;

37 s.5(1), Waters Act, 1920.

38 See Chiah Bee Peng, *Water Legislation and Administration in Malaysia* (Ministry of Agriculture Malaysia, 1983).

39 s.7, Waters Act, 1920. The license is granted by the District Officer with approval of the State Authority, see sub-section 4.

40 s.8, Waters Act, 1920. License to discharge effluents into a river is granted by the State Secretary, see subsection (5).

41 Except for Perlis, Perak, Pahang, Melaka, Sabah and Sarawak.

42 Under corporatisation, the state water authority is formed as an autonomous commercial enterprise with a board of directors. Assets remain in public ownership. Examples are PUAS (Selangor), SATU (Terengganu) and LAKU (Sarawak).

43 Fully privatized water authorities have moved toward public listing and there are already three in Malaysia, namely, PBA (Penang), SAJ Holdings (Johor) and Air Kelantan (Kelantan).

44 See s.9 of the Penang Water Supply Enactment, 1998.

- v. protecting the interests of the consumers in respect of prices of water supply, continuity of water supply and quality of water and services provided;
- vi. ensuring that licensees are able to finance the activities which they are licensed to do;
- vii. investigating any accident involving any part of the water supply system or services;
- viii. prescribing a code of practice for licensees.

The above demonstrates that the scope of responsibilities of state water authorities are wide-ranging which include planning, financing, development, licensing, operation and maintenance of water supply as well as consumer services.<sup>45</sup> The question is with these regulatory functions already in place at state level, why is there a need to duplicate such regulatory controls at federal level? The case for a federal regulator may be strengthened by referring to the ineffectiveness of the carrying out of state regulatory functions. The wide-ranging responsibilities of state water authorities do not commensurate with their human resources capacity. There is also funding limitation that is further aggravated by inadequate cost recovery as well as increasing costs of operation and maintenance. The contracting out or delegation of these functions and responsibilities cannot be seen as the state's retreat from the regulatory arena as the statutory responsibilities under the state water enactments remain with them. Hence the case for a federal regulator to oversee the successful carrying out of the state regulator's functions is made stronger in the present scenario. Many consumer complaints concerning water supply may also be attributed to the inability of state water authorities to handle these wide range of responsibilities.

Another major predicament in state water management relates to the lack of funds and heavy borrowings from the federal government. States are unable to freely source for independent funding as Article 111 of the Federal Constitution restricts the power of the state to borrow. Generally states may only borrow from the federal government. Other borrowings must receive the approval of the federal government and cannot be for a period of more than five years.<sup>46</sup> To address the above problems and in line with the federal government's privatization program<sup>47</sup>, many states have resorted to privatizing main areas of responsibilities in the water supply process especially treatment works.<sup>48</sup> This move has brought about many objections from consumers as well as several non-governmental

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45 See also the Public Works Department website at <http://www.jkr.gov.my/air/institut.htm>.

46 See *Government of Malaysia v Government of the State of Kelantan* (1968) 1 MLJ 159.

47 Discussed below at, *Towards Federal Control: Centralization ?*.

48 The water supply processes are source works, treatment works, distribution systems, billing and revenue collection. The first privatization was in 1987 in respect of the Semenyih treatment plant in Selangor.

organizations. The main contention is that water should not be treated as a commodity but rather an internationally sanctioned human right.<sup>49</sup> Those who oppose water privatization hold the view that it 'commercializes' water management resulting in increased costs for the sourcing and treatment of water which would ultimately burden the consumers.<sup>50</sup> On the other hand, international industry experts opine that efficient water supply management at the state level requires private sector participation as they are more result oriented and technologically capable.<sup>51</sup> Bodies like the World Bank and the Asian Development Bank also encourages private participation in water development projects citing the inability of governments in under developed countries to fund such projects. The table below demonstrates that there are quite a number of private water companies already operating in Malaysia and that privatization is indeed a growing trend in the water industry:<sup>52</sup>

State	Private Water Company
Kedah	1. Taliworks Consortium 2. Air Utara Sdn. Bhd.
Perak	1. Innovest Lyonnaise Sdn. Bhd. 2. Metropolitan Utility Corporation
Selangor	1. Puncak Niaga (M) Sdn. Bhd. 2. Syarikat Bekalan Air Selangor Sdn. Bhd. (SYABAS) 3. Syarikat Pengeluar Air Sungai Selangor Sdn. Bhd. (SPLASH) 4. Konsortium Abbas Sdn. Bhd. 5. Taliworks Consortium
Johor	1. SAJ Holdings Sdn. Bhd.
Negri Sembilan	Taliworks Consortium
Sabah	1. Jetama Sdn. Bhd. 2. Timatch Sdn. Bhd. 3. Lahad Datu Water Supply Co.
Sarawak	LAKU Management Sdn. Bhd.

49 See "Memorandum to Human Rights Commission of Malaysia On Privatisation of Water Resources in Malaysia Threatens A Fundamental Human Right of Access to Water" endorsed by various consumer associations and NGOs in Malaysia, available at <http://www.fomca.org.my/state10.htm>, see also "Cutting The Lifeline: Water Cuts Under Privatisation" in *Utusan Konsumer* Nov. 2002.

50 Dr. Mohd. Arip Kasmu of Universiti Kebangsaan Malaysia (UKM) quoted in *Berita Harian* on 28/10/02.

51 Steve Wheeler, "Technical Director for Thames Water at the Water and Wastewater Technology Cooperation" meeting held in Kuala Lumpur in March 2002, quoted in *Business Times*, March 28, 2002.

52 See *Water Malaysia*, Issue No.4 (April 2003) at 16.17.

The need for sound financial management and the immediate need to fund state water projects may necessitate the privatization process. The scope of privatization should cover all activities from source works to billings.<sup>53</sup> The government expects that water privatization would bring about the following long term outcomes:<sup>54</sup>

- i. The decrease of water losses between treatment plants and consumers;
- ii. Water supplied would be of sufficient quantity and high quality;
- iii. Water charges to domestic, commercial and industrial consumers will more closely match the cost of service provided.

The main concern with water privatization in Malaysia is the lack of accountability and transparency.<sup>55</sup> There is no regulation of the privatization process. Privatization is made under a contractual basis, thus the final terms are only known by the parties to the contract, namely the state government and the concessionaire. Other than conditions imposed by the state water authority in the licenses, conditions imposed under privatization agreements form part of the 'de facto' regulatory environment in Malaysia's water industry. Examples of conditions that can be found in such agreements are:<sup>56</sup>

- i. That the company is to provide the required quantity of water at least equivalent to the design capacity of the plant at all times;
- ii. That the finished water must consistently comply with the quality requirement.
- iii. That the company shall provide to the Director of Water Supply a schedule of maintenance for the Concession Year and shall every six months compile and submit to the Director a status report of compliance with or deviation from such schedule of maintenance.

Earlier forms of privatization were in the nature of facility management agreements.<sup>57</sup> The common form of privatization is the contracting out of the management and operations of water treatment plants and the construction of new plants on a Build Operate Transfer (BOT) basis. Terms of concession agreements differ from case to case and are not public documents. A first step is to establish a central regulatory body to regulate water privatization in all the states.

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53 Indeed this has been the view of the present Minister of Energy, Water and Communications, see "Water Privatisation to Cover Whole Spectrum", *New Straits Times*, 27/4/04 at B1.

54 Above.

55 These are amongst two of the elements of good water governance identified by the Asian Development Bank together with participation and predictability, see Asian Development Bank "Policy Paper: Governance, Sound Development Management", 1995, available at <http://www.adb.org/Documents/Policies/Governance/default.asp>

56 Ir. Chan Chiang Heng, "Revisiting Water Privatisation In Malaysia" in *Water Malaysia*, Issue No.4 (April 2003) at 24.

57 See Lee Koon Yew, "A Look at Some Current Models of Privatisation in Malaysia" in *Water Malaysia*, above at 9.

### **Towards Federal Control: Centralization?**

In 1998, a National Water Resources Council (NWRC) was set up with representations from the federal and state governments. The aim was to achieve consensus concerning water management but the outcome of the first meeting was lukewarm support from only some states. In recent years, the federal government in Malaysia has been proposing to the States that as the States lack the financial resources to manage their water resources and owe the Federal Government monumental sums of money in this respect which remain unpaid, it is perhaps time that they consider handing over the task of managing water to the Federal Government.<sup>58</sup> The plan is to set up a Water Commission that would advise the States on the economics, service, operational and environmental regulation aspects of water services.

In calling for the setting up of a Water Commission, the federal government seems to be following the trend in the United Kingdom with regard to regulation of public utilities. Public utilities regulation in the United Kingdom was precipitated by the privatization policy embarked on by the Conservative Government in 1979 and early 1980's when Britain was in a severe economic crisis.<sup>59</sup> The aim was to reduce public expenditure and introduce private sector competition. Four utilities were privatized in the United Kingdom, namely, telecommunications, gas, electricity and water through Acts of Parliament<sup>60</sup> and regulators were established to regulate each industry.<sup>61</sup> Malaysia similarly embraced privatization in 1983 also as a possible solution to the economic malaise besetting the country at that time. Malaysia's Privatization Master Plan released in February 1991 was to guide the implementation of imminent large scale privatizations of sectors ranging from telecommunications, power generation and supply, ports, airports, highways, posts, railways and sewerage works. Ideally, instead of moving toward federal control, the move by the federal government to establish a Water Commission should be seen as the establishment of an independent regulator to supervise state water management and to deal at arms length with the federal as well as state governments. Indeed the need for such a body is belied by the need to increase public welfare in a climate that increasingly favours private monopoly of water management.

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58 See: "National Water Commission to be set up in Six Months", New Straits Times, 11/4/2002.

59 Graham, n.6 above at 14.

60 See Telecommunications Act 1984 (UK), Gas Act 1986 (UK), Electricity Act 1989 (UK) and Water Industry Act 1991 (UK), Water Industry Act 1999 (UK).

61 The regulators are the Director-Generals of each utility corporation.

Although the benefits of privatization should accrue to the capital owner who supplies the service, there is a need to ensure that benefits also accrue to the consumer who receives a more efficient service and to the public at large through the reduction in the public sector deficit, thereby improving the economy of the country.<sup>62</sup>

The four primary functions of the proposed Water Commission would be:

- 1) To play an advisory and coordinating role among the state water authorities in areas including water policy, water standards and improving the overall regulatory framework;<sup>63</sup>
- 2) Consulting the quality regulators to ensure viable commercial conditions for investors and operators whilst fully safeguarding consumer interests;<sup>64</sup>
- 3) To ensure that private water companies are able to finance the proper carrying out of their activities;<sup>65</sup>
- 4) To facilitate effective competition between private water companies.

It may also be in the interest of consumers to add in another function (although it may constantly compete with the second function above, thus may be taken to be a 'secondary' function) and that is to protect the interests of consumers in respect of water tariff and quality of service. The setting up of the proposed Water Commission should not be taken to be a 'taking over' of water management by the Federal government. The intended outcome may be the centralization of water policies and regulations but the administrative and legislative authorities of the states over water should remain intact. There is also a strong case for central economic regulation in Malaysia's water sector due to the problem of externalities or spillovers, where the price of water does not reflect major costs that its production and use impose on society, a growing competitive market and the threat of predatory pricing.<sup>66</sup> The recent reshuffling of the cabinet after the March 2004 elections saw the creation of a new ministry to govern public utilities namely the Ministry of Energy, Water and Communications. The inclusion of 'water' in naming a federal ministry may be seen as a clear indication that the federal government plans to play a more active role in water management and that water is now recognized as an industry of its own along with energy and communications. Nevertheless, it may also be argued that whilst energy and communications are clearly federal matters under the Federal List<sup>67</sup>, water is still a state matter under the State

62 Ir. Dr. Mohd. Akbar Hj Johari, Rusnah bt Rohani, "Water Supply in the 21st Century- What's in Store", Proceedings of the World Day for Water 2000 Seminar, Penang, March 2000.

63 See "A Case for a Federal Regulator" in *Water Malaysia*, Issue No. 4 (April 2003) at 26.

64 Above.

65 Graham, n.6 above at 28.

66 See Harlow and Rawlings, *Law and Administration* (Butterworths, Second Edition 1997) at 296.

67 See Ninth Schedule, Federal Constitution, Items 10 and 11(c) of the Federal List.

List. Is it proper to make water a subject matter within the name of a federal ministry?

### The Legislative Dilemma

Given the perceived legal impediment of Parliament not being able to legislate on water under the Federal Constitution, is it possible to establish the proposed Water Commission without a statute to validate its existence? Can it exist only on an administrative basis at Federal level where its source of power is based merely on moral persuasion and the assent of state water authorities and other stakeholders? It is clear that under the Federal Constitution, Parliament may not legislate on state matters but is it possible for the federal government to exercise executive powers over such matters by way of establishing the proposed Water Commission? The Federal Constitution allows the federal government to exercise executive authority over state matters in the form of 'the giving of advice and technical assistance'.<sup>68</sup> Indeed, such mechanism already exists in the water sector in the form of the Water Supply Branch in the Ministry of Public Works previously. Major concerns that may arise out of a Water Commission set up merely on an administrative basis are:

- i. Whether such body would have legal and political autonomy?
- ii. The non-binding effect of its directives as there will be no legal sanction;
- iii. The issues of accountability and transparency;
- iv. Whether decisions of such body could be subject to judicial review by the courts?<sup>69</sup>;
- v. The question of holdings and assets;

In an area of pressing public concern such as water management, it would not be feasible for the central regulator to have to overcome the above concerns which could inevitably be faced especially with regard to states that view the centralization of water management as a threat. This is why the government should be looking at creating the proposed Water Commission through a statute. That which is perceived as an impediment may however not be so if we were to proceed on the premise that Parliament may legislate to establish a Commission to exercise the functions of the federal government to give professional advice to the States as provided under Articles 93 and 94 of the Federal Constitution respectively. Article 93 provides for the federal government to conduct inquiries (whether by Commission or otherwise), authorize surveys, collect and publish statistics notwithstanding that these may relate to a matter with regard to which only the State Legislative Assembly may legislate.

68 See Article 94, Federal Constitution.

69 See *R v Panel on Take Overs and Mergers, ex p Datafin plc* [1987] QB 815. In this case it was held that the decision of the Panel, a non-statutory self regulating organization, was amenable to judicial review as it was performing a public duty.

Article 94(1) reads as follows:

“The executive authority of the Federation extends to... the giving of advice and technical assistance to the Government of any State... in respect of any of the matters with respect to which the Legislature of the State may make laws...”.

It would be possible to argue that Parliament has the power to pass a statute to establish a Water Commission. Nevertheless, the scope and functions of the Water Commission must not go beyond “the giving of advice and technical assistance” as prescribed under Article 94. In such a case, Parliament will not be legislating on ‘water’ as a subject matter per se but rather on a body that is set up to provide advice and technical assistance to the states concerning water.<sup>70</sup> The proposed functions of the Water Commission would encompass advising on the following:<sup>71</sup>

- i. minimum standards of public health and environmental controls;
- ii. minimum standards of customer service (water availability, pressure, etc.);
- iii. service performance targets;
- iv. tariff schemes and levels of consumer charges;
- v. asset conditions and investment levels;

It is also expected to monitor customer satisfaction, arbitrate disputes and advise the government on sectoral issues. The above functions do not impede on the states’ legislative and executive powers over water and rightly come within the confines of Article 94. As no law has yet been passed using the above authority, the establishment of the proposed Water Commission through Article 94 would be the first case. There is however another stronger reason why Article 94 should be used as authority for Parliament to set up the proposed Water Commission. Once the Water Commission is set up, there will be a need for the state legislatures to amend the present state water enactments in order to incorporate and acknowledge the functions of the Water Commission. If the Water Commission has been established under Article 94 of the Federal Constitution, amendments to state water enactments may be justified and proceeded with under Article 79 of the Federal Constitution that reads as follows:

“Where it appears to the presiding officer of either House of Parliament or of the Legislative Assembly of any State that a Bill or an amendment to a Bill proposes a change in the law relating to any of the matters enumerated in the State List with respect to which the Federation is exercising functions in accordance with Article 94, he shall certify the Bill or amendment for the purposes of this Article.”

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70 The existence of several federal legislation touching on water like the National Forestry Act, 1984, Environmental Quality Act 1974, etc. as discussed above at 5 and 6 may also be used to justify the passing of a statute to set up a Water Commission.

71 See “A Case For a Federal Regulator” in *Water Malaysia*, Issue No.4 (April 2003) at 26.

There is another often cited exception to the general rule that Parliament may not legislate on state matters and this is for the purpose of promoting uniformity of the laws of two or more states prescribed under Article 76(1)(b) of the Federal Constitution. Such statutes shall not come into operation in any State until it has been adopted by state law and it shall then be taken as a state law and not a federal law.<sup>72</sup> Examples of federal statutes enacted under this Article are the Land Conservation Act, 1960 and the National Forestry Act, 1984. Resort to Article 76(1)(b) may not be suitable to establish the proposed Water Commission as the purpose of the statute is not to provide uniformity of state water laws<sup>73</sup> but to establish a central regulatory body.

### Conclusion

The solution to good water governance in Malaysia today may seem to be a choice between the 'centralization approach' and thus opting for the traditional regulation of 'command and control' or to follow the trend of decentralizing water management and thus, moving towards deregulation.<sup>74</sup> The opportunities of decentralization are the larger possibility to manage water in an integrated way, the possible for practical participation of local communities and local players as well as the larger scope for timely and effective enforcement of rules.<sup>75</sup> The benefits of centralization and regulation may outweigh that of decentralization and deregulation where although the latter may lift constraints for private participation in the public sector, it may also lead to sub-optimal control by industry players thus pushing aside the often real and valid concerns of consumer groups.<sup>76</sup> Although centralization of water management is aimed at improved regulation and control of water resources, it is unlikely that it would be able to solve the problems of lack of funding to maintain water projects in the states. Involvement of various stakeholder companies in the water sector will still be prevalent and the challenge would be to sustain transparency and accountability in the relationship between the various stakeholders.

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72 See Article 76(3) Federal Constitution.

73 One of the functions of the Commission would however include suggesting the streamlining of state water enactments as discussed above at 7.

74 That privatization leads to deregulation may however be inaccurate as experience in the United Kingdom has shown that privatization does not necessarily lead to deregulation. In fact, it is asserted that the financial gain to a government through a privatization initiative will be maximized by insulating the privatized business from competition through government regulation. See Thynne and Goldring, *Accountability and Control* (Law Book Co. Ltd., 1987) at 225.

75 Hall, Ghezze and Steenbergen, "The Challenges In Effective Water Governance", Network for Water and Sanitation (NETWAS) website at <http://www.netwasgroup.com/newsletter/articles/2003>.

76 Above at 307.

Establishing a Water Commission would not strictly lead to centralization in the sense of adopting an 'economy of scale'<sup>77</sup> approach in water management but would be an attempt to put in place a supervisory mechanism over water management in the states. The ultimate concern would be the availability of checks and balances in whichever system that is resorted to. Would the proposed Water Commission be able to operate as an independent body and not become another largely bureaucratic apparatus for the federal government? Can independence really be achieved in a federal set-up like Malaysia where the public service is controlled by the federal government? Failure to achieve a measure of independence from the government runs the risk of the reappearance of detailed political interference in the regulation process.<sup>78</sup>

This article explains the present scenario in Malaysia with regard to water management and has highlighted several problems to be overcome to establish an enabling legal environment for good water governance. The federal government's proposal to set up a Water Commission to oversee present water authorities and regulate water privatization is a progressive suggestion towards improved water governance in Malaysia. A truly enabling environment will come about with the promulgation of a statute to establish the proposed Water Commission. As it stands, the territorial and functional dimensions of the constitution with regard to water should not be seen as an impediment to the successful setting up of the proposed commission. Through consultation with all stakeholders in the water industry (including consumer associations) and the state governments, the federal government is able to play a key role in establishing such commission leading towards good water governance in Malaysia.

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77 See Karl A. Wittfogel, *Oriental Despotism: A Comparative Study of Total Power* (New Haven C.T., Yale University Press, 1957).

78 See Wigglesworth and Barnes, "UK Policies and Regulations" (1992) *Telecommunications Policy* 721, 722.