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Rule of Law for Good Environmental Governance

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Foreword

Konrad-Adenauer-Stiftung is a German political foundation which has, for over 50 years, committed itself to the promotion of democracy, international co-operation and development.

The Rule of Law Programme Asia, launched in 2005, is one of the five regional programmes of Konrad-Adenauer-Stiftung that is dedicated exclusively to the development of rule of law worldwide. The importance of promoting rule of law in Asia cannot be overestimated for its sheer population size and density as well as the geo-cultural diversity it encompasses within it.

Besides the strengthening of classical rule of law structures such as constitutionalism, separation of powers and the guarantee of fundamental rights, the Rule of Law Programme Asia since 2011 also focuses on environmental law and its implementation by the governments, the economy and civil society.

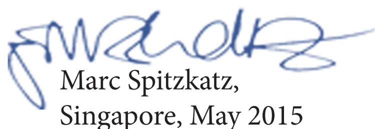
In the future, effective environmental protection will be a crucial objective for Asia: 29 out of the 30 most polluted cities in the world are located in Asia, in which, 7 out of 15 countries, with the highest total of CO_2 emissions from fossil-fuel burning, cement production, and gas–flaring arises from Asian countries, 8 out of 10 countries with the highest amount of freshwater withdrawal are from Asian. Weather disasters are abundant, and one of the worst hit typhoon prone countries is the Philippines. They are caused not only by climatic change due to environmental pollution, but also by a lack of proper land management – many areas crucial for prevention of flooding or erosion are thus converted for development purposes.

The Asian region not only suffers from dramatic environmental degradation due to economic development and population growth; the adoption of rule of law (responsible for the implementation of environmental legislation) is also lacking behind.

In the light of the above, the Rule of Law Programme Asia has commenced a series of seminars, conventions, dialogues and experts' meetings with worldwide partners all over Asia. These events covered a wide range of environmentally related topics, such as the promotion of renewable energy production, the combat of natural resources-related crimes, transboundary pollution, land and forest management. The role of the judiciary, the cooperation between various agencies and regional or international perspectives were discussed as well.

This book provides you with a number of articles representing the variety of topics, but also the scale of challenges lying ahead of us.

Let me take this opportunity to thank the editors, long-time partners and friends of Konrad-Adenauer-Stiftung Rule of Law Programme Asia, as well as the authors who all contributed as experts and resource persons in many of our activities in the region, for their generous contributions and support towards this publication. I would also like to thank Ms. Susan Chan, project coordinator at the Rule of Law Programme Asia, and the team of University of Cebu, Philippines, for their indispensable organizational work.



Marc Spitzkatz,
Singapore, May 2015

Thailand's Land Tenure and Environmental Implications

Eathipol Srisawaluck

Abstract

Land tenure systems in each country embody a complexity of relationships that determine whether land is used efficiently and sustainably. These define the rules of access to land, the incentives arising from the use of land, and the ways in which benefits are distributed to the concerned. Land tenure systems, the legislative framework that have evolved over the decades, in many respects, reflect both the changing socio-economic aspects as well as the physical abundance of land. However, one aspect that is often overlooked (Thailand being no exception) is the link between land tenure systems and the environment. Yet, while environmental problems such as land degradation, flash floods and contamination of water sources can all be traced to the legal and institutional framework that defines the land tenure system, environmental aspects of land resources are becoming more and more apparent. In fact, there is a tendency to treat these as separate issues. Unless there is an acknowledgment of this impact, it is most likely that a vast amount of resources will be spent on addressing environmental problems.

To present this case, the paper is organized in three Sections. Section 1 starts with a description of the land tenure systems in Thailand and the current land-related environmental problems. Section 2 then discusses the links between land tenure and those environmental issues. Section 3 concludes with suggestions on how to address the perceived flaws in the land tenure system which will result in improving the land-related environment.

Keywords: Land Tenure, Environment, Forestland, Public Land, Land reform

1. Thailand's land tenure system

1.1 The declining area under natural forests

Thailand is one of the countries in Southeast Asia. Its area is about 51.312 million hectares. The country borders Myanmar on the west and Lao PDR on the east, north and west. The southwest has a common border with Cambodia and the Gulf of Thailand and Malaysia to the south. There are four regions, namely, the northern, central, northeastern and the southern parts. The population of Thailand is 64.78 million, of which 31.84 million are male, and 32.93 million are female.[1] Around 37.64 percent are currently employed in the agricultural sector while 62.36 percent are the non-agricultural sector.[2]

Land is one of the main factors of production in said country where some 26 percent of the population still rely on the revenue from agriculture.[3] The supply of land for agriculture has

1 Department of Local Administration; 2013.

2 Office of Agricultural Economic, Thailand Agricultural Economic Index analyze by Centre of Information Agriculture Extension Department; August 2012.

3 In 2012 the number of farm households were reported to be 5.9 million. Agricultural Census, National Statistical Office, Ministry of Information and Communication Technology; 2013.

been mainly through conversion of natural forests. With increasing population, the pressure to convert forestland also come from other sources, i.e., physical infrastructure development, the granting of logging concessions, urbanization, expansion of industries and tourism.

Dating back to 1961, the area under natural forests was reportedly 25.65 million hectares or about 50 percent of the country's total land area. By 2012, the areas under natural forests have declined to approximately 17.15 million hectares or 33.43 percent of the total area.[4] About 23.87 million hectares (or 46.53 percent of the total area) are agricultural lands. Lands utilized for various non-agricultural activities (i.e., industrial areas, commercial and service activities, residential areas, land belonging to various public agencies, state enterprises, religious establishments and common areas such as roads, canals and beaches) take up 10.27 million hectares or 20 percent of the total area. The reduction in forest areas has been a major source of concern. A policy has been declared to the effect that forest areas should increase to 40 percent of the total land area comprising 25 percent of conservation forests and 15 percent of economic forests.

1.2. Land tenure system

Under this heading, three issues will be covered, namely the different land categories, the Constitution and stipulations related and other laws related to land resources management.

1.2.1 Land categories

Under the present legal framework, land in the country can be classified into two major categories, namely public and private property. Public land covers the area of 29,381,521 hectares or 57.26 percent of the total area while private land covers the area of 22,118,948 hectares or 42.74 percent of the total area.[5]

(1) Public land

Modern land administration in Thailand can be said to have originated from the promulgation of the Land Code 1954. Section 2 of the Land Code, provides that: "Any parcels of land that have not been claimed by individuals, in effect belong to the state." The Land Code thus clearly distinguishes public from private property by stating that any parcels of land not claimed by private individuals, are, by definition, owned by the state and, therefore, considered public land. Public land can be classified into three categories:

a) Public domain refers to land reserved for common use by the people such as common grazing ground, cemeteries, riverbanks, waterways, public highways and lakes;

b) Public domain reserved exclusively for the state interest or retained for official purposes such as state army areas, state railways, etc.; and

c) Public domain reserved for common usage, but the people have discontinued utilizing the land that results in the return of the property to the ownership of the state.

Apart from the above-mentioned categories, there are also parcels of land, that are

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4 Agricultural Statistics of Thailand, Crop Year 2011/2012, Center for Agricultural Information, Office of Agricultural Economic; 2013.

5 Office of Natural Resources and Environmental Policy and Planning, Final Report of the Study 'Land Classification and Sustainable Land Use'; 2009, p.176.

covered by specific pieces of legislation such as Crown land belonging to religious establishments according to the law, or land belonging to the Temples, Roman Catholic Churches, Christian Foundations or Islamic Religious Organization.

In public land, public agencies can formally endorse the rights to occupy and utilize; in such cases, the legal claim falls short of private property rights. These are occupancy rights granted under Section 1367 of the Civil and Commercial Code, usufruct rights to land in the National Forest Reserves, in land reform areas, in state lands, and in public lands. The government agency may allow private individuals to utilize the land in one form or another. The occupants may be granted usufruct rights such as ALRO 4-01[6], which acknowledge their status as land reform beneficiaries in land reform areas according to the stipulation of the Agricultural Land Reform Act.

(2) Private land

Private land refers to the land of which private individuals or corporate bodies claim full legal ownership according to the provisions of the 1954 Land Code. Section 41 of the 2007 Constitution of Thailand endorses the legal rights, which provide that: The property right of a person is protected. The extent and the restriction of such right shall be in accordance with the provisions of the law. The succession is protected. The right of succession of a person shall be in accordance with the provisions of the law." This means that individuals may utilize land that is privately owned, freely and without restraint, if there is no legislation that places conditions on the manner of land utilization.

There are three types of land rights in Thailand, namely: (i) full private property rights; (ii) conditional private property rights; and (iii) occupancy or 'usufruct rights'. Full private property rights are granted under the 1954 Land Code, provided that the claimer has occupied and utilized the land prior to 1954 and/or can provide documents that support the claim. Private property rights given to beneficiaries of land allocation programs can be subject to restrictions on the transfer of land except to lawful descendants. In some cases, restrictions are binding for a period of 5-10 years. In other cases, such as for land reform beneficiaries who have completed payment under the hire-purchasing agreements, private property rights cannot be transferred unless to lawful descendants, back to the Agricultural Land Reform Office or to farmers' institutions.

Thailand had invested resources in the land registration process and received financial and technical assistance from the World Bank for its Department of Land for Land Titling projects, which contributed to the tremendous progress in issuing land titles. To speed up the titling process, certain regulatory frameworks had to be modified, but not without social and economic trade-offs. The merits of shortened procedures created loopholes, which benefited occupiers of land who may not have had the legitimacy of the claim.

1.2.2 Laws related to land

The Constitution of Kingdom of Thailand, B.E. 2550 (2007) is the supreme law of the State. It defines the principles of individual's property rights, the expropriation of immovable property, compensation and state policies in relation to land, natural resources and the environment. Specifically related to land, Section 85 thereof declares that: "The State shall

6 ALRO is the abbreviation of the Agricultural Land Reform Office while '4-01' is a code number of the legal document issued by this Agency.

pursue directive principles of State policies in relation to land, natural resources and the environment, as follows:

(1) to prescribe rules on land use which cover areas throughout the country, having regard to the consistency with natural surroundings, whether land areas, water surfaces, ways of life of local residents, and the efficient preservation of natural resources, and prescribe standards for sustainable land use, provided that residents in areas affected by such rules on land use shall also have due participation in the decision-making;

(2) to distribute land holding in a fair manner, enable farmers to have ownership or rights in land for farming purposes thoroughly through land reform or otherwise, and provide water resources for sufficient use of water by farmers in a manner suitable for farming;

(3) to provide the town and country planning and carry out the development and action in the implementation of town and country plans in an efficient and effective manner in the interest of sustainable preservation of natural resources;

(4) to provide a plan for managing water resources and other natural resources systematically and in a manner generating public interests, provided that the public shall have due participation in the preservation, maintenance and exploitation of natural resources and biological diversity in a balanced fashion;

(5) to promote, maintain and protect the quality of natural resources in accordance with the sustainable development principle, control and eradicate polluted conditions affecting health, sanitary conditions, welfare and the quality of life of the public, provided that members of the public, local residents, and local government organizations shall have due participation in determining the direction of such work.

As of May 22, 2014, the coup d'état formed the National Council for Peace and Order (NCPO). The 2007 Constitution was therefore no longer binding. However, the principles described were still upheld in the new Constitution that is being currently drafted.

1.2.3 Other laws related to land

Thailand has a number of laws that are relevant to various aspects of land management and utilization. What seems to be the major underlying problem, however, appears to be that these laws lack unity with no effective channel to incorporate the participation of those who might be affected. The existing laws can be divided into 4 categories, (i) those related to management of public lands; (ii) laws which aim at providing access and rights to land as a way of addressing prevalent poverty situation; (iii) laws related to land use aiming at empowering public agencies to control land use; and (iv) laws relevant to efficiency in land use as well as soil and water conservation. There are however limited linkages between laws within and between the four groups, the main reason being that most are laws drafted and enacted to address situations as they arose. Most are laws that preceded the 1997 and the 2007 Constitutions, both of which opened up new dimensions regarding natural resources and land management. They are notably and uniformly lacking in the principle of people's participation, devolution of power to local governments and good governance. Details are as follows:

a. Those related to management of public lands. The main objectives of these laws are to protect and manage properties that belong to the State such as the 1954 Land Code and the Enhancement and Conservation of National Environmental Quality Act of 1992. The laws described below in detail are those particularly relevant to lands of ecological importance.

i. The Forestry Act of 1938. The Act covers aspects on utilization of forest resources such as logging and collection of forest products, collection of fees on timber and on forest products, movement of logs and forest products, control over timber processing, forest clearance and any other activities that may result in the destruction of forest resources. The Act also prohibits the occupation of any parts of the forest areas. Penalties include fines and confiscation of goods and all types of equipment such as tools and machineries, including animals or any other tools used for logging, poaching or any activities in the forest areas prohibited by the Act.

ii. The National Park Act of 1961. The main purpose is to protect natural resources such as flora, forest products, and wild animals to ensure the sustainability of natural resources, and of the natural landscape. The Act prohibits the occupation of any part of the national parks, clearance of areas, collection of forest products, hunting of wild animals, and collection of any rocks, sand or stones. The Act does allow entry into the national park areas for educational and recreational purposes. Violators are subject to fines or imprisonment as well as confiscation of weapons, tools and vehicles used in committing the crimes.

iii. The National Forest Reserve Act of 1963 declares any part of the forest areas as a national forest to ensure the sustainability of the resources. The Act prohibits entry into the declared forest reserve areas, and occupation of land inside the boundary of the forest reserve. It also prohibits any types of construction, clearance of forest areas, or any activities that may result in destruction and depletion of forest resources. The responsible agency is authorized to evict the violator from the forest reserve areas and to pull down any construction works. In case of degraded forest areas, it is within the authority of the Director General of the Royal Forestry Department to allow occupants to remain within the degraded forest area and to utilize the land. Violators are subject to fines or imprisonment and confiscation of tools used to engage in the violation, regardless of whether the possessions belong to the violators.

iv. The Wildlife Preservation and Protection Act of 1992 is to support breeding of wildlife species and to help protect and conserve wildlife species. The principle is also to ensure that Thailand undertakes measures that reflect willingness to cooperate with international communities in the protection and conservation of wildlife and endangered species by declaring designated areas as wildlife sanctuaries and no-hunting zones.

b. Laws, which aim at providing access and rights to land as a way of addressing prevalent poverty situation. These include the 1954 Land Code, Land for the Livelihood Act of 1968; and Agricultural Land Reform Act of 1975.

c. Laws related to land use aiming at empowering public agencies to control land use to ensure that this is in accordance with the types of uses as specified by the law in ways that do not negatively affect the environment. Laws under this category include the Town Planning Act of 1975; Agricultural Land Consolidation Act of 1974; the Building Control Act of 1979; Factory Act of 1992; the Industrial Estate Act of 1979; the Commercial Forest Plantation Act of 1992; and the Land Development Act of 2000.

d. Laws relevant to efficiency in land use as well as soil and water conservation. Laws under this category include the Land Readjustment Act of 2004; and the Land Development Act of 2008 which covers aspects on soil survey, soil classification, and developing an inventory on soil fertility and land capability. The Act also covers aspects of land use planning and zoning, as well as measures for land and water conservation.

1.3. Land-related environmental problems

Thailand is one of the countries in Southeast Asia that has rapid and continued deforestation over the decades. The natural forest cover has now reduced to only around 31 percent of the total country area. The diminishing forest resources, as well as deforestation rate resulted from earlier land policy which put more weight on economic growth through large-scale conversion of natural forests for construction of physical infrastructures such as roads, hydropower plants, irrigation systems. From the 1950s to early 1970s, people were encouraged to clear natural forests so the land can be brought under productive uses. Logging and mining concessions have been granted, because these were the most immediate sources of wealth that could be tapped. Fifty years later, with changes in the demand and the supply side of the equation and with the by-products of pro-growth economic policy being the increasing income disparity and absolute numbers of people living under the poverty line, conversion of natural forests becomes a crime against the State to the people at the lower end of the economic strata often taking proportionately the higher share of the blame. Ultimately, the environmental externalities arising from over-exploitation of natural resources are becoming more apparent and more intensified while neither efficiency nor equity criteria can be satisfied.

Among the indicators of land degradation is the increasing reliance on inputs, specifically chemical fertilizers to replace the natural nutrients in the topsoil. While this may partially help maintain productivity, there are side effects to the environment, as evidenced by run-offs from agriculture that have increased concentration of chemical pollutants in natural water sources. In 2011, for example, Thailand imported chemical fertilizers and pesticides consisting of nearly 6.3 million tons.[7] Apart from the costs of these inputs, few attempts have been made to estimate the external costs in terms of damages to human health and the environment such as contamination of land and water sources. The same can be said for concerns over the steady decline of natural forest coverage but the environmental consequences, such as forest fires, top soil losses, changes in water quality and flow, and increasing incidences of forest fires have become a liability.

2. Aspects of land tenure system with implications to the environment

2.1 Conversion of watersheds for alternative uses especially for agricultural production

One of the reasons why the laws under the first category have been ineffective in controlling deforestation stems from the lack of precise boundaries of the protected forests. Over the years, successive governments have accommodated the presence of communities with the protected forests and in many circumstances, have degazetted forests and granted the right of access and utilization to local communities. Thus, the principle of protecting and conserving forests embodied in the laws conflicts with the interests to clear forest land to satisfy the demands for land from the various economic sectors (agricultural sector and recently by nature-based tourism industries being among the primary sources of demand). Regardless of whether the forest is 'protected', with or without permission, encroachment of forest areas is widespread.

7 Center of Government Strategic Information, National Statistical Office; 2011.

While exceptions have been made for local communities that claim to have settled in forest areas prior to the declaration as 'protected' with conditions that no further forest clearances were permitted, continued forest clearance sadly reflects that the penalties such as fines and imprisonment are far from effective in deterring violation of the above laws.

2.2 Settlements inside protected areas.

The existence of so many settlements inside protected area is due in part to the fact that the State's claims for different types of public land overlaps with land where individuals or communities have supposedly already settled and utilized the land. In many cases, encroachment occurs after the formal declaration of land as public land. According to the Royal Forest Department, there could be as many as 450,000 households living in protected areas utilizing some 1.04 million hectares. 185,916 families are reportedly settled in 359,030 hectares inside National Parks, Wildlife Sanctuaries, Non-Hunting zones. Another 161,932 families are occupying and utilizing an area of 339,231 hectares classified as State Land. In addition, there are a number of households occupying 184,778 hectares of land that are classified for communal public use. [8]

2.3 Overlapping claims

Land disputes due to overlapping claims are one common problem of the country. Many cases of conflict have been recorded where national forest reserves of various categories overlap with areas already claimed by local communities or individuals. An increasing number of cases is being reported where concessions for mining and commercial crops have been granted for land already often occupied by small-scale holders.

Forced evictions have been ordered by the court without sufficient investigation for occupants who lacked of formal claims for land, which technically belongs to the State. Many cases of conflicts have arisen from land titling as well as State investment projects. Increasing conflicts are noted between allocation of land for agriculture and industry, between local use and foreign investment, and between forestry and community settlements.

One of the reasons why overlapping claims are such common occurrences is the open access characteristic of forest resources. Forest land, which is public land by definition, is cleared and cultivated for a number of years before the State asserts a legal claim at which point, *de facto* '*occupier*' becomes '*encroacher*'. Given the population increase and demand for land and the open-access situation, the problems of overlapping between *de facto* of the people and *de jure* claims of the State are likely to expand and become aggravated because the legal and administrative systems that handle the conflicts not only lag behind the process of land use changes but have tended to be more '*reactive*' or responding to changes and problems that have occurred, rather than '*proactive*' in anticipating or even directing the changes.

3. Possible solutions

3.1 Arrange to prove rights of land ownership for those who have occupied and utilized public land prior to claim ownership

One of the mechanisms set up has been to establish the 'National Committee to Address Problems of Public Land Encroachment'. The function of this Committee is to investigate the legitimacy of claims of individuals or local communities having settled in the public land prior

8 Ad Hoc Commission Report on Land Problems and Land Documents, National Assembly; 2010.

to the declaration of the area as being 'public land'. Among the pieces of evidence that can be used to substantiate this claim includes an aerial domain. Based on performance to date, there have been requests that the Committee expedites the work process and identifies alternative and quicker methods that can resolve these claims.

3.2 Community rights as a solution to solve the problem of public land.

Apart from the land allocation under existing laws, there is also a policy on land allocation to local communities that are currently under review. This is seen as a potential solution to problems of forest encroachment by providing tenure security and reducing the uncertainty of being evicted from the land. Such a policy would reduce the social inequality and promote social justice by providing access to land for the poor. Moreover, given that this is a step towards developing a partnership with local communities in protecting, conserving and restoring natural resources, the move towards issuing land rights to local communities is also consistent with the sustainable development principles.

3.3 The promises of economic instruments to complement legal approach

The approaches described above still heavily rely on the use and enforcement of the laws. On the other hand, the continued decline in areas under natural forests and the increasing adverse environmental impacts are ample evidences that the existing laws have been far from effective in controlling both access to land and the ways people use land. What can be said of these laws is that they provide limited incentives, if any. The situation is aggravated by the low penalties for non-compliance. One concept that has been the center of attention and already adopted by many other countries in Southeast Asia is 'Payment for Ecosystems Services' (PES). By providing incentives for resource users to conserve and/or sustainably use resources, PES provides an opportunity to enhance environmental protection and conservation. Forest-dependent local communities and farmers who make decisions about land use are seen as development partners, rather than threats to natural resources.

In many respects, the concept of PES is complementary to the policy related to community rights which are being reviewed. In an analysis of the PES experience or lack of experiences in Thailand, an idea has been put forward that while existing legal framework may not be explicitly endorsing the concept of creating incentives for service providers, they can be relaxed in particular cases if this would enable the implementation of pilot projects.[9] However, with all the potential benefits, cautions must be taken to avoid the possibility that the idea of granting community rights and experimenting with PES be used to legitimize further conversion of forest lands and adoption of non-sustainable land use practices.

9 Orapan Nabangchang, A review of the legal and policy framework for payments for ecosystem services (PES) in Thailand. CIFOR Working Pape 148. Center for International Forestry Research;2014.

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Orapan Nabangchang, A review of the legal and policy framework for payments for ecosystem services (PES) in Thailand; 2014.

The Constitutional Origin of Land Grabs in China

Qianfan Zhang

Abstract

This chapter discusses the constitutional origin of land grabbing in China. The history of land ownership in China indicates that the sudden categorization of urban land as 'state-owned' under Article 10 of the 1982 Constitution cannot constitute a wholesale confiscation by the State. Misinterpretation of this sort has led to serious consequences of compensation below the market value standard, creating multitudes of social conflicts and tragedies in China, as epitomized in the self-immolation of Tang Fu-zhen at the end of December 2009. The tragedy urged the State Council to enact a new Taking and Compensation Regulation in 2011. The new regulation was an improvement over the previous one as it applied to urban land and properties, but the problems related to the taking of rural land remain unresolved. The chapter then examines the root causes of land grabs in China, and concludes with a proposal for re-interpreting Article 10 of the Constitution that will make it consistent with international standards and practices.

Keywords: Land Grabbing, Land Acquisition, State Ownership, Taking, Just Compensation

1. Introduction

Land grabbing is perhaps a universal problem, but it is probably most acutely felt in China, where it has been dubbed 'where to demolish' (拆哪儿，*chai'na'er*). In fact, land grabbing is the very process by which urbanization and urban renewal are carried out, and the people in China have paid dearly for the fast paced economic development. Over the last two decades, land grabbing in the cities and villages have created massive social dislocations, cultural destruction and official corruption. For years it has consistently been listed as the very top cause for both official corruption and civilian grievance petitions (上访，*shangfang*). In the historic city of Nanjing, the capitol of Jiangsu province, as much as three quarters of the old city has been demolished in order to build commercial and residential establishments.[1] Whenever a land acquisition or house demolition is carried out, tension erupts between the people and the government, which is often obliged to use armored police in order to secure peace and order.

Land grab is defined here as an illegitimate compulsory act of government that takes the land right originally owned by the people. A typical example in China is that a local government takes the rural land collectively owned by a village without informed consent and just compensation based on a fair measure of the land value (more details below). Since land in the city is usually owned by the 'state', it is generally understood that the urban residents own the right to use the land rather than the land itself. Still, the demolition of urban houses involves not only the taking of the infrastructure, but also the taking of the right to use the land, which is usually uncompensated and thus constitutes another form of land grab. Indeed, from both international standards and the Chinese legal definition itself, it may plausibly be argued that

1 Xie Haitao, 'The Defence Battle for South Nanjing', Southern Metropolitan Week; 21 August 2009.

'state ownership' is in essence the ownership of the whole people, so that when the government as the land manager comes in and takes hold of the urban (i.e. 'state owned') land owned by the people, there *is* taking, and doing so without compensation does constitute land grab.

This chapter discusses the constitutional origin of the land grab in China. It will first review the history of land ownership and focus on the issue of whether the sudden categorization of urban land as 'state-owned' under Article 10 of the 1982 Constitution constitutes a wholesale confiscation by the State. It then moves to explore the serious consequences of compensation below the market value standard, which has led to many conflicts and tragedies in China, epitomized in the self-immolation of Tang Fu-zhen at the end of December 2009. The tragedy urged the State Council to enact a new Taking and Compensation Regulation in 2011. The new regulation was an improvement over the previous one as it applied to urban land and properties, but the problems related to the taking of rural land remain unresolved. The chapter then examines the root causes of land grabs in China, and concludes with a proposal for re-interpreting Article 10 of the Constitution that will make it consistent with international standards and practices.

2. A brief history of land ownership in China

Before 1949, land in China was predominantly privately owned. However, the Chinese Communist Party (CCP) saw private property as the principal bourgeois evil which needed to be eradicated. Above all, under orthodox Marxist ideology, land ownership, the 'primary means of production' must be firmly controlled in the hands of the State under 'proletarian dictatorship'. Enterprises (also a 'means of production') of the 'nation' and the petit bourgeois, many of whom supported the Communist takeover in 1949, were spared from confiscation during the initial transition period. However, urban land and enterprises were gradually taken over by the State; and rural land, which the CCP had promised to the peasants to gain their support since its early difficult times in the revolutionary border areas, was taken away and merged into the People's Communes almost overnight during the upheaval of the Great Leap Forward in 1958.

Despite the ideological hostility, private land ownership persisted in urban China. After the Communist takeover in 1949, the government confiscated land belonging to counter-revolutionaries such as alleged imperialists, traitors, and war criminals. But the State did not own all land. The regime was unstable at the time, and had to make concessions to various classes of people. Enacted in 1949, Article 3 of the Common Program claimed to protect the private property of workers, peasants and the national bourgeoisie. Thus, land ownership remained largely a private right during most of the 1950s. The situation began to change when the government bought factory land from capitalists and converted it to public land. However, there remained a good deal of private land in cities, especially the land underneath private dwelling houses. This situation continued up until 1954, when the first Communist Constitution was codified, and lasted through the Cultural Revolution (1966-1976) and the 1975 Constitution. The 1978 Constitution provided that the State could take urban or rural land where necessary, implying that at least some urban land remained privately owned. It also provided for State ownership of land containing natural resources, mountains, and minerals.

The countryside paints quite a different picture. In exchange for power and stability, the Communists had promised that the peasants would get their own land from the landlords, and that promise was generally fulfilled in the early 1950s. That did not last long, however. The Great Leap Forward, initiated by Mao Zedong in 1958, turned virtually all peasant land into collective land owned by communes, so that the peasants quickly lost their privately owned land. By the late 1970s, the People's Communes began to crumble and give way to the current

responsibility system, in which peasant families gained the right to use and derive profits from the rural land.

Things became interesting when the current Constitution was enacted in 1982. Article 10 defines the land system and makes all land public. Although successive constitutional amendments gradually enhanced the status of the 'private economy', whose contribution to the GDP has long surpassed that of the public sectors, public land ownership remains the ultimate touchstone for the 'socialist' character of the 1982 Constitution. All forms of social conflicts and tragedies have arisen from the potential for abusing the public power which is hidden in the fantasy of public ownership, coupled with the official imperative to promote development and the GDP figure, from which the ruling party derives its legitimacy. To make things worse, the public land system defined in the 1982 Constitution is a dual – as opposed to a single – ownership system, divided into State-owned land and collectively-owned land. While land in the rural area is collectively owned by villagers, land in the city is owned by the State, which is equivalent to 'the whole people' (全民，*quanmin*).

Compared to the village ownership of rural land, the State ownership of urban land is a more ambiguous concept, which could comprise the people, the government, or a mixture of both. On the common view that Article 10 resulted in an overnight confiscation of private land in the cities, this seems to constitute a wholesale land grab by the State. Although the State is equivalent to the people in the Chinese and perhaps all socialist constitutions, it is not meaningful to talk about 'the people' and public ownership in this sense, especially in a large country like China since it is impossible for 'the people' to meaningfully use such property rights. A representative or manager is needed to effectively exercise the relevant rights. While it is conceivable that the National People's Congress (NPC) could act as such a representative, laws require that the State Council exercise the power to regulate land rights on behalf of the people. Thus, even though the State should be defined in terms of the people, for practical reasons it is described as the government with the power to administer the use of land.

And such power has been further delegated to various levels of local governments in China, since the central government (i.e. the State Council) cannot possibly manage all land in such a vast country. The provincial, city and county governments all possess different degrees of power to regulate land use. Since nobody actually owns the land, these governments, by exercising their managerial powers, sit in the chair of the owner. This is precisely the attitude of the government, as indicated by enacted laws. For example, residents and developers who want to use land for residential and commercial buildings lease it from the government for a maximum of 70 years. Substantive ownership, which includes the right to use the land, is thus limited to 70 years, after which it reverts back to the government.

This understanding of the city land system was convenient for governments, because they could use the land whenever they wanted to. According to conventional wisdom of the governments and mainstream society, the government was effectively the owner and could take the land back at any time on the payment of compensation. The taking seems to always be legitimate because the land belonged to the government in the first place. This understanding makes sense, however, only if Article 10 of the Constitution is interpreted to have confiscated the urban land since, by 1982, there remained isolated pockets of private land (e.g., dwelling houses) that had certificates of land rights.

3. Legal developments before and after the Tang Fu-zhen incident

Article 10 of the Constitution was enacted and interpreted at the beginning of the reform period, when ordinary people were not sufficiently informed, conscious and active in

order to effectively protect their property rights. In the past three decades, China has witnessed a dramatic rise of public consciousness for individual rights, reflected above all in the rapidly revived consciousness about property rights. With the disenchantment with the socialist ideology, ownership of private property is no longer a sign of depraved bourgeoisie, but a source of social recognition and personal pride. In the aftermath of the Sun Zhigang (孙志刚) incident, the constitutional amendment in 2004 not only generally requires the state to 'respect and protect human rights', but declares more specifically that 'the lawful private property of citizens is inviolable' (Art. 13), only a slight step below the 'socialist public property' (Art. 12), which is 'sacrosanct' (神圣不可侵犯，*shensheng buke qinfan*). And for the first time a private property can be taken for public use only if the State 'pay[s] compensation in accordance with the law' (Art. 13).

Such a provision may seem less than impressive, even meaningless, since compensation of some sort is almost always paid in land-takings or demolition of houses as in the Tang Fu-zhen case (more details below). It is *just compensation* that should have been required, and it was the very absence of such requirement that caused Tang Fuzhen's death and many more similar tragedies. Nevertheless, the constitutional amendment does reflect the emerging public consensus on a vital principle for China's social harmony and provides an anchor, as it were, for further legal developments.

A major development is the Property Law enacted by the NPC in 2007, after a year-long delay caused by Professor Gong Xiantian of Peking University, who challenged the provisions of the law for violating the 'socialist character' of the 1982 Constitution by conferring largely equal protection for private and public property. The Property Law, essentially a part of the larger Civil Code which will be enacted in the future, provides comprehensive protections for various types of properties, but proves to be marginally useful for the protection of land rights against taking without just compensation. Article 42 reiterates the constitutional requirement for 'compensation in accordance with the law', but the legally defined compensation may well be below the fair market value of the land or property (e.g. houses) on the land that will be taken. The fact is that even a requirement for just compensation may not be effectively enforced by a court whose personnel appointments and finance depend on the local government, the main driving force behind the taking. In February 2002, for example, over 10000 evicted residents in Beijing brought an administrative class action against the demolitions, yet the court declined to review the case. Although the SPC required the lower courts to hear the taking cases, the local courts often narrowed the scope of review on their own initiative to eschew such 'sensitive' cases.

To be sure, the people do make use of better laws to protect their rights. On the same day as the NPC passed the Property Law, for instance, the court of Jiulongpo district in Chongqing municipality, issued its 'ultimatum' for final relocation to the 'most robust nail house', whose occupants refused to move for years even though the surrounding houses had long been demolished, leaving the house as an isolated island, without water and power supply.[2] However, benefitting from the propitious timing at the passing of the new Property Law, the residents succeeded in obliging the Chongqing government to make an offer to their satisfaction, after which they peacefully moved out. Unfortunately, such a happy ending remains the exception, which cannot save thousands of victims like Tang Fu-zhen.

By the end of 2009, the Sun Zhigang tragedy found itself duplicated in a different context. On December 23, Tang Fu-zhen (唐福珍), a Chengdu resident who had forcibly resisted the

2 Zhang Qianfan, The Constitution of China: A Contextual Analysis, Hart Publishing Co.; 2012, p. 75-76.

demolition team from tearing down her house for hours, lost control and poured petroleum over her body, setting herself on fire. Despite prompt rescue, she died in hospital several days later.[3] The news spread instantly on the internet, fuelled by a section of videotape taken by a neighbor using a mobile phone, which vividly recorded the self-immolation. Like the Sun Zhigang event, the news created a massive public uproar, followed by five law professors from Peking University petitioning the NPC Standing Committee to review the constitutionality of the Regulation on the Demolition of City Houses ('Urban Demolition Regulation') that authorized urban renovation projects. Although the Regulation was not strictly applicable to Tang's house, allegedly an 'illegal construction' located in a 'village within the city' (城中村，*chengzhongcun*), minor details made little difference, and public pressure for abolishing the Urban Demolition Regulation was overwhelming.

Like the Sun Zhigang case, the Tang Fuzhen tragedy moved the central government to take prompt actions. The Legislative Affairs Office (LAO), the State Council's legal department, responded quickly to public pressure. Following several meetings with legal scholars, it managed to publish a draft revision of the old regulation that eliminated a number of its constitutional infirmities.[4] Unlike the Detention and Repatriation Regulation, however, the revision of the Urban Demolition Regulation is a much more harder task since it meets serious resistance from local governments, which have been deriving a significant part of their fiscal revenue from lucrative takings by paying compensation to sub-market values (Zhang 2005). Although the LAO expressed its willingness to require just compensation and narrow the scope of 'public interest' in the new regulation, it did not appear confident enough to withstand the pressure of local governments, which are in charge of implementing most of the central laws and policies, and enjoy considerable discretion in deciding the extent of implementation. After a long delay, apparently having consulted the local governments, the LAO came up with a second draft of the Regulation on Taking and Compensation for Houses on State-Owned Land, which made considerable concession to the local governments. Although the new draft affirmed the principle of just compensation and authorized compulsory taking only with court approval, it deleted several important provisions in the first draft that enabled the interested parties to participate in deciding whether the proposed taking is required by the 'public interest' and compensation satisfies the just compensation criterion. They may challenge compensation in the court, but it is uncertain how much protection the judiciary may provide them given its present status.

4. Urbanisation through taking? The rural land conundrum

Even if the new Regulation reduces the violent demolitions in the cities somewhat, it is inapplicable to land taking in the rural area, where the Tang Fu-zhen tragedy took place. Article 10 of the 1982 Constitution not only provides for the State ownership of the urban land, but also stipulates that 'land in the rural and suburban areas is owned by collectives', i.e. by villages, except those portions which belong to the State according to the law, thus instituting a dualist land ownership regime. Unlike the urban land, which is commonly supposed to have already been owned by the State, the rural land is owned by a non-state entity and thus requires taking if the State intends to gain ownership.

Owing to the mischievous interpretation of Article 10, however, the constitutional taking requirement has failed to secure the ownership of rural land in the hands of villagers. Indeed, several problems have made the piecemeal taking of rural land even worse than that of the wholesale confiscation of urban land.

3 See 'The Strongest Holdout Sticks to the Isolated House', New Beijing Daily; 23 March 2007.
4 'A Relocatee in Chengdu Died of Self-immolation after Resisting the Urban Demolition Team for 3Hours', http://news.163.com/09/1202/10/5PH8QC3K00011229.html; 2 December 2009.

First, ambiguity is necessarily present when dealing with a collective entity – is the land owned by the villagers as a whole, the villagers individually, the village community, or another village organization? Articles 10 and 13 set the preconditions for the taking of land: the demonstration of a public interest and the provision of compensation. The requirement of compensation for taking was added to the Constitution in 2004. But the provision is ambiguous because it did not require *just* compensation, even though Chinese scholars are increasingly inclined today to understand that compensation should be of a just amount according to market value.

Secondly, there is not really a 'market' for rural land to assess its market value since land cannot be freely transacted. Article 10 of the Constitution stipulates: 'the right to use of the land may be transferred according to law', but the transactions of rural land are strictly limited to its own type and are prohibited from exchanges with urban land. The Law of Land Administration, enacted in 1986 and revised several times, is increasingly more rigorous in restricting the right to transfer property. The result is that the peasants are obliged to use the farmland for agricultural purposes. They may engage in the farm work themselves, or may lease the farm to others and collect rent, but they are forbidden from transferring the land to urban residents or using the rural land for any purposes other than agriculture. This restriction on the use of rural land removes an essential characteristic of a free market exchange. Strictly speaking there *is* a 'market' for rural land, but this market is completely separate from the national market for the transaction of urban land – or more accurately, the right to the use of urban land. Compared to the market value of urban land, the value of rural land has long been seriously depressed, making it entirely inadequate for the purposes of awarding just compensation.

Thirdly, the prohibition on voluntary transactions between rural and urban land has created a double effect. On the one hand, housing prices in the cities have kept at high levels due to the scarce supply of urban land. On the contrary, the relatively cheap houses constructed on rural land cannot be sold for residential, commercial or industrial purposes due to the prohibition of the Law of Land Administration. However, despite the legal prohibition, these properties thrive because they are beneficial to peasants and urban residents alike. It is a way, if not the way for peasants to make extra money and for urban residents to reduce their living costs. Of course, these properties are *not* legally recognized or protected. They are called 'small property' as opposed to big property, which are legally constructed and acquired urban houses that have legal titles.

Lastly, rural land can be converted into urban land, but only through the process of land taking by local government. Constructions for industrial, residential or commercial purposes must not only obtain government approval, but also be preceded by the taking process that would convert the collectively owned land to state-owned land. The rationale is that rural land which is owned by the village, must now be owned by the State, so that the State must take the land before construction can be permitted. Thus, associated with the dualist regime is the common understanding (or misunderstanding) that change of ownership requires taking or confiscation, an interpretation that must have made all local officials rest assured since urbanization is now synonymous with taking. Whenever rural land is converted to industrial, commercial or urban residential use, the local government is constitutionally authorized to step in and take the land before selling it for a much higher price.

Under this interpretation, China is perhaps the only country in the world that equates urbanisation with official land-taking or government confiscation. This conceptual misunderstanding is the result of the dualistic land system. While urbanisation through land-taking provides for the seemingly efficient development, it creates very high social costs.

Local officials are now instinctively committed to 'development' by taking the rural land and converting millions of peasants into landless petitioners with unjust compensation. Compared with urban demolitions, rural land takings have produced many more conflicts and tragedies. In Zhucheng, Shandong province, for example, the local government goaded the peasants to move to storied apartment buildings in exchange for their rural homesteads.[5]

The rationale for such a tight State control over rural land is purportedly to maintain food security. However, this rationale has been challenged by the economists and others. Nevertheless, the taking or grabbing continues apace. For instance, the Ministry of Land Resources has drawn a 'red line' around 1.8 billion acres of farm land, requiring that they be preserved, without giving an explanation about its necessity or future usage.[6]

5. Institutional causes of land grab in China

Despite the restrictions in the Land Administration Law, the land preservation objective has not been effectively realized because local officials have every incentive to confiscate village land and sell it to urban developers at a price that is many times of what they paid at the taking, and peasants are in no position to defend themselves. For example, in the case of the Tieben factory in Jiangsu, the land taking not only violated the peasants' rights because they were given insufficient compensation, but it also compromised land security since the local government authorities and the enterprise owner colluded to bypass the strict review and approval rules laid down by the central government. Legally, large projects such as the Tieben factory require State Council approval but by cutting the project into separate pieces, the enterprise owner was able to bypass the strict rules and gained provincial approval instead.[7]

Since the central government often lacks the exact information of the local development projects and peasants are not empowered to defend their land rights, the local government and developers can easily make a corrupt deal at the expense of the interests of both peasants and farm land protection. Having recognized the scope and severity of these problems, the central government is in the process of revising the law. However, for several reasons, the revision is unlikely to change the Chinese model of development or halt the government land grabbing process.

First, China is a 'developmental state' driven by pressures for the growth of the Gross Domestic Product (GDP), which has been the primary source of legitimate justification for one-party monopoly since the crackdown of the Tiananmen Protest in 1989. In order to resuscitate economic reform when the political reform had been suffocated, Deng Xiaoping had to take the 'southern tour' (南巡，*nanxun*) to Guangdong province, where he emphasized the theme 'development is the solid reason'. Soon after, new measures began to produce the expected effects of making officials (rather than the people) the driving force of social development in China. At the same time as China's GDP was increasing at a rate of nearly 10 percent each year for the last two decades, a 'Great Leap Forward' in land grabbing and demolitions under the name of 'development' (发展，*fazhan*) was creating the 'China miracle' which was also contributing to the 'solid' legitimacy of the Party. The speed of economic growth also became a primary indicator used to measure the 'performance'

5 Tu Chonghang, 'Many Provinces and Municipalities Forcibly Abolish Villages to Exchange for Construction Land and Expand Land Finance', New Beijing Daily; 2 November 2010.

6 Mao Yushi, 'Ensuring the red line of 1.8 billion acre farm land caused housing price to rise dramatically', Daily Economy News; 12 December 2008.

7 He Yuxin and Chen Fang, 'The Chaos of Tieben', Finance; 20 May 2004, pp. 77-86.

(政绩，*zhengji*) of local officials. Indeed, the concept of 'local GDP' was invented for that purpose. Since building modern infrastructure is the most efficient way of increasing the local GDP, local officials have always found it irresistible to grab rural land or demolish urban buildings in order to make sure that the numbers for local economic development look good.

Secondly, for over a decade, the income from land grabs has become a major source of revenue for the majority of local governments in China. In many cities and counties, revenue from land sales constitutes about half of the local governments' total revenue, resulting in the phenomenon called 'land finance' (土地财政，*tudi caizheng*).[8] Local governments are compelled into 'land finance' by the fiscal pressure of the Divided Tax (分税制，*fenshuizhi*) scheme implemented in 1994. Although the tax reform was ostensibly a 'fiscal federalism' experiment, giving local governments more autonomy over their own taxes, the net result has been to dramatically increase the central government's share of the total revenue at the expense of the local revenues, thus forcing local governments to find non-tax revenues to maintain the balance sheet.

Thirdly, land finance is only possible in a legal system that does not require just compensation for land and property taking. The local governments' non-compliance with the just compensation standard has fuelled their incentive for taking since substandard compensation makes taking a lucrative proposition. As a result the local government is the largest beneficiary of taking without just compensation.

Finally, taking without just compensation affords the most abundant opportunities for rent-seeking and corruption. Since land revenue is not a tax, it is subject to less formal supervision and control, and thus more open to embezzlement. The large scale construction projects following the taking and demolition also produce corrupt bidding, which facilitates all sorts of briberies. Party and government officials are in the best position to use regulatory power in exchange for profits, which has been one of the quickest ways to make money.

In the past decade, land grabbing has simultaneously been the primary cause of official corruption and of civilian grievance petitions in China. On the one hand, local officials at all levels are obliged to take the people's land and property, both to increase local revenues and to add to their performance scores. On the other hand, takings and demolitions have long been the culprit for social conflicts and instabilities. Ministry of Construction Statistics shows that taking-related grievances have consistently ranked top in the number of petitions in recent years. In the first half of 2004, over 18,000 petitioners went to Beijing to seek relief, the majority of whom arrived in groups.[9] On April 20, for example, several hundred peasants from Tianjin municipality sat before the Ministry of Land and Natural Resources to complain the loss of their contract land.[10] The numbers of conflicts have constantly rises over the years, producing countless 'nail houses' (钉子户，*dingzihu*) across the country; that is those who stand up against local governments and refuse to sell their houses for the low compensation offered.

6. Conclusion: Re-interpreting Article 10 of the Constitution

In order to stop land grabs, China needs to re-interpret Article 10 of its Constitution, so as to return to the people both the urban 'state-owned' and the rural collectively-owned land.

8 Shao Yu, 'How May China Eliminate Land Finance?', Financial Times; 20 June 2013.
9 Zhao Xiaojian, 'Political Economy Behind the "Land New Deal"' 21 Finance 90-93; 2004.
10 Chang Hongxiao, 'Toughening the Law on Land Contract' 14 Finance110-112; 2004.

With respect to the state ownership of urban land, China could learn from the system practised in the United Kingdom, Canada and other former British colonies, where land is nominally owned by the Crown, but the people retain full rights to the use of the land. Even in the socialist countries where land is declared to be public or state-owned, right to use the land should be left predominantly to the people. Here, it is necessary to distinguish between strictly-defined state-owned land that is actually used or managed by the State and the nominally owned state-owned land. The latter should be constitutionally protected for the benefit of the people as the *de facto* owner and manager of the land on which they live and work. This approach is practically difficult, however, because the government is not satisfied with formal ownership of urban land. Instead it wants to reap the full benefits derived from the substantive ownership of land so that it can preempt at will the infrastructures it builds.

With respect to the collective ownership of village land, it is imperative to re-interpret Article 10 so as to return the land to villagers and to delink urbanisation from government taking. Before any land is taken, the constitutional principles requiring public interest and just compensation need to be observed and made consistent with the objective of building a 'socialist market economy' as laid down in Article 15 of the Constitution. These principles will be taken seriously only with effective public participation in the land taking process.

First, the Chinese government must realize that the market principle is respected only if a voluntary exchange is the rule and the first recourse. State confiscation should be a rare exception used only in the public interest, e.g. for railway and highway constructions. In other words, the State should be obligated to prove the presence of a public interest before it can take any land, and it should attempt voluntary private exchanges first by negotiating with the landowners, as is the situation in the UK. The State may only initiate the compulsory taking process when all efforts to secure a voluntary exchange have failed.

Secondly, land taking should offer the original land owner just compensation based on the market value of the land. This has been a long standing universal standard, to which China is moving. For a comparison, Singapore's Land Acquisition Act did not originally follow the just compensation rule since the government felt that the increase in land value was often due to the adjacent publicly built infrastructure. Yet in 2007, Singapore returned to the international standard by amending the Act to give full market value to the owner whose land is taken. It is noteworthy that, governments committed to the rule of law, as in Singapore, will use the revenue derived from a below-market-value compensation scheme in the public interest, whereas in China, such public resource may simply make itself a target for official misappropriation or corruption.

Measuring just compensation may be difficult for countries like China, where rural land is separated from the national land market, and thus technically has no market value. Yet solutions to this problem can be found, e.g. rural land in the city suburb may use the price of urban land in its vicinity as a reference. In any case, the first step is to eliminate the invidious division of urban and rural land markets, and establish a uniform land market nationwide. The Decisions of the Third Plenum of the 18th Congress of the CCP has explicitly endorsed this idea and vowed to establish a system that will allow rural land to enter the market based on the 'same condition, same rights and same price' as that of urban land.

Finally, these principles will remain empty words without the support of adequate institutions. For example, if the court fails to exercise its fair and independent judgment for the market price of the land taken, it will be impossible to obtain just compensation as required by the relevant laws. The question in front of the Chinese public has always been the missing

guardian for its Constitution. If public officials pursue their own profits at the expense of the public interest as defined in the Constitution, who will enforce the Constitution? Since it is the people who need protection, they must stand up to guard their own interests as protected by the Constitution.[11]

Thus, it is of particular importance to guarantee public participation in the land taking process. Sometimes village committees collude with developers and township or county officials, and sell the land without even informing the peasants to whom the land has been leased. Such was the case in Wukan village in Guangdong.[12] To prevent corrupt deals of this type, transparency, timely notices, and full public knowledge, consultations and informed consent should be made the general principles that must be observed before the State may lawfully take the land. Some of these principles have already been adopted by the Regulation on Taking and Compensation for Houses on State Owned Land, and need to be expanded to rural land taking.

In the past two decades, popular movements have arisen where people try to protect their private property. As the case in Chongqing illustrates,[13] property owners may successfully use the Constitution and the Property Law to obtain market value compensation. So far such successes are isolated, but they do give hope to popular initiatives and efforts in China. To effectively protect their economic and property rights, the people themselves must look beyond narrow economic benefits and make full use of their legal and political rights.

11 Qianfan Zhang, 'A Constitution without Constitutionalism? The Paths of Constitutional Developments in China', 8 International Journal of Constitutional Law 950-97; 2010.

12 Martin Patience, 'China's Wukan Village Stands Up for Land Rights. Accessed at http://www.bbc.co.ulr/news/world-asia-china-16205656. Li Qiang, 'Deputy Party Secretary of Guangdong Province Visited Wukan Village, Claimed to Resolve the Issues By Relying on the Mass', Southern Daily; 23 December 2011.

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Are You Hungry? A Dose of the Philippine State of Food (In)Security

Estrella Flores-Catarata

Abstract

The Philippines is one of the most endowed countries in terms of natural resources and a climate highly suitable for agriculture to ensure food security. However, it is also a country mired in chronic poverty and hunger. It is an agricultural country with still majority of its population who are farmers, yet these food producers are mainly the ones so deprived of food. Moreover, the Philippines became the number one importer of rice in Asia. On the other hand, the country is touted as one which has the best legal framework yet, it is where the Rule of Law is one huge problem to resolve.

This paper aims to answer why there is so much hunger in a country of abundance by letting us understand the context of the small Filipino farmers, and the country's agriculture in relation to the land issues that they are usually confronted with.

This will also present concrete cases on how certain laws in the country are being used to pave the way for some self-interests and so-called "development projects" which became detrimental to food security and the self-sufficiency of the farmers. Some successful and viable community initiatives which helped the farmers manage to get by and somehow addressed the immediate pangs of hunger will also be highlighted along with the challenges and proposals for sustainable development.

All the information contained in this article is culled from the research studies of the Philippine Network of Food Security Programmes and its members and networks as well as from concerned government agencies and private institutions. Case studies were done. Several affected farmers and individual experts were also interviewed. Secondary data through desk research were also gathered.

In conclusion, lingering food insecurity and hunger among many Filipinos is undoubtedly caused by social inequities, the farmers' lack of control and/or deprivation of the country's **agricultural** and **arable lands** and other resources. Another major cause is the complex governance problems – from the government leaders' lack of sincerity to address the welfare of its farmer constituents, to issues of corruption and the violation of the Rule of Law.

Keywords: Poverty, Food Security, Agriculture Sector

1. Introduction

The Philippines is a country of 7,100 islands in Asia. Its east is facing the Pacific Ocean. As an archipelago, it has 34,000 square kilometers of coral reefs and a coastline of 36,289 kilometers[1].Having a tropical climate, it is one of the world's 17 mega diversity countries that hosts more than 70% of the world species. Concretely, there are more than 500 animal

1 Ocean Defender Tour of Southeast Asia; 2013. Accessed at OD-2013-PH-SEAS.php.

species, 13,000 plant species wherein 2/3 of these are endemic.[2]

The entire land area is around 30 million hectares where 13 million is devoted to agriculture, this is according to the data by Kilusang Magbubukid ng Pilipinas (KMP[3] for short). The main crops that grow are rice, coconut, sugar cane, corn, root crops, and tropical fruits.[4] The Philippines is an agricultural country with the majority of its population and labor force living in the countryside. According to the Commission on Population (POPCOM) of the Philippines, the estimated total population of the Philippines as of January 1, 2015 is 100,730,309.[5]

"Overall national poverty statistics remain bleak at 29%. And the top five poorest provinces in the country are in Mindanao Muslim provinces, Apayao in the Cordillera, and Eastern Samar in the Visayas with a poverty rate ranging from 50% to 70%.[6] "In 2009, annual reports found that 26.5 percent of Filipinos lived on less than $1 a day -- a poverty rate that was roughly the same level as Haiti's. And a new report by the National Statistics and Coordination Board (NSCB) for the first half of 2012 found no statistical improvement in national poverty levels since 2006."[7] Furthermore, "Thirty-two percent (32) of children under age five suffer from moderate to severe stunting due to malnutrition, according to UNICEF, and roughly 60 percent of Filipinos die without ever having seen a healthcare professional".[8]

According to some of the findings of the ADB study on the Philippines, poverty in the Philippines remains a predominantly rural phenomenon which is partly attributable to decade-long problems in agriculture. Agricultural growth has not been sustained for many reasons: typhoons, failure in agrarian reform, inadequate delivery of agricultural services, and weak governance. In 2006, almost 75% of the poor were found in the rural areas, where the poverty incidence was 37.84% compared with 14.3% in urban areas.[9] The Philippines has a skewed distribution of landholdings. Balisacan noted that the poorest in rural areas tend to be landless.[10] Indicating a link between access to land and resources, and poverty alleviation, Balisacan and Pernia in 2002[11] also found agrarian reform to be a significant variable that directly impacts the welfare of the poor. But despite years of implementation, the Philippines agrarian reform program has made little dent in the inequitable distribution of land. Various studies also assert that a country's initial land distribution influences its subsequent economic

2 The Frenzy for Raw Materials: The Effects of Mining in the Philippines. Lilli Breininger, Michael Reckordt.

3 KMP is a nationwide peasant movement in the Philippines strongly critical of government and lobbying for the enactment of the Genuine Agrarian Reform Bill.

4 Bureau of Agricultural Statistics; 2010.

5 National Statistics and Coordination Board (NSCB) in the Philippines.

6 National Statistics and Coordination Board website.

7 National Statistics and Coordination Board (NSCB) in the Philippines.

8 Jillian Keenan, The Atlantic.

9 Poverty in the Philippines: Causes, Constraints, Opportunities by Asian Development Bank.

10 Balisacan citing Philippine Census of Agriculture, various years; 2007b.

11 Poverty in the Philippines by Asian Development Bank. Accessed at https://books.google.com.ph/oks?id=LpDOBQAAQBAJ&pg=PA41&lpg=PA41&dq=Indicating+a+link+between+access+to+land+and+resources,+and+poverty+alleviation,+Balisacan+and+Pernia+in+2002++also+found+agrarian+reform+to+be+a+significant+variable+that+directly+impacts+the+welfare+of+the+poor&source=bl&ots=OBlTRUJKm_&sig=WW3He85Oex4oLvKjWOUE8c2WWU&hl=en&sa=X&ei=FrduVZq5K4HWmAWR-oDADQ&ved=0CB0Q6AwAA#v=onepage&q=Indicating%20a%20link%20between%20access%20to%20land%20and%20resources%2C%20and%20poverty%20alleviation%2C%20Balisacan%20and%20Pernia%20in%202002%20%20also%20found%20agrarian%20reform%20to%20be%20a%20significant%20variable%20that%20directly%20impacts%20the%20welfare%20of%20the%20poor&f=false.

growth and human development performance.[12] A typical developing country with initial high land inequality is expected to have a lower long-term income growth rate and slower pace of poverty reduction than a country with a more equitable land distribution. Thus, aside from its direct effects on poverty, high land inequality also affects the poor indirectly through its negative impact on long-term economic growth."[13]

2. Why is hunger most prevalent in the agriculture sector?

According to the Philippine Center for Investigative Journalism report, in the year 2000, out of a population of over 81 million Filipinos, 21.2 % or more than 17 million people were said to be not reaching the food threshold.[14] The year 2000 was the time when the United Nations set the Millennium Development Goal (MDG) of reducing by half the number of hungry population in the World. Although the MDG setting was done in the year 2000, the baseline data and timeline was from the year 1990 towards 2015. Fast forward to September 2014, the Social Weather Station (SWS) survey revealed that 9.1 million families or an estimate of 54 million of the Filipinos were poor and hungry.[15] Ibon Foundation conducted its survey also in April 2014, and the result revealed that 6 of 10 Filipinos cannot buy enough food and have trouble paying for basic costs of living.[16]

The case study below conducted by a non-government organization Central Visayas Farmers Development Center Inc. (FARDEC)[17] revealed a very concrete and vivid explanation and understanding why farmers, the supposed food producers experienced so much hunger.

Rice and corn are the primary staples in the Philippines. The country used to have 4,419 traditional rice varieties.[18] These varieties grew even without petro-chemical fertilizers, resistant to harmful insects and pests and can also grow even on rain-dependent farms. According to the old Filipino farmers, who planted traditional rice varieties, they used to plant and harvest two times in a year, but they can be sure of the volume of yields. They were not worried of floods nor absence of water. These varieties also were tastier, and the seeds can withstand longer period of storage. Traditional seeds are also recyclable. Farmers need not buy seeds every cropping. They just had to set aside seeds out of their harvest for the next cropping. It can also be noted that before the Green Revolution, the Philippines used to be self-reliant in terms of staples. In fact, the country was exporting rice and also its seeds. It was perhaps one reason why neighboring Southeast Asian countries became interested to study the Philippine traditional rice seed varieties.

And then in 1970's, Marcos introduced the "Green Revolution" as one of his flagship programs. That was the start of the introduction of so-called high-yielding varieties. Since then, farming became so costly for the farmers. The cost of seeds, petro-chemical fertilizers and pesticides tied the farmers to the mercy of traders who loaned to them these inputs overpriced.

12 Deininger and Squire; 1998.
13 Poverty in the Philippines: Causes, Constraints, Opportunities by Asian Development Bank.
14 Ordonez, Ernesto M., Why Filipinos Are Hungry? Accessed at http://www.pcij.org/i-report.
15 Social Weather Station is a private research institution in the Philippines. See http://www.sws.org.ph.
16 Ibon Foundation is an independent research NGO in the country. See http://www.ibon.org.
17 Central Visayas Farmers Development Center Inc. (FARDEC) is a region-wide farmers NGO in Central Visayas established since 1990 that rendered programs and services on farmers organizing, ustainable agriculture, rice marketing, research and advocacy.
18 Masipag Research. Masipag (Magsasak at Siyentista Para saPag-unlad ng Agrikultura) is a network of POs, NGOs and Scientists.

And with the government's neglect in supporting pre and post-harvest facilities, farmers again have to shoulder the high irrigation service fees as well as post harvest facilities, such as thresher and blower rents, which are big additions to the costs of production.

Further aggravating the situation of poverty among farmers is the underpricing of their produce by the monopoly traders. During harvest time, due to the National Food Authority's incapacity to procure the *palay* of farmers, when supposedly it is the mandate of this government agency, the monopoly traders set and control the pricing of this very important agricultural product. Farmers are always at the mercy of the monopoly traders, who control not just the procurement of *palay* but also the milling, marketing, and pricing distribution of the milled rice.

And, above all, because the farmers are still tenants, ¼ of the farmers' gross harvests still have to be given to the respective landlords as share. Overall, computing the farmers gross income less total cost of production, the poor farmers were left with a net deficit of PhP 3,000 per harvest time which is for a period of 3 – 4 months. This, explains the irony of hunger among the farmers, who are the supposed food producers.

Table 1. Case study of a Bohol tenant rice farmer's production costs and income conducted by FARDEC in 2014

For One Hectare Rice Farm	Costs of Production
Seeds - P260/ kg X 45 kg per hectare	P11,700.00
Fertilizer – Complete 14-14-14 P1,250/sack X 5 sacks	P6,250.00
Fertilizer – Urea P1,200/sack X 5 sacks	P6,000.00
Pesticides - P270/hectare	P 270.00
Transport Cost of Fertilizer – P30/sack X 10 sacks	P 300.00
Land Preparation Costs	
Clearing P200/day X 5 persons	P1,000.00
Cleaning P400/day X 4 persons	P 1,600.00
Plowing (without carabao) P400/day X 8 persons	P3,200.00
Harrowing P400/day X 4 persons	P1,600.00
Transplanting 900 pcs X 1/piece	P 900.00
Planting P 250/day/person X 12 persons	P3,000.00
Weeding P250/day/person X 12 persons	P3,000.00
TOTAL PRE – HARVEST COSTS OF PRODUCTION	**P 38,820.00**
Thresher and blower rent (3 sacks palay or 120 kg@23/kg)	**2,760.00**
Irrigation Fee (150 kg *palay* @23/kg)	**3,450.00**
TOTAL COSTS OF PRODUCTION	**45,030.00**
AVERAGE YIELD: 60 SACKS/HA X 40 KG/SACK X 23/KG	**55,200.00**
Landlord's Share	**13,800.00**
Tenant Farmer's (3 shares X 10,200) Gross Income	**41,400.00**
Less TOTAL COSTS OF PRODUCTION	**45,030.00**
Net Income/Deficit of the Farmer	**(-3,630.00)**

3. Land use conversion in the Philippines

Since the early 90's, the government under then President Fidel V. Ramos crafted a program called Medium Term Philippine Development Plan (MTPDP). Mainly, it was supposedly aimed for NIChood or making the Philippines a Newly-Industrialized Country (NIC) just like with its neighbors in Asia. Then President Ramos was always speaking about in many of his presidential speeches how he wanted the Philippines to make the new tiger in Asia. Obviously, that slogan did not materialize. Nevertheless, that program started and triggered the massive land use conversion of many agricultural lands which according to our research and the Department of Agrarian Reform (DAR) estimate, an average of 27,000 hectares of agricultural lands in the Philippines was lost annually to land use conversion.[19] And, of course, whether it is called "development" or "progress" by those local and foreign business corporations, it is "land grabbing" for the Filipino farmers. Based on actual experiences of farmers and civil society organizations helping farmers in the assertion of land rights, in the Philippine context, since the 1990's until now, Philippine Network of Food Security Programmes (PNFSP) defined land grabbing as:

> "The taking away of the lands cultivated by small farmers and the communities, often facilitated by the "government" either legally or "illegally" to be converted into commercial, industrial, tourism, mega dams, agribusiness or large scale - mining uses by the foreign companies and/or big business, without the benefit of genuine consultation, just compensation and proper relocation, and employing deception and harassment and at worst, extra judicial killings against the poor farmers and human rights defenders."[20]

4. Some laws that paved for "land expropriation"

"The Philippines has earned the dubious distinction of having the worst record in bringing wrongdoers to justice, according to a study of countries plagued by impunity."[21] The country topped the list of 59 countries included in the first World Impunity Index. The researchers defined impunity as "the impossibility, *de jure* or *de facto*, of bringing the perpetrators of violations to account whether in criminal, civil, administrative, or disciplinary proceedings since they are not subject to any inquiry that might lead to their being accused, arrested, tried, and, if found guilty, sentenced to appropriate penalties, and to making reparations to their victims." Interestingly, the researchers concluded that corruption is not the source but the result of impunity. "The reason people have become increasingly corrupt is because they realize how the system functions, how the structure of the system of government creates conditions to allow to them to escape unpunished," said L. A. Derbez Bautista, rector of the university. "Having good laws is not enough for a country to develop," the study stressed. "People need to know that those are going to be effectively implemented."This is quoted from the recent report of the Impunity and Justice Research Center of the Universidad de las Americas, a

19 Department of Agrarian Reform website.

20 PNFSP's definition of LAND GRABBING is based on the many experience of farmers in the Philippines. This definition may not be the conventional definition of land grabbing but is only exclusive to PNFSP and those farmers organizations who themselves experienced how the lands that they are cultivating were taken away from them. Even if others may disagree, the author will stand by this definition which is solidly based on the experience of farmers and farmers organizations that she has been working with for the past 25 years. The Philippine Network of Food Security Programmes is a network of 30 NGO's all over the country which is directly involved with farmers in the work of addressing food security and land rights issues.

21 Accessed at http://www.InterAksyon.com on 24 April 2015.

Mexican – based University as published recently in InterAksyon.com on April 24, 2015.[22]

The Philippines can be said as one of the countries with a strong legal framework. And it is so unfortunate that many of our good laws are not enforced nor implemented while some "controversial" laws are used to advance or paved the way for some certain self and/or corporate interests, often at the expense of the already poor and hapless farmers and our fragile environment. The following are just highlights of the laws that have been criticized for its specific loopholes that paved for land grabbing and/or land expropriation cases as experienced by the farmers and indigenous peoples in the Philippines.

4.1 The loopholes in Republic Act 6657 otherwise known as, the Comprehensive Agrarian Reform Law (CARL) [23]

The CARL defines agricultural lands in Section 3 (c) of RA 6657 as lands devoted to agricultural activity as defined in this Act and not classified as mineral, forest, residential, commercial, or industrial land.

Classification or reclassification of lands is subject to the authority of the Local Government Units (LGU). Some lands have already been classified or reclassified prior to the Republic Act (RA) 6657 either by the LGU or other government entities. What we are saying is, Agricultural lands should be defined according to actual use and not according to what they were declared to be by a government entity.

Moreover, Section 8 of RA 6657 legalized and allowed multi-national corporations (MNCs) to maintain their control and operation of vast tracts of agricultural lands through lease, management, grower, or service contracts for a period not exceeding twenty-five years, renewable for not more than twenty-five years.

As a result of this provision, lands leased to foreign corporations like Dole and Del Monte in Mindanao remained untouched. They kept 220,000 hectares of agricultural lands devoted the to production of export crops and opted to be covered by the non-land transfer schemes of CARP.[24]

Another loophole is Section 31 of RA 6657 which provided for the Stock Distribution Option (SDO) as an alternative to actual land distribution. Instead of land, farmers were supposedly given shares of stock and became co-owners with the landlord of the stock corporation. This is concretely the case of the controversial more than 6,000-hectare Hacienda Luisita in Tarlac, Philippines owned by the current Philippine President's family, the Cojuangco's. [25]

22 Accessed at http://www.InterAksyon.com on 24 April 2015.

23 Comprehensive Agrarian Reform Program. Accessed at http://www.dar.gov.ph.

24 Research/Data Base of the Kilusang Magbubukid ng Pilipinas (Peasant Movement in the Philippines) and Sentro Para sa Tunay na Repormang Agraryo (SENTRA). SENTRA is an NGO based in Manila which is providing legal assistance to farmers faced with agrarian disputes.

25 The 6000 – hectare hacienda Luisita in Tarlac is one of the most controversial land cases in the Philippines which is owned by the Cojuangco clan of former President Corazon Cojaungco – Aquino. When the CARL was enacted, the Stock Distribution Option was applied instead of actually distributing the land to the farm workers in the hacienda. Farmworkers in the hacienda organized themselves as AMBALA (Alyansa ng mga Manggagawang Bukid sa Asyenda Luisita). In November 2006, a massacre of the striking farmworkers happened that killed 13 of the AMBALA members. The farmers kept their struggle to assert for their land rights until the Supreme Court under former SC Justice Renato Corona decided to cover 4000 hectares of the more than 6000 of the hacienda into actual land distribution under CARP. That decision prompted farmers to cultivate the lands into rice and vegetable farms. However, based on account

According to the Hacienda Luisita farmers' legal counsel, the farmers' capital is always the land, but with Stock Distribution Option, they surrender the control and ownership of the land to the corporation. What actually happened was, farmers-beneficiaries will not be able to exercise the right of ownership over the land because the corporation retains the ownership. The Management can manipulate the income and loss statement to make it appear that the business is losing. And they can easily do that because, in this case, farmers are thrown into a world totally alien to them. Farmers in the Philippines who are not always formally educated could not be familiar with corporation laws, Questions such as what are the functions of Board of Directors and how are they chosen in a corporation, and what are the value of having Representation, among other are intricacies of running a business that they need to be familiar with. As per actual experience of Filipino farmers, they are still under the control of the landowners, and there is no freedom to cultivate and develop the lands according to indigenous own methods or practice. Their relations are governed by contractual stipulations. Their security of tenure is easily negated, and farmers ended up losing the land by a simple expedient claim by the landlord of a violation of the terms and conditions."[26]

From 1988 to end of June 1995, in period of (7) years after the supposed implementation of the CARP (Comprehensive Agrarian Reform Program), approximately 33,707 hectares of agricultural lands were converted to other uses. According to a study by the KMP, 17,348 hectares or more than 50% of the agricultural lands were issued conversion orders and were exempted from CARP by virtue of the Department of Justice (DOJ) Opinion 44.[27]

4.2 The Department of Justice (DOJ) opinion 44 – DOJ No. 44

The DOJ Opinion 44 is an opinion by then Secretary Franklin Drilon in 1990 that lands already reclassified into residential, industrial, or commercial use or purpose prior to June 15, 1988 are not covered by the CARP (Comprehensive Agrarian Reform Program). In which case, landowners no longer need any conversion clearance from the DAR to convert the same into non-agricultural uses. The DOJ based its opinion on the definition of agricultural land under the CARP. In 1993, the Supreme Court upheld the opinion and on that basis, thousands of hectares were exempted from the CARP. The case is Natalia Realty, Inc. vs. DAR in 225 Supreme Court Reports Annotated (SCRA) 278." Therefore, the DOJ Opinion paved the way for rampant land use conversion.

According to Atty. Jobert I. Pahilga, legal counsel of many farmers in land disputes, "Under DOJ 44, agricultural lands already reclassified into other uses before June 15, 1988 are no longer considered agricultural lands even when their actual use is agriculture or for agriculture-derivative production. Those lands are ripe for conversion even when farmers are still tilling the said lands. This DOJ opinion was affirmed by the Supreme Court in the Natalia Realty,Inc. vs. the Department of Agrarian. That was made the basis of exclusion from agrarian reform of productive agricultural lands such as the 14,000 hectares Hacienda Yulo in Canlubang, Sta. Rosa, and Calamba, Laguna; the 8650 hectares Hacienda Looc, in Nasugbu, Batangas; the 217 hectares irrigated rice land known as Tropical Lands in Dasmarinas, Cavite; the 6,000 hectares Hacienda Agoncillo in Laurel

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of farmers, TADECO (Tarlac Development Corporation) kept on bulldozing and destroying their farms because TADECO wanted to convert the land into other uses. So until now, the land dispute is going on. Source: SENTRA (Sentro Para sa Tunay na Repormang Agraryo) and KMP.

26 Atty. Jobert Pahilga, Executive Director of the SENTRA. Accessed at http://www.humanrights philippines.net.

27 Kilusang Magbubukid ng Pilipinas research desk.

and Talisay, Batangas; the thousand of hectares of agricultural lands in Aplaya Laiya, San Juan, Batangas; the 400 hectares productive being developed by APEX and PILAR Development Corporations in Salawag, Dasmarinas, Cavite; the 90 hectares irrigated rice land in Malolos and Calumpit, Bulacan developed by Sta. Lucia Realty; among others. Aside from excluding those lands from agrarian reform, DOJ opinion 44 paved the way for massive displacement of farmers as a result of the land conversion that ensued thereon."[28]

In the case Natalia Realty, Inc. vs. DAR, Natalia Realty Inc. is the owner of a 125 hectares of land set aside by Presidential Proclamation No. 1637 (1979) as town site area for the Lungsod Silangan Reservation Estate Developers and Investors Corporation (EDIC). EDIC is granted preliminary approval and locational clearances by the Human Settlements Regulatory Commission (HSRC) for the establishment of the Antipolo Hills subdivision. In November 1990, a Notice of Coverage was issued by the DAR on the undeveloped portion of the landholding. The developer filed its objections and filed this case accusing grave abuse of discretion against the DAR for including the undeveloped portions of the landholding under the coverage of the CARP. The issue dealt with the question:

If the lands are already classified for residential, commercial, or other purposes and already approved by the HSRC prior to June 15, 1988, can these lands be still covered by Republic Act 6657?

The Supreme Court ruled that land subject of the case has been classified by the Lungsod Silangan Reservation through Proclamation No.1637 prior to the effectively of Republic Act 6657 and in effect converted these lands into residential use. Since the land was already converted prior to June 15, 1988, the DAR is bound by such conversion and therefore, it was an error to include this in the coverage of the CARL.

4.3 Section 20 of the Local Government Code

"In conjunction with Section 20 of the Local Government Code(LGC) and the case of Province of Camarines Sur vs. Court of Appeals in 222 SCRA 173 (1993), the local government units have power to reclassify lands and adopt zoning plans or ordinances. This provision of the Local Government Code and Section 65 of the LGC are being availed of by landowners to exempt land from CARP (Comprehensive Agrarian Reform Program) coverage", according to Atty. Pahilga of SENTRA. Landowners can easily "influence" a *Sangguniang Bayan*" (municipal council) to adopt a zoning ordinance to suit their needs. After a zoning ordinance is adopted, they petition the Department of Agrarian Reform (DAR) to exempt their landholdings from CARP coverage. Eventually, they apply for conversion. Another case to prove this is FARDEC's experience in the case of the assisted farmers in the mountain areas of Pardo, Cebu City. More than 100 hectares of prime agricultural lands planted with corn, vegetables, fruits, and root crops were now converted into a golf course and first class housing subdivision. The said land was covered by the government's agrarian reform program under Presidential Decree No. 27 – Operation Land Transfer[29]. Recognizing the farmers as beneficiaries, the DAR organized the farmers as *Baruganan Alang sa Repormang Agraryo* (BARA) and started processing the coverage of the lands and the transfer of the title to the farmer – beneficiaries from the Aznar Brothers who owned the land. In the early 1990's, Sta. Lucia Realty and Development Corporation came

28 Atty. Jobert I. Pahilga, Executive Director of SENTRA, Extending Agrarian Reform Law: Same Old Story. Same Results accessed at http://www.humanrightsphilippines.net.

29 Presidential Decree No. 27 or PD 27 Operation Land Transfer program is the agrarian reform law of former President Marcos that took effect since 1970's.

to develop the area. Bulldozers demolished the farms of the farmers. The BARA sought the help of FARDEC and the DAR. BARA filed a case against Sta. Lucia Realty and Development Corporation. In the course of the farmers struggle to defend their land rights, two of its leaders, Olympia Caneda and Samuel Tardin – a barangay tanod of Pardo who were most vocal and always in the front lines of the human barricades were murdered one night in their own house in June 1993. But the BARA farmers did not easily give up. In mid 1990's, then DAR Secretary Ernesto Garilao made a decision in favor of the BARA farmers upholding the coverage of PD 27 in the contested land thereby ordering the Sta. Lucia Realty to stop the bulldozing of the said lands, to compensate the displaced farmers, and to provide a relocation site as replacement of those already lost farms and homes. The BARA thought their land problem was over until in March 1997, the Aznar Brothers filed a motion for reconsideration to the Court of Appeals invoking Cebu City Council's reclassification of the lands into residential, commercial,and tourism purposes. The Court of Appeals (CA) decided in favor of the Aznar Brothers and Sta. Lucia Realty Development Corporation. A notice of demolition was then ordered and enforced. In early 2000, the remaining members of the BARA farmers were totally demolished from the supposedly P.D. 27 – covered agricultural lands with no relocation, not even a compensation. This is just one of the many cases of reversal of agrarian reform coverage that happened.

According to Atty. Pahilga, "In September 2007, the DAR has already reported that 5,049 Emancipation Patents and 103,092 Certificate of Land Ownership Awards were cancelled. That figure did not include pending cases for cancellation of EPs and CLOAs, which may go as high as 50,000 cases. To date, even when asked by Congress to submit the data, the DAR has not made an actual determination and inventory of how many CLOAs/ EPs were cancelled."[30]

According to IBON Foundation's own research, by the middle of 2004, more than 20,000 Emancipation Patents and Certificate of Land Ownership Awards covering 380,000 hectares of land were cancelled.

In an interview with the DAR's Regional Director in the Visayas (who requested that his name be not mentioned), he admitted that land use conversions of many agricultural lands are mostly illegal, which means these did not pass through the approval of the DAR.

4.4. The Philippine Mining Act of 1995 or Republic Act 7942

The Philippine Mining law is the main policy that governs all mining operations in the Philippines. The law provides three approaches in forming and finalizing contracts for mining companies' operations. These are the Exploration Permits (EP), Mineral Production Sharing Agreement (MPSA), and the Financial Technical Assistance Agreement (FTAA).

The FTAA permits 100% foreign ownership of mining operations although the Philippine Constitution previously allowed only for a maximum of 40 percent. The companies can lease from 81,000 hectares up to 324,000 hectares. The leasing period is 25 years but can be extended for another 25 years. The law allows for logging as much as the company sees fit in the concession area.[31] These are part of the privileges provided in the Financial or Technical Assistance Agreement under the Mining Act of 2005.

According to many critics of this law, "the government's current mining program is hinged on the extraction and export of Philippine minerals to foreign markets where investors straddle the rush to cash in on volatile and speculative metals markets and the lucrative sell-out

30 Accessed at http://www.humanrightsphilippines.net.

31 Reckordt, Breininger, The Frenzy for Raw Materials: Effects of Mining in the Philippines, p. 51.

of mineral ores. It failed to create significant gains on domestic employment and development and devastated ecosystems that are the lifeblood of the nation's agriculture and fisheries-dependent communities."[32] "Since the mid-1980's, mining has contributed less than two percent to the value of gross domestic product, a contribution which is negligible, in contrast to agriculture, fishing, and electronics. As to the employment generated, between 1990 – 2008, only .3 to .6 percent of the total industrial workforce in the Philippine are in the mining and quarrying industry."[33]

4.5 The Bio-fuels Act of 2006 or Republic Act 9367

This law which was enacted during the presidency of Gloria MacapagalArroyo aimed to develop local bio-fuel industry in the Philippines from sugar cane, jathropa, cassava, coconut, and hybrid corn. With this, the program targets 10 plants to be established in Quezon province, Negros Occidental, Tamlang Valley in Negros Oriental, and expanding in Cebu, Bohol, Mindanao, and Batangas.

"Often referred to as "green" fuel, biofuels are packaged in the public view as the answer to current energy and environmental problems. Although certain studies from the scientific community already warned governments that biofuels are far from being "clean", and the technology is not cost-effective at the current stage, many countries have carelessly fast-tracked legislations due to pressures from the market. Biofuels have been erroneously promoted as "carbon neutral". But according to specialists in genetics and biochemistry, the processing, refining and consumption stage of biofuels already involve a process of burning, where the carbon dioxide ($C0_2$) that plants absorb when they develop in the fields, is just returned to the atmosphere. The use of fertilizers, pesticides, agricultural machinery in harvesting, transportation, and the infrastructure used for distribution, also produces considerable CO_2 emissions. In fact, if a hectare of forest land converted for biofuel production can save 13 tons per year in carbon emissions, that same land can absorb 20 tons per year of CO_2 if it remains forested, outweighing the benefits of biofuels in terms of greenhouse gas emissions."[34]

Quoting the UN, "The benefits to farmers are not assured. [Growing biofuel crops] can be especially harmful to farmers who do not own their land... At their worst, biofuel programmes can also result in a concentration of ownership that could drive the world's poorest farmers off their land and into deeper poverty."

5. Right to Food is Right to the Land

Food security as defined is the economic and physical access to all people at all times to safe, sufficient and nutritious food to lead a healthy and active life.[35] For the Philippine Network of Food Security Programmes, there are five major pre-conditions to achieve this, as follows:

a. Availability of sufficient food

b. Stability of food supply

c. Accessibility of food everyone has the means and can afford to access food

32 Center for Environmental Concerns (CEC) is a non government organization in the Philippines that strongly criticizes the Mining Act of 1995 for tis detrimental impact to the environment. See http://www.cec.org.

33 Reckordt, Breininger, The Frenzy for Raw Materials: Effects of Mining in the Philippines, p. 57.

34 Fuelling the Crisis: Policy Analysis on the Bio-fuels Act of 2006. Accessed at www.cecphil.org.

35 1996 World Food Summit.

d. Fair and equitable distribution of food and resources that is mainly the land for agriculture

e. Quality of food and nutrition which means food safety

Based on the said definition, five food security dimensions can be identified. These are food availability, economic and physical access to food, food utilization, quality of food, and stability over time.

Recognizing the incidence of global hunger, one of the Millennium Development Goals set in the year 2000 is, by the year 2015, extreme poverty and hunger must be eradicated with three target indicators, as follows:

a. Reduce by half between 1990 and 2015, the proportion of people whose income is less than $1 a day;

b. Achieve full and productive employment and decent work for all;

c. Reduce by half, between 1990 and 2015, the number of hungry population.

The Philippine government was one of those countries who committed to this goal. It is good to commit. But, whether it is on the right track towards achieving that goal in terms of programs and policies, or at least, doing something to minimize cases aggravating the situation is entirely a different story. Looking at the concrete situation of farmers and indigenous peoples from the grassroots, we can indeed say that figures revealed in surveys don't lie but these revelations are even just conservative statistics. It is far worst to see the human faces of festering and intensifying poverty and hunger in the rural areas as well as in the urban poor areas.

There can never be food security among farmers for as long as they are deprived of their right to the land. Food security relies on agriculture and the land. These days, when climate change has been recognized as a global phenomenon, there is already a strong recognition of the prime importance of small-scale farming and sustainable agriculture to ensure food security. Many farmers' organizations firmly believe that genuine land distribution is the first key to resolving this. Farmers organizations in the Philippines with the strong support of various civil societies have always been asserting for their land rights, no matter how difficult and risky.

Using the framework of the Rights–Based Approach (RBA),[36] the right to food as the right to the land must always be collectively asserted. There have been success stories to cite. And despite the seemingly bleak situation of the many poor farmers, these palpable leaps and victories have somehow provided a glimmer of hope.

6. Sustainable agriculture, community–based initiatives and the challenges

Sustained community-initiatives concretely provided alleviation to poverty and hunger. These good practices ranged from innovative farming practices, appropriate technologies and community- based enterprises in improving food production and building resiliency. All these are

36 The Rights-Based Approach or RBA originated from the Human Rights - Based Approach which started in 2003 with the UN Statement of Common Understanding on HRBA approaches to develop ment cooperation by development agencies and non-government organizations to achieve a positive change in power relations in many societies. There are two stakeholders in the RBA – the rights holders who do not experience their full rights – poor farmers and fisherfolks, indigenous peoples, urban poor settlers, women, children , etc and the duty bearers (government institutions and leaders) who are duty-bound to fulfil the rights of the rights holders.

in the framework and approach for sustainable agriculture using diversified integrated farming system (DIFS). "Sustainable agriculture is an alternative system of agriculture that is based on the principles of ecological soundness, holistic science, social equitability and economic viability. The reality of change in the climate further aggravates the existing problems of farmers. The agro-ecosystem is very fragile that it needs an integrated approach of ecologically sound alternatives to the existing conventional agriculture-free of synthetic fertilizers and chemical pesticides and most of all, building on the existing strength of the farmers and their communities."[37]

The key to the success of these initiatives is the strength of the peoples' organization. But, the challenge has always been how to replicate these and multiply and elicit the sincere support of even the local government units in the communities. Another big challenge is to muster the critical mass of empowered people for the lobby and assertion of the peoples' rights and making claims from the duty bearers. A critical mass of people is direly needed to make the government accountable. There is too much sins of "omission of responsibilities as well as the fault of commission wherein government officials themselves are violating the laws. These are very glaring in so many cases of corruption in all levels of governance. The culture of impunity is another biggest challenge in governance. In fact, the rule of law is what the Philippine really needs. We recognize the big responsibilities and accountability of the local government and the national government.

The local government units should also give their all-out support to these community initiatives if only to, without delay, address the immediate pangs of hunger, and the reality of disasters that always strike the Philippines. They should ensure enforcing and making functional good legal frameworks and mechanisms. The Philippines has the Organic Agriculture Act, the National Disaster Risk Reduction and Management Law, the Climate Change Act, to mention some good laws, that supposedly need serious enforcement and implementation. The challenge for good governance is paramount. The national and local government efficiency and sincerity to attend to the needs of the people is something that is so wanting.

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Emancipation Patents or EP's are equivalent land titles given to farmer-beneficiaries of the Marcos agrarian reform program Presidential Decree 27 Operation Land Transfer. Farmer – beneficiaries can only be given EP's by the DAR if they fully paid the amortization fees to the Land Bank of the Philippines.

Operation Land Transfer. Farmer-beneficiaries can only be given EP's by the DAR if they fully paid the amortization fees to the Land Bank of the Philippines.

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Environmental Rights In Malaysia : Evolution and Conceptualisation, Grappling With Climate Change and Other Pressing Environmental Issues and the Environmental Vision For Accountability

Roger Chan Weng Keng

Abstract

This paper attempts to challenge the often misconceived perception in Malaysia that enforcement is the main obstacle toward an environmental rule of law. It bolsters the fact that environmental degradation is happening because some of the laws that are enforced are environmentally unfriendly. It addresses the reality that development activities such as massive logging and land clearing can be legal yet lethal. The method of conceptual analysis is introduced as a bridge to the emergence of environmental rights in general. The human rights-based approach to the environment is given treatment as a benchmark for the development of the environmental regime in Malaysia. State-Federal relations in the context of the Malaysian Constitution is also analysed to illustrate the obstacles in having a uniform national environmental policy. Data are elicited from information already in the public domain such as reported recently by the media, legal sources and the author's personal experiences and observation especially in the recent flood crisis. The findings of this paper lay bare the dire need for accountability in managing our resources and social capital. A vision for environmental accountability is therefore attempted in place of the present enforcement-based model, as the first most important step toward curing the many deficiencies of Malaysian environmental laws and addressing environmental corruption.

Keywords: Environmental Accountability, Enforcement, Environmental Rule of Law

1. Introduction

This paper is organised into three parts. First, it deals with the position of environmental rights in Malaysia with emphasis on the underlying influences and factors related to the development of that area; second, it addresses the Climate Change issue and particular environmental problems that presently bedevil the nation; and third, it lays down suggestions of what an environmental vision ought to entail in achieving maximum mileage toward environmental rule of law.

2. Where and how does Malaysia stand on environmental rights?

Malaysians do not live with an attitude of absolute indifference to the environment around them. So a good place to start and a question worth dwelling upon is to ask exactly where and how Malaysians stand in addressing the multifarious environmental issues that have been cropping up relentlessly over recent years. To name a few from the list: radioactive waste disposal, massive deforestation, illegal logging, endangered species, climate change, solid waste management, displacement of people due to flood disasters, construction of highways, land clearing and hill slope development, pollution of lakes, rivers and waterways, and poor air quality.

3. Sowing the seeds of environmental rights and post-war development.

Since the dawn of civilisation, man had known of how the environment could be useful in providing sources of food for survival. However, his awareness of how to protect it was in question. As recorded in the history of how many great civilisations such as the Sumerians and the Mayans of the last 5000 years, and more recently those of Easter Islands, were destroyed leading to ecological collapse and demise of society.

Later, the growth of scientific knowledge that was to come seemed to have sown the seeds of awareness that environmental protection needs to be considered as an indispensable element of survival because damage to it can cause damage to man as well. That seed was to set in the motion for the modern environmental movement that was to transform our relationship with the environment from mere awareness to a language of rights.

The bridge from awareness to rights was, however, provided by some form of recognition accorded to environmental protection. This was often expressed in the language of human rights rooted in the indivisible rights of human dignity, equality and liberty. So it is no surprise that while the Universal Declaration of Human Rights of 1948 makes no express mention of environmental rights, rights of an environmental nature then was treated under the International Covenant of Economic, Social and Cultural Rights (ICESCR) 1966 as a human right to health. Article 12, para 2 (b) of the ICESCR provides that the steps Parties must take to achieve the full realization of the right to health "shall include those necessary for the improvement of all aspects of environmental and industrial hygiene."

The post-Stockholm Conference (1972) era saw rights of an environmental nature taking two main stream routes one in the form of countries making a conscious effort to enact in their constitutions an express right to an environment characterised by adjectives such as clean, healthy, or sustainable; while the other is not in creating a new set of rights but expanding existing human rights to life and health that relates to the environment. The manifestations of the first stream routes saw what was described by David Richard Boyd as '*The Environmental Rights Revolution*.'[3] More than 90 States, with Portugal being the first, adopted similar formulations of environmental rights in their constitutions.The other stream routes saw the development of human rights that are vulnerable to environmental harm and of human rights for responsive and sound environmental policy making.

3.1 The heuristic approach to environmental rights

One other plausible reasoning that could add force to hasten the emergence of environmental rights post-Stockholm is heuristic. Some say that the subject of environmental rights is as recent as space travel. The cosmologist Carl Sagan showed us how *Earth* looked like: a pale blue dot in an image taken in 1990. Then images and photographs of the world taken in space by the Apollo astronauts somehow evoked an impression and a kind of sympathetic emotion to some who had seen them for the first time, though they have become a familiar image today. The Brundtland Commission in 1987, charged with the function to unite countries in achieving sustainable development, described the pattern of how *Earth* looked like from space and human's inability to fit in, in the following words:

"In the middle of the 20th century, we saw our planet from space for the first time. Historians may eventually find that this vision had a greater impact on thought than did the Copernican revolution of the 16th century, which upset the human self-image by revealing that the earth is not the centre of the universe. From space, we see a small and fragile ball dominated not by human activity and edifice but by a pattern of clouds, oceans, greenery, and

soils. Humanity's inability to fit its activities into that pattern is changing planetary systems, fundamentally. Many such changes are accompanied by life- threatening hazards. This new reality, from which there is no escape, must be recognized- and managed".

Perhaps it is not too much to claim that the pale blue dot, the impression and emotion have something to do with the emergence of environmental rights as well.

3.2 But whose right is environmental rights?

Environmental rights are basically encapsulated in environmental law. Its reach encompasses the broad spectrum of framework legislation, regionalisation of environmental rights, global agreements and international environmental instruments and declarations, even the decennial calendar of global environmental conferences. A country's environmental law can incorporate national, regional, and international dimensions, sometimes all at once or bear that distinction depending on a particular environmental context. For example, Climate Change laws of a certain country could see the implementation of its Climate Change legislation as a national framework legislation as well as a regional environmental instrument or as a United Nation Framework Convention on Climate Change (UNFCCC) all at once. Lord Hope in Walton v. Scottish Ministers, *UKSC 44 (2012),* gave some indication of the broad sweep and scope of environmental law when he said, "environmental law…proceeds on the basis that the quality of the natural environment is of legitimate concern to everyone."

4. The Position of Environmental Rights in Malaysia

The foregoing establishes the broad outline on the trend of influences and the inter-mix of factors on the development of environmental laws in Malaysia. Such a development crystallises in an assortment of environmental laws within the framework legislative model covering almost every conceivable aspect from land, air and water. This can be sufficiently though not exhaustively, represented as follows:

Malaysian Environmental Laws

1. Environmental Quality Act 1974 (Act 127)

    i. Environmental Quality (Licensing) Regulations 1977 [P. U. (A) 198/77]

    ii. Environmental Quality (Prescribed Premises) (Crude Palm Oil) Order 1977 [P. U. (A) 199/77]

    iii. Environmental Quality (Prescribed Premises) (Crude Palm Oil) Regulations 1977 [P. U. (A) 324/77]

    iv. Environmental Quality (Prescribed Premises) (Raw Natural Rubber) Order 1978 [P. U. (A) 250/78]

    v. Environmental Quality (Clean Air) Regulations 1978 [P. U. (A) 280/78]

    vi. Environmental Quality (Compounding of Offences) Rules 1978 [P. U. Environmental Quality (Prescribed Premises) (Raw Natural Rubber) Order 1978 [P. U. (A) 250/78] A) 281/78]

    vii. Environmental Quality (Prescribed Premises) (Raw Natural Rubber) Regulations 1978 [P. U. (A) 338/78]

viii. Environmental Quality (Sewage and Industrial Effluents) Regulations 1979 [P. U. (A) 12/79]

ix. Environmental Quality (Control of Lead Concentration in Motor Gasoline)Regulations 1985 [P. U. (A) 296/85]

x. Environmental Quality (Motor Vehicle Noise) Regulations 1987 [P. U.(A) 244/87]

xi. Environmental Quality (Prescribed Activities) (Environmental Impact Assessment) Order 1987 [P. U. (A) 362/87]

xii. Environmental Quality (Schedule Wastes) Regulations 1989 [P. U. (A)139/89]

xiii. Environmental Quality (Prescribed Premises) (Schedule Wastes Treatment and Disposal Facilities) Regulations 1989 [P. U. (A) 141/89]

xiv. Environmental Quality (Prescribed Premises) (Schedule Wastes Treatment and Disposal Facilities) Order 1989 (PU (A) 140/89)

xv. Environmental Quality (Delegation of Power on Marine Pollution Control) Order 1993 (PU (A) 276/93)

xvi. Environmental Quality (Prohibition on the Use of Chlorofluorocarbons and other Gases as Propellants and Blowing Agents) order 1993 (P.U. (A) 434/93)

xvii. Environmental Quality (Delegation of Power on Marine Pollution Control) order 1994 (P.U. (A) 537/94)

xviii. Environmental Quality (Prohibition on the Use of Controlled Substances in Soap, Synthetic Detergent and Other Cleaning Agents) Order 1995 (P.U.(A) 115/95)

xix. Environmental Quality (Control of Emission from Diesel Engines) Regulations 1996 (P.U. (A) 429/96)

xx. Environmental Quality (Control of Emission from Petrol Engines) Regulations 1996 (P.U. (A) 543/96)

xxi. Environmental Quality (Refrigerant Management) Regulations 1999 (P.U. (A) 451/99)

xxii. Environmental Quality (Halon Management) Regulations 1999 (P.U. (A) 452/99)

xxiii. Environmental Quality (Delegation of Power) Order 1999 (P.U. (A) 501/99)

xxiv. Environmental Quality (Prescribed Activities) (Open Burning) Order 2000 (P.U. (A) 308/2000)

xxv. Environmental Quality (Clean Air) (Amendment) Regulations 2000 (P.U.(A) 309/2000)

xxvi. Environmental Quality (Compounding of Offences) (Open Burning) Rules 2000 (P.U (A) 310/2000)

xxvii. Environmental Quality (Delegation of Power) (Investigation of Open Burning) order 2000 (P.U.(A) 311/2000)

xxviii. Environmental Quality (Sewage and Industrial Effluents) (Amendment) Regulations 2000 (P.U. (A) 398/2000)

xxix. Environmental Quality (Control of Emission from Diesel Engines) (Amendment) Rules 2000 (P.U. (A) 488/2000)

xxx. Environmental Quality (Prescribed Activities) (Environmental Impact Assessment) (Amendment) Order 2000 (P.U. (A)489/2000)

xxxi. Environmental Quality (Delegation of Power) (Halon Management) Order 2000 (P.U. (A) 490/2000)

xxxii. Environmental Quality (Delegation of Power) (Perbadanan Putrajaya) Order 2000 (P.U. (A) 233/2000)

xxxiii. Environmental Quality (Appeal Board) Regulations 2003.

xxxiv. Environmental Quality (Declared Activities) (Open Burning) Order 2003.

xxxv. Environmental Quality (Dioxon and Furan) Regulations 2004 (P.U. (A) 104/2004)

xxxvi. Environmental Quality (Prescribed Conveyance) (Schedule Waste) Order 2005 (P.U. (A) 293/2005)

2. Atomic Energy Licensing Act
3. Biosafety Act 2007
4. Drainage Works Act 1954
5. Fisheries Act 1985
6. International Trade in Endangered Species Act 2008
7. Irrigation Areas Act 1953
8. Land Conservation Act 1960
9. Local Government Act 1979
10. Merchant Shipping (Oil Pollution) Act 1994
11. National Forestry Act 1984
12. National Park Act 1980
13. Parks Enactment 1984
14. Plant Quarantine Act 1976
15. Pearl Oyster Shell Fishery Ordinance (Sabah Ordinance)

16. Pesticides Act 1974
17. Protection of Wildlife Act 1972
18. Radioactive Substance Act 1968
19. Sewerage Services Act 1993
20. Street, Drainage and Building Act 1974
21. Town and Country Planning Act 1974
22. Water Enactment 1920 (Revised) Act 1979
23. Water Services Industries Act 2006
24. Wildlife Conservation Act 2010
25. Sabah Animal Ordinance 1962
26. Sabah Biodiversity Enactment 2000
27. Sabah Drainage and Irrigation Ordinance 1956
28. Sabah Environment Protection Enactment 2002
29. Sabah Forest Enactment 1968
30. Sabah Mining Ordinance 1960
31. Sabah Wildlife Conservation Enactment 1997
32. Sarawak Biodiversity Centre Ordinance 1997
33. Sarawak Forest Ordinance 1954
34. Sarawak Natural Resources and Environment (Amendment) Ordinance 2001

5. The Constitutional provisions

All the above environmental laws can be linked to the relevant provisions of the Malaysian Constitution (known as the Federal Constitution), in particular, to those that relate to fundamental liberties. Article 5 (1), for instance says that: "No person shall be deprived of his life or personal liberty save in accordance with law." It basically means the right to life. This was clarified, though obiter, in the case of Tan Teck Seng v Suruhanjaya Perkhidmatan Pendidikan 1 MLJ 261, (1996), where the Court of Appeals, said:

"The expression 'life' appearing in Article 5 does not refer to mere existence. It incorporates all those facets that are an integral part of life and those matters that go to form the quality of life itself. Of these are the rights to seek and be engaged in lawful and gainful employment and to receive those benefits that our society has to offer to its members. It includes the right to live in reasonably healthy and pollution free environment." (Emphasis supplied)

6. Regional and international environmental rights

Malaysia is a member of the Association of South East Asian Nations (ASEAN) and also a party to the ASEAN Human Rights Declaration, whereupon paragraph 28 (f) incorporates a *"right to a safe, clean and sustainable environment"* as an ingredient to adequate standard

of living. It is also a party to the Rio Declaration of 1992, which enunciated environmental principles for environmental protection that, *inter alia* include international cooperation, common but differentiated responsibilities, environmental impact assessment, public participation and access to courts for remedies to environmental injustice. It is also a party to many of the outcomes of the World Summit on Sustainable Development (WSSD) 2002 and Rio+20 that have consistently maintained focus on sustainable development. While many of these areas of environmental enunciations in regional and international fora are not explicitly cascaded into its national legislative framework, these can be viewed as 'soft law' to show the level of its commitment to the myriad environmental issues that it is facing.

7. Grappling with climate change and other environmental issues in Malaysia.

There are two sub-components to this part of the paper. First, to highlight why Climate Change is singled out as the primary focus in its preference over other specific environmental issues as the biggest single environmental issue for discussion. In the course of which the character of other environmental issues in Malaysia will naturally follow. That said, it should be understood that this is not to hint that other environmental issues are of less significance, since all these are ultimately linked across a wide spectrum. Second, to highlight and discuss what exactly are the stumbling blocks to deter good environmental governance in Malaysia.

7.1 The crucial issue of climate change in Malaysia

As stated earlier, a national environmental issue can at once be both transnational and international. This can never be applied more aptly than Climate Change.

Jaap Spier, once wrote provocatively, in his article "High Noon: prevention of climate damage as the primary goal of liability?" that:

"Why is there a legal basis for life-sentences for murderers and- arguably-not for people who are wantonly putting at risk the lives and well-being of over a billion people, to give just one example? We ought to look at the law from such a perspective. Thinking along such lines we may hope to find the perfect weapon to fight climate change."

The foregoing excerpt somewhat underscore the severity of the Climate Change issue as a concern of humanity. Because of the scale and the potential of it to wreak damage at both national and global level, Climate Change is no doubt the *'Mother of all Environmental and Human Rights Issues'*. It is inevitable that other pressing environmental issues, including the environmental rights will naturally be roped in any Climate Change discussion in Malaysia. Extreme weather, massive deforestation, indiscriminate land clearing, pollution of catchment areas, and burning at cleared sites to make way for monocultures, such as oil palm plantations, are not uncommon here. The violation of environmental rights (through drastically reduced water retention capacity as manifested in the recent massive floods and landslides) will definitely be engaged as specific environmental issues but they can also be engaged as a Climate Change issue.

In this regard, it is noteworthy to pay heed also to a preliminary report by the UN Independent Expert on the issues of human rights obligations to the environment where it was stated that the Office of the High Commissioner for Human Rights (OHCHR) conducted a study in 2008-2009 on the effects of Climate Change on the enjoyment of human rights, and it concluded that:

"Climate change will post direct and indirect threats to many rights including: the right to life and food as a result of malnutrition and extreme weather events; the right to water as a result of melting glaciers and reductions in snow cover; and the right to the highest attainable

standard of health as a result of malnutrition, extreme weather, and an increasing incidence of malaria and other diseases that thrive in warmer weather."

In light of the aforesaid, the Malaysian Bar, on 15th March 2014, unanimously passed *a* Climate Change Resolution which *inter alia* strongly called on the government to:

"Take immediate action to ensure effective enforcement of environmental laws, and to undertake urgent law reform, where required, including ensuring transparency and proper public consultation with all stakeholders and independent specialised assessment of safety aspects of industrial processes, and not allowing ouster clauses to prevent judicial review for better enforcement and more effective punishment for offences against the environment, which increase global warming and threaten Planet Earth."

That event was a watershed in the history of the Malaysian Bar. Traditionally, they dwelled principally on matters within the pantheon of human rights and civil liberties, now they formally take on the Climate Change agenda as an indispensable ingredient to the observance and enjoyment of fundamental human rights. In a sense, it underscores the well-founded principle that without safeguarding natural resources through environmental protection, there is actually nothing to fight for.

7.2 *Firing on all cylinders to address Climate Change*

At the time of writing, it was reported in a mainstream media, dated 26th February 2015, that the Malaysian Prime Minister said "Malaysia needs to fire all cylinders to tackle climate change and global warming."

He went on to say that Malaysians would end up paying a dear price if the issue is taken lightly as the country is already feeling the backlash of Climate Change and global warming through intense dry spell and massive floods.

Those remarks are most welcome and indeed encouraging in particular when he said that the Green Technology and Climate Change Council was a crucial platform to find ways to address climate change and draft the green technology development agenda. It was further said that "The Roadmap of Carbon Intensity Reduction in Malaysia study found that a 44 per cent intensity reduction (target) by 2020 and 53 per cent by 2030 could only be achieved if all mitigation measures were executed fully."

Despite the catchiness of these statements, this is a good story to tell if all mitigation measures were put in place and fully executed. This brings on the questions of environmental governance and the need to address a number of stumbling blocks. What are they?

7.3 Stumbling blocks to good environmental governance in Malaysia

It is proposed to introduce some of the serious ones that are germane to the discussion, to wit:

7.3.1 Massive Clearance of Forested Areas Continues Unabated

Massive clearing of forested areas and hill slope developments still occur from time to time, such as in the states of Kelantan, Pahang and Penang. For fairly obvious reasons, this will not bode well for our Climate Change agenda but instead will derail much of the plan to fight Climate Change instead. The devastating effect was felt in the recent flood disasters resulting in an unprecedented, massive displacement of an estimated 250,000 Malaysians and 23 known deaths.

Some sceptics had asked stoically, "Who says and where does it say that the recent flood disasters were linked to massive clearing of forests and logging?" The answer is, the science says it. Continuous tree-cutting will lead to soil and debris to run-off and choke rivers. Water from clogged rivers will overflow to flood human settlements. During periods of heavy rainfall it could be disastrous.

The National Security Council confirmed that the floods last year and landslides occurring now were linked to land clearing for agricultural and development reasons as well as illegal encroachment. On top of that sea levels are perceptibly rising and by the turn of the century will make the recent devastating floods on the east coast of Peninsula Malaysia seem minor. This is backed by a study by the National Hydraulic Research Institute (Nahrim) which says that many of our coastlines are affected by rising sea levels, with numerous parts of the country expected to be under water by the end of the century. Fig. 1 below gives the altimeter satellite locations and the projected sea-level rise in metres by the year 2100.[1]

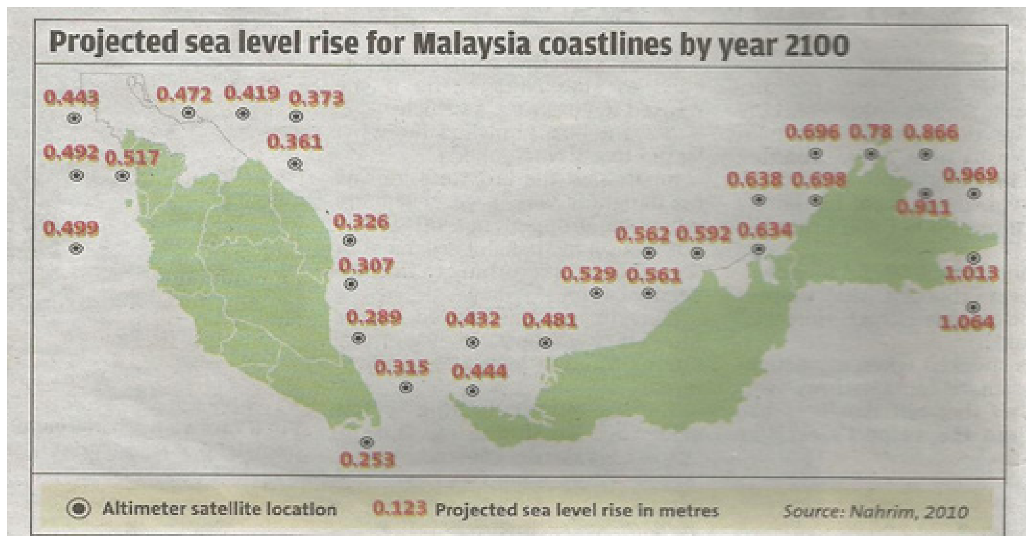

Fig. 1 Projected sea level rise in Malaysia by year 2100. Source: Nahrim

A recent case[1] in point that is worth dwelling in relation to the issue of inadequate forest cover is the clearing of some 3,000 hectares of Lesong permanent forest reserves, as big as the township of Cyberjaya, with untold number of logs taken out of the jungle every day. Lesong is part of the Endau-Rompin Complex, which include the wildlife rich Endau-Rompin National Park, and has a total area of 52,464 hectares. The Pahang Forestry Department divided Lesong into three parts:

1. 16,896 ha. as 'degraded forest' though whether it has degraded is disputed by environmentalists.

2. 16,958 ha. as production forest, to be managed under 'sustainable forest management Principles'.

3. The remaining area would be protected.

1 See *The Star* of 25th September 2014. Figures 2, 3 and 4 in the Appendices.

Arising from this, the damage to endangered species is serious. The impact includes loss of habitats and poaching, edge effect,[2] animal-human conflict and catchment area pollution. According to the International Union, for Conservation of Nature's Red List of Threatened Species, 686 plants and 225 animals in Malaysia are at risk of extinction. There are about 300 tigers left in the country and they are being squeezed into extinction[3] Lesong logging will cause widespread and severe damage to the environment and the eco-system. In a word this is prejudicial to life.

Many questions remain unanswered on Lesong. Why can't the 1st area be managed according to sustainability principle is anybody's guess. Isn't it the Forestry Department to show evidence of a degraded forest? What about the impact on the indigenous people's foraging area and the fact that once destroyed will take many decades to restore.

8. Environmental corruption in Malaysia

In an issue of the *News Straits Times* dated 26th February 2015, a former Forestry Department Officer in the State of Perak was convicted by the Malaysian Anti-Corruption Commission Act 2009 after he pleaded guilty of accepting an RM100,000 bribe three years ago. However, the background to this is that he has amassed more than RM3 million in his bank accounts that he was ordered by the Court to return to the government. He was previously slapped with 13 other charges, 12 for accepting gratification amounting RM290,000 from a timber contractor at a district Forestry officers' room and another for failing to explain his extraordinary wealth. Apparently, the fine of only RM70,000 in default of 7 months jail imposed by the Court was the result of some plea bargaining in which the prosecution decided to drop the other 13 charges.

This case study poses a number of worrisome questions. Is this only the tip of the iceberg, considering the accused was not a high ranking officer? What about the unjust enrichment to the contractors and logging companies who are also parties to such corrupt practices? Could it mean that lack enforcement and lack of manpower that we hear so often are just phrases bandied about for our environmental woes when the root of the problem is corruption?

Just across the South China Sea in the State of Sarawak, where many of the pristine jungle are gone, it was recently reported that the newly-minted Chief Minister roped in the stakeholders including major timber companies to publicly make integrity pledges. In this context he was reported to have said, "Don't mess with me" to underline his tough stand on environmental corruption. He has for the first time sanctioned Forestry Officers or Rangers with the use of firearms, though whether that can curb corruption remains questionable.[4]

In another instance what was once a serene, beautiful highland resort that was Cameron Highlands, was recently marred by reports of massive mudslides and flooding that took the toll of lives and property. Though the reasons given by the authorities for the disaster were not convincing enough, apparently the blame seems to shift to illegal farming. Almost immediately, some of these illegal farms were bulldozed and destroyed to a great loss of revenue. The question that still remains is, if true, why wasn't action taken earlier before the disaster? Who gave approval for illicit farming activities, even if tacitly?

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2 That is when the edges of the forest where logging has laid the land bare get exposed to wind and sunlight, which forces animals like tigers away, shrinking their habitat. See *The Star of 25th* September 2014.

3 See *The Star* of 25th September 2014.

4 This integrity pledge and sanction of firearms are widely reported that can easily be access online.

8.1 The Constitutional overlapping and non-streamlining of responsibilities, between Federal and State Governments on environmental jurisdiction

Historically, when the Malaysian Constitution was drafted, it was dictated by socio-economic and political markers, not environmental. The environmental push was started only with the Stockholm Conference in 1972 after which many countries incorporated environmental considerations into their constitutions. The Malaysian Constitution is still based on the pre-1972 model.

Having said that, there are matters within the ambit of the Federal List (List 1 of the 9th Schedule of the Constitution) but have a counterpart in the State List (List 2 of the 9th Schedule of the Constitution). For example, control of an agricultural pest or welfare of the aborigines are items under the Federal List. But, at the same time, agriculture and forestry are under the State List. Here is where the simple case of overlapping and non-streamlining occurs.

Another example that could suggest a not so simple picture is the pollution of rivers. It is governed by the Environmental Quality Act 1974 and enforced by a federal agency known as the Department of Environment. However, the State List provides that the State has jurisdiction over rivers and, hence, provides for enforcement powers against polluters of rivers. But then rivers flow into a number of States. Therefore, it is not a matter of surprise in practice to hear an uninitiated and misguided state or federal officer pointing a finger that a particular environmental province is not within their jurisdiction or belonging to another. Here lies the problem of enforcing environmental issues uniformly in a not so simple overlapping of jurisdictions. Yet, it can still further be complicated or exacerbated in a situation where both the Federal and State government are from different political parties, with different environmental policies.

Overlapping laws can also arise from the Concurrent List, that is, where both Federal and State are competent to legislate. In this case both laws must be complied with, and if there are any inconsistencies between Federal and State laws, Article 75 of the Malaysian Constitution provides that the State law is invalid to the extent of the inconsistency.[5]

9. The not-so-environmentally friendly laws in Malaysia

What are they? First, they are environmental laws with ouster clauses. These are clauses in environmental laws that strip the courts of their judicial powers to review executive decisions which are considered final and non-appealable. They stymie the effort of the judiciary in ensuring environmental rule of law. Such clauses are unconstitutional as our concept of constitutional supremacy has three fundamental branches of government, the executive, legislature, and the judiciary. Upon this concept, no one branch is to make an encroachment upon the powers of another. One example of such clauses can be found in section 32(5) of the Atomic Energy and Licensing Act 1984, where "the order of the Minister shall be final and shall not be subject to any appeal or review in any Court."

Second, is the Official Secret Act 1972, which is an Act for the Protection of Official State Secrets. When applied to environmental issues it could stymie the flow of and access to information, and is in direct conflict with the spirit and intent of Principle 10 of the Rio Declaration 1992. Environmental human rights defenders in Malaysia frequently protest against the threat of the use of this Act against them.

5 Article 75 of the Federal Constitution reads: " If any State law is inconsistent with a Federal law, the feder al law shall prevail and the State law shall, to the extent of the inconsistency, be void.

Finally, there is the draconian Sedition Act 1948, which could be used to stifle free speech and expression on environmental issues. Use of the Defamation Act 1957 by non-State actors to stifle dissent on environmental and health issues is also not uncommon in practice.

9.1 Addressing the environmental vision of accountability

Constructive criticism is candidly offered in this part of the paper with suggested solutions in the hope that they are heeded. Malaysia could have been prepared before the recent floods.

The massive floods recently cost us loss of lives and displacement of around 250,000 people.[6] Bloomberg News reported an estimated 184,000 hectares of oil palm or 3.5 per cent of the country's total planted area was affected.[7] Losses and cost of rebuilding and repair amounted to billions of ringgit.[8] Was all this foreseeable? Did we learn our lessons from the disastrous floods that happened in the State of Johor during the last time? Did we have a vision of accountability and a proper response system in place long before all this happened?

Authorities, such as the Department of Environment, the Meteorological Department, the Drainage and Irrigation Department, the Ministry of Natural Resource and Environment and the National Security Council, all have the means, both technical and informative, to foresee and detect the dire warnings of that disaster. But they choose to ignore the science going along that pathway until it was too late. They did not draw lessons from the past. They only responded during or after the event. Nothing was done by the authorities long before the event, and have the people thoroughly consulted as to a swift response plan in case a disaster of such magnitude like that happened. Had such a comprehensive plan been mapped out and relayed to the people or meetings been consistently held to ask questions like, "what else can we do and can we know after a bad experience of Johor in the past?" and, "what can we do to prepare our nation for a much greater danger that the signs and the science tell us?" the country would be in a much better position to ward off that danger. What happened shows that the authorities did nothing before the event or have a misguided vision of accountability instead.

Accountability is the very basic foundation of a vibrant and transparent democratic system as it lies at the core of good governance and rule of law. The author believes and argues that there was no accountability as far as the recent disastrous floods were concerned. What was presented to the people was only proposed mitigation measures during and after the event that the powers-that-be-promised to fulfil.

What existed before the event was the fear of accountability that was responsible for half-measure, lacklustre and cavalier attitude of those responsible. It is, therefore, suggested that this component be looked at seriously in attending to the environmental rule of law for what will happen in the next round may not be disastrous but catastrophic.

10. Strengthening Our Institutions on Corruption

The Malaysian Anti-Corruption Commission (MACC) needs to be strengthened as an effective corruption-combating institution. Some basic reforms should be made at least in this regard in the direction that it functions independently and impartially in order to be viable and potent in wiping out the scourge of corruption. According to the Memorandum for the Reform

6 Malay Mail Online, 26th Dec to 30 Dec 2014; Bernama, 3rd Jan 2015; Infomasi Bencana; 4th Jan 2015.
7 Bloomberg, "Malaysia Tallies Flood Damage as Palm Reserves Seen Dropping"; 2nd Jan 2015.
8 The Malaysian Insider, "Flood damage will cost billions says Muhyiddin"; 5th Jan 2015.

of the Malaysian Anti-Corruption Commission circulated at the Malaysian Anti-Corruption Commission Reform Proposals Consultation Roundtable, held at the Bar Council Malaysia, on 12 February, in its introduction, it states:

"At the heart of these proposals is the initiative to establish a constitutionally mandated Anti-Corruption Service Commission ("ACSC") that is to be headed by a constitutionally recognized Chief Commissioner of the ACSC. This newly created entity would operate essentially as an oversight body of the existing MACC. Thus, both the constitutionally founded ACSC and the statutorily established MACC are to be separate entities."

Many of the proposals contained therein are noteworthy of consideration. In cases of extraordinary wealth when compared to public servant sources of income, the need to incorporate a provision in the law to make it an offence automatically is worth considering.

10.1 Enacting environmental-friendly laws, such as a Climate Change Act in Malaysia and promotion of good practices

There is scientific consensus of thousands of scientists from all over the world engaged in the most elaborate research effort on global warming that unless something is urgently done to reduce carbon emission there will be a string of climate catastrophes we have to face.[9] If the science is not matched by political will, enforcement will then be a major hurdle to overcome. Another difficulty is, only when climate-linked cases are brought to Court can they be heard and adjudicated. Here is where a Climate Change Act can be the bridge between science and political will. Because with a sanction, enforcement of carbon emission standards can be made more effective. At the same time, environment friendly laws like promoting biodiversity and forestry preservation should be encouraged while not-so-environmentally friendly laws, as enumerated above should be abolished or amended accordingly in consonance with good environmental governance.

It is recommended that the good practices outlined in the report prepared by the Independent Expert on human rights and environment, John Knox, be used as a guidepost in the implementation of human rights obligations in relation to the environment in Malaysia and also be used as a basis to guide in the formulation of all environmental laws, practice and procedure and all environmental policy-making. The Independent Expert has compiled close to 100 such good practices which are organised to include (a) procedural participation in environmental decision-making to protect rights of expression and association and to provide access to legal remedies; (b) substantive obligations, including obligations relating to non-State actors; (c) obligations relating to transboundary harm; and (d) obligations relating to those in vulnerable situations. See link here[10].

9 The scientists work under the auspices of the Inter-Governmental Panel On Climate Change (IPCC) charged with providing the scientific view on Climate Change to the international community.

10 Accessed at http://www.ohchr.org/EN/Issues/Environment/IEEnvironment/Pages/GoodPractices.aspx.

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Appendices

Lesong logging:

Legal but lethal

Some 3,000ha of the Lesong permanent reserve forest are being cleared for what will eventually become 'timber plantation sites'. The Pahang Forestry Department says the move, approved by the state executive council, is legal. But environmentalists warn that it could be devastating for wildlife, including elephants and critically endangered tigers.

EXCLUSIVE

» See pages 2 and 3 for reports by PATRICK LEE

Fig. 2

Jungle the size of Cyberjaya logged

Only areas known as 'degraded forest' cleared, says state Forestry Department

By PATRICK LEE

Fig. 3

Dept: Poor timber quality the reason for forest clearing

Here today, gone tomorrow: Trucks carrying logs from the Lesong permanent forest reserve.

KUALA ROMPIN: At least a third of Lesong's forests have been deemed as poor in timber quality – the reason the Pahang government says it is allowing it to be logged before being replanted.

Pahang Forestry Department director Datuk Mohd Paiz Kamaruzaman said these poor quality forest areas would be converted to timber plantation sites.

"Part of the Lesong forest reserve is considered poor based on its standing volume composition (referring to how much wood in the trees can actually be sold).

"Hence, a decision was made by the Pahang state government to convert part of Lesong that is poor in standing volume composition into commercial timber plantations," he told *The Star* via e-mail.

Some 3,000ha of forest, he said, had been earmarked for forest plantation development and licensed for logging as at the end of July this year.

This area comes under a much larger 16,896ha area designated by Pahang as industrial timber plantation since 2012 and is termed a "degraded" forest.

A second 16,958ha area has been marked as production forest, where it would be managed according to "sustainable forest management principles".

The remaining 32% of Lesong would be protected. Lesong's total area is 52,464ha.

"The whole 16,896ha of Lesong that have been designated for forest plantation can all be classified as degraded or poor forest," Mohd Paiz said.

He added that once these approved plantation sites were logged, they would be replanted with commercial timber trees and rubber trees, among others.

They would also meet the demand of domestic timber processing industries, he said.

He said the area chosen to be developed as a forest plantation was considered easily accessible and its terrain was suitable for conversion to oil palm and other agricultural activities.

When asked about concerns that wildlife habitats would be at risk due to the logging, Mohd Paiz said the placement of the sites did not form a single whole block and that natural forests in the area would still be retained.

Fig. 4

Legal Study on the Chinese Marine Environmental Capacity System

Haifeng-Deng

Abstract

Marine environmental capacity is a special environmental element based on the sea water self-purification. Due to its determinable, perceptible and relatively disposable characteristics, it is possible for the marine environmental capacity to become the object of special property. According to the quasi-property theory, taking the marine environmental capacity as object, China should institute the marine pollutant discharge right, and the obligee of such right is entitled to use and profit from the marine environmental capacity. As the legal basis of the marine environmental capacity, the marine pollutant discharge right could be allocated through the method of marketization. The feasible channel to solve the problem of marine environmental pollution is through private law, and this presents a major opportunity to deepen the reform of marine environmental pollution governance system for China.

Keywords: Marine Environmental Capacity, Quasi-property, Marine Pollutant, Discharge Right

1. The introduction of marine environmental capacity

1.1 The interpretation of the concept of marine environmental capacity

The marine environmental capacity refers to the required national standard for sea water quality to maintain special ecological function in a sea area, and the allowable maximum pollutant discharge within the certain time limit. It is related to the self-purification capability of sea water, and the quantitative description of the comprehensive manifestation of the self-purification capability.[1]

The marine environmental capacity has dual-nature of natural objective and man-made subjective. The natural objective nature refers to the nature or condition of the special marine environment, such as: the geographical conditions of sea area environment like: space, position, and formation (for example, gulf or river mouth); the hydrological conditions like: tidal current and temperature, the physical, chemical and biological transfer process, and the physical and chemical nature of pollution, among others. The man-made subjective nature generally refers to the environmental quality standard that humans should meet to maintain the special environmental function of the target sea water.[2] The difference of the natural objective nature determines the difference in the self-purification capacity of various marine environments to some degree, for instance, the marine environmental capacity of an open sea area is more than that of an enclosed or semi-enclosed sea area. The man-made subjective nature more evidently reflects the demand degree of human on marine environmental quality, as well as imposes the influence on the measurement and determination

1 Jing Zhu, 'Overview of Research Progress and Calculation Methods for Marine Environment Capacity' 4 Water Science and Engineering Technology 8; 2009.

2 Xiulin Wang, Keqiang Li, Xiaoxiong Shi, Marine Environment Capacity for Main Chemical Pollutants in Jiaozhou Gulf (1st supp, 1st edn, Beijing, Science Press);2006. p.101.

of marine environmental capacity. Under the general circumstance, people divide sea areas into different functional areas in the light of different use aims and protective targets. The marine environmental capacity is different due to variety of functions played by sea water. For example, the marine environmental capacity in the marine oil and gas exploration area should be treated more than in sea water culture zone. Thus, to some degree, it is biased to define the marine environmental capacity as the maximum quantity or the best capacity to accommodate pollutants only from the scientific aspect. It is an indispensable factor for the subjective conditions, such as specific requirement of the State on the administration of marine environment and the public actual demand for marine environment to understand marine environmental capacity.

1.2 The resource characteristics of marine environmental capacity

The marine environmental capacity is an important natural resource with a dual-nature of natural and social. On one hand, it follows the intangible characteristic of environmental capacity, for it is the marine resource granted by nature in the sea water, showing the ecological function of sea water on purification and dilution of pollutants. Thus, it is the environmental factor in survival and development of human society, and can be brought into the recycle process of social production for the purpose of human utilization, and create the enormous social wealth through resources allocation and transaction. The marine environmental capacity has the following characteristics from the aspect of the resource:

Firstly, it is intangible. As the marine environmental capacity exists in the intangible form, it cannot be directly perceived through the visual sense although it exists in the environment. Due to the intangible characteristic of marine environmental capacity, when the property system takes the instituted object, it is necessary to grant it a "tangible" form through legal fiction to realize the specialization of the concept and define the right boundary.

Secondly, it is entire. Generally speaking, natural resources have the entire characteristic, of existing resources in the natural condition with the mutual intrinsic organic linkages forming the uniform of the entire body of natural environment with correlative dependence and restriction.[3] The marine environmental capacity is entire. On one hand, due to the liquidity of sea water body, the marine environmental capacity in a sea area is always integrated with the environmental capacity in other sea areas. The construction of marine environmental capacity system must be based on the whole sea area. The marine environmental capacity and other marine resources exist on the basis of sea water body to commonly constitute the marine ecological and environmental entire body. It is necessary to coordinate mutually the conflicts of resource exploitation and utilization.

Thirdly, it is exhaustible. Since the marine environmental capacity is an exhaustible natural resource, it is hard to restore rapidly and renew within the recycle period of sea water natural purification if it is utilized. Thus, the utilization of marine environmental capacity need to be controlled to some extent. The improper utilization will not only cause the excessive impairment of marine environmental capacity, but will also will cause the inhabiting sea water area to lose the whole or part of functions for a long period.

Fourthly, it is unstable. As it is prone to the influence of the external natural factors, such as temperature and precipitation, the marine environmental capacity resource is unstable, because it adds to the liquidity of sea water making the marine environmental capacity unstable at large. As a result, the right of the holder to develop and utilize the marine environmental

3 Zitai Zhang, Natural Resource Law (1st supp, 1st edn, Beijing, Peking University Press); 2007. p.4.

capacity is prone to be injured by natural and man-made factors, and it needs the special system on right protection and remedies.

2. Usufructuary situation and problem of marine environmental capacity in China

The resource allocation of marine environmental capacity is the basis of market body's use and earnings of marine environmental capacity, and directly determines the extent of realizing the value of the marine environmental capacity resource. At present, the marine environmental capacity resource is mainly allocated on the basis of administrative, legal relation through the marine pollutant discharge permit in China. The marine pollutant discharge permit is a kind of specific administrative act based on public law. In the key sea areas where the pollutant discharge total quantity control is carried out,[4] the marine competent authorities determine the total quantity control index for major pollutant discharge to sea. Based on the application of the administrative counterpart, the authorities grant the applicants the utilization of marine environmental capacity by the issuance of the permit within the scope of the total quantity control index. The Marine Environmental Protection Law of China specifically states that: any land-sourced pollution, marine engineering construction, and any act of marine pollutant discharge, such as dumping waste the prior application where administrative permit for the establishment of drain outlet for pollutant discharged to sea shall be lodged. Thus, the pollutant discharge without administrative permit is illegal.

The allocation of the marine environmental capacity resource based on the governmental permit shows the strong administrative regulation and control, and the counterpart may be entitled to the similar license through the authorization of administrative authorities. The marine pollutant discharge permit is the evidence of doer's entitlement to discharge pollutants into the sea without any nature on the evidence of private right confirmation. The fundamental cause of the problem is that the right to exploit and utilize the marine environmental capacity that is based on private law has not yet been instituted in the form of law in China. There are some obvious defects in the resource allocation mechanism which relies on the public law and the safeguard of administrative compulsory force. These manifest as the administrative license trading between private legal bodies under the administrative, legal framework is prohibited strictly so that the property attribute of the marine environmental capacity resource has been disregarded for a long term. Meanwhile, it is difficult for the property attribute of the marine environmental capacity resource to effectively create social material wealth through the market trading. At the same time, the mode of "command and control" makes market bodies under passive and controlled status in the course of resources allocation. It is also hard to inspire their initiatives and self-awareness for improving production technologies and renewing production equipment to improve economic and environmental benefits through discharge reduction of pollutants. This shows that the current situation of allocating the marine environmental capacity resource simply depend on public law methods. Thus, it impedes the realization of the value maximum value of marine environmental capacity resource, and cannot make China get rid of the numerous difficulties of marine environmental pollution governance.

Therefore, it is necessary to create the right carrier for marine environmental capacity through a system making environmental capacity a property to realize the allocation of marine environmental capacity based on private law, and to substitute the rigid provisions on the resources allocation in the former administrative law. This could specify the inherent attribute

4 According to the practice of administration of marine environmental protection, the so-called "key sea areas" in the Law on Marine Environmental Protection, generally refer to four sea areas such as Huanghai Sea, anhai Sea, Bohai Sea, and Donghai Sea.

of confirming private right of the marine pollutant discharge permit, so that the obligee can realize the trading of right to use marine environmental capacity through the transfer of permit under the legal conditions. At present, in order to realize the thought of resources allocation based on private law, the property carrier of marine environmental capacity must be determined, i.e, the marine pollutant discharge right must be instituted and confirmed.

3. The property carrier of marine environmental capacity—marine pollutant discharge right

3.1 The property characteristic of marine environmental capacity

In accordance with the theory of civil law, a "thing" under the property law refers to the material thing existing beyond any person which can be disposed of and utilized by the holder of rights to satisfy the need of right holder's interests.[5] In tradition, it is thought that the most elementary expression of satisfying the need of the right holder's interests is to bring forward economic interests for civil right holder, only the things that a "rational economic man" may occupy, use, and get earnings from to create the actual wealth, and become the quantification of property object. Because it is impossible to actually control and dispose of the resources such as water and air so that no economic interest is directly produced, it is natural to go beyond the scope of civil law, and thus, it cannot become the property object.[6] However, with the increasingly severe environmental problem and the gradual reinforcement of human consciousness of environmental protection, the traditional theory of property object choice taking the economic value as standard also starts to change. The introduction of sustainable development concept makes the public aware of the significance of natural resources' ecological value, and the pursuit of economic interests must be preconditioned with respect to natural resources' ecological nature. As a result, with the idea of ecological ration being stepped into the horizon of legal theory deeply, there are some breakthroughs in the previous rigorous and conservative standard for limiting property object. With this, more scholars began to attempt to bring the environmental capacity into the scope of property object. The paper writer following such thought and standing at the point of view of interpretation theory thinks that the marine environmental capacity is able to satisfy the relevant characteristics of property object to some degree. Concretely speaking:

Firstly, the marine environmental capacity is perceivable. Although it is not easy for the marine environmental capacity to be directly perceived through the visual sense due to its intangible form, the marine ecological function carries it closely to link to the survival of all kinds of marine lives. When sea water body plays the purification role of pollutants' solution and dilution, people can completely feel such ecological course although they fail to see it directly. Therefore, it is undoubted that the marine environmental capacity is perceivable.

Secondly, the marine environmental capacity is relatively disposable. In the traditional civil law theory, it is thought that physical independence is the indispensable condition of property object, i.e, a thing must be distinguished from other things in the real form, but the marine environmental capacity is not completely independent in the physical form. However, with the social development, the concept of independent thing is changing, and even if there is no physical independence in a thing, whether it is independent or not, may be determined

5 Junju Ma, Yanman Yu, Elementary Theory on Civil Law (the second edition) (1st supp, 2nd edn, Beijing, Law Press) ;2005. p.66.

6 Haifeng Deng, Pollutant Discharge Right: reading based on the context of private law (1st supp, 1st edn, Beijing, Peking University Press); 2008. p.75.

in accordance with the trading concept or the standard of legal provision.[7] If such standard is evaluated, the marine environmental capacity will become the independent object through the method of specialization that can be disposed of by humans to some degree. On one hand, the marine environmental capacity can be separated from sea water body in the form of specific value through the method of scientific quantification, with the concept of independence. Thus, the liquidity of water body causes the marine environmental capacity mutually to be blended with other water environmental capacity in the course of global water recycle that is difficult to separate. However, due to the weaker influence caused by external factor such as wind force, the diffusion speed of pollutants in water body is slow and the diffusion degree is not complete, so it is easy for water body pollution to show the local and regional characteristics.[8] Therefore, with regard to the problem of water pollution control, it is more prone to focus on a certain special water area rather than the entire water environment with the relatively partial and static idea and the regional research method. As a result, with regard to a certain sea area as the independent water body taking the beach as boundary, naturally, the marine environmental capacity contained in the sea area which exists in the form of independent material is natrually distinguished from other kinds of water environmental capacity. For example, the pollutants discharge along the river bank finally flows to sea with the flow of river water, indirectly causing the unfavorable effect on the marine ecological environment. However, if the sea water environment is relatively static and fixed, the pollutant discharge along the river is the act of exhausting the river environmental capacity, rather than the utilization of marine environmental capacity.

Thirdly, the marine environmental capacity is confirmable. Since 1980s, the natural scientific workers in China have explored the method to determine the environmental capacity adaptable to China's environmental system. The available capacity of a certain special region and environmental factor on a kind of pollutant is calculated as "the volume of special environmental factor multiplied by the difference between the limit density of per m^3 pollutant minus the average density of self-contained pollutant per m3 environmental factor"[9]. In comprehensive consideration of the influences of sea water characteristic, water quality target, pollutant characteristics, pollutant discharge way, space-time distribution of pollution sources, and measurement of marine environmental capacity may be applicable to the above-mentioned method. It is evident that the environmental capacity in special time and special area can be determined in the form of value through a scientific calculation. The marine environmental capacity is no longer too profound to be understood, and difficult to be measured.[10]

Through the above discussion on the property characteristics of marine environmental capacity, the following are the conclusion: the changing social life with each passing day pushes the property law to be beyond the former limitation, and brings more new types legal object into the research view of property law, so as to meet the right holder's actual need. Under such background, if it is measured by the appropriately open and loose standard, the marine environmental capacity is consistent with the requirement on basic attributes of things, and is entitled to the property object.

7 Liming Wang, Research on Property Law (1st supp, 2nd edn, Beijing, China Renmin University Press); 2007. p.63.

8 Alexandra Teitz, 'Assessing Point Source Discharge Permit Trading: Case Study in Controlling Selenium Discharge to the San Francisco Bay Estuary' Ecology Law; 1994. p.96.

9 Haifeng Deng, 'Quasi-property of Environment Capacity and its Right Constitution' 4 China Law Science; 2005. p.61.

10 Haifeng Deng Pollutant Discharge Right: reading based on the context of orivate land; 2005. p.79.

3.2 The marine pollutant discharge right and its scope of law

The marine pollutant discharge right is also called "marine environmental capacity use right", it refers to the right that the right holder may use and get earnings from the marine environmental capacity on the basis of self-purification capability of marine environment in accordance with law. It is known from the definition that the marine pollutant discharge right which is the property treating the marine environmental capacity as object, and belongs to a kind of quasi-property in nature. The so-called quasi-property means not the single right with the same nature, but the generic terms of a group of rights with various natures.[11] According to the Real Right Law of the People's Republic of China, the quasi-property consists of the mineral prospecting right, the mining right, the water intake right, and the right to use water areas or tidal flats for breeding or fishery among others now.[12] On the precondition of conforming to the basic attributes of a property, the quasi-property is special on right object, constitution of right, whether the right have the nature of the public right.

On the aim of law, the aim of the traditional property rights system is to set legal order for the possession and ownership of real estate. While the aim of quasi-property right system is to provide institutional support for the exploitation and utilization of other natural resources which pertains to land in case the real estate has its right holder. On the effectiveness of the right, to realize the possession and control of real estate, the law generally endows real estate with the property of exclusion of others' interference. It strictly sticks to the principle of "one property, one right", i.e, the rights of conflicted effectiveness cannot exist simultaneously in the same real estate.

Nonetheless, the aim of quasi-property right system is not to realize the possession and control of real estate, thus, the law can allow the same kinds of quasi-property rights to exist in the same real estate in the meantime, which means that the quasi-property right system is not exclusive. In the acquisition ways of the right, the traditional property law abides by the principle of will autonomy, according to the consensus of the owner of the real estate and the right holder of *jus in re aliena* to set different types of *jus in re aliena*. Since the various types of rights of a quasi-property right system relate to the state sovereign rights of natural resources and social public welfare, they must obtain the approval or permission of the public organizations.[13] As one of the quasi-properties, the marine pollutant discharge right has the unique attributes different from the traditional property:

Firstly, the object of the marine pollutant discharge right is special. As the object of marine pollutant discharge right, it is difficult for the marine environmental capacity to be separated from the material-carrier sea water body in the physical sense. It is necessary to interpret flexibly the uniqueness of marine environmental capacity according to the elastic standard. Due to the difference in the disposal content and degree of an object between different properties, in terms of the different kinds of property will have different, whether stricter or looser requirement terms of the uniqueness of its object. Sometimes, when we may make the property holder disposal of the object to realize the purpose of property through special quantity, region or period, such object may be deemed as uniqueness.[14] Therefore, profound

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11 Jianyuan Cui, Research on Quasi-property (1st supp, 1nd edn, Beijing, Law Press); 2003. p.20.

12 Real Right Law of the People's Republic of China, Article 123; 2007.

13 Xiaying Mei. The characteristic of Quasi-property and it's legislative model. Accessed at http://www.civil law.com.cn/article/default.asp?id=7917.

14 Weixing Shen, Principles of Property Law (1st supp, 1st edn, Beijing, China Renmin University Press; 2008. p.6.

reconsideration of the uniqueness of object equaling to the conclusion of identity through the application of time and space view, the marine environmental capacity may show the definite scope of room and period to make the right holder able to directly dispose of the object and to realize the specialization of marine pollutant discharge right object.

Finally, the marine pollutant discharge right is special in respect of occupying and exclusive power and function. On one hand, the core of marine pollutant discharge right is utilization rather than disposal, i.e., its existence is not on the necessary condition of occupying marine environmental capacity and its material carrier. The purpose of performance result is to realize the maximum value of marine environmental capacity resource under the precondition of maintaining the marine environmental quality, thus, there is basically no power and function of occupying in the marine pollutant discharge right. On the other hand, as the exclusiveness of property must be based on the power and function of occupying and disposal, the absence of occupying power and function leads to the marine pollutant discharge right that is not exclusive in the strict sense. Therefore, there will be many marine pollutant discharge rights that are co-existing in the same sea water body in practice.

Secondly, the marine pollutant discharge right is the private right with a public right nature. At the same time, the marine pollutant discharge right is produced in accordance with the relevant public law, and must be confirmed by strict administrative license procedure. And also, some compulsory norms at the level of public law must be followed in the performance of marine pollutant discharge right forming the special property with double attributes of public right and private right.

3.3 The mother right of marine pollutant discharge right

The marine pollutant discharge right is the *jus in re aliena* that the right holder may use and get earnings from the marine environmental capacity. According to the principle of property law, "since *jus in re aliena* must be produced from *jus in re propria, jus in re propria* is the mother land of *jus in re aliena*; there is no *jus in re aliena* without mother right.[15]" The marine pollutant discharge right should be derived from its mother right. It is necessary to follow the thought that "the ownership on the object of *jus in re aliena* is the mother right of *jus in re aliena*" in the determination of the mother right of marine pollutant discharge right. Firstly, the object of marine pollutant discharge right is the marine environmental capacity within a certain scope of sea area. Further, it is concluded that the ownership of marine environmental capacity is the ownership of marine environmental capacity within such sea area scope. Therefore, the ownership of marine environmental capacity and the marine pollutant discharge right, which take the marine environmental capacity as common object, is the relationship between the mother right and son right.

The ownership of marine environmental capacity is the expression that the state perpetuates sovereign rights of marine environmental capacity source in the private law. How much sea area where one country owns the sovereign rights of exploration and utilization of marine environmental capacity determines the right boundary of marine environmental capacity ownership and determines the boundary of marine pollutant discharge right as subordinate right?

Firstly, with regard to territorial sea area, in accordance with the United Nations Convention on the Law of the Sea, the sovereign rights of a coastal State extends beyond its land territory and internal waters to an adjacent belt of sea area described as the territorial sea,

15 Haifeng Deng Pollutant Discharge Right: reading based on the context of prvate land; 2008.88.

i.e, its territorial sea up to a limit not exceeding 12 nautical miles, and measured from baselines from which the breadth of the territorial sea is measured.[16] It is evident that a state shall be entitled to exploitation and utilization of resources in the territory extended by its sovereign rights. The entire marine environmental capacity in the territorial sea water body of 12 nautical miles belongs to the natural resource scope of the state. Since China has adopted the Law on Territorial Sea and the Contiguous Zone[17] to declare the sovereign rights of territorial sea, the government on behalf of the State enjoys the ownership of marine environmental capacity in the territorial sea.

Secondly, it is necessary to confirm whether the marine environmental capacity resource beyond the territorial sea area should belong to a state sovereign rights scope of natural resource in accordance with the rules of international law. In accordance with the United Nations Convention on the Law of the Sea, in 200 nautical miles measured from baselines from which the breadth of the territorial sea is measured, i.e. exclusive economic zone, the coastal state may have sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources of the waters superjacent to the seabed and of the seabed and its subsoil. With regard to other activities for the economic exploitation and exploration of the zone,[18] the waters superjacent to the seabed beyond 200 nautical miles is subject to the high sea system; thus, no state may declare the sovereign rights in such area, and the expenses or material objects should be paid in the exploitation of biological resources on the continental shelf beyond 200 nautical miles. It is seen that the boundary limit of a state sovereign rights on marine environmental capacity resource to be the exclusive economic zone of 200 nautical miles, and the coastal state may have the national ownership or private ownership of marine environmental capacity to such extent in accordance with the tradition of the state of resources ownership.

As far as China is concerned, Article 9 of the Constitution specifically declares that China carries out the unitary mode of all natural resources owned by the State, and the government exercises the ownership of natural resources on behalf of the State. Therefore, the entire marine environmental capacity resource in the exclusive economic zone waters of China shall be owned by the state, and natural person or legal person cannot become the right holder of marine environmental capacity ownership. Under such mode, the ownership of marine environmental capacity may be defined as the rights owned by the state to use, get earnings from and dispose the marine environmental capacity resource. If any private entity uses the marine environmental capacity, it must file the application to the government, and the government grants the marine environmental capacity use right, i.e., the marine pollutant discharge right, in the manner of administrative license on behalf of the State. At the same time, in the event that any act of sea use of the bordering State causes the cross-border marine pollution and ecological damage in the exclusive economic zone of China, it may bring a claim for infringement damages for the reason that the ownership of marine environmental capacity is injured. Which could set legal methods to remedy the passive status of China on the issue of claim against other States for cross-border marine pollution, ship carriage pollution, collision and oil pollution damage? Any loss or damage to marine ecological value can be remedied in the course of investigating and determining the responsibility for such damage.

16 United Nations Convention on the Law of the Sea; 1982. pp.2-3.
17 The Law of the People's Republic of China on Territorial Sea and the Contiguous Zone Article 5 states 'the sovereign rights of the People's Republic of China over the territorial sea shall extend the sky, seabed and subsoil of the territorial sea.'
18 United Nations Convention on the Law of the Sea; 1982. p.56.

4. Conflicts and coordination among marine pollutant discharge right and the different rights

Since marine pollutant discharge right is not exclusive, additionally, as its object the marine water body carries a variety of different marine resource rights, then there must be conflicts among marine pollutant discharge right and the different rights. The marine resource usufructuary right which includes marine pollutant discharge right is the right base for the successive and the pure economic loss victims to seek remedy in compensation for marine ecological damage. Therefore seeking the coordination rules will create conditions for establishing the sequence of payment of above different victims, when the loss cannot be fully compensated, the sequence of payment has an especially significant meaning.

4.1 Conflicts and coordination among marine pollutant discharge rights

The conflicts among the marine pollutant discharge rights taking the marine environmental capacity in the same sea area as object may be resolved according to the following methods:

Firstly, according to the sequence of marine pollutant discharge right purposes. If all marine pollutant discharge rights are instituted for various purposes, the conflicts among marine pollutant discharge rights may be coordinated according to a certain sequence of purposes. The marine pollutant discharge right at the first sequence is the higher priority than that at the secondary sequence on its performance. The implementation of such principle of coordination must be based on the determined reasonable purpose sequence; thus, the purpose sequence of water right priority takes the reference for the purpose sequence of marine pollutant discharge rights. At present, there are three legislative modes on the provision of water right priority sequence in China:

1) Article 21 in the Water Law of PRC states "the exploitation and utilization of water resources shall firstly satisfy the living water of urban and rural residents, and concurrently give attention to the need for agriculture, industry, ecological environmental water use, and shipping, etc. "; thus, it may be concluded that the water right priority sequence of living water for residents, agricultural water, industrial water, ecological environment water, and shipping water; 2) In accordance with the provision of Article 18 of Water Resources Law of Taiwan, China, the sequence of water use is: household and public supply of water, agricultural water, water for water conservancy, industrial water, shipping water, and water for other purposes; and 3) The applicable water right sequence in Kansas, USA, is household water, municipal administration water, amusement water, and water for water conservancy. From the above legislative modes for three kinds of water right priority sequence, we may see that the performance of water right generally is subject to the principle of civil water and public water as priority, but industrial water as secondary.[19] Therefore, when there are conflicts among the marine pollutant discharge rights for different purposes of pollutant discharge, the coordination and resolution shall follow the following sequence rules, i.e. the household marine pollutant discharge right, the public marine pollutant discharge right, the agricultural marine pollutant discharge right, the industrial marine pollutant discharge right, the shipping marine pollutant discharge right, and amusement marine pollutant discharge right.

Secondly, according to the time of instituting the marine pollutant discharge right. If all marine pollutant discharge rights are instituted for the same purpose, with regard to the marine pollutant discharge rights at the same sequence, the principle of time priority should be

19 Jianyuan Cui, Research on Quasi-property(1st suoo,2nd end, Beijing, Law Press); 2003. p.316.

applied to coordinate the conflicts of performing such rights; and the right holder of acquiring the marine pollutant discharge right at earlier time should be protected preferentially. The implementation of such coordination principle must be based on the confirmation time of instituting the marine pollutant discharge right. Therefore, the rules for coordination of such rights shall be applied in accordance with the principle that, if there is earlier registration, it is higher priority, and it is subject to the time of registration of the pollutant discharge right and obtaining the pollutant discharge permit. In general, the marine pollutant discharge right of earlier registration and obtaining the marine pollutant discharge permit is higher priority than the pollutant discharge right of later registration.

4.2 Conflict and coordination between the marine pollutant discharge right and other marine usufructuary right

In addition to the above-mentioned conflicts among the marine pollutant discharge rights, due to the difference in the manners of utilizing marine resources, the marine pollutant discharge right may conflict with other usufructuary right in sea. For example: in order to realize the maximum benefit of marine resources utilization, the right to cultivate is instituted for the purpose of using the sea water culture function, the waste discharge capability of sea water may be used to institute the marine pollutant discharge right through quantization into marine environmental capacity; at that time, both rights that take sea water as right carrier in obviously different ways of using sea water are overlapped, and the conflict is unavoidable in the course of performing the rights.

In this paper, it is thought that we should take the division of marine function as the basic principle of requirements on sea use and follow the standard of survival interests and functional use of sea as priority to coordinate the conflict between the marine pollutant discharge right and other marine usufructuary right.

Firstly, the performance of many usufructuary rights in the sea shall take the division of marine functional areas as the basic principle. The marine functional area division is to divide the areas with special leading function applicable to various exploitation way and obtaining the best comprehensive benefit according to the geography location, natural resources, and environmental situation, in combination with considering the current situation of marine exploitation and utilization and economic and social development demands.[20] One of the major roles of marine functional area division is to consider the space distribution of marine resources, and the compound and open nature of the performance to coordinate and resolve the contradiction in the resources exploitation and utilization and to form a reasonable and regulated order of marine resources exploitation and utilization.[21]

At present, the marine functional division in China includes sea water baths, sea water culture zone, marine natural protection zone, marine dumping area, and marine oil and gas zone. It is necessary to realize the orderly performance of various kinds of marine *jus in re aliena* under the all marine functional zone division, for example, sea water baths is a zone to perform the sea-use right for amusement, and the performance of marine fishery sea-use right focuses on the sea water culture zone, but the marine dumping area and oil and gas zone are the zones to perform the marine pollutant discharge right. Therefore, within the special marine functional zone, the marine *jus in re aliena* taking the leading status shall be higher priority than other rights. For instance, with regard to sea water culture zone, the marine pollutant discharge right

20 China Marine 21 Century Agenda; 1996. p.7, 25.

21 Xiangmin Xu, Research on Legal Protection of Marine Environment (1st supp, 1st edn, Qingdao, Ocean University of China Press); 2006. p.90.

may not infringe the marine fishery right. Therefore, the Law on Marine Environmental Protection specifically states that no newly-built pollutant discharge point may be in the important fishery waters, and when discharging heated waste water into the sea, the measures shall be taken to ensure that the water temperature in the adjacent fishing areas is kept within state water quality standards. However, in the marine dumping area and oil and gas exploitation zone where the marine pollutant discharge right plays a role, such marine *jus in re aliena* as the fishery right and sea-use right for amusement cannot be realized.

Secondly, in the sea area without dividing the functional zones or with unclear functional zone division, it is necessary for the conflicts of many marine usufructary rights to measure the interests based on the principle of fairness to determine the sequence of performing the rights. On one hand, the marine *jus in re aliena* carrying the survival interests shall be performed preferentially. The value that natural resources can realize is to express the human survival and property interests. The human survival right means that everyone has the right to maintain his and his family's health and welfare in the necessary living standard under some economic development level to guarantee and improve the basic living and healthy level. It is evident that the survival interests guarantee is the basic requirement of human being and the indispensable safeguard to keep the whole society fair and stable. Therefore, the survival natural resources property that is necessary to the human survival and development should be the higher priority than the natural resources property. With regard to the specific performance of marine rights, the civil sea-use right closely related to the human survival interests, including civil marine pollutant discharge right, and self-use fishery right, etc. shall be performed priority, but the industrial and commercial sea-use rights which are instituted for the purpose of realization of property interests shall be less priority.

On the other hand, the marine *jus in re aliena* taking the functional resources as object shall be performed priority. According to the differences in the carrying interests, all marine resources may be divided into resource-based resources and functional resources. The resource-based resource refers to the natural resources that the exploitation and utilization will exhaust or change the previous state thereof, such as the marine environmental capacity resource, and sea water resource used for irrigation; the functional resource refers to the natural resources that the inherent state of resources will not be changed at the time of exploitation and utilization, such as the sea water resource used for marine culture or shipping. Under the general circumstances, the marine *jus in re aliena* taking the functional resource as object, shall be higher priority than the marine *jus in re aliena* taking the resource-based resource as object, for the reason that the functional resources will not be reduced or changed at the time of exploitation and utilization. For example, when fishermen utilize sea water for the purpose of fishery culture, their acts will not exhaust the marine water body or obviously change the nature of marine water body, and the marine pollutant discharge right may be realized after completing the performance of culture right. However, if it is permitted to perform the marine pollutant discharge right at first, the culture function of sea water will be affected, so that it will be difficult to realize the sea water culture right. Therefore, on this principle, the marine pollutant discharge right shall be less priority than the marine *jus in re aliena* taking the functional resource as right object.

5. Conclusion

The marine environmental pollution and ecological degradation are one of the serious environmental problems that the human society is facing with. Since the 20th century with the accelerated development of industrial scope, the claim and utilization of human being on the marine resources have far been beyond the bearing capacity of marine environment; and the sea closely linked to the human health and well-being is faced with an ordeal of ecological

crisis. However, as of today, the exploitation, utilization and management of human on marine resources are still focusing on the economic value of marine resources, but disregarding marine ecological value. At the same time, the applicable legislation on marine environmental protection is unable to make humans fully recognize the importance of marine ecological value. Therefore, in order to solve the marine environment problem, the marine ecological value must be confirmed and identified, and the civil property system provides a good tool for it. This paper institutes the marine pollutant discharge right with the power and function of use and earnings by treating marine environmental capacity as object, with reference to the theory of quasi-property and new-type object, on the theoretical basis of taking environmental capacity as a property.

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Governance in Natural Resources and Environmental Management in Songkhla Lake Basin, Thailand

Monthip Sriratana Tabucanon

Abstract

Songkhla Lake is Thailand's largest freshwater ecosystem, encompassing 1,042 sq. km. with a total basin area of 8,729 sq. km. The lake is an internationally important ecosystem in terms of biodiversity because of its unique ecosystem of fresh, brackish, and salt waters. These unique characteristics form the basis for major economic activities in the provinces of Nakhon Si Thammarat, Phatthalung, and Songkhla. There are as many as 1.7 million people who rely on the lake for fisheries, forestry and forestry products, agriculture and tourism.

These ecological resources are threatened by often unplanned and destructive human use; in addition, climate change will have significant impacts on these resources. Climate change is expected to create conditions of extreme weather, including changes in temperature and precipitation. The floods, droughts, the rise of sea level, and other impacts of climate change will bring and affect the ecology of Songkhla lake and the overall basin. However, the means or methods to measure accurately Songkhla Lake Basin can be segregated into three: degradation of biological resources, governance, and information management.

a. Degradation of biological resources: The degradation of the biological diversity and biological services is arguably the only and big issue in the Songkhla Lake Basin. Continued resource degradation also makes it increasingly difficult to counter the impacts of climate change.

b. Governance: There has been large and ineffective management of the lake and its resources despite numerous studies and management recommendations since the 1970s/80s. With this, it exacerbated the loss of biological resources where most of the people depend.

c. Knowledge management: Although there have been many studies of various magnitudes and durations done in the Songkhla Lake Basin, these are not used by local government and resource managers. Either because they are not available to them or because the studies themselves do not address priority development and ecological issues. The study did not reach the person government entity in-charge or study itself does not address the need of development and ecological issues.

This paper highlights the way to improve the database on the social and natural resources for the Basin. It also recommends an accurate, effective, and modern principles of good governance structure for managing natural resources and the environment that is suitable for Songkhla Lake Basin.

Keywords: Governance, Knowledge Management, Environmental Conservation

1. Introduction

1.1 The Songkhla Lake Basin

The Songkhla Lake Basin (SLB), considered the biggest lake system in Thailand, is

situated in the southern part of Thailand, close to the border with Malaysia. SLB has a total area of 8,000 sq km and the population of 1.5 million of which 75% resides in rural areas. Eighty-eight (88%) of SLB is land area and the remaining comprises of four interconnected lakes, i.e. Thale Noi, Thale Luang, Thale Sap and Thale Sap Songkhla. The Thale Sap Songkhla connects the lake system to the Gulf of Thailand resulting to seasonal changes in the lake's salinity.

1.2 Seven challenges - and several opportunities

1.2.1 Seven challenges

According to Prince of Songkhla University (2010) the challenges in the SLB include:

- Forest & mangroves: The steady decline of upstream forest and mangroves. The upstream forest area has decreased by over 40% to about 12.5% (Year 2004 statistics) of the basin area, during the past two decades. Only about 15,000 ha. of mangrove forest and wetland, or 1.7% of the basin area, is left.

- Sedimentation: Studies on soil erosion and sedimentation in waterways and lakes, and erosion along the coast show that the sedimentation rate in Songkhla Lake is around 5.0 – 6.9 mm per year. At this alarming rate, without any remedial action, the lake will be filled in 300-400 years.

- Developmental conflicts: Due to inappropriate and unplanned land use conflicts between shrimp farming and paddy cultivation; and impacts of roads and other physical development on drainage and wetlands habitats occur.

- Water extraction: Fresh surface water over-pumping causing saline intrusion; and groundwater overuse. Annual groundwater surveillance data indicate that the extent of the area where the groundwater level is below sea level has expanded from 2,700 ha. in 1992 to 10,300 ha. in 2002. In some areas, it is more than 10 m. below the sea.

- Increasing flood exposure: Hat Yai, the major business city of southern Thailand, was devastated by floods in 1988, 2000, and 2011. Smaller cities and rural areas were also flooded. Inadequate city planning and inefficient water management was blamed because of the flood in varying degrees that reaches to smaller cities.

- Fisheries: Fish catch was exceeding maximum sustainable yield; fish migration is blocked; resources are over-used and in urgent need of restoration. There are currently over 2,000 bag nets and more than 30,000 sitting cages in Songkhla Lake. One cannot place a 10-m radius circle in the lower part of Songkhla Lake without hitting a fishing gear.

- Pollution: There are pollution problems such as solid waste and sewage disposal, water pollution, including domestic wastewater; industrial wastewater; and wastewater from pig farms and shrimp farms.

1.2.2 Opportunities

Amidst the above challenges, there are some potential and significant development opportunities, namely:(1) Continued development of resource-based livelihoods, in terms of quality and generated value of production. (2)Good governance supported by civil society

and local wisdom. (3)Demand side management of water utilization. (4) Capacity building and awareness-building for local governments and society as a whole. and. (5)Eco-tourism development spearheaded by entrepreneurs.

2. Status and assessment

The SLB represents a highly unique and valuable economic and ecological region of Thailand. The diverse terrain - from the forested, mountainous areas in the western and southern plains, to the wetlands and the coastal regions of the lower Basin- offers a rich environment. This rich environment supports a wide range of plant and animal life and presents economic opportunities, including rubber and fruit production, rice cultivation, and fishing. These in turn have spawned thriving food and rubber/latex processing industries, which are located primarily in the Development Corridor in the southern part of SLB. Important parts of this Corridor are the twin cities of Hat Yai and Songkhla, the largest urban agglomeration in Southern Thailand, and a hub of financial, business, tourism, transportation and residential service industries.

As mentioned earlier the SLB's size and the characteristic mix of fresh and brackish water creates a unique habitat, which enables highly specialized species of flora and fauna to flourish. Fish catches in the Lakes are among the highest in Asia, making the Songkhla Lake System one of the most productive in the World.

2.1 The lake system and its tributaries form the lifeblood of the region

SLB provides freshwater for irrigation, household and industry consumption, natural water storage, and drainage system. It functions as a habitat for aquatic life. In these capacities, SLB is one of the major supporters for its thriving the economic sectors.

As the SLB continues to develop and grow, the productivity and regenerative capacity of this critical region of Thailand is coming under serious threats and pressures. These threats and pressures come from the unsustainable exploitation of limited natural resources, the encroachment into fragile areas, and the adverse impact on the natural resources and the ecosystems from the economic activities in SLB.

2.2 Five Economic Sectors contribute to the exploitation and deterioration of SLB these are:

1. Agriculture and Livestock (including Irrigation Systems): Unsustainable management practices resulting in: deteriorating soil quality, erosion, wasteful water consumption and changing water system dynamics, human encroachment into forested land, and nutrient and organic loading of rivers and lakes.

2. Fisheries (including the recent boom in Shrimp Farming): Unsustainable management practices have resulted in unsustainable fish catches, severe water and land pollution and salination and human encroachment into mangroves.

3. Mining (most notably the Petroleum Extraction and Refining): which poses a serious threat of an oil spill.

4. Tourism and Recreation: Uncontrolled development of tourism poses a threat to fragile natural habitats.

5. Industrialization, Urbanization, and Rural Development: Improperly managed waste handling threatens water quality and health, and unchecked development is expanding into unsuitable or fragile habitats.

The trends toward increasing urbanization, intensification of agriculture and aquaculture, and expansion of manufacturing threaten to exacerbate the situation if nothing is done.

The effects of these pressures are already being felt in the Four Resource Systems of the SLB as reported by Danish Cooperation of Environment and Development (DANCED, 1999) as follows:

1. Water System

Water system pressures include the presence of the significant load of nutrients and organic matter to upper lakes, the heavy pollution in several rivers and Phru Khuan Kreng Wetland. There are also contaminations of several groundwater reservoirs and water shortages during the dry season. Serious hydrological changes are due to surface water extraction. There is also the shallowing of Thale Noi and river mouths in the Upper Lakes.

2. Land-Use and Settlement System

There are large number of abandoned and derelict shrimp farms and increasing incidence of idol arable land, as well as incompatibility and inappropriateness of land-use. There are likewise difficulties are encountered in siting large environmental facilities.

3. Socio-economic System

The system is experiencing declining productivity of crops and shrimp farms; fish catches are reported to be decreasing. There is a risk of economic instability and shortage of farm labor.

4. Ecological System

The wetlands are under severe threat. The Irrawaddy dolphins are in threatened with extinction. Further the hydrological system is experiencing significant changes.

5. Implementation Capacity

Implementation is hampered by inadequate data collection and management, lack of strategic planning and policy formulation, lack of coordinated programming and project identification, poor record of effective plan implementation, and weak enforcement of regulations.

3. Management framework of watershed: Songkhla Lake basin

The Office of Natural Resources and Environment Planning (ONEP) under Ministry of Natural Resources and Environment (MNRE) is in charge of water resources and the environment. The Ministry of Agriculture and Cooperatives represents the dominant off-stream water demand. Other ministries with tasks related to water resources in the basin, include: Ministry of Energy; Ministry of Industry; Ministry of Public Health; Ministry of Social Development and Human Security; and Ministry of Tourism and Sports. Each ministry has an office in each province.

The ONEP has been mandated as the coordinating agency to seek collaboration and involvement of all government agencies concerned, as well as from the provincial authorities, local communities, NGOs and community–based organizations (CBOs). Like in most countries, management of the environment is relying on a strategic planning and regulatory process. In

Thailand, there are two departments, namely: ONEP and Department of Water Resources within the MNRE responsible for watershed management; and execution of development programmes, with the great power and budgets involved is the responsibility of other agencies and, of course, the private sector. The main issue concerns the degree of influence or controls the environment agencies can exert over the development process.[4] (Tabucanon, 1998). ONEP and Department of Water Resources are the two responsible departments in Thailand for watershed management. They are responsible for the execution of development programmes, budget for other agencies, and other sector.

It can be noted that the entire watershed management program has far been framed in terms of Ministry budgets and Cabinet resolutions in a top-down manner within cross-Ministerial integration. There is no program budget or any legislation governing integrated watershed management plans and activities (DANCED, 1999). The projects rely on the good will of those agencies that do have funds and legal instruments to implement the decisions emanating from the action planning process.

Currently, there are thirty-two (32) government departments in nine ministries having some responsibilities with regard to watershed management and generally, the water affairs. Recently, the National River Basin Development Committee has been established. However, this National Committee has not made any major changes (DANCED, 1999).

In order to raise awareness of the importance of the coherent and integrated approach to watershed management, ONEP has organized a number of workshops over the past fifteen (15) years. There are two crucial issues concerning the immediate requirements of the watershed management. The first will be the success with which the Forestry Department can control illegal logging and forest encroachment. The second will be the success with which the process can convince illegal settlers in protected areas to move or to accept relevant control measures in the resettlement projects. It will be necessary to resolve the general problem of who should be responsible for definitive planning at the provincial and local level whether there will be an adequate legal and administrative framework to make sustainable watershed management.

The first of these problems arises within the responsible government agencies (Sutiwipakorn & Ratanachai 2005). Watershed management is not explicitly legislated and implied in the national umbrella environment legislation under the "Enhancement and Conservation of National Environmental Act, 1992". This states that whether areas have been designated as "conservation and environmentally protected areas" or "pollution control areas", provincial governors are obliged to instigate the production of Environmental Quality Management Plans (EQMPs). The watershed management is the responsibility of the ONEP while responsibility for pollution control plans rests within the Pollution Control Department; both are components of the MONRE. Activities designed to control pollution at the provincial level in the framework of the province are not in place. EQMPs are being formulated and generated quite independently of the concept embodied in watershed management, such that the interaction between upstream conservation mechanism and downstream intensive developments are not being dealt with the same planning framework.

In addition to this, with the exception of the very broad and general National Economic Social Development Plan, there is no framework for specific planning budget in any plan. Each government department has its own plans and programs that they implement with a lack of strong and effective coordination together with other government departments. Similarly, the private sector operator is relatively free of planning restrictions or guidance.

4. Governance natural resources and environmental management. Songkhla Lake Basin

4.1 Policy development: Key for resource management

Songkhla Lakes-specific policies are rarely developed to manage the resources of the lake basin. Instead, government directions are contained in sector-specific (water or environment) policies for the lake. Good policies must be sensitive to local circumstances. Consistent, high-level political support is essential for policies to succeed. The policies have failed in the past due to limited ability of local people to respond to the changes. It is important that sector-specific policies are consistent and supportive of the Songkhla Lake management. Actions in one sector affect the performance of other sectors and policies must reflect the need to address the system management issues of upstream of the Lake or in the Lake basin.

4.2 Institutions: core of Songkhla Lake Basin management

Formal institutions, such as Ministry of Natural Resources and Environment assess the leading roles for Songkhla Lake management. The responsibilities of the Ministry may include resource development, service delivery, and regulatory advisory or coordinating roles. Informal Institutions such as NGOs, local communities can also play important roles.

There are constraints in the Songkhla Lake Basin Management, to wit: (1) Lack of technical and administrative skills.(2) Successful institutions develop a diversity of linkages. Most important of management are direct links to senior decision makers, including politicians. These links take a time to build up and need to build as early as possible. Links among line agencies and Ministries at the central and provincial level, as well as informal links, are also very important. Strong institutional links are needed with local communities in order to pass local information upwards to institutions and to promote the roles of public involvement and participation including education. (3) Flexibility of the institutions. Institutions need to adapt to suit the priorities and the changing development needs of the lake. This will help expand inclusiveness of different stakeholders to address the wide range of the management issues. (4) Interdisciplinary approaches. Different institutions can integrate their works by interdisciplinary approaches and can be successful through political willingness together with the financial support to carry out the activities.

4.3 Rules: to promote the management plan

Rules are necessary to manage the resource allocation fairly and efficiently. The rules can be in different forms such as national laws regulations or by-laws. These rules have to be combined with public involvement or participation in establishing and implementing the rules and enforcement of rules. The enforcement of rules can be challenging due to a lack of data, equipment, knowledge and training, lack of political and administrative leadership.

4.4 Public participation: for a better management

Public involvement by different stakeholder's leads to greater acceptance of rules, incorporates local knowledge in decisions, reduces the cost of enforcement, and attracts political commitment. It is important to include the following expressly in current legislation; (a) The Long-term plan for the stakeholder participation is necessary to assist the community development (b) Tools to build the technical program, such as micro-credit to the local community NGOs, community-based organizations as well as engagement in the strategies action plan; and (c) Grants are needed to fund projects on women empowerment on local development and poverty reduction issues.

4.5 Information system: guides for decision-making

Information systems with scientific, economic, and social aspects have been important in guiding the decision-making for the sustainable development of the Songkhla Lake. It is important to establish information systems at two levels – at the national and local policymakers' level, and the other at the level of local communities.

4.6 Funding mechanism: for local sources

The principle of payments for the use of local lake basin resources needs to be supported. Payments in environmental services are most commonly recognized in general but uses tended to regard user charges as too difficult to implement. It is important to decentralize funding to local governments to manage the integration of works.

5. Conclusions

Successful SLB management can be achieved by the confidence of implementing agencies, local governments, public participation and good collaboration among government agencies, civil society, private sector, and academic community. SLB has potential for sustainable development especially of resource–based livelihoods, good governance, demand side management of water utilization, enhancement of laws and regulations, capacity building, awareness-raising, and knowledge management for all stakeholders as a whole.

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Role of Environmental Courts and Tribunals in Promoting Rule of Law

Ritwick Dutta

Abstract

Specialized environmental court was set up in 2010 in India with the coming into force of the National Green Tribunal Act, 2010. This was set up pursuant to various decisions of the Supreme Court of India highlighting the need for dedicated environmental courts for environmental issues as well as India's international commitment pursuant to the Rio Declaration. The National Green Tribunal (NGT) has jurisdiction to deal with all substantial issues related to the environment. Over the last four years, the NGT has emerged as the most significant institution so far as access to justice is concern. The NGT has delivered landmark judgments on environmental issues and has provided a significant avenue for justice for communities who are affected due to wrong developmental policies and plans. However, there is a need to critically examine the functioning of the NGT in terms of access to justice and sustainable development. This paper critically examines the various judgments of the NGT in terms of principles of sustainable development, the precautionary principle, and the polluter-pays principle. This is important given the fact that despite the NGT emerging as a significant judicial institution, there are crucial issues to access of justice which needs to be addressed. Specifically, there is a need to examine how easy or difficult for the poor and the marginalized communities to access the NGT, the time required for deciding the matter, and whether certain trends are emerging so far as the decisions of the NGT is concerned. An important issue is the relationship of the NGT with the executive and also the High Courts and the Supreme Court. The aim ultimately is that the four years of working of the NGT could not only guide future reform, but also guide countries that are planning to set up environmental courts.

Keywords: Environmental Court, Access to Justice, Sustainable Development

1. Introduction

One of the most significant developments in recent years in the field of environmental law has been the establishment of the National Green Tribunal in India. The National Green Tribunal ('NGT' in short) has emerged as the most active and without doubt, a forum where the maximum numbers of environmental cases are adjudicated on a daily basis. There is perhaps no comparison anywhere in the world in terms of the volume and range of cases which the NGT deals with on a daily basis. The various decisions of the NGT have led to the development of a new environmental jurisprudence in the country. In addition, the NGT is also ensuring that the various environmental statutes are implemented in letter and spirit. Despite the challenges, there are issues that need to be addressed in order to make the NGT an effective forum for redress of grievances with respect to the environment.

This paper focuses on the initial steps that led to the setting up of the NGT; it then focuses on the challenges, and administrative and legal hurdles in making it functional; and then finally on the significant decisions and challenges which face the NGT in India.

2. Recognizing the need for setting up Environmental Courts

The need for establishing specialized tribunals includes efficiency and speed in the disposal of cases, harnessing expertise relevant to the specialized field, reducing the costs of dispute resolution, uniformity of decision-making, integrating related issues and remedies, and increasing public participation and confidence.

The genesis and evolution of specialized environmental courts is an interesting journey that started with the recognition that environmental rights are at par with other human, social, and cultural rights; and the requirement of protection and safeguarding the environment. Thus, the right to healthy environment got woven into Article 21 of the Constitution of India by way of judicial activism. The courts in India have taken a liberal and wider interpretation of the term 'Right to Life' and have assisted in addressing a variety of aspects relating to protection and improvement of environment and its various components. The Supreme Court has adopted an expanded view of 'life' under Article 21 and enriched it to include environmental rights by reading it along with Articles 47, 48A and 51A(g) of the Constitution.

The need for setting up of separate, multi-faceted, and specialized Environmental Courts or Tribunals was stressed upon by the Supreme Court while rendering its judgment in the matter of A.P. Pollution Control Board v. M.V. Nayudu[1]. The apex court also made specific reference to the necessity of technical and scientific inputs as formulated by Lord Woolf in England and to Environmental Court legislations as they exist in Australia, New Zealand, and other countries. Some of the relevant paragraphs in M.V Nayudu case are worth quoting:

> "In matters regarding industrial pollution and in particular, in relation to the alleged breach of the provisions of the Water (Prevention and Control of Pollution) Act, 1974, its rules or notifications issued thereunder, serious issues involving pollution and related technology have been arising in appeals under Article 136 and in writ petitions under Article 32 of the Constitution of India filed in this Court and also in writ petitions before High Courts under Article 226. The cases involve the correctness of opinions on technological aspects expressed by the Pollution Control Boards or other bodies whose opinions are placed before the Courts. In such a situation, considerable difficulty is experienced by this Court or the High Courts in adjudicating upon the correctness of the technological and scientific opinions presented to the Courts or in regard to the efficacy of the technology proposed to be adopted by the industry or in regard to the need for alternative technology or modifications as suggested by the Pollution Control Board or other bodies."

These judgments were a result of the concern of the Supreme Court about complexity and uncertainty underpinned due to the scientific evidence presented to the court. Such evidence generated tensions between the fears expressed by the claimants and the assurances given by the defendants. Scientists may refine, modify, or discard variables or models as more information becomes available. However, agencies and courts must make choices based on existing scientific knowledge. In addition, the evidence generally presented in a scientific form may prove difficult to test or refute. Therefore, inadequacies in the record arising out of uncertainty or insufficient knowledge may not be properly acknowledged or considered.

1 2 SUPREME COURT CASES 718 (1999).

Following the observations made by the Supreme Court of India and the Principles laid down in the international conferences held at in Stockholm and Rio de Janeiro, the Law Commission of India, undertook an extensive study on the establishment of separate and specialized environmental courts. The Law Commission in its 186th Report, has inter-alia recommended establishment of separate 'Environmental Courts' in each State, consisting of judicial and scientific experts in the field of environment for dealing with environmental disputes besides having appellate jurisdiction in respect of appeals under the various Pollution Control Laws. The Commission has also recommended for repeal of the National Environment Tribunal Act, 1995 and the National Environmental Appellate Authority Act, 1997.

As a cumulative effect of all the factors narrated above, the National Green Tribunal Bill was introduced in Lok Sabha by the then Minister of Environment and Forests on Jairam Ramesh on 31st July 2009. Based on the comments by members of the Parliament and recommendations of the Parliamentary Standing Committee, the Central Government made seven amendments to the National Green Tribunal Bill, 2009. The amendments broadened the definition of "persons aggrieved" to allow individuals to approach the Green Tribunal. It also outlined the "foundational principles" of the precautionary principle, polluter-pays principle and inter-generational equity that would govern the Tribunal.

3. The jurisdiction of the National Green Tribunal

The NGT has jurisdiction over all civil cases where substantial questions relating to the environment arises with reference to the implementation of the Acts mentioned in the schedule are to be decided by the Tribunal. Jurisdiction of the civil courts has been excluded under Section 29 of the NGT Act. In terms of Section 29 (1), from the date of establishment of Tribunal under the NGT Act, no civil court shall have jurisdiction to entertain any appeal in respect of any matter, which the Tribunal is empowered to determine under its Appellate jurisdiction, while under sub-section (2), no civil court shall have jurisdiction to settle dispute or entertain any question relating to any claim for granting any relief or compensation or restitution of property damaged or environment damaged which may be adjudicated upon by the Tribunal, and no injunction in respect of the action taken shall be granted by the civil court.

The Tribunal is vested with three kinds of jurisdiction within the framework of the NGT Act:

1. Original Jurisdiction: Section 14 gives original jurisdiction to the Tribunal. It is provided that the Tribunal shall have jurisdiction over all civil cases where a substantial question relating to environment (including enforcement of any legal right relating to environment) is involved and such questions arise out of implementation of the enactments specified in Schedule I to the NGT Act. In terms of Section 14 (2), this Tribunal shall hear the disputes arising from the questions in sub-section (1) and settle such disputes and pass orders thereon.

2. Appellate Jurisdiction: The legislature has conferred upon the Tribunal an Appellate Jurisdiction. Section 16 contemplates that any person aggrieved by the orders passed by the authorities or bodies under clause (a) to (j) of Section 16, may file an appeal to the Tribunal. The NGT in J Wilfred versus Union of India, has held:

> "There is nothing in Section 16 of the NGT Act that specifically or even by necessary implication provides that the appellate jurisdiction of the Tribunal is circumscribed by any limitation. The Tribunal shall be the Appellate Authority competent to decide questions of law and fact both. It may be noticed that the procedure laid down by the Code of Civil

Procedure, 1908 (for short 'CPC'), does not apply to the proceedings before the Tribunal stricto sensu and the Tribunal is to be guided by the principles of natural justice. It is further stipulated under Section 19(4) of the NGT Act that the Tribunal is vested with the same powers as are vested in a civil court under CPC and would have specifically the powers enumerated under clause (a) to (k) of sub-section (4) of Section 19. Under the provisions of CPC, particularly Order XLI, the Appellate Court, particularly, the First Appellate Court is a Court of both fact and law. It is a settled principle of law, and in fact, has been consistently adopted by the Higher Courts. Thus, the questions of law or fact arising before the Tribunal in the Appeals preferred by the aggrieved persons can be examined by the Tribunal."

3. Relief and Compensation: The third kind of special jurisdiction that is vested in the Tribunal emerges from the provisions of Section 15 of the NGT Act. This Section empowers the Tribunal to order relief and compensation to victims of pollution and other environmental damage arising under the enactments specified in the Schedule I, for restitution of property damaged and for restitution of the environment in such area/areas, as the Tribunal may think fit.

The Jurisdiction of the NGT has been further enhanced by the Supreme Court directing that environmental matters should be adjudicated before the National Green Tribunal. In Bhopal Gas Peedith Mahila Sanghathan versus Union of India[2], the Supreme Court has specifically directed that environmental cases should be filed before the National Green Tribunal and further all pending cases before the High Court be transferred to the NGT. The relevant paragraph from the Judgment reads as follows:

"38. Keeping in view the provisions and scheme of the National Green Tribunal Act, 2010 (for short the NGT Act particularly Sections 14, 29, 30 and 38(5), it can safely be concluded that the environmental issues and matters covered under the NGT Act, Schedule 1 should be instituted and litigated before the National Green Tribunal (for short NGT). Such approach may be necessary to avoid the likelihood of conflict of orders between the High Courts and the NGT. Thus, in unambiguous terms, we direct that all the matters instituted after coming into force of the NGT Act and which are covered under the provisions of the NGT Act and/or in Schedule I to the NGT Act shall stand transferred and can be instituted only before the NGT. This will help in rendering expeditious and specialized justice in the field of environment to all concerned.

39. We find it imperative to place on record a caution for consideration of the courts of competent jurisdiction that the cases filed and pending prior to coming into force of the NGT Act, involving questions of environmental laws and/or relating to any of the seven statutes specified in Schedule I of the NGT Act, should also be dealt with by the specialized tribunal, that is the NGT, created under the provisions of the NGT Act. The Courts may be well advised to direct transfer of such cases to the NGT in its discretion, as it will be in the fitness of administration of justice."(Emphasis supplied)

2 8 SCC 326 (2012).

So far as the jurisdiction is concerned, the NGT in Kalpavriksh versus Union of India and ors[3] have held:

> 'The jurisdiction of the Tribunal is thus, very wide. Once a case has nexus with the environment or the laws relatable thereto, the jurisdiction of the Tribunal can be invoked. Not only the cases of direct adverse impact on the environment can be brought within the jurisdiction of the Tribunal, but even cases that have indirect adverse impacts can be considered by the Tribunal." (Emphasis supplied)

3.1 Some key decisions of the NGT

3.1.1 NGT on the Application of the Precautionary Principle by the NGT

The NGT Act mandates that the NGT shall be bound to apply the Precautionary Principle while deciding an Appeal or Application. The Precautionary Principle was dealt in Goa Foundation versus Union of India where the Court elaborated on the jurisdiction of the Tribunal vis-a-vis the Precautionary Principle, to wit:

> "An anticipated action will also fall within the ambit of the jurisdiction of the Tribunal. Section 20 of the NGT Act provides that, while deciding cases before it, the Tribunal shall take into consideration the three principles -- the principle of sustainable development, the precautionary principle, and the polluter pays principle. The precautionary principle would operate where actual injury has not occurred as on the date of institution of an application. In other words, an anticipated or likely injury to environment can be a sufficient cause of action, partially or wholly, for invoking the jurisdiction of the Tribunal in terms of Sub-sections (1) and (2) of Section 14 of the NGT Act. The language of Section 20 is referable to the jurisdiction of the Tribunal in terms of Sections 14 and 15 of the Act. The precautionary principle is permissible and is opposed to actual injury or damage. On the cogent reading of Section 14 with Section 2(m) and Section 20 of the NGT Act, likely damage to environment would be covered under the precautionary principle, and therefore, provide jurisdiction to the Tribunal to entertain such a question. The applicability of the precautionary principle is a statutory command to the Tribunal while deciding or settling disputes arising out of substantial questions relating to the environment. Thus, any violation or even an apprehended violation of this principle would be actionable by any person before the Tribunal. Inaction in the facts and circumstances of a given case could itself be a violation of the precautionary principle, and therefore, bring it within the ambit of jurisdiction of the Tribunal, as defined under the NGT Act. By inaction, naturally, there will be a violation of the precautionary principle, and therefore, the Tribunal will have jurisdiction to entertain all civil cases raising such questions of the environment."

3.1.2 NGT on Burden of Proof

The National Green Tribunal Act, 2010 empowers the Tribunal to grant the following types of relief:

3 National Green Tribunal, Application No 116 of 2013 THC.

(i) Relief and Compensation to the victims of pollution and other environmental damages arising out of enactments in Schedule I of the NGT Act

(ii) Restitution of the property damaged

(iii) Restitution of the environment of such area or areas

In Ossie Fernandes versus Union of India[4], the National Green Tribunal has clarified on the nature of the burden of proof in environmental cases. The relevant paragraph reads as follows:

> "We are aware that in the matter of environment, the burden is always on the project proponent. But that does not mean that the appellants cannot make a submission giving details of the environmental damage that may be caused by the given circumstances as an initial burden. Unless until a particular nature of environmental threat prima facie made out by the appellant, it may be difficult for the project proponent to discharge his burden in the wilderness."

3.1.3 NGT on duty to give reasons

One of the most significant contributions of the NGT has been its insistence that decisions with respect to the environment must be based on reasons. Environmental decisions and specifically approvals given to various infrastructure-related activities including extractive industries are marked by lack of transparency and arbitrariness. As per the statutory scheme in India, industrial and construction related projects beyond a certain threshold requires an approval under the Environment Impact Assessment Notification, 2006. The projects are appraised by the Expert Appraisal Committee (EAC) at the Federal level and the State Environment Impact Assessment Authority (SEIAA) at the State/ Provincial level. The EAC or the SEIAA is required to undertake a detailed scrutiny of the proceeding and outcome of the public hearings/ public consultation as well as analyze the Environment Impact Assessment Report. This procedure is rarely followed in letter and spirit. The NGT over the last four years has rendered numerous judgments wherein it reiterated the requirement that every administrative decision must be based on reasons, and that it must be evident from the records that the EAC/ SEIAA or the Ministry of Environment and Forest as the case may be has applied its mind to the various relevant aspects under consideration. The failure to give such reason would render the decision liable to be struck down on a ground of arbitrariness. Some of the key decisions of the NGT on this issue are as follows:

(1) Gau Raxa Hitraxak Manch and Gauchar Paryavaran Pouchav Trust, Rjula v. Union of India[5]

> "ii) The Authorities – Environment Appraisal Committee (EAC) and Ministry of Environment and Forests (MoEF) shall pass "speaking orders" giving reasons either for recommendation/non-recommendation of approval or rejection, whatsoever it may be, in support of Appraisal/EC, done on reconsideration of the issues/objections."

4 Appeal No. 12 of 2011.
5 M. A No. 94/ 2014 in APPEAL No. 16/ 2014 order dated 17.11.2014.

(2) Swami Gyan Swarup Sanand and ors. V. Union of India and ors[6]

"5. [T]here are a number of judgments signifying the need of recording the reasons for its decisions/ orders passed by an administrative authority/ judicial/ quasi- judicial body which serves a salutary purpose, namely; it excludes chances of arbitrariness, and ensures a degree of fairness in the process of decision making. Ultimately what is necessary is that the reasons are clear and explicit so as to indicate that the authority has given due consideration and applied its mind to the points in controversy. Therefore, in our opinion the requirement of recording the reasons is very essential, and that should be the basis for governing the decisions of the Committee exercising the administrative power."

(3) Rudresh Naik v. Goa State Coastal Zone Management Authority [7]

"12. It is a settled rule of law that administrative authorities that are dealing with the rights of the parties and are passing orders which will have civil consequences, must record appropriate reasons in support of their decisions. Certainly, these reasons must not be like judgments of courts, but they must provide an insight into the thinking process of the authority as to for what reasons it accepted or rejected the request of the applicant. The authority concerned should provide a fair and transparent procedure, and the authority concerned must apply its mind and dispose of the matter by a reasoned or speaking order."

(4) Ossie Fernandes v. Ministry of Environment and Forests[8]

"There appears to be no improvement in following the procedure required in conducting PH, in spite of a catena of judgments rendered by the Hon'ble Supreme Court and Hon'ble High Courts across the country laying down the principles to be followed in conducting Public Hearing and subsequent appraisal of project by EAC. In view of our bad experience in dealing with the issue of preparation of draft EIA Report in consonance with the ToR and conducting PH, before parting with the judgment, we propose to suggest the following to be included either as part of executive instructions or rules, as the case may be. This may ensure proper appraisal of the suggestions/ objections raised during the PH, by the EAC, and even when they are challenged before the courts of law."(Page 20)

"EAC minutes should incorporate detailed reasons, in writing, for acceptance or otherwise against each issue arising out of PH and brought before it." (Page 22)

(5) Jeet Singh Kanwar v. MoEF and Ors[9]

"21.The EAC in the 56th meeting dated 13.10.2009 considered the issues raised during the public hearing, viz. impact on environment due to

6 M.A No. 461/ 2013 in Original Application No. 26/ 2011 order dated 20.02.2014.
7 2013 ALL (1) NGT reporter(2) (DELHI) 47.
8 Appeal No. 12/ 2011.
9 2013 ALL (1) NGT REPORTER (DELHI) 129.

operation of proposed project, location of ash pond; capacity for utilization of ash; development of green belt to arrest air pollution; measures for giving compensation to 22 families (homestead losers) and 212 land losers; water required from other sources having not been mentioned in EIA; impact due to land acquisition; acquisition of agriculture land; impact on ground water; providing civic amenities to villagers by project proponent; providing free tree/fruit saplings for cultivation; impact on agriculture land due to proposed ash pond etc. Though, the EAC was cognizant of the above issues which are stated in the minutes yet it is not at all clear as to how the EAC was satisfied with responses to the Project Proponent and the cumulative effect of the issues raised in the course of public hearing."

(6) Samata v. Union of India[10]

"54.[T]he detailed scrutiny as required by the notification in order to make an evaluation of the project has not been done since there is nothing to indicate in the minutes of the meeting that in respect of the issues raised at the time of public hearing in respect of each issue i.e., objections raised at the public hearing and what was the correspondence and clarification made by Project Proponent thereon and why and for what reasons those objections were negatived and the clarifications of the Project Proponent were accepted. Thus, the Tribunal is able to notice a thorough failure on the part of the EAC in performing its duty of proper consideration and evaluation of the project by making a detailed scrutiny before approving the same. The contentions put forth by the learned counsel for the respondents that number of specific condition were stipulated by the EAC at the time of recommendation and without proper consideration of both objections and concerns at the time of providing and proper responses made by the Project Proponent, those conditions could not have been stipulated cannot be countenanced. It is true that the EAC while recommending the project for the grant of EC has stipulated conditions. Mere stipulation of specific conditions ipso facto cannot be an answer, while the minutes recorded above clearly indicate that there was no appraisal wherein an evaluation by detailed scrutiny of the project is required as per the mandatory provisions of EIA Notification, 2006. The Central Government, in its wisdom thought it fit and necessary and circumstances also warranted issuance of the EIA Notification, 2006 superseding the earlier Notification, 1990 whereby EAC has been constituted for all projects in Category A and SLEAC for Category B for the purpose of screening, scoping and appraisal of the projects. The EAC is constituted consisting of a Chairman and number of members who are experts from different fields only with the sole objective of national interest in order to ensure establishment of new projects or expansion of already existing activity without affecting the ecological and environmental conditions. Thus, a duty is cast upon the EAC or SLEAC as the case may be to apply the cardinal and Principle of Sustainable Development and Principle of Precaution while screening, scoping and appraisal of the projects or activities. While so, it is evident in the instant case that the EAC has miserably failed in the performance of its duty not only as mandated by the EIA Notification, 2006, but has also disappointed the legal expectations from the same. For a huge project as the

10 Appeal No. 9 of 2011.

one in the instant case, a thermal power plant with an estimated cost of Rs. 11,838 crore, covering a total area of 1675 acres of land, the consideration for approval has been done in such a cursory and arbitrary manner even without taking note of the implication and importance of environmental issues. On the same day the EAC took for appraisal not only the thermal power plant in question, but also other projects which would be indicative of the haste and speedy exercise of its function of appraisal of the project. It casts a doubt that whether the EAC would have accepted the response made by the Project Proponent in respect of the objections and concerns raised at the time of public hearing as a Gospel Truth. Thus, the EAC has not conducted itself as mandated by the EIA Notification, 2006 since it has not made proper appraisal by considering the available materials and objections in order to make proper evaluation of the project before making a recommendation for grant of EC."

3.1.4 NGT on the need for cumulative impact assessment

The National Green Tribunal, in T. Muruganandam v. Union of India & Ors[11] specifically noted the need for a cumulative Impact Assessment Study in the areas where numerous projects were located, and examined the scope and meaning of the term "cumulative impact assessment":

"Our effort, in this case, is to understand what Cumulative Impact Assessment Study is. An enquiring mind would start with the existing law as well as scientific literature and it might be found in persuasive precedents available in the domestic law/literature on closely related topics and at a time in persuasive foreign decision/literature which may show how other jurisdictions have resolved the problem."

"The European Commission in its guidelines for Assessment of indirect and Cumulative impacts as well as impact interactions defines Cumulative Impact as "Impacts that result from incremental changes caused by other past, present or reasonably foreseeable actions together with the project". CEAA guidelines give a similar definition of Cumulative effects: these are changes to the environment that are caused by an action in combination with other past, present, and future human actions. The U.S Environmental Protection Agency defines it as "the combined incremental effect on human activity". .. Thus, the Cumulative Impact as the term indicates is not the impact of any project in isolation but it is a total impact resulting from the interaction of the project with other project activities around it- past, present and those to come up in future. It is a comprehensive view of the impacts resulting from all the projects- past, present or planned ones on the environment. Cumulative Impact may be same or different and those were arising out of individual activities and tend to be larger, long lasting and spread over a greater area within the individual impact. Such studies are therefore commonly expected to:

1. Assess effects over a larger area that may cross jurisdiction boundaries;
2. Assess effects during a longer period of time into the past and future;
3. Consider effects on other eco-system components due to interactions with other actions, and not just the effect of the single action under review;

11 Appeal No. 50 of 2012.

4. Include other past, existing and future (reasonably foreseeable) action; and
5. Evaluate significant effect in consideration of other than just local and direct effects."

In Sarpanch, Grampanchayat Tiroda vs. MoEF[12], the Tribunal observed:

> "Unfortunately, the cumulative effect of these four proposed projects was not considered to be of significance in causing environmental pollution in a small area. It appears an impression is sought to be created that there was only one application of Tiroda mine, and at that time the Redi mine was not in operation.
>
> When number of mines are sought to be considered in a small area of Sawantwadi Taluk, the EAC was expected to examine various aspects such as the cumulative impact of Air, Water, Noise, Flora Fauna, and socio-economic aspects in view of large number of transport vehicles, plants and machinery etc. that would be operating in the area. It would have been appropriate, if a cumulative impact study was undertaken to take care of all existing/proposed mines within 10 km of the present project site apart from Redi mine, if any. Therefore, we are of the opinion that these aspects were not properly assessed and examined scientifically and, therefore, the EIA report requires to be re-examined afresh".

The need for a cumulative impact assessment of existing and proposed projects in a river basin was stressed by the Supreme Court in Alaknanda Hydro Power Corporation Ltd v. Anuj Joshi, where it was observed that:

> "We are, however, very much concerned with the mushrooming of large number of hydroelectric projects in the State of Uttarakhand and its impact on Alaknanda and Bhagirathi river basins. Various studies also indicate that in the upper-Ganga area, including Bhagirathi and Alaknanda rivers and their tributaries, there are large and small hydropower dams. The cumulative impact of those project components like dams, tunnels, blasting, power-house, muck disposal, mining, deforestation, etc. on eco-system, is yet to be scientifically examined."

Recognizing that "the cumulative impact of the various projects in place and which are under construction on the river basins have not been properly examined or assessed, which requires a detailed technical and scientific study", the Supreme Court directed a comprehensive basin assessment, including the "adverse effect of the existing projects, projects under construction and proposed, on the environment and ecology" and a proper Disaster Management Plan.

4. Conclusion

Without a doubt, the NGT has emerged as the most important institution so far as environmental justice and enforcing the Rule of Law relative to environmental issues are concerned. As a result of the decisions of the NGT, there is now increased citizen participation in enforcing environmental laws, and there is an increased level of accountability so far as governmental functionaries are concerned. In addition, the industrial sector of today is aware

12 Appeal No. 3 of 2011, video order dated 12.09.2011.

of the fact that citizens have legal measures tools to ensure that violations do not take place. Despite these positive developments, there are challenges ahead. In spite of the fact that the NGT hears a large number of cases on a daily basis, there is still an issue of the pendency of also a large number of cases. Despite the fact that there are five benches of the NGT across the country, yet for a large country like India, there needs to have more NGT benches across the country. At a more fundamental level, despite the statutory time limit of six months for disposal of cases, the actual time taken for deciding cases is much more. Further, some of the most significant decisions of the NGT have been stayed by the Supreme Court, which has appellate jurisdiction over NGT decisions. One of the most recent threats to the NGT is actually from the Executive itself. The Ministry of Environment and Forest set up a High-Level Committee to review environmental laws, and one of the specific recommendations of the Committee is to curtail the power of the NGT. The report is likely to be accepted by the government and if implemented will fundamentally change the powers of the NGT. On the positive side, there is an increased of public support for the NGT and is growing every day. It is, therefore, unlikely that curtailing the powers of the NGT is going to be easy, and if done will be subjected to legal challenge.

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[2013 ALL (1) NGT REPORTER (DELHI) 129.

Legal and Policy Responses towards Climate Change Adaptation in the Philippines

Rose-Liza Eisma-Osorio and Gloria Estenzo-Ramos

Abstract

With the onset of global climate change, there is a need to rethink how the Philippines should respond to address its unintended consequences through the rule of law. The present legal framework adequately addresses climate change adaptation as an important national strategy, however, the government at the moment is limited to focusing only disaster preparedness and response with less understanding on climate risks. The programs and resources are also not in place for government programs and responses to climate change. The implementation of the Climate Change Act of 2009, as amended, requires concerted efforts by the mandated agencies, at the national level, and by local government units on the ground. The National Framework Strategy on Climate Change: 2010-2022 serves as the blueprint to build adaptive capacity of communities and increase resilience of natural ecosystems against the threats of climate change. Although it identifies specific actions to mitigate effects of climate change, it falls short of identifying adaptation strategies by merely focusing on enhancing the availability and quality of vulnerability and adaptation assessments to serve as the basis for formulating appropriate climate change adaptation strategies. At the local level, climate-smart local planning and the implementation of pilot measures to enhance adaptation to climate change has been initiated in a few areas. Nevertheless, strengthening capacity of the local governments in their tasks of policy development and planning remains to be a challenge. Existing laws have already laid the bases for a paradigm shift towards climate change adaptation by reducing and managing risks. The rule of law must then be put in place by increasing access to justice and participation of key stakeholders – the citizens.

Keywords: Climate Change Adaptation, Disaster Response, Access to Justice, Stakeholder Participation

1. Introduction

Many important steps have been taken in the development of the adaptation regime under the United Nations Framework Convention on Climate Change.[1] The Fourth Assessment Report of the Intergovernmental Panel for Climate Change and the international imperatives drawn during the Bali Conference in 2007 have established the urgency of adaptation especially for developing and vulnerable countries.[2] The recent 20th session of the Conference of the Parties and the 10th session of the Conference of the Parties to the Kyoto Protocol in Lima, Peru further reveal the increasing recognition of climate change adaptation onto the same level as curbing greenhouse gas emissions.[3] With the determination to strengthen climate action,

1 See < http://unfccc.int/focus/adaptation/items/6999.php> accessed on 20 December 2014

2 IPCC, *Climate Change 2014: Impacts, Adaptation, and Vulnerability (Technical Summary) (IPCC WGII AR5 TS, 2014);* p.2.

3 See <http://unfccc.int/2860.php#decisions> accessed on 31 December 2014.

National Adaptation Plans (NAPs) were also recognized as an important way of delivering resilience.[4]

Climate change adaptation has been defined as adjustments in ecological, social, or economic systems in response to actual or expected climatic stimuli and their effects or impacts.[5] It refers to changes in processes, practices, and structures to moderate potential damages or to benefit from opportunities associated with climate change.[6] Adaptation has been initially mentioned in two major Philippine laws - Republic Act No. 9729 (Climate Change Act of 2009) and Republic Act 10121 (Disaster Risk Reduction and Management Act of 2010). Both laws have defined adaptation as "the adjustment in natural or human systems in response to actual or expected climatic stimuli or their effects, which moderates harm or exploits beneficial opportunities."[7]

In light of these legal developments, the Philippines has adopted a national policy to address climate change. The National Strategic Framework and Program on Climate Change was crafted by the Climate Change Commission to serve as the basis for climate change planning, research and development, extension, monitoring of activities, and climate financing, to protect vulnerable and marginalized communities from the adverse effects of climate change.[8] The National Framework Strategy on Climate Change: 2010-2022 is the Philippines' roadmap towards building the adaptive capacity of communities and increasing the resilience of natural ecosystems to climate change, and optimizing mitigation opportunities towards sustainable development.[9] It identifies Key Result Areas to be pursued in key climate-sensitive sectors such as ecosystems, food, water, human health, infrastructure, energy, and human society. Here, the critical aspect of climate change adaptation is highlighted as a matter of principle.

Despite the formulation of a national legislation on climate change and an existing policy framework on climate change adaptation, there are still ongoing challenges in terms of the country's ability to respond to climate change. The Philippines is one of the most vulnerable countries in the world. It is often faced with a myriad of climate-related challenges such as extreme weather events, increasing temperatures, changing rainfall patterns, rising sea levels amidst a backdrop of prevalent poverty conditions. Adaptation will be a comprehensive strategy that requires many resources and integration of sectoral programs. A key approach would require a closer look into harmonizing existing environmental laws and transforming these to improve climate change adaptation. Laws adopted in the 1970s, such as the Forestry Code and Environmental Impact Assessment are no longer able to adapt to the new climate context. Enabling laws to mitigate logging, mining, and other key environmental threats must be reviewed. Public participation, transparency, and other good governance measures must be put in place in the current administrative structures. Environmental impact assessment (EIA) as an effective planning tool must be improved. Finally, the rule of law through better access to justice in the current climate realities should be widely adopted.

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4 See Decision -/CP.20 Lima Call for Climate Action, Advance unedited version, <http://unfccc.int/files/meetings/lima_dec_2014/application/pdf/auv_cop20_lima_call_for_climate_action.df>. Accessed on 31 December 2014.

5 See <http://unfccc.int/2860.php#decisions>. Accessed on 31 December 2014.

6 See <http://unfccc.int/2860.php#decisions>. Accessed on 31 December 2014.

7 See Rep. Act 9729 and Rep. Act 10121.

8 Rep. Act 9729, Sec. 8 (2009).

9 See <http://neda.gov.ph/wp-content/uploads/2013/10/nfscc_sgd.pdf>.

Succeeding sections will examine the legislative responses and administrative policies on climate change in general, and climate change adaptation in particular. The status of implementation and intrinsic limitations especially at the local level of governance will be reviewed and analyzed as well. Finally, recommendations will be made to transform the country's environmental laws and enhance its rule of law.

2. Policy and Legal Responses for Climate Change

2.1 Climate Change Act of 2009, as amended

Pursuant to the Constitutional mandate to protect the right of the people to a balanced and healthful ecology, the Philippine Congress enacted Republic Act 9729, also known as the Climate Change Act of 2009. In said law, the State seeks to afford full protection and the advancement of the environmental right of the people as well as fulfilling human needs while maintaining the quality of the natural environment for current and future generations.[10]

The Climate Change Act is considered as a landmark legislation which directly deals with climate change adaptation. It advances the policies to strengthen, integrate, consolidate and institutionalize government initiatives to achieve coordination in the implementation of plans and programs to address climate change in the context of sustainable development. Moreover, it defines adaptation as "the adjustment in natural or human systems in response to actual or expected climatic stimuli or their effects, which moderates harm or exploits beneficial opportunities."[11]

The goals, programs and plans under the climate change law of the Philippines are administered through the Climate Change Commission (CCC). The CCC is an independent and autonomous agency under the Office of the President of the Philippines. It serves as the sole policy-making body of the government tasked to coordinate, monitor and evaluate the programs and action plans of the government relating to climate change. The CCC is mandated to create the official National Strategic Framework and Program on Climate Change as the basis for climate change planning, research and development, extension, monitoring of activities, and climate financing, to protect vulnerable and marginalized communities from the adverse effects of climate change.[12]

Republic Act 9729 was later on amended in 2012 by Republic Act 10174 that seeks to establish the People's Survival Fund in order to provide long-term finance streams to enable the government to effectively address the problem of climate change.

2.2 National Framework Strategy on Climate Change: an overview

The threefold goals of the National Framework Strategy on Climate Change: 2010-2022 consist of building adaptive capacity of communities, increase resilience of natural ecosystems, and optimize mitigation opportunities towards sustainable development.[13] Adaptation to climate change of both natural ecosystems and human communities is further emphasized together with the recognition that mitigation and adaptation have a mutually beneficial relationship. Mitigation and adaptation are the national priorities, and therefore, the pillars, of

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10 Section 2, Republic Act No. 9729 (2009).
11 *See* Rep. Act 9729 and Rep. Act 10121.
12 Rep. Act 9729, Sec. 8 (2009).
13 Guiding Principles, NSFCC: 2010-2022, Office of the President of the Philippines – Climate Change Commission, pp. 5-6 (undated).

the National Framework Strategy on Climate Change, with adaptation as the anchor strategy.[14] Hence, the Framework aggressively highlights the critical aspect of adaptation which was meant to be translated to all levels of governance alongside coordinating national efforts towards integrated ecosystem-based management.[15]

Since the Framework aims to build a roadmap that will serve as a basis for a national program on climate change,[16] several guiding principles were adopted. To mention a few, the Framework adopts the Philippine Agenda 21 for Sustainable Development to ensure human needs while maintaining the natural environment, special attention was given to ensure equal and equitable protection of the poor, women, children, and other vulnerable and disadvantaged sectors.[17] This is in line with the recognition within the national framework document that addressing climate change must transcend environmental challenges and is closely linked with socio-economic targets.[18] Anticipatory adaptation measures were also mulled despite inadequate scientific information.[19]

The Framework depicts the critical role that national government agencies play in addressing climate change concerns in accordance with their mandates.[20] It also recognizes the principle of subsidiarity and the role of local governments as front-liners in addressing climate change.[21] Aside from government instrumentalities, participation of the private sector, civil society, indigenous peoples and other marginalized groups most vulnerable to climate change impacts are valued and promoted.[22]

Key result areas (KRAs) on adaptation and mitigation were to be pursued in key climate-sensitive sectors.[23] It is emphasized that these KRAs will provide the impetus for drawing up other national, sector and local adaptation plans. Enhanced knowledge systems on vulnerability or threats from potential hazards to the population and to existing infrastructure are necessary.[24] Due to the multiple vulnerabilities of the country, the integrated approach to the management of ecosystems, i.e., river basins, coastal and marine ecosystems, and biodiversity should be utilized. Water governance and management are highlighted in view of the climate risks on the country's water resources. Climate-responsive agriculture is likewise seen as a strategy considering the sensitivity of the country's agricultural sector to climate change impacts. Other areas of concern include climate-responsive health sector, climate-proofing infrastructure, and disaster risk reduction.

With regard to mitigation, one of the KRAs focused on energy efficiency and conservation, including adaptability of energy infrastructures. Based on the greenhouse gas (GHG) inventory conducted in 2000, the Philippines' net emission was 21,767 Gg of GHG,

14 Guiding Principles, NSFCC: 2010-2022, p.6.

15 Preface, NSFCC: 2010-2022, Office of the President of the Philippines – Climate Change Commission, 3 (undated).

16 Preface, NSFCC: 2010-2022, p.3.

17 Preface, NSFCC: 2010-2022, p.3.

18 Philippine Climate Change Framework, NSFCC: 2010-2022, Office of the President of the Philippines – Climate Change Commission, p.17 (undated).

19 Guiding Principles, NSFCC: 2010-2022, 2.8, 2.9, and 2.10.

20 Guiding Principles, NSFCC: 2010-2022, 2.12.

21 Guiding Principles, NSFCC: 2010-20222.12.

22 Guiding Principles, NSFCC: 2010-2022, 2.13 and 2.14.

23 Preface, NSFCC: 2010-2022, p.3.

24 The Adaptation Pillar, NSFCC: 2010-2022, Office of the President of the Philippines – Climate Change Commission, 27 (undated).

with the energy sector contributing the highest at 55% of the total.[25] Other KRAs on mitigation addressed increasing development and utilization of renewable energy,[26] improving efficiency of the transport sector,[27] reducing carbon footprint through energy-efficient design and materials for public infrastructure and settlements,[28] sustainable management of forests and enhancement of carbon stocks in watersheds, forests and other terrestrial ecosystems,[29] and full implementation of proper waste management. [30]

The national framework is considered as a dynamic and living document, hence, its provisions must be reviewed every three (3) years in order to take into consideration new challenges and emergence of opportunities. As the Philippines continues to grapple with new climate realities each year, the need for national and local adaptation plans cannot be over-emphasized.

The national climate change framework strategy has recently been translated into a National Climate Change Action Plan (NCCAP), which prioritizes food security, water sufficiency, ecological and environmental stability, human security, climate-smart industries and services, sustainable energy, and knowledge and capacity development as the strategic direction for 2011 to 2028.[31] In the said Action Plan, the country placed greater emphasis on adaptation as necessary to complement measures that reduce greenhouse gas emissions.[32] It is a mechanism to manage risks, adjust economic activity to reduce vulnerability and to improve business certainty.[33] The NCCAP seeks to comprehensively address the challenges of climate change through an enabling policy environment. Mechanisms for its implementation, such as public financing, are indicative of prioritization of adaptation to reduce vulnerability and risks of communities particularly the marginalized poor.[34] Emphasis is also given to participation of the private sector to optimize mitigation opportunities towards sustainable development.

An example of innovative climate financing is in the form of Disaster Management Assistance Fund (DMAF).[35] The DMAF is a lending facility to LGUs offered at very low rates (3% to 5%), the primary objective thereof is to provide timely financial support to disaster risk and damage management initiatives, which include disaster prevention and mitigation projects, response and relief related projects, and recovery and rehabilitation projects.

Aside from the DMAF, the Climate Change Act of 2009 also requires government financial institutions to provide preferential financial loan packages for local government units, as part of an incentive package for good governance based on an LGU performance rating system.[36] These loans are not tied to the IRA (internal revenue allotment) and can be over and

25 The Adaptation Pillar, NSFCC: 2010-2022, p.21.
26 The Adaptation Pillar, NSFCC: 2010-2022, p.23.
27 The Adaptation Pillar, NSFCC: 2010-2022, p.23.
28 The Adaptation Pillar, NSFCC: 2010-2022, p.24.
29 The Adaptation Pillar, NSFCC: 2010-2022, p.25.
30 The Adaptation Pillar, NSFCC: 2010-2022, p.26.
31 National Climate Change Action Plan, Preface at <http://www.climate.gov.ph/index.php/cc-policies#cc-related-plans-and-policies>. Accessed on January 30, 2015.
32 National Climate Change Action Plan, Introduction, at <http://www.climate.gov.ph/index.php/cc-policies#cc-related-plans-and-policies>. Accessed on January 30, 2015, p. 2.
33 National Climate Change Action Plan, Introduction, at <http://www.climate.gov.ph/index.php/cc-policies#cc-related-plans-and-policies>. Accessed on January 30, 2015, p. 2.
34 National Climate Change Action Plan, at <http://www.climate.gov.ph/index.php/cc-policies#cc-related-plans-and-policies> accessed on January 30, 2015, p. 5.
35 National Climate Change Action Plan, p.57.
36 National Climate Change Action Plan, p.58.

above the 5% allotted for the local Disaster Risk Reduction and Management (DRRM) fund, formerly the calamity fund.[37]

2.3 Local Disaster Risk Reduction and Management Programs

2.3.1 Status of Implementation

By virtue of the Philippine Disaster Risk Reduction and Management Act of 2010, disaster management in the Philippines cascades from the national to municipal levels. Each Disaster Risk Reduction and Management Council (DRRMC) is represented by multiple stakeholders where government ministries, the armed forces, emergency services and civil society are represented. The National DRRMC designates four cabinet secretaries as leads for the four-fold aspects of the disaster management cycle: Preparedness, Response, Prevention and Mitigation, and Rehabilitation and Recovery.

The disaster law of the Philippines has laid the basis for its first line of defense in combating climate change effects, which is disaster risk reduction and management. One of its state policies calls for the development, promotion, and implementation of a comprehensive National Disaster Risk Reduction and Management Plan. Such Plan is intended to enhance institutional and technical capacity of the national government and the local government units (LGUs) together with partner stakeholders to face the paradigm shift towards disaster preparedness and mitigation. Disaster resilience of communities must be increased. To do this, science-based early warning systems are now in place. Arrangements and measures for reducing disaster risks, including projected climate risks and enhancing disaster preparedness and response capabilities at all levels, must be fully tackled in climate and disaster risk-based planning. Disaster risk reduction and climate change measures which are gender responsive, sensitive to indigenous knowledge systems and cultures, and respectful of human rights have to be integrated.

Pursuant to this basic law on disaster risk reduction management, all local chief executives must actively act as Chairpersons of the Local Disaster Coordinating Councils. In doing so, climate change adaptation and disaster risk reduction measures must be mainstreamed into local policies, plans, budgets and investment program as a priority concern.[38]

2.3.2 Limitations

Absence of local climate change adaptation plans which must be a more comprehensive plan is evident. While most LGUs have formulated their local DRRM plans, there is a need to enhance these plans in order to take a more comprehensive and integrated approach to managing their climate risks.

The Climate Change Act provides that LGUs as frontline agencies in the formulation, planning and implementation of climate change action plans in their respective areas, shall formulate their Local Climate Change Action Plan, consistent with the provisions of the Local Government Code, the Framework, and the National Climate Change Action Plan.[39]

37 National Climate Change Action Plan, p.58.
38 Memorandum Circular No. 2008-69.
39 Republic Act 9729, Sec. 14.

3. Strengthening current environmental laws and enhancing rule of law to improve climate change adaptation

A transformation of environmental law and policy in many ways is required for adaptation to climate change.[40] One strategic approach in the Philippines would be to strengthen current environmental laws that can improve adaptation of human communities to climate change. The Philippines faces a myriad of threats, such as changes in annual mean temperatures, sea level rise, increases in variability and pattern of rainfall and super typhoon events resulting to storm surges, flooding, landslides, and the like. Climate risks can be drastically reduced by setting in place climate-responsive legal measures.

For one, the provisions of the Water Code of the Philippines on public easement and salvage zones must be closely scrutinized in terms of its efficacy. The existing law provides that the banks of rivers and streams and the shores of the seas and lakes throughout their entire length and within a zone of three (3) meters in urban areas, twenty (20) meters in agricultural areas and forty (40) meters in forest areas, along their margins are subject to the easement of public use in the interest of recreation, navigation, floatage, fishing and salvage.[41] However, the implementation of these easement zones has not been strictly followed. The government authorities are notably tentative in implementing these zones even after Typhoon Haiyan when their rehabilitation entity, Office of the Presidential Assistant for Rehabilitation and Recovery (OPARR) sought for exemption from such rule.[42] This showed the lack of foresight and disregard to adaptation requirements for climate change resulting to unwarranted exposure of hazard-prone communities to storm surge, sea level rise and the like with the onset of more climate-related disasters.

Secondly, the Environmental Impact Assessment (EIA) law of the Philippines has long been a subject of scrutiny. The EIA system was first introduced in Presidential Decree 1151, also known as the Philippine Environment Policy. In Section 4 thereof, it provides that all agencies and instrumentalities of the national government, including government-owned or controlled corporations, as well as private corporations, firms and entities shall prepare, file and include in every action, project or undertaking which significantly affects the quality of the environment, environmental impact statements. Towards this end, environmental impact statements are required specifically those on (1) the environmental impact of the proposed action project or undertaking; (2) any adverse environmental effect which cannot be avoided should the proposal be implemented; (3) alternative to the proposed action; (4) a determination that the short-term uses of the resources of the environment are consistent with the maintenance and enhancement of the long-term productivity of the same; and (5) whenever the proposal involves the use of depletable or non-renewable resources, a finding must be made that such use and commitment are warranted.

This law introducing the EIA system was further strengthened by the enactment of Presidential Decree 1586, which established the Philippine Environmental Impact Statement System. The law provides that, once the President upon the recommendation of the National Environmental Protection Council (NEPC)[43] declares any project as environmentally critical and/or located in an environmentally critical area, the project proponent is required to secure

40 See J.B. Ruhl, 'Climate Change Adaptation and the Structural Transformation of Environmental Law', (2010) 40 EL 363.

41 Presidential Decree 1067, Section 51.

42 Briefing Room: Presidential Assistant for Rehabilitation and Recovery, "PARR: "No Build Zone" Policy not recommended in Yolanda-affected areas," Official Gazette (March 14, 2014).

43 Now replaced by the Environmental Management Bureau of the Department of Environment and Natural Resources thru an EIA Review Committee.

an Environmental Compliance Certificate (ECC). All other projects, undertakings and areas not declared as environmentally critical shall be considered as non-critical and shall not be required to submit an environmental impact statement. However, such non-critical projects may be required to provide additional safeguards as may be deemed necessary by the government authorities.

In relation to the aforestated provisions, Presidential Proclamation 2146 was issued to specify environmentally critical projects that will fall within the scope of the EIA system. These include heavy industries, resource extractive industries, and infrastructure projects. Areas that are considered as environmentally critical include nationally-declared protected areas, habitats of endangered species, prime agricultural lands, pristine mangrove areas, coral reef areas with excellent cover, and the like. Golf course projects were included by virtue of a subsequent decree, Presidential Decree 803.

Despite the existence of a strong legal framework, lingering issues remain with respect to the EIA laws especially since subsequent issuances at the administrative level have somewhat watered down their efficacy. Two department orders have helped shaped the EIS system for the past decades. Department Administrative Order 37, series of 1996 issued by the Department of Environment and Natural Resources (DENR), had provided safeguards on full public participation and accountability. Mandatory consultations were required of project proponents relative to environmental risk assessment and presumption of public risk. However, in a subsequent DENR Department Administrative Order 30, series of 2003, the mandatory requirements for social acceptability no longer includes the conduct of public consultations. An automatic approval provision was included in the event that the 15-120 day period for processing ECC application has lapsed.

Another objectionable feature in the law is the further classification of projects which were deemed incompatible with the national law. What the DAO 30-2003 effectively did was to require projects under Category A (Environmentally Critical Projects (ECPs) with significant potential to cause negative environmental impacts) and Category B (Projects that are not categorized as ECPs, but which may cause negative environmental impacts because they are located in Environmentally Critical Areas) to secure an ECC. However, it added two other categories, namely: Category C (Projects intended to directly enhance environmental quality or address existing environmental problems not falling under Category A or B) and Category D (Projects unlikely to cause adverse environmental impacts) and required these to submit Project Description and to secure a Certificate of Non-Coverage, respectively. The requirement for the latter categories were seen as an ultra vires act that seeks to diminish public participation in accordance with the social acceptability requirement. At its present form, mandatory public hearing is required for ECPs only, unless otherwise determined by the Environmental Management Bureau (EMB). Such conflicting proviso underscores the full discretion given to the EMB as to whether meaning public participation will be given full significance.

In the advent of climate change, adaptation measures need to be in place especially in environmentally critical areas. Guidelines for projects that are proposed in these areas must, at best, be sufficient to ensure free, prior and informed consent of communities likely to be affected before allowing such projects to be implemented.

Finally, increasing access to justice is necessary in order to ensure resilient communities and climate change adaptation. The landmark Rules of Procedure for Environmental Cases[44]

44 Administrative Matter 09-6-8-SC. Rules of Procedure for Environmental Cases. Effective APRIL 29, 2010. Manila, Philippines.

was adopted by the Supreme Court on 13 April 2010, which became effective on 29 April 2010, and which integrated a "rights-based approach to environmental justice." The Rules usher in a new era of human rights and environmental rights protection. Dormant substantive rights are actualized through providing citizens (including government agencies, corporations and non-government organizations) distinct procedural rights.[45]

The Rules' objectives are:

1. To protect and advance the constitutional right of the people to a balanced and healthful ecology;

2. To provide a simplified, speedy, and inexpensive procedure for the enforcement of environmental rights and duties recognized under the Constitution, existing laws, rules and regulations, and international agreements;

3. To introduce and adopt innovations and best practices ensuring the effective enforcement of remedies and redress for violation of environmental laws; and

4. To enable the courts to monitor and exact compliance with orders and judgments in environmental cases.

Innovations include the following: Liberalized Locus Standi and Citizen's Suit, Speedy Disposition of Cases though judicial affidavit and requirement that trials be conducted within one year, consent decrees, ancillary remedies such as environmental protection orders, application of the Precautionary Principle, Prohibition against Strategic Legal Action Against Public Participation and Special Civil Actions.

Special Civil Actions such as the Writ of Kalikasan (nature) and the writ of continuing mandamus are among the swift remedies available to petitioners of environmental cases. The Writ of Kalikasan is a legal remedy that is available when the environmental damage is of such magnitude that it prejudices the life, health, or property of inhabitants in two or more cities or provinces. The writ is issued in favor of petitioners (or affected party) who can take refuge with the higher courts – the Court of Appeals and the Supreme Court – through summary proceedings.

On the other hand, a Writ of Continuing Mandamus under Rule 8 thereof may be used to compel the performance of a ministerial duty especially enjoined by law. The court retains jurisdiction after the judgment to ensure its implementation through submission of reports and other methods to monitor compliance with its ruling.

"While it is still premature to make conclusions on the impact of the Rules on human and environmental rights protection and sustainability, citizens and environmental groups are bolstered by the swift response of the green courts in addressing recent critical environmental challenges. The leak of the gas pipeline that caused the evacuation of residents in a condominium in Makati City resulted in the first writ of kalikasan being issued by the Supreme Court. A green court issued a temporary environmental protection order (TEPO) to stop the indiscriminate throwing of hazardous coal ash. The TEPO was the first one to be issued in the Visayas and the second in the country. Amid wide media coverage, the green court judge and the parties

45 Estenzo-Ramos, Gloria.2011. Innovative Procedural Rules on Environmental Cases in the Philippines: Ushering In a Golden Era for Environmental Rights Protection. IUCN Academy of Environmental Law e-Journal; 2011, p.1.

actually visited the relevant dumpsites and the coal power plants. The provisions relating to SLAPP suits contained in the Rules should ensure that the filing of such suits against environmental crusaders is no longer met with anxiety, sleepless nights and dread."[46]

While substantial inroads had been undertaken in the implementation of the Rules by the green courts, many justices, judges and members of the legal profession and citizens, in general, are still bereft of the knowledge of environmental laws, more so the Rules. They are unaware of their benefits to human rights promotion and environmental protection and in building the resiliency of people and the planet amid the climate and governance crisis. "The consistency with which the judges implement the Rules, the widespread dissemination of knowledge of the Rules and the citizens' trust in the legal processes prescribed by the Rules, will no doubt impact on their implementation. Their implementation will hopefully integrate a mindset of sustainability throughout all sectors of Philippine society. Future development will probably include a growing public demand to attain good governance and for public officers and employees to fulfill their environmental protection mandates efficiently and effectively. The Rules might also pave the way for the business sector to realize that it is smart business practice to comply with environmental laws."[47]

4. Conclusion

The United Nations University's Institute for Environment and Human Security and the German Alliance Development Works revealed that the Philippines ranks third in the list of countries most vulnerable to climate change. "Factors, such as land conversion, deforestation, and mining activities, worsen the effects of climate change and have a multiplier effect on disasters."[48]

By way of responding to the disasters and climate challenges, and to start building the resiliency of its people and degraded ecosystems, the country's laws, Republic Act 9729, the Climate Change Act of 2009, as amended by R.A. 10174, and Republic Act 10121, Philippine Disaster Risk Reduction and Management Act of 2010 required the integration of climate change and DRRM in all policies programs and projects of the government. The National Climate Change Action Plan approved by the Philippine Climate Change Commission, with the President as Chairperson, identifies the seven urgent strategies to address climate change, as follows: food security, water stability, environmental and ecological stability, human security, sustainable energy, climate-smart industries and services and knowledge and capacity development.

The clearly strong legal framework for environmental protection, public participation and local autonomy under the 1987 Constitution, environmental laws and the more recent statutes on climate change and disaster risk reduction have not been accompanied by strict enforcement and clear guidelines. To add to its challenging woes, the Philippines has to increasingly face its extreme vulnerability to disasters and effects of climate change.

The environment is the source of life of the earth. For Filipinos, the word 'environment' is inseparable from the concept of nature in that the word 'nature' in our language, which is

46 Ibid.
47 Ibid.
48 A quote from Rodne Galicha, Philippine country district manager of The Climate Reality Project (TCRP), http://globalnation.inquirer.net/14987/philippines-ranks-third-on-climate-change-vulnerability-list#ixzz2PPq5xiaZ.

'kalikasan', and the natural elements of life of land, air, and water are interchangeable.[49] Hence, emphasis must be given towards preserving the remaining natural resource base in the country through available legal remedies and exploring options to review and improve the present environmental legal framework and other related actions.

49 Davide, Hilario G. Jr. The Environment as Life Source and the Writ of Kalikasan in the Philippines. 29 (Pace Environmental Law Review 592); 2012.

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Interface Among Rule of Law, Human Rights and Human Security in Environmental Challenges in ASEAN

Koh Kheng-Lian

Abstract

The trilogy of the rule of law, human rights and human security has not been fully played out in the context of environmental challenges such as land grabbing. While the rule of law applies generally, the implications of human rights and the environment have not yet been fully understood. And, the notion of human security is a recent discourse that adds the human dimension to environment, particularly in policy making. How do these three approaches work together, or do they? Are they complementary in the pursuit of environmental sustainability. The paper examines some situations, particularly in the context of climate change in the ASEAN context. As far as the writer is aware, the 'trilogy' has not been considered in a given situation but rather separately. The 'interface' hopes to bring about climate justice through all or a combination of these approaches.

Keywords: ASEAN, Human Rights, Human Security, Climate Change

1. Introduction

The current environmental challenges that the ASEAN region faces include the impact of climate change on environmental sustainability, and 'land grabbing' - quite often as a result of climate change creating extreme weather conditions which lead investors in the agribusiness acquiring large swathes of arable land in choice watershed areas in developing countries, as their own country is being impacted by climate change, and they look for 'greener' pastures.

In an era of climate change disruption, all ASEAN (Association of Southeast Asian Nations)[1] member countries (AMCs), as with the rest of the world, are affected by the impacts of climate change and attendant vulnerabilities. In the case of AMCs in transition, i.e., Cambodia, Laos, Myanmar and Vietnam (CLMV), they fall victims to land grabbing. The CLMV have large populations who are poor and vulnerable, and are hardest hit by climate change and land grabbing. These situations bring to the fore questions of the interface of the rule of law, human rights and human security in order to achieve good governance and climate justice .

In considering such 'interface', it is also relevant to consider ASEAN's role as part of the United Nations system in which it facilitates the implementation of global objectives. Thus, the UNEP's (United Nations Environment Program) rule of law and sustainable development[2],the United Nations Human Rights Council 2012[3] project in promoting the enjoyment of a safe, clean and sustainable environment, and the UNDP's (United Nations Development Program) report on human security[4] are important elements in the examination of the ASEAN legal frameworks relating to rule of law, human rights and human security, viewed in the context of its environmental challenges.

1 Retrieved on January 10, 2015, from http://www.asean.org/asean/about-asean.
2 Accessed at http://www.unep.org/delc/worldcongress/TheWorldCongress/tabid/55695/Default.aspx.
3 United Nations General Assembly, Human rights Council (A/HRC/22/43: 21 December 2012).
4 Accessed at http://hdr.undp.org/sites/default/files/reports/255/hdr_1994_en_complete_nostats.pdf.

This paper examines the interface between the rule of law, human rights and human security approaches, which are being challenged in varying degrees in the two environmental challenges abovementioned. The commonality in these situations is whether good governance and climate justice can be achieved through any one or the combination of these approaches.

Rule of law: The rule of law is embodied in the Preamble to the ASEAN Charter[5] "adhering to the principles of democracy, the rule of law and good governance, respect for and protection of human rights …". The focus of the rule of law in this paper is the forging of a symbiosis between the environment and development based on ecological and social sustainability.

A number of internationally accepted standards, including the ASEAN notion of the rule of law are embodied in the term 'rule of law', as adopted in the 'World Justice Project' definition[6]:

- Accountability under the law
- Protection of fundamental rights, including the security of persons and property
- Accessibility, fairness and efficiency
- Justice is delivered timely and independently

Rio + 20, 'Future We Want' reaffirms the role of the rule of law in sustainable development. It highlights the role played by national judiciaries in ensuring fairness and equity in the implementation of policies to further sustainable development.[7]

Human rights: the ASEAN Human Rights Declaration 2012 (AHRD)[8], Art 28 (f) declares the right to a 'safe, clean and sustainable environment', see, *infra*. Article 11 provides that "Every person has an inherent right to life which shall be protected by law. …" Article 12 provides "… No person shall be subject to arbitrary arrest…detention, abduction or any other form of deprivation of liberty."

Human security: The discourse on human security and the environment, received recognition from the United Nations Development Program - Human Development Report in 1994 (UNDP Report). [9] On the scope of this new human dimension, the Report stated: "Human security is a summation of seven distinct elements of security, including food security, health security and environmental security".

5 Accessed at http://www.asean.org/archive/publications/ASEAN-Charter.pdf. See Article 1 (7): Article 2 (h) & (i).

6 What is the Rule of Law? Retrieved on January 10, 2015 from http://worldjusticeproject.org/what-rule-lawhttp://worldjusticeproject.org/what-rule-law.

7 See Resolution by the UN General Assembly on the Rule of Law which underlines the importance of fair, stable and predictable legal frameworks for generating inclusive, sustainable and equitable development and maintaining peace and security; A/RES/67/1. See also, UNEP Governing Council the February; UNEP/ GC.27/13.

8 ASEAN Human Rights Declaration (soft law). Retrieved on January 10, 2015, from http://www.asean.org/news/asean-statement-communiques/item/asean-human-rights-declaration.

9 Human Development Report, 1994. Retrieved on January 10, 2015, from http://hdr.undp.org/sites/default/files/reports/255/hdr_1994_en_complete_nostats.pdf.

The rationale of the ASEAN 'Non- Traditional Security (NTS)' approach in the ASEAN Political Security Community Blueprint (APSC)[10] is 'human security'. The referent of NTS is people centered. This is in alignment with the UNDP Report which highlighted four characteristics of human security: it is universal, people-centered, interdependent and focuses on early prevention. It further outlined seven interconnected elements of human security: economic, food, health, environmental, personal, community and political.

There is some overlap between human security and human rights, both of which, for example, include food and water. Human security is the basis for the enjoyment of human rights. It is significant that the link between human security and human rights was recently recognized at the ASEAN Defense Ministers Meeting (ADMM) held from 18 -20 May 2011[11] in Jakarta when it endorsed the UNDP notion of human security. The ADMM "agreed to move further toward people-centered security and new forms of security cooperation that will entail it to be placed throughout the whole of the ASEAN Security Community by 2015". It stated: "the term human security should be expanded to include freedom from want and the achievement of human needs in relation to human rights and humanitarian law."

2. Relevant ASEAN and international instruments

There is no ASEAN document on the rule of law as such but the ASEAN Charter[12] contains recognition of the rule of law. Also, some ASEAN Member Countries (AMCs) give recognition to the rule of law either in their constitution, legislation or judicial decisions.

Below is a list of some of the main ASEAN and international instruments relating to the rule of law, human rights and human security. In each of the instruments, some elements relevant to our study are highlighted.

2.1 ASEAN instruments

- ASEAN Vision 2020, 1997 (accelerated to 2015)[13]

  »Envision a caring ASEAN - hunger, deprivation and poverty are no longer basic problems; civil society empowered, attention to disadvantaged communities - social justice and rule of law; envision a clean and green ASEAN.

- ASEAN Agreement on Disaster Management and Emergency Response (AADMER), 2005 [14]

10 ASEAN Political-Security Blueprint. Retrieved on January 10, 2015 from http://www.asean.org/archive/5187-18.pdf. See Koh Kheng – Lian, "The Discourse of Environmental Security in the ASEAN Context", Chapter 9 in Jessup B & Rubenstein K. (eds) Environmental Discourses in Public and International Law (Cambridge University Press: 2012), pp. 218 – 237.

11 A. Kusalasari, M. (2011, July 19). Moving from state-centered to people-centered security in ASEAN. Jakarta Post. Retrieved on January 10, 2015, from http://www.thejakartapost.com/news/2011/07/19/moving-state- centered-people-centered-security-asean.html.

12 Charter of the Association of Southeast Asian Nations. Retrieved on January 10, 2015, from http://www.asean.org/asean/asean-charter/asean-charter.

13 ASEAN Vision 2020. Retrieved on January 10, 2015, from http://www.asean.org/news/item/asean-vsion-2020.

14 The ASEAN Agreement on Disaster Management and Emergency Response. Retrieved on January 10, 2015 from http://www.asean.org/communities/asean-socio-cultural-community/item/the- asean-agreement-on-disaster-management-and-emergency-response.

»Serious disruption of the functioning of a community causing widespread human, material, economic and environmental losses; provide effective mechanisms to achieve substantial reduction of disaster losses in lives… environmental assets … jointly respond to disaster emergencies through concerted national efforts and intensified regional and international cooperation….; incorporated into ASEAN Political Security Community Blueprint (APSC), section II.5, 2009 (Strengthen Cooperation on Disaster Management & Emergency Response).

● Agreement on the Establishment of the ASEAN Co-ordinating Centre for Humanitarian Assistance on Disaster Management, 2011 (AHA Centre)

»Facilitate cooperation and coordination among parties, and with relevant UN and international organizations, in promoting regional collaboration in disaster management and emergency response.

● ASEAN Strategic Plan of Action on Water Resources Management, 2005[15]

»Vision: the attainment of sustainability of water resources to ensure sufficient water quantity of acceptable quality to meet … (needs of) health, food security, economy and environment. For a Climate change and extreme events, develop flood classification, and flood risk mapping…integration of water and land use management, etc.

● ASEAN Charter, 2007

»Adhering to the principles of democracy, the rule of law and good governance, respect for and protection of human rights and fundamental freedoms.

»Art 14 of the ASEAN Human Rights Body. It called for establishment of an 'ASEAN human rights body' for 'promotion and protection of human rights and fundamental freedoms'. The ASEAN Intergovernmental Commission on Human Rights (AICHR) was established pursuant to Art 14. It operates in accordance with its Terms of Reference (TOR).

● ASEAN Human Rights Declaration, 2012 (AHRD), Arts. 28, 35, 36, 37, (establish human rights cooperation in the region), see *infra* , III for a more detailed account.

● ASEAN Socio-Cultural Community Blueprint, 2009[16] (II. D. & D1.)

»Deals with poverty alleviation and ensuring environmental sustainability (e.g., responding to climate change and addressing its impacts.

● ASEAN Integrated Food Security (AIFS) Framework and Strategic Plan of Action on Food Security in the ASEAN Region, 2009 - 2013

»Strategic thrusts include food security and emergency/shortage relief cooperation. ASEAN Emergency Rice Reserve.

15 ASEAN Strategic Plan of Action on Water Resources Management. Retrieved on January 10, 2015 from http://environment.asean.org/files/ASEAN%20Strategic%20Plan%20of%20Action%20on%20Water%20Resources%20Management.pdf.

16 ASEAN Socio-Cultural Community Blueprint. Retrieved on January 10, 2015, from http://www.asean.org/archive/5187-19.pdf.

● ASEAN Multi-Sectoral Framework on Climate Change Agriculture and Forestry Towards Food Security, 2009 (AFCC)[17] (cooperation and coordination in adaptation and mitigation measures)

»Climate change – increase in frequency and intensity – threatens food security and leads to conflicts over the use of land and water resources, migration of people and threats to regional security. Strengthen resilience and adaptive capacity of farmers and fishermen to cope with imminent climate change.

»Contribute to food security through sustainable, efficient and effective use of land, forest, water and aquatic resources by minimizing risks and impacts of and contributions to climate change.

»Areas of cooperation: exchange of information, crop production, postharvest and handling, training and extension, research and development as well as trade promotion in the areas of crops, livestock, fisheries, and forestry.

● Singapore Declaration on Climate Change, Energy and the Environment, 2007[18]

»Need to take effective approach to the interrelated challenges of climate change and other environmental and health issues in the context of sustainable development.

»Adaptation as a critical issue.

»Commitment to UNFCCC and Kyoto Protocol; need to enhance adaptive capacities actions to tackle global climate change issues; enhance access to safe drinking water, strengthen cooperation on management capacity and measures for natural disaster risks raised by climate variability.

»Recognizing poverty eradication, poses new challenges and growing urbanization increases need for environmental management.

»Application of common but differentiated responsibilities.

»Singapore Resolution on Environmental Sustainability and Climate Change 2009

»Foster cooperation in responding to climate change.

»Promote sustainable environmental practices to achieve clean air, clean land, and clean water…

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17 ASEAN Multi-Sectoral Framework on Climate Change Agriculture and Forestry Towards Food Security. Retrieved January 10, 2015, from http://www.asean-cn.org/Item/1151.aspx.

18 Singapore Declaration on Climate Change, Energy and the Environment. Retrieved on January 10, 2015 from http://cil.nus.edu.sg/2007/2007-singapore-declaration-on-climate-change-energy-and-the-environ ment-signed-on-21-november-2007-in-singapore-by-the-heads-of-state government/.

»ASEAN Leaders' Statement on Joint Response to Climate Change, 2010[19]

»Cooperation in research and development of knowledge sharing to enhance food production.

»Enhance participation towards strengthening international cooperation to address climate change.

- ASEAN Political-Security Community Blueprint (APSC) 2009 -2015[20]

»Promotion and Protection of Human Rights (II. A.1.5.).

»A Cohesive, Peaceful and Resilient Region with Shared Responsibility for Comprehensive Security (II. B.): ASEAN Charter, Art 1(8) – to respond effectively, in accordance with the principle of comprehensive security, to all forms of threats and transboundary challenges.

»Non-Traditional Security Issues –respond in accordance with principles of comprehensive security to threats and 'transboundary challenges' (II. B. 4) (Can this include climate change impacts?).

- Roadmap for the Attainment of the Millennium Development Goals in ASEAN, 2010 (MDG Goal 1: Poverty)

»ASEAN's commitment to building the ASEAN community, 2015, set of goals for improving well-being and poverty in its broader senses – Art. 1 ASEAN Charter.

»Research initiative, 'Poverty Reduction and Social Development in ASEAN: Towards an ASEAN Roadmap for the Implementation of the UN MDGs Plus.[21]

- The Initiative for ASEAN Integration (IAI) Strategic Framework and IAI Work Plan 2 (2009-2015)

»Narrowing development divides: enhances ASEAN's competitiveness as a region to provide framework for regional cooperation.

»To supplement national efforts aimed at poverty reduction and promotion of equitable and inclusive development.

»Align with three ASEAN Pillars i.e. APSC, ASEAN Economic Community (AEC) and ASEAN Socio-Cultural Community (ASCC).

»External assistance for gaps in priority sectors, capacity building and human resource development.

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19 ASEAN Leaders' Statement on Joint Response to Climate Change. Retrieved on January 10, 2015 from http://cil.nus.edu.sg/rp/pdf/2010%20ASEAN%20Leaders%20Statement%20on%20Joint%20Response%20to%20Climate%20Change-pdf.

20 ASEAN Political-Security Community Blueprint. Retrieved on January 10, 2015, from http://www.asean.org/archive/5187-18.pdf.

21 ASEAN Roadmap for the Attainment of the Millennium Development Goals. Retrieved onJanuary 10, 2015, from http://www.asean.org/archive/documents/19th%20summit/MDG-Roadmap.pdf .

»Resource mobilization from ASEAN, its Dialogue Partners, Sectoral Partners and Development Partners, regional and financial institutions.

»Social welfare protection – poverty alleviation, social safety net, enhancing food and safety, building disaster resilience, promote Corporate Social Responsibility.

»Addressing global environmental issues, develop and implement a comprehensive program to build capacity of CLMV for effective participation and negotiations in multilateral environmental agreements and implementation of their obligations to those agreements.

- ASEAN Framework Action Plan on Rural Development and Poverty Eradication (2011-2015)[22]

»Strengthen the role of the SOMRDPE (Senior Officials Meeting on Rural Development and Poverty Eradication)[23] in the overall ASEAN efforts of poverty eradication under the socio-cultural pillar;

»Enhance the participation of Civil Society Organizations and the private sector in the achievement of the goals and objectives of this framework action plan in recognition of their growing role in rural development and poverty eradication.

2.2 International instruments relevant to rule of law, human rights and human security

As many AMCs have adopted, ratified or are parties to MEAs relating to the rule of law, human rights or human security, a list of some of them are given below (I will highlight the elements of some of the instruments):

- UN Declaration of Human Rights, 1948[24]
- International Covenant on Economic, Social and Cultural Rights, 1966[25]
- Millennium Development Goals 2015 (Goal 1 Poverty; Goal 7 Sustainability)[26]
- United Nations Framework Convention on Climate Change, & Kyoto Protocol[27]
- Male Declaration on the Human Dimension of Global Climate Change, 2007[28]
- Convinced that immediate and effective action to mitigate and adapt to climate

22 ASEAN Framework Action Plan on Rural Development and Poverty Eradication. Retrieved onJanuary 10, 2015, from http://www.asean.org/resources/publications/asean-publications/item/asean-framework-action-plan-on-rural-development-and-poverty-eradication-2011-2015.

23 ASEAN Ministers Meeting on Rural Development and Poverty Eradication. Retrieved on January 10, 2015, from http://www.asean.org/communities/asean-socio-cultural-community/category/asean-ministers-meeting-on-rural-development-and-poverty-eradication-amrdpe.

24 The Universal Declaration of Human Rights. Retrieved on January 10, 2015, from http://www.un.org/en/documents/udhr/.

25 International Covenant on Economic, Social and Cultural Rights. Retrieved on January 10, 2015, from http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx.

26 Millennium Development Goals. Retrieved on January 10, 2015, from http://www.undp.org/mdg/.

27 United Nations Framework Convention on Climate Change, & Kyoto Protocol. Retrieved on January 10, 2015, from http://unfccc.int/kyoto_protocol/items/2830.php.

28 Male Declaration on the Human Dimension of Global Climate Change. Retrieved on January 10, 2015, from http://www.ciel.org/Publications/Male_Declaration_Nov07.pdf.

change presents the greatest opportunity to preserve the prospects for future prosperity, and that further delay risks irreparable harm and jeopardizes sustainable development.

● Reaffirming the United Nations Charter and the Universal Declaration of Human Rights.

● Recalling the relevant provisions of declarations, resolutions and programmes of action adopted by major United Nations conferences, … the Declaration of the United Nations Conference on the Human Environment of 1972 (Stockholm Declaration), the 1992 Rio Declaration on Environment and Development and Agenda 21, and the 2002 Johannesburg Declaration on Sustainable Development and Plan of Implementation of the World Summit on Sustainable Development.

● Noting that the fundamental right to an environment capable of supporting human society and the full enjoyment of human rights is recognized, in varying formulation.

● Emphasizes the human aspects of sustainable developmentConcerned that climate change has clear and immediate implications for the full enjoyment of human rights including inter alia the right to life, the right to take part in cultural life, the right to use and enjoy property, the right to an adequate standard of living, the right to food, and the right to the highest attainable standard of physical and mental health.

● (UN General Assembly Resolution Recognizing Access to Clean Water, Sanitation as Human Rights), 2010[29] (all ASEAN Member Countries, except Philippines, adopted this Resolution, 64/219)

● UNFCCC: Draft Decision/CP. 16, December 2010: Outcome of the work of the Ad Hoc Working Group on Long-Term Cooperative Action under the Convention[30]

● Noting resolution 10/4 of the United Nations Human Rights Council on human rights and climate change, which recognizes that the adverse effects of climate change have a range of direct and indirect implications for the effective enjoyment of human rights and that the effects of climate change will be felt most acutely by those segments of the population that are already vulnerable owing to geography, gender, age, indigenous or minority status and disability.

● Affirms that enhanced action on adaptation should be undertaken in accordance with the Convention; follow a country-driven, gender-sensitive, participatory and fully transparent approach, taking into consideration vulnerable groups, communities and ecosystems; and be based on and guided by the best available science and, as appropriate, traditional and indigenous knowledge; with a view to integrating adaptation into relevant social, economic and environmental policies and actions, where appropriate.

● UN Human Rights Council

● Resolution adopted by the Human Rights Council, 2011:18/22 Human Rights and Climate Change[31]

29 General Assembly Adopts Resolution Recognizing Access to Clean Water, Sanitation as Human Right, by Recorded Vote of 122 in Favour, None against, 41 Abstentions. Retrieved on January 10, 2015, from http://www.un.org/press/en/2010/ga10967.doc.htm.

30 Draft decision -/CP.16 Outcome of the work of the Ad Hoc Working Group on long-term Cooperative Action under the Convention. Retrieved on January 10, 2015, from https://unfccc.int/files/meetings/cop_16/application/pdf/cop16_lca.pdf.

31 Resolution adopted by the Human Rights Council 18/22 Human rights and climate change.

● Global nature of climate change calls for the widest possible cooperation by all countries and their participation in an effective and appropriate international response.

● Climate change-related impact - implications, both direct and indirect, for the effective enjoyment of human rights, including, *inter alia*, the right to life, the right to adequate food, the right to the highest attainable standard of health, the right to adequate housing, the right to self-determination and the right to safe drinking water and sanitation, and recalling that in no case may a people be deprived of its own means of subsistence.

● Effects of climate change will be felt most acutely by those segments of the population that are already in vulnerable situations owing to factors such as geography, poverty, gender, age, indigenous or minority status and disability.

● UN Human Rights Council: Report (2012 – 2015)

● On 6 July 2012 the Council appointed Professor John H Knox, of Wake Forest University, as an independent expert to conduct research on the issue of human rights relating the enjoyment of a safe, clean, healthy and sustainable development. [32] [33]

● The Report of 2012 noted that the relationship between human rights and the environment is now firmly established: first, as many human rights bodies at the global, regional and national levels have recognized, environmental degradation (e.g., caused by climate change) can impact on the enjoyment of a broad range of human rights, including rights to life, health, food and water; second, environmental policymaking can provide protection of the human rights that may be threatened by environmental degradation. These protective rights include rights of free expression and association, rights of information and participation, and rights to remedy.[34]

● Joint Statement by the UN special rapporteurs and independent urging Member States of UNFCCC to integrate human rights standards and principles in the climate change negotiations at the 20 COP meeting in Lima (10 December 2014)[35]

● The Statement of the United Nations Special Procedures Mandate Holders on the

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Retrieved on January 10, 2015, from http://www.ohchr.org/Documents/Issues/ClimateChange/A.HRC.RES.18.22.pdf.

32 The Human Rights Council in Resolution 19/10 adopted on 22 March 2012 decided to appoint an Independent Expert. Professor Knox was appointed on 6 July 2012 as an independent expert His man date was formerly began on 1 August 2012. See also,' The emerging law of environmental human rights is clearer than ever before' http://www.universal-rights.org/blogs/75-the-emerging-law- of-environmen tal-huan-rights-is-clearer-than-ever-before,22 April 2014.

33 B. Human rights vulnerable to environmental harm, para 20.

34 See also Joint statement of the special procedure mandate holders of the Human Rights Council on the United Nations Climate Change Conference (Copenhagen, 7–18 December 2009. To provide that study and clarification is a principal focus of this mandate, the Independent Expert will rely not only on research and on the views of interested stakeholders, including Governments, international bodies, national human rights institutions, civil society organizations, the private sector and academic institutions. Until that work is completed, it would be premature to draw general conclusions about the human rights obligations relating to the environment.

35 See more at: http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15393&LangID=E#sthash.SBV3e6MR.dpuf] December 2015 at COP21 in Paris:http://unfccc.int/documentation/submissions_from_observers/items/7479.php;see also,http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15393&LangID=E#sthash.SBV3e6MR.dpuf].

occasion of the Human Rights Day Geneva, 10 December 2014[36]

This Statement contains important points on human rights and reiterates the importance of integrating human rights and environment. Below is a summary of the main points:

Climate change … impacts interfere with the effective enjoyment of human rights particularly the disadvantaged, marginalized, and vulnerable individuals and groups.

»Human rights can also be threatened where mitigation or adaptation measures are adopted without the full and effective participation of concerned individuals and communities; they can result in violations of human rights and may lead to the adoption of measures that are unsustainable and not responding to the needs of rights-holders.

»To prevent such adverse impacts, States must incorporate their existing obligations under the human rights framework into the climate change negotiations.

»Applying human rights in the context of climate change brings many benefits. It moves the rights of affected individuals and communities centre stage in all response strategies.

● Climate justice sees the effect and causes of climate change in relation to the concept of justice, namely, whether the rights of most marginalized and vulnerable populations are taken into account when implementing response measures and whether such measures are fair, equitable and transparent.

● Human rights should be at the core of climate change governance.

● Human rights must be pivotal in the ongoing negotiations and the new agreement must be firmly anchored in the human rights framework, including the principle of climate justice.

● The Member States of UNFCCC should include language in the 2015 climate agreement that provides that the Parties shall, in all climate change related actions, respect, protect, promote, and fulfil human rights for all.

● The Joint Statement urged the State Parties at COP 20 in Lima to launch a work program to ensure that human rights are integrated into all aspects of climate actions, taking into consideration the impact of climate change in the lives of all people,… to formally recognize Human Rights Day …

● Rio + 20: Future We Want. UN Conference on Sustainable Development, 2012.[37]

➢ Paras.119, 120, 121, 122 123. Water and sanitation and sustainable development access to safe drinking water and basic sanitation and the development of integrated water resource management and water efficiency plans, ensuring sustainable water use. Commitment to the progressive realization of access to

36 Accessed at http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15393&LangID=E.

37 Rio + 20: Future We Want. Retrieved on January 10, 2015, from http://www.un.org/en/sustainable future/.

safe and affordable drinking water and basic sanitation for all, as necessary for poverty eradication, women's empowerment and to protect human health, and to significantly improve the implementation of integrated water resource management at all levels as appropriate; human right to safe drinking water and sanitation; adopt measures to address floods, droughts and water scarcity.

● Voluntary Guidelines on Responsible Governance of Tenure of Land, Fisheries, Forests and in the Context of National Food Security. Adopted by the Committee of the World Food Security, 11 May 2012. [38]

➢FAO: outlines principles and practices that governments can refer to when making laws and administering land.

Aim: to promote food security and sustainable development by improving secure access to land, fisheries and forests and protecting the rights of millions of often very poor people. Historic and far-reaching: 'Giving poor and vulnerable people secure and equitable rights to access land and other natural resources is a key condition in the fight against hunger and poverty. It is a historic breakthrough that countries have agreed on these first-ever global land tenure guidelines. We now have a shared vision. It's a starting point that will help improve the often dire situation of the hungry and poor.'

- Guiding Principles on Business and Human Rights: Implementing the United Nations, ' Protect, Respect and. Remedy' Framework, 2012. [39]

➢ The role of business enterprises should respect human rights.

● 2012 Rio + 20 Conference Outcome Document[40]

»States emphasized their responsibilities 'to respect, protect and promote human rights and fundamental freedoms…' Need to reduce inequalities and foster social inclusion and acknowledged that democracy, good governance and rule of law , at the national and international levels are 'essential for sustainable development…environmental protection and the eradication of poverty and hunger.'

● Human Rights and Post – 2015 Development Agenda[41]

»UN MDG 2000 Goal 7: Ensure Environmental Sustainability[42] 'to ensure communities, individuals …have.. a safe, clean, healthy and sustainable

38 About the Voluntary Guidelines on the Responsible Governance of Tenure. Retrieved on January 10, 2015, from http://www.fao.org/nr/tenure/voluntary-guidelines/en/.

39 Guiding Principles on Business and Human Rights: Implementing the United Nations, ' Protect, Respect and Remedy' Framework. Retrieved on January 10, 2015, from http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

40 The Future We Want - Zero draft of the outcome document. Retrieved on January 10, 2015, from http://www.uncsd2012.org/futurewewant.html.

41 Human Rights and Post-2015 Development Agenda. Retrieved on January 10, 2015, from http://www.ohchr.org/EN/Issues/MDG/Pages/MDGPost2015Agenda.aspx.

42 Joint Declaration on the Attainment of the Millennium Development Goals in ASEAN, 2009. Retrieved on January 10, 2015, from http://www.asean.org/news/item/joint-declaration-on-the-attaiment-of-the-millennium-development-goals-in-asean.

environment … to mitigate climate change and provide for adaptation to its impacts to in a manner that respects human rights obligations.'

»MDG 2015: 'A Million Voices: The World We Want' (report from the global consultations).[43]

The above ASEAN and international instruments form the background to critically examine the two areas below. In this brief paper, it is not possible to deal with all the issues in the context of all the instruments but the reader can examine them against these instruments to see what needs to be done to achieve environmental justice.

3. Addressing Climate Change issues under human rights and human security

The securitization of climate change in the ASEAN context, particularly in some areas, has in recent years been in the forefront of the APSC climate change discourse. Climate change issues can generate security concerns as they impact on human needs such as water, food, shelter (in recent times, this is particularly acute as the issues of land grabbing (*infra*) is ironically not to feed the rural poor but rather to seize their lands to grow commercial crops- the agribusiness has hitherto given scant attention to human rights and is an area that potentially causes conflict situations[44]. This has implications for the enjoyment of human rights.[45] Mary Robinson, President of the Mary Robinson Foundation- Climate Justice, and United Nations Secretary- General's Special Envoy for Climate Change, in her recent article in *The Guardian* said:[46] " The human cost of global warming has a name: Climate justice. … Climate justice is not just the recognition that climate change is not a matter of human rights and development; it also involves recognizing that the victims of global warming are not responsible for it, nor can their actions alone halt it." She mentioned the International Bar Association Report, *Achieving Justice and Human Rights in an Era of Climate Disruption*[47], which called for solution to climate change and fair solutions to protect human rights and uphold the rule of law.[48]

There are three main dimensions of time which must be addressed to effectively deal with climate change threats and for the continued enjoyment of human rights: before, during and after the onset of climate change. One is past and preventive, one present, and one future. Building a resilient society to battle climate change threats before the onset will help reduce disaster risk; during the disaster episode, society should be prepared to reduce its impact; in the aftermath, the recovery process is crucial to bring society back to normality. In all these phases of disasters no one country can deal with it alone. Hence, the NTS approach (or securitization) is appropriate as it calls for a' whole of ASEAN' or ' whole of the world' approach.

43 A Million Voices: The World We Want: A sustainable future with dignity for all. Retrieved on January 10, 2015, from http://www.unfoundation.org/assets/pdf/un-development-group-report.pdf

44 Climate Change and Human Security- A Challenging Environment of Injustice: Report by the Mission and Public Affairs Council, June 2008.

45 Resolution adopted by the Human Rights Council: Human rights and climate change A/HRC/RES/18/22. Retrieved on January 15, 2015, from http://www.ohchr.org/Documents/Issues/Climate Change/A.HRC.RES.18.22.pdf.

46 Accessed at https://www.google.com/url?rct=j&sa=t&url=http://www.theguardian.com/sustainable-business/2015/jan/09/mary-robinson-law-coming-up-short-climate-change&ct=ga&cd=CAEYACoTMTg3NDQ5NDMzMjgzMzg5OTQyMzIaZjY4MWZlODFhMmRhODgwMzpjb206ZW46VVM&usg=AFQjCNFOUB3NEbVMT3G2eceAprtXWsVfxQ.

47 International Bar Association Climate Change Justice and Human Rights Task Force Report, July 2014.

48 Accessed at http://www.ibanet.org/PresidentialTaskForceCCJHR2014.aspx.

ASEAN moved in the right direction to enhance the human security approach (at least in some areas) through the APSC framework. The new form of security cooperation, i.e. 'people–centered security', mentioned earlier, will enhance the enjoyment of human rights under AHRD, and build an integrated ASEAN Community.

As human security and human rights are interconnected (we noted that human security enhances the enjoyment of human rights), let us examine the human rights approach to climate change. The relationship between the conceptual and legal framework of human rights and climate change is still the subject of much discourse. Can human rights law adequately address sustainable development and environmental justice or climate change justice?

Alan Boyle and Ben Boer, in their joint background paper, Human Rights and the Environment, presented at the 13th Informal ASEM Seminar on Human Rights, 21 -23 Oct 2013, Copenhagen observed (p 59):[49]

> "First,… while climate change has obvious implications for the enjoyment of human rights, it is less obvious whether, and to what extent, such effects can be qualified as human rights violations *strictu sensu*. Secondly,[h] uman rights litigation is not well suited to promote precautionary measures based on risk assessment, unless such risks pose an imminent threat to human rights of specific individuals."

This is true in the climate change scenario (*infra*). The writers went on to say 'on the view set out here, a human rights perspective on climate change essentially serves to reinforce pressure coming from the more vulnerable developing states. Its utility is 'rhetorical rather than juridical.'

In the ASEAN context, it may also be said that AHRD is 'political rather than juridical' (at this juncture of time) as it is only declaratory, hence, not-binding unless a member state provides for redress for an individual or group of communities in cases of violations or abuse of AHRD rights such as in the Philippine case of *Oposa et al. v. Fulgencio S. Factoran, Jr. etal*[50] *(hereinafter 'the Oposa case'), and the Malaysian 'right to life' in its constitution, both of which have been in existence before ADHR, 2012.*

Be that as it may, the AHDR non-binding rights can be used as standard setting norms. Even as a policy tool, there are limitations to the human rights approach. Human rights focuses on the responsibility of states to grant rights within a territory whereas the securitization of climate change based on human security can adopt a 'whole of ASEAN' or even 'whole of the world' approach (e.g., in climate change disasters and humanitarian aid.

ASEAN has signed an MOU with the UN and the World Bank to deal with disasters). The securitization of climate change through the mechanism of the APSC- NTS approach, with its rationale of 'human security' deals with the responsibilities of member states not only within their territories, but as 'transboundary challenges' or as issues brought about by climate change (*infra*).

49 Human Rights and the Environment 13th Informal ASEM Seminar on Human Rights Background Paper. Retrieved on January 10, 2015, from http://asef.org/images/docs/13th%20Informal%20ASEM%20Seminar%20-%20Background%20paper%20%28FINAL%29.pdf.

50 G.R. No. 101083 (30 July 1993).

Another constraint to human rights is that human rights law is generally reactive, whereas human security is proactive and preventive as a policy tool.

3.1. Interface between human rights and human security in tackling climate change issues

Human rights obligations are not always effective and the absence of a particular human right provision, e.g., the right to water embodied in a Constitution or law, does not mean that such access to clean affordable water cannot be achieved. Two stories in ASEAN may be told on water where there is no provision of the human right to water in each of the countries. Yet each has its success story in water governance – Singapore and Phnom Penh being cases in point.

Singapore does not have a human right to water embodied in its Constitution or in its law but it has since the 1960s, after a period of drought, made water a security issue. Today, it has sufficient and safe water through its 'four national taps': from its reservoirs, from Malaysia under an Agreement, NEWater and desalination. It has won a number of awards including the Stockholm Industry Water Award in 2007.[51] In sanitation, the last 'bucket system' was abolished in 1997. Its success story is one of political will, good governance and rule of law. The testimony of its determination to make water its security is seen in the statement of its former Singapore Prime Minister, Lee Kuan Yew (Apr 3, 2013): 'This (water) dominated every other policy. Every other policy had to bend at the knees for water survival'.[52]

Another story of leadership in water governance is in Phnom Pen (Cambodia). The man responsible is Ek Sonn Chan of Cambodia[53], whose determination in providing clean and affordable water to Phom Penh almost cost him his life but he was undeterred and succeeded by putting in place water supply to the city. He subsequently became general director of the Phnom Penh Water Supply Authority (PPWSA).' His achievements were recognized and he was awarded the Ramon Magsaysay Award for Government Service in 2006; PPWSA was given the Stockholm Industry Water Award in 2010 and the ADB Water Prize 'Water for All'. It also established an incentive system based on bonuses among the workers, introduced an internal discipline system with a penalty for violators, and set up a discipline commission for all levels of the organization to deal with corruption.

The UN General Resolution Recognizing Access to Clean Water, and Sanitation[54] (GA/10967) as Human Right 2010. Even before the 2012 AHDR, 9 of the 10 AMCs adopted the UN Resolution. What are the implications of this right *vis-a-vis* that in ADHR: Can human security complement some of the areas of human rights?

Unlike many other 'local' environmental issues, many climate change issues are sans frontier –we share one atmosphere, one stratosphere, and what happens from climate change in one part of the world can affect another part. The world is very much interdependent in terms of threats from climate change (climatic migration, typhoons, food and water insecurities arising from droughts and floods, diseases, etc.). Human insecurities or the human security of climate change is an emerging issue.

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51 Stockholm Industry Water Award. Retrieved on January 10, 2015, from http://www.siwi.org/prizes/stockholmindustrywateraward/winners/pub-singapore/.

52 Soon Guan, C. (n.d.). Water for all- Conserve, Value, Enjoy. Retrieved on January 10, 2015, from http://www.macaomiecf.com/cms2014/fckupload/file/4Chua Soon Guan.pdf.

53 Profile at Ramon Magsaysay Award Foundation. Retrieved on January 10, 2015, from http://www.rmaf.org.ph/newrmaf/main/awardees/awardee/profile/140.

54 Supra.

Sir David King 2004 Chief Scientist, British Government said: [55]

> "The international community has … paid increasing attention to the security implications of climate change… climate change is a far greater threat to the world's stability than international terrorism."

As already noted, APSC and its NTS approach provide a mechanism for 'transboundary' challenges such as those outlined above to securitize climate change threats. What does this mean and what is the interface with the human rights approach?

The main thrust of NTS is the notion of 'human security' as its referent, with the following elements:

» Emerging notion of human insecurities including climate man-made disasters, etc. as challenges to peace, security and long – term development, conditions for the enjoyment of human rights.

» Human security overlaps with some areas of human rights (food and water insecurities). Insecurities can cross -over from national to regional and global.

» NTS is premised on the existence of an increasingly integrated and interdependent world. Hence, 'whole-of-the-world' approach–'comprehensive security' under NTS calls for enhanced/intensive cooperation, mobilization of resources, even where a serious security event occurs suddenly.

The two major components of human security are 'freedom from fear' and 'freedom from want' (environmental security). These freedoms are in the Preamble to the Universal Declaration of Human Rights. Central to the human security approach is the idea that people have 'the right to live in freedom and dignity, free from poverty and despair'.

- Human security recognizes the interlinkages between peace, development and human rights. Thus human security forms part of the family of human concepts (including human rights, human needs, and human development). It includes threats in the future, including climate change where the issue is transnational and interdependent. Hence, it is amenable to the APSC Non-Traditional Security approach.

- Climate Change and Security at UN: An article by Beck & Burleson[56], mentions 'Climate Change and Security'. The writers state:

> The initiative on climate and security grew out of a simple realization that when the survival of nation States is at stake, international peace and security must be recognized as a legal issue that the international community has a collective obligation to address. While elementary, the efforts of small island nation states in 2007 to formally link climate change to international peace and security caused

55 Brown, O., Hammill, A., & Mcleman, O. (2007). Climate change as the 'new' security threat: Implications for Africa. International Affairs, 83(6), 1141–1154. Retrieved on January 10, 2015, from https://www.iisd.org/pdf/2007/climate_security_threat_africa.pdf.

56 Beck S. & Burleson E. (2014). Inside the System, Outside the Box: Palau's Pursuit of Climate Justice and Security at the United Nations. Transnational Environmental Law. doi:10.1017/S2047102514000028. Retrieved on January 10, 2015, from http://journals.cambridge.org/download.php?file=%2F5659_F82A6DC44C08849F3E6B9F822DF6CD76_journals__TEL_S2047102514000028a.pdf&cover=Y&code=43fec948ed41b5823a840b894cced959.

uproar at the UN…. Progress on addressing climate change within a security framework had remained embryonic as a result of lack of political will among the five permanent members of the UNSC….Recognizing climate change as a threat to international peace and security places the issue within the jurisdiction of UNSC, the only UN body with the power to bind even unwilling states to take measures set out in resolutions. The UNSC has real power to compel timely and effective action within the realm of international peace and security…. Security framing can enhance the ability of the international community to do so.

The complementarity between Human Rights and Human Security was noted in the UN Platform.[57]

- UN World Summit Outcome 2005.[58] Freedom from fear (e.g., violence – 'land grabbing'), freedom from want (e.g., poverty and environmental degradation), freedom to live in dignity (enjoyment of all aspects of human rights).

- Rio + 20, The Future We Want, 2012, paragraph 25:

> We acknowledge that climate change is a cross-cutting and persistent crisis and express our concern that the scale and gravity of the negative impacts of climate change affects all countries and undermine the ability of all countries, in particular, developing countries to achieve sustainable development and the MDGs … and threaten the survival of nations.

In AHRD, adopted in Phnom Penh on 18 November 2012, the relevant articles are:

AHRD Art 28 (f) which declares the right to a 'safe, clean and sustainable environment'. The precise meaning and scope of this is not clear and has to be worked out but it would appear to have a wide import and overlaps with the other human rights in Art 28, such as safe drinking water and access to safe and nutritious food .

Art 28 must be read with Art 36 which calls, *inter alia*, for '… development programmes aimed at poverty alleviation, the creation of conditions including the protection and sustainability of the environment for the peoples of ASEAN to enjoy all human rights recognized in this Declaration on an equitable basis, and the progressive narrowing of the development gap in ASEAN'.

Articles 28 and 36 are in conformity with the purposes and principles of the Articles in the ASEAN Charter relating to the promotion and protection of human rights and fundamental freedoms (Art 1 paras 7,8, 9,11; Art 2 paras (h), (i)) .

Art 28 is aligned to the human rights set out in the UN Human Rights Council: Mapping Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment Focus report on human rights and climate change (June 2014).[59] The rights

57 The United Nations Trust Fund for Human Security (UNTFHS). Retrieved from https://www.google.com.sg/?gfe_rd=cr&ei=MR5wU5jXBoSQiAfMoYGABw#q=Human+Rights+and+Human+Securty + was+noted+in+the++UN+Platform.

58 The 2005 World Summit: An Overview. Retrieved on January 11, 2015, from http://www.un.org/ga/docuents/overview 2005summit.pdf.

59 Mapping Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment Focus report. Retrieved on January 11 2015, from http://www.google.com.sg/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=4&ved=0C C8QFjAD&url=http%3A%2F%2Fieenvironment.org%2Fwp-content%2Fup loads%2F2014%2F08%2FClimate-Change-map

threatened by climate change, include the right to adequate food, clean water, housing and other enjoyment of human rights, direct and indirect, are dependent on a safe environment, free from the negative impacts of climate change.

Climate change has contributed to both the sudden onset and slow-onset events that will affect the full enjoyment of all human rights. This is unique and must be borne in mind in addressing climate change through human rights and human security frameworks.

AHRD does not expressly mention its interconnection with climate change, although scientists and the 5th IPCC Report (2013), have recognized climate change due to anthropogenic factors.

As a soft law declaration, ADHR human rights can set standards (these have to be elaborated as they are mere frameworks), but they can become hard law. However, these ADHR rights cannot be enforced in courts unless they have been incorporated into the constitution or laws of an ASEAN Member State (national level), or recognized as erga omnes (Oposa case).

Where fundamental human rights are set out in Constitutions, they are 'guaranteed' and cannot be taken away unless the Constitution so permits. The Philippine Supreme court has even gone further in the interpretation of the Philippine Constitution which provides that the "State shall protect and advance the right of the people to a balance and healthful ecology in accord with the rhythm and harmony of nature". In the Oposa case, the Supreme Court ruled that the right to a healthy environment carried with it an obligation to preserve that environment and these basic rights need not even be written in the Constitution for they are assumed to exist from the inception of humankind for the succeeding generations. Davide J, in the Oposa Case, said:

> Such a right belongs to a different category of rights altogether for it concerns nothing less than the right to self-preservation and self-perpetuation… the advancement of which may even be said to predate all governments and constitutions…these basic rights need not even be written in the Constitution for they are assumed to exist from the inception of mankind. …. the day would not be too far when all else would be lost not only for the recent generation, but also for those to come–generations which stand to inherit nothing but a parched earth incapable of sustaining life.

This was a powerful and bold ruling and can be interpreted as erga omnes, enforceable in respect of all persons, even if there is no treaty obligation.

The 'right to life' in the Malaysian Constitution can be given a wider meaning as some Indian courts have done in regard to the same phrase in the Indian Constitution so as to include within it a right to a quality of life, the right to live with dignity and the right to livelihood. [60] For example, the right to food and safe drinking water can be linked to the right to life.

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ping-report-15-August-final.docx&ei=Sw2yVKmZKtDmuQS1mIGQCA&usg=AFQjCNHrk 3FUboZcEHGEUQ5kqkFgb6JiWw.

60 Olga Tellis & Ors vs Bombay Municipal Corporation & Ors 1986 AIR 180, 1985; SCR Supl. (2) 51; Court on its own motion vs Union of India and Ors. Retrieved on January 11, 2015 from http://judis.nic. in/supremecourt/imgst.aspx?filename=39823.

4. Land grabbing: rule of law, human rights and human security- impact on poor subsistence farmers

One of the most pressing issues in the ASEAN region and other parts of the world (other parts of Asia, Africa, and South America) is 'land grabbing'. 'Land grabbing' is complex and controversial. In many instances there seems at least to be a *prima facie* violation of human rights. In many developing countries or those in transition where land grabbing occurs, the rule of law is rendered toothless as a mechanism for transparency, accountability , protection of fundamental rights of property , accessibility, enforceability and justice.

In many instances foreign investors acquire large swathes of land near watersheds to grow commercial crops for export, such as sugar, or crops for alternative fuels. The result - the poor rural communities or subsistence farmers have their land grabbed. They are relocated in some far away places where there is no infrastructure and where the land given to them is mostly barren. The poor are made poorer and they do not get the benefit of the profits from the commercial crops. They are deprived of their livelihood and are not adequately compensated. Another aspect of such land grabs is that the use made of the land may not be sustainable. Olivier de Schutter, UN Special Rapporteur on the *Right to Food*[61], says that investments in agriculture must truly reduce hunger and malnutrition and that we should think beyond the debate about access to land as it is framed today. The large-scale investments in farmland are ineffectively managed and do not contribute to rural development, but rather produce food and profits for rich countries.

Climate change impacting on weather conditions causing typhoons, droughts, intrusion of salinity into water have threatened food security. Together with other factors such financial upheaval of 2008, the search for alternative energy have led to the phenomenon of 'landgrabbing' all over the world including the ASEAN region. ASEAN countries, e.g, Lao, Cambodia, Myanmar and Vietnam have also experienced a surge of foreign investors (and in some cases with the complicity of their governments) where large swathes of land have been grabbed from owners/ farmers with out adequate compensation. The irony is that while the food/energy crisis which has brought in investors to produce commercial crops (e.g., sugar, and crops for alternative fuels - maize, corn) on a commercial scale to be exported to the west, it has exacerbated food shortage among subsistencefarmers in these countries, and many of them have lost their livelihood. These foreign investors also choose choice land – with watershed areas for their agriculture. The result: the poor subsistence farmers of these countries who are now landless is deprived of their livelihood and food and water security and are not adequately compensated. Most of the claimed that their land is illegally taken away. Is there a right to food on the part of subsistence farmers who have their farm land taken away?

Not all cases of land grabbing will lead to an infringement of the right to food security and threaten human rights. We will, however, deal with cases when it does raise such questions. The AHRD has extended beyond the traditional concept of human rights to include under the right to adequate and affordable food, freedom from hunger and access to safe and nutritious food (28 a). In the section on Right to Development, Art. 35 provides a right of every human person and peoples of ASEAN to participate in, and benefit equitably and sustainably from economic, social, cultural and political development under Economic, Social and Cultural Rights.

61 Olivier De Schutter, UN Special Rapporteur 2008-2014 EU5P. Retrieved on January 11, 2015 from http://www.srfood.org/.

Art. 28(e), 'right to safe drinking water and sanitation'. On the right, Article 36 adopts a 'meaningful people-oriented and gender responsive development aimed at poverty alleviation the creation of conditions, including the protection and sustainability of the environment for the peoples of ASEAN to enjoy all human rights recognised in this Declaration on an equitable basis, and the progressive narrowing of the development gap. Article 10 affirms all the civil and political rights in the Universal Declaration of Human Rights. Art. 13 provides that no person shall be subject to … abduction and any form of deprivation of liberty.

All rights-based approach together with Art. 17 of the AHRD provides that every person has the right to use, dispose of and give that person's lawfully acquired possessions alone or in association with others; No person shall be arbitrarily deprived of such property', bring to bear the some of land grabbing phenomenon in the ASEAN region. This is not to say that all land grabbing comes within the scope of human rights but in appropriate circumstances, they bring these rights to the fore. Where a government leases out land to foreigners for a long period of time without consulting with the owners who rely on their land to survive, is there a violation of the human right to food under the AHRD , or is human security being compromised (below) for the concept of human security.[62]

Surya Subedi, the UN Special Rapporteur on Cambodia in 2012, in a Briefing Note on Cambodia (A Mounting Human Rights Crisis: Land disputes and forced evictions continue unabated in Cambodia, and feature the use of force by the authorities and business enterprises),[63] gives a compelling report on the abuses of human rights in the context of land grabbing. He also gave a keynote speech, 'Food Crisis and the Global Land Grab' at the Workshop on Land Grabs in Asia: What role for the law? He outlined some of the issues of land grabbing:[64]

> Under international law, the right to property (especially of foreigners or foreign investors) has been protected for a long time. The conditions for the expropriation or nationalisation of land are:
>
> - Compensation must be given
> - Must be carried out in a non-discriminatory manner
> - Must be carried out with due process of law
> - Must be for a bona fide public purpose: Who defines the public purpose? Usually the government passes a decree stating that it is for a public purpose. But the land often ends up in the hands of private parties such as national or foreign investors. The international law regime relating to land acquisition or expropriation of land has not necessarily been translated into national law.

The Universal Declaration of Human Rights (UDHR) recognized all individuals' right to property. No other international human rights treaty guarantees the right to property either.

It is surprising that a right at the heart of the international human rights agenda does not find expression in a legally binding treaty. He argues that the United Nations Declaration of Human Rights ("UDHR") has now acquired customary international law ("CIL") character

62 See Michelle Tolson, Land is Life, and it's Slipping Away, IPS, 14 Feb 2013).
63 International Federation for Human Rights (FIDH) – Briefing Note. Retrieved from https://www.fidh.org/IMG/pdf/fidh_briefingnote-cambodia_20.09.2012_final-2.pdf.
64 Held from 5 & 6 April 2013, Faculty of Law, National University of Singapore.

and is binding on states. When the 192 UN nations met in 2005 in New York they agreed that the UDHR is a binding legal document. This is a clear endorsement of the UDHR's legal and binding nature. Does it need to be given force in domestic law through legislative enactment?

Investors

Many countries are welcoming of foreign investors in land. Under international law, foreign investors have greater protection than national investors. Investors tend to engage in nationality shopping. An investor who registers in the United Kingdom and returns to China to invest as a foreign investor is entitled to better legal protection. Disputes have to be settled before an international tribunal or under UK law. This legal certainty reassures investors. Most Cambodian land grabs are carried out either by foreign investors or by the government for social housing projects to house the low income, the unemployed and illegal occupiers.

Problems

Across Asia, land is typically divided into 4 categories:

- State public land – land which is protected by law and difficult to encroach upon;
- State private land – land which the state can sell off to individuals and companies;
- Private land – land owned by private individuals; and
- Community land – land owned by indigenous or other peoples, which the state cannot encroach upon.

In many countries, state public land is being converted to state private land. State public land belongs to the people but when it is reclassified as state private land, legal protection is stripped from the land and the state obtains the power to sell the land.

Subedi argued that both regional and international law must play a role in solving the land grab problem.

In this connection, it is noted that a number of international organizations organized an international meeting of South East Asian Human Rights Institutionalism 2011, hosted by an Indonesian NGO. The outcome was the adoption of the Bali Declaration on Human Rights and Agribusiness in Southeast Asia, 2011[65] adopted by the international meeting of South East Asian Human Rights Institutions (infra). This Declaration brought up a number of concerns regarding violations of land rights in the context of agribusiness.

Following the Bali Declaration, the European Parliament on 29 October 2012 called for a moratorium on forced evictions and recommended that the European Union suspend tariff-free imports of agricultural goods linked to human rights abuses in Cambodia, with specific reference to the sugarcane plantation industry. [66]

In the context of ASEAN, things have been moving very fast from NGOs and CSOs. The Bali Declaration on Human Rights and Agribusiness in Southeast Asia,2011, led to the Phnom Penh Workshop on Human Rights and Agribusiness

65 Accessed at http://www.forestpeoples.org/sites/fpp/files/publication/2011/12/final-bali-declaration-adopted-1- dec-2011.pdf.

66 Accessed at http://www.phnompenhpost.com/national/eu-may-partially-suspend-trade-agreement-cambodia.

in Southeast Asia, 2012[67] to produce the Phnom Penh Joint Statement to give more effective consideration to the Bali Declaration on Human Rights and Agribusiness.[68]

The Phnom Penh Joint Statement "calls on the governments of the ASEAN region to respect and uphold land rights for local communities and indigenous peoples and to make the right to free, prior and informed consent a mandatory requirement to national laws on land tenure. It also calls on ASEAN to extend the mandate of AICHER (ASEAN Intergovernmental Commission on Human Rights) as an effective and independent human rights mechanism to investigate the violation of farmers' and indigenous peoples' rights and to encourage member states to domesticate the Voluntary Guidelines on Responsible Governance of Tenure of Land, Fisheries, Forests and in the Context of National Food Security[69] (adopted by the Committee of the World Food Security, 1 May 2012).

The purpose of the Phnom Penh workshop was to consolidate the outcomes of the Bali Workshop and the Bali Declaration on Human Rights and Agribusiness[70] encouraging the AICHR to receive or recognise the Bali Declaration and to encourage the AICHR to urge Members States to implement it nationally. Informative updates on the situation of agribusiness and human rights across the Southeast Asian region were shared by National Human Rights Commission[71], and the workshop participants gained important knowledge about the AICHR and the progress being made to establish an ASEAN human rights mechanism. A field visit to a sugarcane Economic Land Concession in Koh Kong, Southern Cambodia[72], provided first-hand insights for all participants on the realities of land grabbing, food and water insecurity and forced evictions by transnational corporations; in this case, a Thai and Taiwanese joint venture, where the Thai Human Rights Commission has found prima facie evidence of violations of human rights including the right to life and the right to self-determination.

There is a call to the European Union, the sugar importers Tate and Lyle and the American Sugar Refining Company to investigate the continuing human rights violations in the sugarcane plantation industry in Cambodia (following the Bali Declaration, *supra)*. The ASEAN NGO's and CSO's voices were strengthened by Montien Resolution.[73] There is a need to be coupled with an international approach because land grabs are occurring everywhere in the developing world. Regional instruments can hitch onto international or UN instruments to create a strong regime.

Where protests from those dispossessed of their land have led to conflicts and killings. Where the rule of law and human rights are anathema to governments. What about the less tested notion of human security? What is the interface among the three approaches?

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67 Statement of the Phnom Penh Workshop on Human Rights and Agribusiness in Southeast Asia: Making the Bali Declaration Effective. Retrieved from www.forestpeoples.org/.../2012%20Phnom%20 Penh%20Statement.pdf.

68 Accessed at http://www.forestpeoples.org/sites/fpp/files/publication/2011/12/final-bali-declaration-adopt ed-1-dec-2011.pdf.

69 Accessed at http://www.fao.org/docrep/016/i2801e/i2801e.pdf.

70 Making the Bali Declaration Effective: The Phnom Penh Workshop on Human Rights and Agribusiness. Retrieved from https://recoftc.wordpress.com/tag/human-rights/.

71 Accessed at http://www.nigeriarights.gov.ng/.

72 Making the Bali Declaration Effective: The Phnom Penh Workshop on Human Rights and Agribusi ness. Retrieved from https://recoftc.wordpress.com/tag/human-rights/; Cambodia's Ruling Elite May Face ICC Probe Over Land Grab - http://thediplomat.com/2014/10/cambodias-ruling-elite-may-face-icc-probe- over-land-grab/.

73 Accessed at http://www.forestpeoples.org/topics/agribusiness/publication/2013/montien-resolution-human-rights-and-agribusiness-southeast-asia.

The rule of law acting as 'policemen' of human rights regarding protection of life and property is often disregarded or given scant attention by the governments involved . Indeed, they may be in connivance with investors. If corruption is added to the scenario, conflict abounds. If climate change has brought about extremes of weather causing crop failures and leading foreign investors to find greener pastures elsewhere to grow crops, the notion of the securitization of climate change ,i.e, the NTS approach in the APSC (ASEAN–Political Security Community Blueprint) provides the platform to deal with the situation. Yet not much is known of the vitality and potential of this approach, or perhaps it is fraught with other problems such as that of sovereignty, institutional incapacity, politics, economics, to mention a few.

In some instances where governments are anathema to the rule of law and human rights as they consider it is a hindrance to development, they get round and turn the rule of law to serve their own purposes – a travesty of rule of law and human rights. Below is an account of such a perverse 'rule of law' application in Myanmar: [74]

> "Ironically, the over-played 'rule of law' mantra is what provides state legitimacy in carrying out what can be thought of now as a 'legal land grab', where the new land-related laws are haphazardly and improperly applied to legally turn farmers into 'squatters' and their farm fields into 'vacant wastelands' for corporate investment."
>
> When the law books are not enough to legitimate the "legal land grab", the government releases its police force to convince farmers that the principle of "might is right" still applies. Farmers at Letpadaung and in Kachin State's Hukaung Valley, or those at the struggling Special Economic Zones (SEZs), need no such reminder.
>
> This means we have entered the terrain of "legal land grabs" that cannot easily be contested on legal grounds, including more than 5.2 million acres of private agribusiness concessions that have been awarded to date. Of this, more than 3 million acres have been "legally" awarded since the new government took office and started applying its new land-related laws.
>
> The national government's Land Acquisition Investigation Commission cannot accept any land grab cases from before 1988, or any case deemed "legal" according to the laws in effect at the time – mostly the 1991 Wastelands Law and the two new land laws enacted since 2012.
>
> This sets a dangerous precedent for what is considered a "legal" land seizure, both past and present, and for the "rule of law", which is being used to support so-called "legal" land grabs.
>
> But it is not only law books – backed by state police forces – that are calling the shots these days in the country's last wild frontier. In many ethnic areas of the country – Shan State in particular – armed ethnic militias are on the frontline of land grabs in areas under their influence."

74 Woods, K. (2014, March 03). A political anatomy of land grabs. Myanmar Times. Retrieved on January 11, 2015, from http://www.mmtimes.com/index.php/national-news/9740-a-political-anato my-of-land-grabs.html.

The rule of law opposes the arbitrary exercise of power. The World Justice Index on the rule of law[75] notes that decades of military rule have severely damaged the institutions and networks that are vital to ensuring protection of the rule of law and human rights in Myanmar. It notes that Myanmar enters a new era of political reforms in legal and social environment, it is fraught with challenges for vulnerable societies, and the rural communities that are affected by land grabbing is no exception. There are currently few channels for challenging abuse of the rule of law (the little that there is) and human rights. One such channel is the Justice Base NGO which aims to promote the rule of law in transitional and post-conflict societies by building the capacity of local lawyers and supporting nationally-owned rule of law initiatives. It also aims to strengthen the capacity of lawyers to engage in and guide national discussion on the rule of law.[76] . Notions of human rights, human security still leave very much to be desired across all sectors including land grabbing. Looked at against the background of Myanmar's long history of military rule and authoritarian government from 1962 – 2010, it is not surprising, although the country has opened up and are in the throes of many changes. It does not help if investors do not pay regard to issues of rule of law or human rights and has the connivance of the government.

Turning to the situation in Lao PDR, where land grabbing is also rife. The champion of rights of the poor rural population deprived of their land, Dr. Sombath Somphone[77], a Ramon Magsaysay Awardee in 2005, came to grief when he 'disappeared' over two years ago on 15 December 2013 when the vehicle he was travelling was stopped near a police checkpoint and another vehicle came up. He alighted from his vehicle to go to the other one. Reliable sources said that at the night of his abduction, he was in the custody of the Vientiane authorities but nothing has been heard of him since. Can human rights law, both international and under AHRD or can AICHR which has no investigative power assist? Many international organizations and personalities have sought for his release including Hillary Clinton, John Kerry and Desmond Tutu[78]. A group of legislators, civil society leaders and activists have launched a Sombath initiative which calls for justice regarding his enforced disappearance.

The political background is important to understand Lao's poor rule of law and human rights situation. It was a communist regime. Since the present Lao People's Revolutionary party (LPRD) took over in 1975, the human rights situation has improved but the government's record remains disturbing. The LPRP controls dissent tightly and acts harshly against those it perceives as threatening to itself or to social order. Standards of government accountability in Laos are extremely poor.[79]

There are many other cases of land grabbing in other parts of ASEAN but suffice it to say that the above examples illustrate that the rule of law, human rights and human security

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75 Myanmar Legal Profession Support Initiative. Retrieved on January 11, 2015, from http://worldjustice project.org/opportunity-fund/myanmar-legal-profession-support-initiative.

76 Justice Base. Retrieved on January 11, 2015, from http://justicebase.org/; See also Harding, A. (2014). Law and Development in its Burmese moment: Legal Reform in as Emergency Democracy. In M. Crouch & T. Lindsey (Eds.), Law, Society and Transition in Myanmar (pp. 377-400). Oxford: Hart Publishing.

77 Laos: Caught on camera the enforced disappearance of Sombath Somphone. Retrieved on January 11, 2015, from http://www.amnestyusa.org/sites/default/files/laos_-_caught_on_cam era_-_the_enforced_disappearance_of_sombath_somphone.pdf; HRW: Lao government's investi gation into Sombath case 'is a sham' (2014, December 15). Retrieved on January 15, 2015, from http:// www. dw.de/hrw-lao-governments-investigation-into-sombath-case-is-a-sham/a-18129563.

78 Dobbin, M. (2013, July 22). Scholars call for Sombath probe. The Age. Retrieved on January 11, 2015, from http://www.theage.com.au/victoria/scholars-call-for-sombath-probe-20130721-2qchj.html.

79 Bull, C. (n.d.). Laos. Retrieved from https://freedomhouse.org/report/laos.

seem rhetorical, even as ASEAN itself is grappling with the issues, and has a framework for human rights and human security, and the rule of law generally is contained in the ASEAN Charter. The AHRD is powerless in providing any remedy to the dispossessed. [80]

Conclusion and Way Forward

The rule of law, human rights and human security dimensions are being played out in the discourse on climate change, land grabbing, sustainable development and climate justice. The traditional rule of law focuses on individual rather than the broader questions of national foreign policy which allows for a whole-of-ASEAN approach or the whole-of-the-world approach in bringing about climate justice and the attainment of the post-2015 Sustainable Development Goals and MDGs. It appears that the traditional rule of law is outdated or at least inadequate in solving the bigger picture of climate change and land grabbing.

That said, where the rule of law and human rights are anathema to certain countries which are also skeptical about human security, these elements can, nonetheless, serve a useful function to achieve the ASEAN Vision 2020 which has been accelerated to 2015 to align with the achievement by UNMDG by 2015, of a 'clean and green' ASEAN and a caring people–centered society. The bottom line is the wider freedom from want and fear (all sorts of threats that affect the enjoyment of human rights), and such rights and freedoms are embodied by the ASEAN Charter 2007. Each right requires different considerations and must be worked out separately and in an interlocking matrix, below:

- Research on climate change, human rights and human security is needed from all disciplinary fronts to give it a holistic perspective. Currently, research is mostly sectoral and there should be an alliance of all relevant disciplines to deal with the issues.

The Centre for Non-Traditional Security (NTS) Studies in the S Rajaratnam School of International Studies (RSIS), Nanyang Technological University (NYU) has been doing research on climate security and human security. AHRD human rights can be a useful tool to tackle climate change and land grabbing. It is not a toothless soft law declaration without any bite but has potential. Its Preamble recognizes a framework that can contribute to the ASEAN community building process. It is a political statement as well as a legal commitment that complements the ASEAN Charter, ASEAN roadmaps, strategies, actions, and programmes found in numerous instruments, such as APSC, ASCC, AADMER and also relevant international instruments that link issues of climate change and land grabbing to the rule of law, human rights and human security to a new world paradigm not only within ASEAN but the world. ASEAN as a regional organization is part of the global network that must respond effectively to the linkage between climate change, human rights and human security. In line and together with the rest if the world, ASEAN needs to raise its voice louder and higher.

The rule of law, human rights and human security can work together in tandem to provide solutions to environmental issues. However, there are limitations as to the relationship of the rule of law, human rights and human security and the environment. Research is needed to further the understanding of the relationship not only on humans but the ecosystem at the regional (e.g., ASEAN), global and national levels.

80 Mong Palatino, 'Human Rights Declaration falls short', The Diplomat, 28 Nov 2012.

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The ASEAN Transboundary Haze Pollution Agreement–An Effective Environmental Governance Tool?

Daniel Heilmann

Abstract:

Indonesia, on 20th January 2015 deposited its instrument of ratification of the Transboundary Haze Pollution Agreement with the ASEAN Secretariat and thus became the last ASEAN member state to join the treaty. The ratification is remarkable because Indonesia is the main source of haze pollution in the region. Haze pollution poses a serious health threat to the people of Indonesia, Singapore and Malaysia, and, for decades haze pollution has been a highly contentious issue among ASEAN member states. This article argues that Indonesia's ratification will not be an immediate game changer. The mechanisms of the Agreement are too weak to contribute much to a reduction of haze pollution in the region. The Agreement is designed according to the ASEAN way, i.e. a non-binding approach that is based on the principles of state sovereignty and non-intervention. This makes it unlikely that the Agreement itself will bring about change, even now that all ASEAN member states have ratified it.

Keywords: Haze Pollution, Regional Agreement, ASEAN Co-operation, International Environmental Law

1. Introduction

Parts of Southeast Asia have experienced severe transboundary haze pollution over several decades. The haze, caused by forest and peat fires originating in Indonesia, has implications for regional politics because transboundary pollution apparently does not recognize geographical borders. Over the years, ASEAN has intensified its attempts to address collectively this environmental issue. But the coordination of action has not been easy, and it has proven difficult to regulate transboundary haze pollution through regional governance tools. However, on 16th September 2014 Indonesian lawmakers ratified the ASEAN Transboundary Haze Pollution Agreement[1], thus Indonesia becoming the last ASEAN country to ratify the treaty.

The reoccurring perennial haze pollution raises several questions, and especially the question why the governance framework has remained largely ineffective. The dynamics that play a role in all multilateral environmental governance regimes are also important in this case. First of all, source states usually are not interested to ratify international agreements if they have to shoulder the costs of the implementation.[2] States, as rational actors, only engage in an environmental regime if the expected benefits exceed the expected costs.[3] Furthermore, source states are reluctant to agree to an arrangement that upsets the status quo because they receive

1 Hereinafter: THPA or Agreement.

2 For an analysis of the cost-benefit criterion concerning transboundary pollution, see Merrill 972. Generally, for collective action to occur, the benefit derived from the regime (in terms of reducing externalities) must exceed the costs of creating and maintaining the regime.

3 Also see Litta, 82.

most or all of the economic benefits of the economic activity that creates the pollution.[4] At the same time, the affected countries do not only not obtain any benefit from the economic activities occurring in the source state, but they are forced to bear the cost of mitigating the transboundary pollution.[5] It is basically this collision of interests which makes it difficult to negotiate agreements between source states and affected states.[6] States tend to only create an international or regional regime under the condition that they cannot solve a problem on their own.[7] Clearly, a dichotomy of interests has been the case in Southeast Asia. The opposing interests of the source state and affected states are at the heart of the conflict and the reason of ratification of the THPA by Indonesia has taken so long.

Therefore, it is timely that this chapter examines the adequacy of the legal regime governing haze pollution. The study seeks to assess the effectiveness of the regional governance approach, and particularly the THPA, now that Indonesia has ratified the Agreement. Ultimately, it argues that haze mitigation is, at least in part, unsuccessful due to the style of regional engagement in ASEAN. The study is divided into six main sections. The second section summarizes the problem of haze pollution in Southeast Asia. The third section looks at the developments that led to the establishment of the Agreement while the fourth section scrutinizes the features of the regime as set out in the Agreement. Finally, the fifth section assesses the effectiveness of the THPA against the realities on the ground, before the sixth section draws some conclusions.

2. Haze Pollution in Southeast Asia

The use of fire to clear land is entrenched in many Southeast Asian cultures and the resulting haze[8] spreads across the region in the inter-monsoonal dry season.[9] The problem is mostly man-made, and in many instances the fires are deliberately started by local farmers and by plantation and timber interests to clear land. Burning is the cheapest and easiest method to clear undergrowth and logging wastes following the removal of timber.[10] The forest and land fires in Indonesia are the sole contributing factor to regional haze.[11] The haze that originates in Indonesia is so massive that it has at times reached beyond peninsular Malaysia to Thailand, Cambodia, and Laos on the Asian mainland, and Brunei and the Malaysian states on the island of Borneo.[12]

Air is considered hazy when ground level visibility is between 1000 and 2000 meters.[13] A major problematic effect is that haze tends to remain in one location when there is no wind, thus creating adverse health effects. However, the haze from one source can also travel great

4 Jerger, 37.

5 Tacconi argues that Indonesia has no real incentive to join the THPA for that reason. However, Indo nesia also lost between 1.7 and 2.7 billion USD as a result of the negatve impact of fires on timber production, plantation crops, etc.; see Tacconi et al., 12 et seqq.

6 Merrill, 932.

7 See Litta, 82.

8 Tay (1998), 207 points out that there is a tendency to speak about "haze" rather than about "air pollution", however, the term haze may understate the risk to human health.

9 Lohman et al., 376.

10 See Barber & Schweithelm, 31 et seqq. Fires are also caused by small scale farmers, but these are smaller in impact compared to the ones conducted by agribusiness companies.

11 Haze pollution affects the health of over one hundred million people in the region. Due to the location of the haze and prevailing wind patterns, most severely affected are the people in Indonesia, Singapore and Malaysia.

12 Jerger, 37.

13 Haze describes the amount of particulate matter in the air and its effect on visibility, see Jerger, 35.

distances when strong wind patterns prevail. An international dimension develops when haze travels across borders and becomes transboundary pollution.[14] Transboundary pollution has been defined as a physical externality or spillover that crosses state lines.[15] More precisely, transboundary pollution occurs when a potentially harmful environmental agent is released in one jurisdiction (the source state) and physically migrates through a natural medium, such as air, to another jurisdiction (the affected state).[16] The THPA defines haze pollution in Article 1, para. 6 as "smoke resulting from land and/or forest fire which causes deleterious effects of such nature as to endanger human health, harm living resources and ecosystems and material property and impair or interfere with amenities and other legitimate uses of the environment". A major contributor to haze pollution is fires in peat soils.[17] Peat fires are difficult to suppress as they occur under the ground and produce very thick haze and release a high amount of carbon.

Especially the haze crisis of 1997 led to unprecedented damage in the region and it was on the brink of an environmental catastrophe. Fires from logging and palm plantations raged on the Indonesian islands of Sumatra and Kalimantan; when wind patterns shifted the haze from these fires traveled from Indonesia to Malaysia, Brunei, Singapore, Thailand, and the Philippines. By the time the fires were brought under control, the region had suffered widespread forest destruction[18] and land had been lost that could have otherwise been used for agriculture.[19] The damage was estimated at more than USD 9 billion in terms of economic, social and environmental losses.[20] The economic loss mainly arose from losses such as the destruction of crops and timber and the decline in tourism and foreign investment in the affected regions. Ecological damage included the loss of biodiversity and habitats, including the destruction of endangered species of flora and fauna, and the impairment of crop productivity due to pollution and reduced photosynthesis.[21] But the effects were not limited to the natural environment only, as millions of people in the region had been exposed to the haze for weeks. The unhealthy haze conditions had increased mortality in Malaysia and lowered infant and fetal survival in Indonesia.[22]

Since then, haze pollution has occurred in the region almost every year. The problem flares up every dry season in varying degrees. Unusually severe haze pollution was recorded in 2006, 2009 and 2013.[23] In 2013, haze pollution reached hazardous levels again when the pollution index reached record highs and in some locations surpassed the pollution rate of 1997. In June and July of 2013, the haze crisis affected several countries, including Brunei, Indonesia, Malaysia, Singapore and Southern Thailand. As in the years before, the haze was caused by

14 Transboundary air pollution originating from Asia has been detected as far away as over the island Hawai'i and even the mainland of the United States, see de Bie, 124.

15 Merrill, 968; Jerger, 35.

16 Merrill, 968.

17 Peat soil is comprised of partly decomposed plant material and can easily burn as soon as the water is drained out and the peat dries up, and because 60% of the world's tropical peatlands are found in Southeast Asia, this proves particularly problematic in the ASEAN context.

18 It has been estimated that almost ten million hectares of forest were lost.

19 Jerger, 40, see also Tay (1998), 206.

20 See ASEAN Fact Sheet; Khee-Jin Tan, 656.

21 Khee-Jin Tan, 657.

22 Lohman et al., 376.

23 After the 2006 haze crisis, Indonesia had already seemed to be moving towards ratification of the THPA, but then decided to instead set up a committee to further study the Agreement in detail, thus effectively stopping its parliamentary ratification process. Indonesia's position then shifted quickly after the fires were put out, and by June 2007 it was clear that Indonesia would not ratify the Agreement, see Varkkey (2009), 94.

large-scale burning in parts of Sumatra and Borneo. The Pollution Standards Index in Singapore reached a record high of 401 on 21 June 2013, surpassing the previous record of 226 set during the 1997 haze crisis.[24] On 23 June 2013, the Air Pollution Index in Muar, Johor spiked to 746, which was almost 2.5 times above the minimum range of the hazardous level, hence resulting in the declaration of a state of emergency.[25] In response to the 2013 haze crisis, ASEAN leaders agreed in October 2013 to adopt a monitoring system and to share satellite data to help better locate fire hotspots, as well as to ascertain if these hotspots are on land owned by plantation companies. However, the problem of hazardous haze pollution has not yet been properly brought under control.

3. Regional Co-operation Leading to the Agreement

Already in 1985 ASEAN began to acknowledge haze pollution as a regional concern with the adoption of the Agreement on the Conservation of Nature and Natural Resources, which included a reference to air pollution and transfrontier environmental effects. Over time other agreements followed with references to transboundary pollution, such as the 1990 Kuala Lumpur Accord on Environment and Development and the 1992 Singapore Resolution on Environment and Development. The first Workshop on Transboundary Pollution and Haze in ASEAN Countries was held in Balikpapan, Indonesia in 1992. It specifically addressed haze as an individual problem in the region. The ASEAN ministerial meeting on the environment in 1994 marked the beginnings of a visible effort to address the continuous problem of haze pollution. The effort was driven primarily by Singapore which pushed for multilateral cooperation to address the problem because it realized that it could do nothing further domestically to reduce the impact of haze.[26]

In 1995, ASEAN member states agreed to adopt the Cooperation Plan on Transboundary Pollution.[27] As a follow up to this plan, a Haze Technical Task Force (HTTF) with the objective of putting into operation the measures included in the co-operation plan was established. Despite an alert system being activated in 1995, substantial co-operation between ASEAN member states began only in 1997 when the ASEAN Ministerial Meeting on Haze was established. This finally gave transboundary haze pollution a special status of importance in the organization.[28] In light of the 1997 disastrous haze experience, the Meeting formulated the Regional Haze Action Plan[29] (RHAP) under the HTTF to provide further commitment and detail to the co-operation plan. The RHAP set out co-operative measures amongst ASEAN members to address the problem of haze. The primary objectives of the RHAP were to prevent land and forest fires through better management policies and enforcement, to establish operational mechanisms to monitor land

24 It was more than 100 higher than the previous record as well, see BBC News, Singapore Haze its record high from Indonesia fires. Available at <http://www.bbc.com/news/world-asia-22998592>.
25 See The Star Online. Available at <http://www.thestar.com.my/News/Nation/2013/06/23/Haze-API-in-Muar-spikes-at-746/>.
26 Varkkey (2011), 91.
27 The plan set out policies and strategies to deal with atmospheric and other forms of transboundary pollution including a number of measures to prevent and respond to the fires and haze, such as the promotion of zero-burning practices, the deployment of ground forces to prevent and detect forest fires, and the establishment of national focal points to strengthen regional coordination.
28 Varkkey (2012), 85.
29 The Regional Haze Action Plan is available at <http://cil.nus.edu.sg/rp/pdf/1997RegionalHazeAction Plan-pdf. pdf>.

and forest fires, and to strengthen regional land and forest fire-fighting capability.[30] The RHAP asked ASEAN member states to develop national plans to encapsulate their policies and strategies to prevent and mitigate land and forest fires.[31] Additionally, the RHAP undertook to strengthen regional monitoring mechanisms by establishing early warning and monitoring systems to provide an alert of the first outbreak of land and forest fires.[32] As a part of this effort, the ASEAN Specialized Meteorological Centre (ASMC) was strengthened. ASEAN set out to make the RHAP operational immediately and requested assistance from the Asian Development Bank (ADB). The ADB responded quickly by approving regional technical assistance. Additionally, in 1998, the ASEAN Summit issued the Hanoi Plan of Action that called for full implementation of the RHAP by 2001 and established a procedure by which fire-fighting resources could be pooled for regional fire-fighting operations.[33] In April 1999, ASEAN adopted a zero-burning policy and urged its member states to implement the necessary laws and regulations to enforce it. On top of that, a number of dialogue sessions and workshops were convened to promote the zero burning policy among plantation owners and timber concessionaires.[34]

All summed up, there had been quite some activity on the ASEAN level after the hazardous haze pollution episode of 1997. However, these initiatives and instruments - particularly the 1995 ASEAN Cooperation Plan on Transboundary Pollution and the 1997 Regional Haze Action Plan - were not binding on ASEAN member states. They were soft law, based on which the state parties developed their own plans, guidelines, and measures to prevent and monitor fires.[35] Therefore, especially the Singaporean government felt the need for a more "concrete" regional agreement because it believed that regional governance (i.e. the RHAP) was not sufficiently effective. It regarded the non-existence of penalties or compensation in the existing framework as a crucial shortcoming that made the regional instruments mere statements of intent.[36] Hence, in 2001, the THPA was proposed with the goal to provide legally binding support for the RHAP.[37] Unlike its predecessor agreements, the THPA was envisioned to be a fully-fledged treaty regime with binding obligations. Whether it has lived up to these aspirations will be assessed below.

30 Varkkey (2012), 85. The RHAP was divided into three parts. The first part required member states to draw up national plans based on the regional plan, the second part sought to strengthen the monitoring and anticipation of forest fires and increased pollution levels through the ASMC in Singapore; and the third part focused upon the enhancement of fire-fighting capability.

31 RHAP, at para. 6.

32 RHAP, at para. 8.

33 Specifically, it established two Sub-Regional Fire-Fighting Arrangements (SRFA) for Borneo and the Sumatra/Riau provinces in Indonesia under the RHAP to facilitate the movement of resources from one member country to the other on order to mitigate the haze problem, see Varkkey (2012), 85.

34 For a timeline of haze action in the ASEAN context see also the ASEAN Haze Action Online Web site. Available at <haze.asean.org>.

35 Khee-Jin Tan, 661.

36 Varkkey (2011), 92, with further references.

37 At the same time also a Peatland Management Initiative (APMI) was proposed at the 9th ASEAN Ministerial Meeting on Haze in 2002. This initiative was to complement the SRFA initiatives with a special focus on addressing issues of fire prevention and control in the region's peatlands. The goals of the APMI are to promote sustainable management of peatlands through collective efforts and enhanced cooperation among ASEAN member countries towards achieving local community upport and to promote regional benefits through reduced risk of fire and associated haze.

4. The Framework of the Agreement

4.1 International environmental law standards

The THPA is a product of joint action by all ASEAN member states. It was signed by the members of ASEAN on 10 June 2002 in Kuala Lumpur during the World Conference on Land and Forest Fire Hazards. The Agreement entered into force on 25th November 2003, sixty days after the deposit of the sixth instrument of ratification by Thailand with the Secretary-General of ASEAN. However, it took another eleven years for the tenth and final ASEAN member – Indonesia - to ratify the THPA.

The Agreement addresses crucial aspects of fire and haze pollution including prevention, monitoring, and mitigation. The respective provisions of the Agreement can be interpreted as a commitment to the fundamental "no harm" principle. This cornerstone principle of international environmental law pronounces that states are under an obligation not to cause harm to the environment of other states, or to the areas beyond their national jurisdiction. The essence of the obligation is that states may not conduct or permit activities within their territories without regard to other states or for the protection of the global environment. In relation to transboundary air pollution, the principle had been famously spelled out in the Trail-Smelter Case in 1941. The tribunal held that "no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties of persons therein, when the case is of serious consequence […]".[38] The no-harm rule as articulated in this decision is a conceptual anchor to international environmental law. It also informs the THPA with its ultimate goal of preventing or at least mitigating transboundary haze pollution.[39]

The THPA recognizes that the adverse effects of transboundary haze pollution must be tackled through concerted efforts and international co-operation. This goal is pursued by the state parties in the overall context of sustainable development and in accordance with the provisions of the Agreement.[40] The sovereign right of the parties to exploit their natural resources is reaffirmed in Art. 3, para. 1 THPA. It is a manifestation of the core environmental law principle, as exemplified by the ubiquitous Principle 21 of the 1972 Stockholm Declaration of the United Nations Conference on the Human Environment, which declares in almost identical wording that "States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or areas beyond the limits of national jurisdiction".[41] Accordingly, states are not free to act as they wish on their territory, but they bear the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment and harm to human health of other states or of areas beyond the limits of national jurisdiction. This potentially leads to a dichotomy. Experience shows that sustainable development and sovereign exploitation of resources do not always go hand in hand. The Agreement therefore mandates the parties to take

38 Trail Smelter Case (U.S./Can.), 716.

39 For a discussion of the no harm principle in the context of international environmental agreements, see also Nurhidayah (1012), 5 et seqq.

40 Art. 2 THPA.

41 Stockholm Declaration of the United Nations Conference on the Human Environment, Principle 21. Available at <http://www.unep.org/Documents.Multilingual/Default.asp?documentid=97&articleid=1503>.

precautionary measures, i.e. anticipate, prevent and monitor transboundary haze pollution as a result of land and forest fires (Art. 3, para. 3 THPA). The internationally recognized precautionary principle, which aims at ensuring a high level of environmental protection through preventative decision-making in the case of risk, is reflected in this norm.[42]

In sum, the THPA refers to the fundamental principles of international environmental law[43], such as the no harm rule, the precautionary principle and the sovereign right to exploit natural resources, and enshrines them in the regional governance framework.[44]

4.2 Monitoring, assistance and prevention

The operationally most important provisions of the Agreement are arguably Articles 7, 9 and 12 on monitoring, prevention and assistance in the case of fires. The Agreement does not only oblige state parties to co-operate, but it also urges the parties to take steps to prevent and monitor transboundary haze pollution. The Agreement refers to these norms as binding (the parties "shall"), but the provisions are written in a way that gives discretion to the member states concerning their actions and the types of activities that they carry out to mitigate haze pollution. Nevertheless, these provisions impose obligations on the parties to develop the requisite legal or administrative machineries in order to combat transboundary haze pollution.[45] The Agreement does not include penalties or punishment for transgression, but its provisions are wide enough to provide for the enactment of strong national laws and the domestic prosecution of offenders to defer the use of fire.[46] States are thereby encouraged to follow-up on the domestic level with the implementation of laws that reflect the spirit of the Agreement.

If a state party needs assistance in the event of fire or haze pollution, it may request such assistance directly from any other party or through the ASEAN Centre. Assistance can only be employed at the request of a party and with the consent of the receiving party.[47] The state in which the fire occurs retains control over the actions to be taken and over the admission of assistance into its territory. The respective party exercises the overall direction, control, coordination, and supervision of the assistance within its territory (Art. 12, para. 1 THPA). It must provide, to the extent possible, local facilities and services for the proper and effective administration of the assistance (Art. 13, para. 2 THPA). The requesting party, in addition, exempts the assisting party from taxes, duties, and any other charges that would normally be assessed (Art. 14, para. 2 THPA). Thus, the parties concerned retain sovereignty and - ideally - enjoy the benefit of combined resources in the fight against haze pollution. This is generally commendable, but under the terms of the Agreement there is nothing that affected states can do to compel the acceptance of assistance should the state causing harm refuse to accept assistance in fighting fires and resulting haze. Thus, these provisions potentially undermine the effectiveness of the Agreement. Tan rightly points out that the Agreement would be more effective in responding to a situation of crisis if certain safeguards, such as a high-level council comprising representatives of all state parties with

42 However, the provision on the precautionary principle is in non-mandatory language: the parties "should" take precautionary measures, as opposed to "shall".
43 For a discussion of the core rules of international environmental law see Mackielo.
44 See also Nurhidayah (2012), who discusses the influence of international law on the ASEAN gover nance approach in detail.
45 Tan, 663.
46 Tan, 663.
47 Art. 12, para. 2 THPA.

the mandate to call for mandatory assistance, would have been established.[48]

Concerning monitoring, the Agreement emphasizes that each party monitors all fire prone areas, all land and/or forest fires, and haze pollution arising from such land and forest fires (Art. 7, para. 1 THPA). Furthermore, parties shall take "immediate action" to control or put out a fire in the event that a fire occurs. Concerning the prevention of fires Art. 9 THPA states that each party must: (a) develop and implement legislative and other regulatory measures to promote a zero burning policy; (b) identify and monitor areas which are prone to fires; (c) strengthen local fire-fighting and fire management capability; and (d) promote public education and awareness building campaigns. However, there are no specific targets that the parties are obliged to meet in regard to these measures.[49]

4.3 Co-ordination and information sharing

The Agreement relies on several structures to facilitate co-ordination and information sharing amongst the parties: (1) the Co-ordinating Centre for Transboundary Haze Pollution Control[50]; (2) the ASEAN Secretariat, and (3) the ASEAN Transboundary Haze Pollution Control Fund. [51]

Art. 5 THPA establishes the ASEAN Centre. The ASEAN Centre's function is an extension of the Specialized Meteorological Centre, which was established by ASEAN in 1993 to enhance collaboration between the member states. The task of the ASEAN Centre is to facilitate co-operation and co-ordination among parties in managing transboundary haze. To that end, it promotes transparency and co-ordination particularly by gathering data, and standardizing and disseminating the data to the parties. Ultimately, having a centralized database allows for more efficient communication and decreases the parties' time and effort needed to search for data.[52] In addition to the collection of data, the data submitted by state parties is standardized. The ASEAN Centre, according to Art. 5, para.2 THPA, works on the basis that the designated national authority acts first to put out fires. Only when the national authority declares an emergency situation, it may make a request to the ASEAN Centre to provide assistance. The discretion to declare a state of emergency lies with the national authority. Thus, the ASEAN Centre cannot prescribe or take any action should state parties decide to handle the situation unilaterally.[53] However, once a state party has decided to seek assistance from the ASEAN Centre, it can become a quite effective tool to orchestrate a response to the fire or haze pollution. For example, under Art. 12, para. 6 THPA the parties shall "identify and notify the ASEAN Centre of experts, equipment and materials that could be made available for the provision of assistance to other parties […] as well as the terms, especially financial, under which such assistance could be provided". A considerable advantage lies in a concerted response to fires, and such response can be orchestrated by the ASEAN Centre.

Furthermore, The Agreement establishes a Control Fund under Art. 20, para. 1 THPA. The Control Fund is administered by the ASEAN Secretariat under the Guidance of State parties, which make voluntary contributions to the Control Fund (Art. 20, paras. 2 and 3 THPA). The fund has not proven to be a success, as only US$ 240,329 have been

48 Tan, 667; see also Tacconi et al., 7.
49 See Tacconi et al., 6.
50 Hereinafter: ASEAN Centre.
51 Hereinafter: Control Fund.
52 Up until 2014, see Jerger, 41.
53 Tan, 667.

donated by state parties.[54] Moreover, the Agreement does not provide for rules on how to allocate the financial resources of the fund, thus giving the Secretariat discretion to redirect spending.[55] Tacconi argues in favor of an appropriately financed fund that addresses the deep determinants of the fires and provides incentives to farmers, who depend on fires for their basic livelihood, to change their behavior.[56] It remains to be seen whether the Control Fund will ultimately be properly equipped by the state parties.

Another interesting feature of the Agreement, which promotes technical cooperation between the member States, is Art. 16 THPA. It declares that parties shall promote the development of markets for the utilization of biomass and appropriate methods for disposal of agricultural wastes (Art. 16, para. g THPA). This provision recognizes that peatlands as biomass are a large cause of the fires that create haze pollution. By developing markets for biomass, the Agreement tries to incentivize the harvesting and controlled burning of peat.[57] Ideally, this market creates an incentive for stakeholders to manage peatlands effectively, so that the peat is not wasted and peat is turned into a product (rather than just a byproduct). Other areas of technical co-operation under Art. 16 THPA include training programmes for fire-fighters; the standardization of reporting formats; and the development of training, education and awareness-raising campaigns, in particular relating to zero-burning practices and the impact of haze pollution on human health. Overall, it is fair to say that the Agreement promotes co-operation between the state parties in all fields relevant to haze pollution. However, such co-operation remains by and large voluntary.

4.4 Enforcement and dispute settlement

Art. 27 THPA states that "[A]ny dispute between the parties as to the interpretation or application of, or compliance with, this Agreement or any Protocol thereto, shall be settled amicably by consultation or negotiation". Thus, the domestic legal framework in member states remains crucial in case of transboundary haze pollution.[58] No mandatory or coercive steps can be taken under the Agreement. Despite its mandatory language, the THPA is ultimately a soft law instrument.

In this context it is interesting to note that the states which have been severely affected by transboundary haze pollution (particularly Malaysia and Singapore), have never asked Indonesia to bear state responsibility for the alleged breach of the international obligation to control its forest and land fires and to incur international liability for the damage done.[59] Given the intensity of the fires and the effect that they had on the neighboring countries, it is surprising that the affected states have not raised the argument that Indonesia was in breach of its international obligations when failing to control the activities that led to the fires. Concerning the 1997 haze crisis, Tan argues that under international law Indonesia was responsible for the actions on its soil of which it knew, and which it had an obligation to control.[60] The obligation arguably could arise from the Draft Articles on

54 Jerger, 42.
55 Koh, 6, states that some of the available funds were spent in Indonesia, notably even before Indonesia became a state party to the THPA.
56 See Tacconi et al., 20.
57 See Jerger 42.
58 For an assessment of the legal framework governing forest fires and haze pollution in Indonesia, see Nurhidayah, 215 et seqq.
59 See Tan (1999), 841 et seqq; he argues that such state responsibility can be clearly made out, particularly for the extreme fires of 1997/1998.
60 Tan (1999), 841; according to Tan, Indonesia also had a duty to co-operate and accept assistance by other countries concerning the fire-fighting efforts.

State Responsibility, which include rules for injurious consequences arising out of acts not prohibited by international law.[61] It seems at least possible that a case brought forward in an international forum (such as the International Court of Justice), and based on arguments of state responsibility, would have been successful.[62] However, this has never happened, as a litigious attitude over the fires was seen as too antithetical to ASEAN values.[63]

Arguably, the muted response of the affected states to haze pollution demonstrates the adherence to the principles of non-intervention and sovereignty, which has traditionally been adopted by the ASEAN community.[64] This understanding of doing things the ASEAN way shines through in the key provisions of the THPA, which omit juridical dispute settlement mechanisms. The THPA strongly emphasizes co-operation, co-ordination and consultation between the member states. It does not only not provide for a dispute settlement mechanism, but it also lacks to mention legal consequences for non-compliance and a breach of the Agreement. Jerger identifies these non-confrontational features as a managerial approach, which may have some strengths that an agreement focusing on enforcement mechanisms would not have.[65] For example, the managerial approach enhances co-operation between the parties by drawing their attention to the achievement of common goals.[66] But, in the end, when conciliation is not possible, and interference with the national policies of a member state is not an option, resolving disputes to improve the situation becomes a significant challenge.[67]

5. Effectiveness of the Agreement

The main features of the Agreement have been illustrated above. But what are the consequences for environmental governance? Principally, international governance regimes vary tremendously in their effectiveness.[68] While certain regimes have a strong effect on the issues that they govern, others remain rather weak. The effectiveness of any given governance

61 The Draft Articles are not binding on states in their entirety, as they are a non-binding resolution of theGeneral Assembly of the United Nations. However, some rules in the Articles on State Responsi bility reflect customary international law. Customary International Law is binding upon all states.

62 Tan (1999), 855, concludes that Indonesia was responsible under international law for the fires and the transboundary harm that resulted from them in the 1997 haze pollution crisis. As a consequence Tan argues that Indonesia would be under the obligation to effect adequate reparations for the harm caused.

63 Tay (1998), 215. Tay (1998), 45, also states that if the governments of ASEAN states are reluctant to take enforcement actions against the Indonesian government, another approach would be to privat ize the disputes from the inter-governmental level, to a matter of private international law. To such ends, private litigants in one country could be given access to the courts of a second country, in order to pursue private suits against defendants in that country.

64 Tan, 659 refers to the "ASEAN way" of doing things, i.e. a reluctance to deal with other countries in harsh terms and the belief that in view of ASEAN's history, culture and context such methods were unlikely to work or could even prove to be counter-productive.

65 Jerger, 40-41, argues that the THPA relies on several structures to facilitate coordination and infor mation reporting and sharing among parties which are consistent with a managerial model that favors consensus between the state parties. The managerial model enhances cooperation between the parties by focusing their attention on common goals to be achieved. This is in contrast to the "traditional" approach, which focuses on setting targets and punishing parties when they do not comply. Jerger argues that the managerial model provides states with an effective framework for mitigating international environmental problems such as transboundary air pollution.

66 Jerger, 41.

67 Koh / Robinson, 17.

68 See Mushkat, 263 (with further references). For an assessment of the effectiveness and shortcomings of the Northeast Asian environmental governance system with a view particularly to transboundary pollution, see Lee, 782 et seqq.

regime (and the multilateral treaty supporting it), depends in large part on whether the treaty regime secures compliance of the target actors within the state parties.[69] A treaty regime can only be effective when the rules which it prescribes are adequately implemented and enforced, eliciting a high degree of compliance by the parties and resulting in the resolution or amelioration of the problem at hand.[70] This holds also true for the THPA.

5.1 Indonesia's efforts to mitigate haze pollution

In the context of the THPA, it was very important from the beginning that all key stakeholders become a party to the treaty. This has not been the case until recently. But even now that all ASEAN member states are a state party and are arguably willing to comply with the Agreement, it must be doubted whether they have the capacity to comply fully with the treaty and curb activities that lead to land and forest fires. Especially Indonesia, as the source state of haze pollution, faces tremendous problems.

First of all, it must be noted that even before ratifying the THPA, Indonesia had taken some action to mitigate transboundary haze, and, arguably it had complied with most provisions of the THPA.[71] For instance, Indonesia had taken steps to prevent fires from passing a zero-burning policy and by creating a fire brigade. Both are actions required to be taken under the THPA. Indonesia has also been part of regional haze pollution mitigation efforts through its membership in the Sub-Regional Ministerial Steering Committee on Transboundary Haze Pollution (MSC), and it has occasionally co-operated on a bilateral level with Singapore.[72] In sum, Indonesia was in accordance with most of the conditional language of the THPA even before ratification of the Agreement.[73] But the benefits of Indonesia having ratified the THPA could still prove significant as additional co-ordination in addressing transboundary haze could take place by further facilitating the exchange and spread of information. Whether that will be enough to facilitate, a lasting solution is questionable.

Another hindrance to the effectiveness of the Agreement lies in the avoidance to address the root causes of haze pollution. The THPA obligates parties to study the root causes of the haze,[74] but it does not articulately spell out these root causes for the fires and haze pollution, which, inter alia, lie in unsound natural resource management, land tenure conflicts and illegal logging. Indonesia has laws against illegal burning, but these laws are a weak deterrent due to inadequate enforcement and the misalignment of incentives. The self-interests of both small Indonesian farmers and big plantation companies looking to increase their revenue are inconsistent with actions that would have to be taken to uphold the laws.[75] The environmental problem of land and peat fires is caused by, and has impact on, private actors. As a result, imposing lofty and non-enforceable obligations on states does not ensure that the underlying problems are properly addressed and that private actors will modify their conduct.[76] The refusal to openly address the root causes is thus an additional aspect that contributes to the ineffectiveness of the Agreement.

69 Tan, 650.
70 Tan, 650.
71 See Jerger, 43.
72 Singapore and Indonesia have, for example, co-operated in drafting a Master Plan for 35 fire prone areas in the Muaro Jambi Regency, see Koh, 6.
73 Coming to the same conclusion Jerger, 43.
74 The Preamble states the "need to study the root causes and the implications of the transboundary haze pollution and the need to seek solutions for the problems identified".
75 Ultimately, economic interest is a major driving force for regional co-operation and the economic interest is commonly interrelated with political interest, see Nguitragool, 97.
76 Brunnée, 396.

5.2 The ASEAN Way

ASEAN member states prefer an approach in regional affairs that is based on the principles of non-intervention and national sovereignty.[77] Various ASEAN treaties, including the 1967 Bangkok Declaration, prescribe approaches to regional engagement known collectively as the ASEAN way. They are a set of formalized procedural norms. These include inter alia the search for consensus; the sanctity of sovereign rights; the principles of sensitivity and politeness; non-confrontational approaches to negotiations; behind-the-scenes discussions; and an emphasis on informal and non-legalistic procedures.[78] The 1976 Treaty of Amity and Cooperation in Southeast Asia in Article 2 emphasizes that member states are not to interfere in the internal affairs of one another and recognizes the right of every state "to lead its national existence free from external interference".

As Koh rightfully points out, one of the cornerstones of effective governance is the way decisions are made.[79] In this context, it has been argued that the persistence of haze pollution, despite decade-long efforts of prevention, is due to the limitations posed by the ASEAN way on regional governance.[80] Subscribing to the ASEAN way shields national governments from having to commit to addressing joint tasks that governments either find too demanding or too politically difficult. In keeping with the procedural voluntarism of the ASEAN way, parties can avoid legally binding agreements.[81] The non-interference principle enables governments to exclude any issue deemed to be politically sensitive from being discussed at the regional level. Moreover, it ultimately discourages ASEAN member states from criticizing other member states.[82] As a result, the principle of non-interference provides member states with considerable autonomy to determine the extent to which they implement regional environmental agendas, even those that they have agreed to initially.[83] Clearly, this has been an issue regarding the THPA.

But even ASEAN member states do not always adhere to the ASEAN way. For example, diplomatic tensions ran high at the end of 2006, when Singapore raised the haze issue at the United Nations General Assembly, calling for a wider effort which that international expertise to tackle the problem. Indonesia was quick to state that the haze was a domestic problem and described the move as tantamount to interference in the

77 See also Koh /Robinson (2002), 642 et seqq, for a discussion of the influence of the ASEAN way on environmental governance.

78 See Varkkey (2012), 80 (with further references).

79 Koh, 2.

80 See, for example, Litta, 86, who argues that the ASEAN way results in a deficit of material obligations and lack of enforceability of treaty obligations; see also, Koh, 3.

81 Varkkey (2012), 81 et seqq, points out that the ASEAN model of regionalism differs completely from European regionalism under the European Union. This difference explains why environmental regionalism in Europe has been arguably more successful, while environmental regionalism in Southeast Asia has not. While the main drivers of the EU are its supranational institutions, the main drivers of the ASEAN organization are member states, and unlike the European Commission, the ASEAN Secretariat has been deliberately denied the resources and mandate necessary and continues to be subordinate to national secretariats. The ASEAN model of regionalism therefore much better enables member states to control the scope, depth and speed of regionalism in ASEAN, which best suits their national interests.

82 The non-interference principle owes much of its origin to the conflicts surrounding Indonesia, Malaysia and the Philippines in the 1960s, predating the establishment of ASEAN, see Varkkey (2009), 86.

83 Varkkey (2012), 82 et seqq points out that as a result, this has ultimately served to protect the interests of the regional oil palm plantation sector, while allowing haze to persist.

domestic affairs and sovereignty of Indonesia.[84] It clearly favored the problem to be dealt with on the ASEAN level alone, without worldwide assistance. Singapore defended its actions, stating that it was not meant to offend Indonesia, but to mobilize the international support that was needed as Singapore did not believe that the problem could be solved without international support[85]. It pointed out that Article 2 THPA specifically mentions that transboundary haze pollution should be prevented and monitored through concerted national efforts and intensified regional and international co-operation and that the haze was an intrusion into the domestic environment of Singapore.[86] Obviously, a threshold exists, beyond which, once crossed, states are not willing to adhere to the ASEAN way. This episode also demonstrates that the THPA's lack of coercive mechanisms is potentially crucial because it frustrates affected state parties (although it is important to note that at the time Indonesia was not a state party to the Agreement and was not bound by its provisions). The ASEAN way works better when members' interests converge than when they have opposing interests. When states' interests diverge, the ASEAN way usually leads countries to evade issues and avoid confrontation.[87] Experience shows that this is exactly what seems to happen as soon as an actual haze crisis is over.

6. Conclusion

Since the entry into force of the THPA, some progress has been made in the effort to co-ordinate the struggle against haze pollution. A higher level of co-operation has been reached, including, for example, the conduct of simulation exercises and the implementation of zero burning and controlled-burning policies. In addition, the THPA has been useful in generating a sizeable amount of information on the haze. The data is reported, standardized and made available by the ASEAN Centre. However, the 2013 haze crisis has demonstrated dramatically that there has been no amelioration. Haze pollution again reached hazardous levels in Indonesia, Singapore, and Malaysia. The 2013 crisis was arguably the worst haze crisis ever, with record high levels of pollution. Taking this discouraging development into account, one must conclude that the THPA has failed as a regional governance tool.[88] Whether the haze pollution would have been even worse without the THPA is pure speculation. The 2013 haze crisis shows that only little improvements have been consolidated and that the THPA has not achieved its environmental goal in terms of mitigating haze pollution.

Due to the style of regional governance - which prioritizes national sovereignty - the implementation of the THPA is strategically shaped by the state parties. The underlying ASEAN way puts the burden of implementation, compliance and enforcement of the parties.[89] This may contribute to a sub-optimal haze prevention and mitigation effort, and it leads to the Agreement's ineffectiveness in providing long-term, workable solutions

84 Koh, 4; Varkkey (2011), 95. The dispute got quite heated and arguably as a "retaliation" for Singa porean actions at the United Nations, in January 2007 Indonesia banned the export of sand to Sin gapore.

85 Varkkey (2011), 95.

86 Koh, 5; Varkkey (2011), 95; Tay also points out that haze is not purely an internal matter of the respective states - at least not when there are severe external effects and transboundary damage, see Tay (1998), 214.

87 Koh / Robinson, 15.

88 Regional Environmental Governance in Southeast Asia in other sectors seems to be more success ful. The evolving climate change regime and the respective domestic laws are more promising, see Whitehead, 194.

89 Koh, 16.

for haze pollution.[90] As has been pointed out, crucial issues are the lack of enforcement mechanisms and the missing link to the root causes.[91] The strategy of addressing the haze through a co-operative (or managerial) approach in the THPA has not delivered environmentally positive results.

Whether that will change - now that all ASEAN members have ratified the THPA - is doubtful. It is encouraging to see that Indonesia finally ratified the Agreement and that it takes steps into a community minded co-operative direction. But, as has been stated, Indonesia had effectively complied with most of the THPA even before its ratification. Whether the ratification will quickly lead to mitigation of haze pollution is therefore not clear. But at least all ASEAN member states have now officially agreed that haze pollution is not a domestic problem, but rather a regional problem. That in itself is an important hurdle which has finally been cleared.

90 Varkkey (2012), 89-90; Litta even states that it is doubtful that the THPA is more than just a "paper tiger" (Litta, 86).

91 Similar also Mushkat, 267.

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The Effect of Basic Environmental Act on Environmental Governance in Taiwan: From the Aspect of Judicial Review

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Abstract

The primary approach to addressing environmental pollution under environmental law has long been the "end-of-pipeline" approach, in which a large number of pollution-oriented pieces of legislation governing the media of air, water, soil, ocean, among others, have been implemented. Yet, with a view to addressing environmental change with a more holistic and innovative approach, policy-oriented pieces of legislation—e.g. the Basic Environmental Act (BEA) or the Framework Act on Environment—have been adopted by several countries in Asia, including Taiwan, Japan, and South Korea. Taiwan adopted the BEA on December 11, 2002. After more than a decade of implementation, it now seems to be a suitable moment to assess its effectiveness in dealing with environmental challenges.

The main purpose of this article is to evaluate the BEA's role in court cases. This will include an investigation of the *statement/argument brought by plaintiff and defendant* and *the judges' verdicts*, in cases where provisions of the BEA have been mentioned. Apparently, the actual effect of BEA in a judge's mind is weaker than environmental non-governmental organizations had expected. More critically, while the main purpose of the BEA is to address environmental pollution, it has actually created a large number of useless legal arguments and resulted in confusing legal precedent.

Keywords: Environmental Pollution, Environmental Governance

I. Introduction

The primary approach to dealing with environmental pollution under environmental law has long been the "end-of-pipeline" approach, where a large number of pollution-oriented pieces of legislation governing the media of air, water, soil, ocean, etc., have been implemented. In Taiwan, a similar approach has been adopted in the past few decades. A large number of pollution prevention and control Acts have been passed and adopted, such as: the Air Pollution Prevention and Control Act,[1] the Water Pollution Prevention and Control Act,[2] the Noise Regulation Act,[3] the Marine Pollution and Control Act,[4] etc. Such an environmental legislative approach with substantive and procedural measures indeed contributes significantly to the improvement of the environment. Yet, the weaknesses of such a diverse approach and the dissociation from environmental policy have been identified as potential issues with the current legislative approach. Thus, a new legal instrument has been emerging.

1 Air Pollution Control Act, available at: http://ivy5.epa.gov.tw/epalaw/search/LordiDispFull.aspx?ltype=04&lname=0010.
2 Accessed at http://ivy5.epa.gov.tw/epalaw/search/LordiDispFull.aspx?ltype=06&lname=0010.
3 Accessed at http://ivy5.epa.gov.tw/epalaw/search/LordiDispFull.aspx?ltype=05&lname=0010.
4 Accessed at http://ivy5.epa.gov.tw/epalaw/search/LordiDispFull.aspx?ltype=15&lname=0010.

With a view to addressing environmental challenge with a more holistic and innovative approach, policy-oriented legislations e.g. the Basic Environmental Act (BEA) or Framework Act on Environment have been adopted by several countries in Asia, including Taiwan,[5] Japan,[6] and South Korea.[7] This "basic act" phenomenon is not limited to the environmental law and policy field. For instance, in Japan, there are more than forty legislations having such "basic act" features in almost all policy and law fields, such as: the Forest Basic Act,[8] the Disaster Basic Act,[9] the Traffic Safety Basic Act,[10] and even the Basic Act on Aging Society,[11] or the Basic Act of Space and Universe.[12] Japan's "basic act" approach seems to have influenced neighbouring countries. To the west, South Korea, seems highly influenced by its neighboring country, a large number of "framework acts" can also be found.[13] such as: The Framework Act on the Video Industry Promotion, the Framework Act on Volunteer Service Activities, the Framework Act of Disasters and safety, the Framework Act on Low Birth Rate in an Aging Society, etc.

5 Basic Environment Act, available at: http://law.epa.gov.tw/en/laws/811708521.html.

6 The Basic Environment Law, http://www.env.go.jp/en/laws/policy/basic/.

7 Framework Act on Environmental Policy of 2008, available at: http://www.moleg.go.kr/english/korLawEng?pstSeq=47525.

8 Forest Basic Act《森林・林業基本法》（昭和39年7月9日法律第161号；最終改正：平成二〇年五月二三日法律第三八号)，available at: http://law.e-gov.go.jp/htmldata/S39/S39HO161.html.

9 Disaster Basic Act《災害対策基本法》（昭和36年11月15日法律第223号，最終改正：平成二三年一二月一四日法律第一二四号），available at: http://law.e-gov.go.jp/htmldata/S36/S36HO223.html.

10 Traffic Safety Basic Act《交通安全対策基本法》（昭和45年6月1日法律110号；最終改正：平成二三年八月三〇日法律第一〇五号）, available at: http://law.e-gov.go.jp/htmldata/S45/S45HO110.html.

11 Basic Act on Aging Society,《高齢社会対策基本法》（平成7年11月15日法律第129号.）

12 Basic Act of Space and Universe《宇宙基本法》（平成20年5月28日法律第43号）, available at: http://law.e-gov.go.jp/htmldata/H20/H20HO043.html.

13 There are more than 60 search results relating to "framework act". E.g. Framework Act on Environmnetal Policy, FrameworkAct on Cooperatives, Framework Act on Administrative Investigations, Framework Act on Administrative Regulations, Framework Act on Marine Fishery Development, Framework Act on the Regulations of Land Use, Framework Act on Juveniles, Framework Act on RailRoad Industry Development, Framework Act on Intellectual Property, Framework Act on Small and Medium Enterprises, Framework Act on Product Safety, Framework Act on Electronic Documents and Transactions, Framework Act on Telecommunications, Framework Act on Low Carbon, Green Growth, Framework Act on Low Birth Rate in IN an Aging Society, Framework Act on Treatment of Foreigners Residing in the Republic of Korea, Framework Act on the management of Disasters and Safety, Framework Act on Volunteer Service Activities, Framework Act on Qualifications, Framework Act on the Development of Human Resources, Framework Act on the Video Industry Promotion, Framework Act on Food Safety, Framework Act on Consumers, Framework Act on Fire Services, Framework Act on Health, Safety and Welfare of Fire Officers, Framework Act on Forestry, Framework Act on Social Security, Framework Act on the Management of Charges, Framework Act on Health and Medical Services, Framework Act on Broadcasting Communications Development, Framework Act on Civil Defence, Framework Act on Logistics olicies, Framework Act on the Promotion of Cultural Industries, Framework Act on Agriculture and Fisheries, Rural Community and Food Industry Framework Act on Labour Welfare, Framework Act on Military Welfare Framework Act on the National Land, Framework Act on International Development Cooperation, Framework Act on Korean Language, Framework Act on National Taxes, Framework Act on National Standards , Framework Act on National Informatization, Framework Act on Veterans Affairs,Framework Act on Education, Framework Act on Tourism, Framework Act on Science and Technology, Framework Act on Employment Policy, Framework Act on Health, Safety, and Welfare of Police Officers, Framework Act on Building, Framework Act on the Construction Industry, Framework Act on Health Examinations, Framework Act on Healthy Families.

To the south, in Taiwan, so far (6) six "basic acts" have been adopted.[14] All of these countries have adopted "basic acts" in the environmental fields in spite of having different titles of law (e.g. the Basic Environment Act of Taiwan, the Framework Act on Environmental Policy of South Korea, and the Basic Environment Law of Japan). Thus, this commonality inspired the author investigate the effectiveness of such "basic act" legislation on environmental governance, especially in Taiwan. Also, Taiwan's Basic Environmental Act (BEA) was adopted on December 11, 2002. After more than a decade of the implementation, it now seems to be a suitable moment to assess its effectiveness in dealing with environmental challenges.

Theoretically, there are three main aspects to consider in evaluating the role of the BEA; these are the impact of the BEA on the administrative, legislative, and judicial decision-making process. Most of the literature, however, tends to focus on the "general" impact of the BEA, the "greatness" of the BEA in terms of leadership, and the influential role of the BEA in the political and legal arena.[15] There is even literature considering the semi-constitutional law status of the BEA.[16] Only a few viewpoints seek to adopt a more realistic and concrete approach to determine the influence of the BEA in practice.[17]

For instance, during the 10-year review conference for the BEA, one professor sought to attribute the establishment of the Environmental Education Act, the establishment of a Ministry of Environmental and Resources (to replace the current and hierarchically low Environmental Protection Agency), and the enacting of Renewable Energy Act of 2009, to the success of the BEA as a symbol of the effect of the BEA on the legislative function.[18] Another professor was suspicious and curious about the casual link between the BEA and the aforementioned achievements.[19] He began to develop a "judicial approach" to review the judicial cases related

14 The Indigenous Peoples Basic Law, available at: http://db.lawbank.com.tw/ENG/FLAW/FLAWDAT01.asp?lsid=FL034022; Hakka Basic Act, available at: http://db.lawbank.com.tw/ENG/FLAW/FLAWDAT01.asp?lsid=FL052022; Educational Fundamental Act, Date: 1999.06.23 (Announced) Date: 2013.12.11 (Amended), available at: http://db.lawbank.com.tw/ENG/FLAW/FLAWDAT01.asp?lsid=FL008468; Fundamental Science and Technology Act, available at: http://db.lawbank.com.tw/ENG/FLAW/FLAWDAT01.asp?lsid=FL009566; Basic Environment Act, available at: http://db.lawbank.com.tw/ENG/FLAW/FLAWDAT01.asp?lsid=FL022359; Fundamental Communications Act, available at: http://db.lawbank.com.tw/ENG/FLAW/FLAWDAT01.asp?lsid=FL027987.

15 See e.g., Jiunn-rong Yeh, The Development and Function of BEA, The Conference Proceeding for Tenth Anniversary of BEA, 7 December 2012, pp. 14-15. (葉俊榮，環境基本法的脈絡與功能，　環境基本法十週年論壇論文集，2012年12月7日，頁14-15); Hu, The Milestone of BEA, available at: http://old.npf.org.tw/PUBLICATION/SD/091/SD-C-091-176.htm (胡思聰，「環境基本法」樹立的里程碑).

16 See e.g., Tsai,Hsiu-Ching, The Evaluation on the Bill of BEA, The Journal of the Legislative Yuan, 28(3), p. 43. (蔡秀卿，環境保護基本法草案之檢討，立法院院聞，第28卷第3期，頁43。).

17 See e.g., Tsi-Yang Chen, Taiwan Environmental Law, 2ed Edition, p. 107 (陳慈陽，環境法總論，二版，頁107); Wang Yu-cheng, A Critical Review of the Role of BEA: Quo Vadis, The Conference Proceeding for Tenth Anniversary of BEA, 7 December 2012, p. 37. (王毓正，環境基本法何去何從？quo vadis，環境基本法十週年論壇論文集，2012年12月7日，頁37。). See also, Anton Ming-Zhi Gao, The Role of Environmental Basic Act of Taiwan in the Court Verdicts, Judicial Aspiration Issue 105, January 2013, pp. 54-66; Anton Ming-Zhi GAO, An Alternative Way to Deal with Climate Change: A Comparative Study and Critical Review of Basic Acts and Bills on Climate Change and Energy in Japan, South Korea, and Taiwan, OGEL Special Issue on "Comparative Energy Law", March 2011, OGEL Journal.

18 See Jiunn-rong Yeh, above n.15, at 14-15.

19 See Wang Yu-cheng, above n.17, at 24.

to the BEA, including the statement, court ruling, and court judgment. Such approach indeed motivated this author to do more to determine how the BEA impacts the attitude of the plaintiff, the defendant, and the judges concerning the environmental governance of Taiwan.

The main purpose of this article is to evaluate the role of BEA in court cases. This will include an investigation of the statement/argument brought by plaintiff and defendant and the judges' verdicts, where the provisions of the BEA have been mentioned. Due to the "public law" nature of most environmental litigation, this article will focus on the rulings and judgment of the two public law courts of Taiwan, i.e. the Supreme Administrative Court (SAC) and the High Administrative Court (HAC). After the preliminary survey on the rulings and judgments involving provisions of the BEA, numerical data can be displayed in Table 1. This article will provide further analysis of the gap between expectation (statement/argument brought by plaintiff and defendant) and the real effects (the court position of ruling/judgment).

Table 1: The Cases with Reference to BEA during the Judicial Review Process (from date of enactment to December 2014). Source: the cases and ruling database of the Judicial Yuan of Taiwan, http://jirs.judicial.gov.tw/FJUD/

Administrative court		*statement/argument brought by plaintiff and defendant*	*the court ruling/judgment*
Supreme Administrative Court		34	18 (8/10)
High Administrative Court	Taipei	80	61(54*/9)
	Tai-Chung	7	2(0/2)
	Kaohsiung	13	2(0/2)
Total		**134**	**83 (62/23)**

* 51 rulings are cases based on the same facts but with different plaintiffs.

2. The expectation of the BEA: legal argument between plaintiff and defendant

There are only 41 provisions in the BEA. Due to the "abstract" nature of the BEA, it is expected that it would be easy to cite the BEA as a legal basis for court actions. So far, there are 134 cases referring to different provisions of the BEA. Not all provisions play the same role. Thus, this article will divide its analysis to elaborate on the relatively frequently cited provisions and the less influential provisions respectively.

2.1 The frequently cited BEA provisions

2.1.1 Legal definition clause of the BEA (Article 2)

Article 2 of the BEA defines the abstract concepts of environment and sustainable development as follows.

- The term "environment" in this Act means collectively the natural resources that influence human survival and development and the human impact of natural factors, including sunlight, air, water, soil, earth, minerals, forests, wildlife, scenery, recreation, social economy, culture, historical monuments, natural monuments, natural ecological systems, etc.

● "Sustainable development" means satisfying contemporary needs without sacrificing the ability of future generations to satisfy their needs.

Even so, during the litigation process of most cases, only the concept of environment is further discussed between the plaintiff and defendant. Interestingly, many plaintiffs (i.e. the 51 rulings in Table 1) use Article 2 along with Articles 3[20] and 28[21] to justify their standing to bring a lawsuit or an administrative appeal, but these grounds were rejected by the judges in each case.

In general, the plaintiffs tend to consider that Article 2 should be interpreted as broadening the BEA's scope of protection to human beings; thus, in determining standing, the parties having direct interest in a case should be interpreted as broadly as possible.[22] Why use Article 2 to justify the litigation in the 51 rulings cited in Table 1? It is because the cases at hand in all 51 cases were related to the protection of a historical, physical monument. Since such monument is considered part of the environment and protected by the BEA, it would be reasonable to give such right to bring suit to all citizens.

Regarding the administrative appeal, the plaintiffs argued that everyone should be eligible to launch an administrative appeal against the government.[23] While during the litigation process, each citizen should be considered as the interested party of his or her individual case; and therefore, should be permitted to enforce every right of litigation procedure.[24] The main reason plaintiffs made such argument was that, in Taiwan, usually only the legal entity directly affected by a development project can have legal standing to bring the lawsuit. In the 51 cases at hand, the main issue was whether the demolition of an old hospital to build a METRO terminal could have been regarded as the damage of historical monument that would damage the plaintiffs' interests. Thus, the plaintiffs sought to launch the flooding cases strategy (51 cases for the similar case) and use the Article 2 to justify their interest to the historical monument at stake. Does such strategy work? The attitude of the court will be explained in the next section.

2.1.2 The environmental integration and priority clause? (Article 3)

Article 3 of the BEA attempts to clarify the usual conflict among economic, technology, social, and environmental interests: "Economic, technological, and social development shall equally emphasize environmental protection based on long-term national interests. However, in the event that economic, technological or social development has a seriously negative impact on the environment or endangers the environment, the protection of the environment shall prevail".

In this provision, it is apparent that there are two conflicting statements up for interpretation, and that this provision cannot necessarily be considered an "environment

20 Economic, technological, and social development shall equally emphasize environmental protection based on long-term national interests. However, in the event that economic, technological, or social development has a seriously negative impact on the environment or endangers the environment, the protection of the environment shall prevail.

21 Environmental resources belong to all citizens and future generations. The central government shall establish a system in which those who pollute or destroy the environment pay. Pollution control or environmental restoration fees that are collected from those who pollute or destroy shall be used to preserve the sustainable use of the environment.

22 E.g., High Administrative Court Judgment 2010/347 (99年度訴字第347號).

23 E.g., High Administrative Court Ruling 2007/01979 (96年度裁字第01979號); High Administrative Court Ruling 2007/00081 (96年度停字第00081號).

24 E.g., High Administrative Court Ruling 2007/00095 (96年度停字第00095號).

priority principle" since, the first sentence outlines an "environment integration principle". Thus, the environment seems to be a higher priority than other goals only under the exceptional situation in which economic, technological, or social development creates "a seriously negative impact on the environment or endangers the environment". Such a delicate conceptual difference is hard to understand at first glance; thus, it is tempting for parties or judges to rely on the principle of environmental priority.

Regarding the concept of Article 3, many cases try to claim that the whole of Article 3 is an environmental priority principle, which means environmental protection prevails over economic development.[25] Yet, it should be noted that there is a further debate between plaintiff and defendant on such principle. The main reason for the debate is that, there is an equal treatment clause in the Taiwan Constitutional clause[26] giving equal priority to environmental, economic, and technological development. Thus, Article 3 of the BEA may cause tension between regulatory law and the Constitution. During debates, the pro-environment side usually concludes that the environmental priority principle of the Article 3 of the BEA does not conflict with the constitutional idea of "equal treatment".[27] The environment should be the priority[28] instead of capitalism.[29]

The other side usually argues that the interpretation of the "whole" Article 3 should also be based on the constitution provision,[30] and thus the environment does not always prevail over economic and technological development. This author tends to agree with this position. Also, the development project in the relevant cases would have had positive effects on the environment; thus the project would not fall under the domain of the second sentence as something that has "a seriously negative impact on the environment or endangers the environment" (i.e. making the end result of this interpretation that environment would not take priority to economic and technological development).[31]

Finally, the argument in many cases is about the effects of Article 3 in individual circumstances. Some contend that the normative and substantive nature of Article 3 make it more possible to violate Article 3 in reality.[32] Such normative effects are confirmed by the BEA role in transposing the International Covenant on Civil and Political Rights and International Covenant on Economic, Social, and Cultural Rights.[33] Due to its effect, Article 3 of the BEA is binding not only to the administrative sector, but also the judicial sector.[34] More specifically, the environmental priority principle is being used as a strong argument

25 High Administrative Court Ruling 2012/484 (101年度裁字第484號); High Administrative Court Ruling 2012/483 (101年度裁字第483號); High Administrative Court Ruling 2005/00105 (94年度停字第00105號).
26 Article 10(2) of The Additional Articles of the Constitution of the Republic of China states, "environmental and ecological protection shall be given equal consideration with economic and technological development".
27 High Administrative Court Judgment 2009/47 (98年度訴字第47號).
28 High Administrative Court Judgment 2009/47 (98年度訴字第47號); Supreme Administrative Court Judgment 2012/55 (101年度判字第55號).
29 High Administrative Court Judgment 2009/47 (98年度訴字第47號).
30 High Administrative Court Judgment 2009/47 (98年度訴字第47號）.
31 High Administrative Court Judgment 2009/47 (98年度訴字第47號）.
32 High Administrative Court Ruling 2005/4 (94年度停更一字第4號).
33 High Administrative Court Judgment 2011/118 (100年度訴字第118號）.
34 High Administrative Court Ruling 2010/843 (99年度裁字第843號).

to grant the Provisional/Preliminary Injunction against proposed development to avoid further harm to the environment.[35]

2.1.3 Polluter and government responsibility [Article 4 (II-III))

Article 4, Sections II and III further clarify the responsibility between polluter and government. The polluter should bear the sole responsibility for the environmental damage it caused,[36] while the government may play a supplementary role based on certain preconditions.[37]

During the litigation, Article 4 is used to argue whether a certain legal entity should be responsible for the environmental damage under consideration. For instance, there is the controversial issue of whether the "landowner"[38] and "the land user or the land substantial manager"[39] should be considered as polluters.

The other main battleground under Article 4 relates to governmental "backup" responsibility. Several cases focus on whether the government became liable because the circumstances litigated met the criteria of "in the event that those who pollute or destroy the environment in the foregoing paragraph do not exist or cannot be confirmed".[40] In addition, some cases directly address the responsibility of the government. The argument usually claims there are other specific governmental duties created by the BEA, specifically mentioning the general clause of Article 4(3). For instance, Article 25 can be seen as creating a specific duty of the government in promulgating and enforcing the environmental regulation.[41] Once the government is unable to monitor the situation or to identify the polluter, and then the "managing agency" of the environmental regulations should be held responsible for such situation.[42] Also, some argue the government's responsibility is based on the interaction of Articles 39[43] and 4(3). For example, under these articles, it is argued that the government should be held liable for fly-tipping from unknown sources.[44]

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35 High Administrative Court Ruling 2010/2454 (99年度裁字第2454號); High Administrative Court Ruling 2010/37 (99年度停字第37號) .

36 Article 4(2): "Those who pollute or destroy the environment shall be responsible for the environmental harm or risk they create".

37 Article 4(3): "The government shall bear responsibility in the event that those who pollute or destroy the environment in the foregoing paragraph do not exist or cannot be confirmed".

38 High Administrative Court Judgment 2010/3 (99年度訴更一字第3號); Supreme Administrative Court Judgment 2011/2056 (100年度判字第2056號); High Administrative Court Judgment 2010/3 (99年度訴更一字第3號).

39 High Administrative Court Ruling 2006/02935 (95年度裁字第02935號).

40 High Administrative Court Judgment 2003/374 (92年度訴字第374號); Supreme Administrative Court Judgment 2011/1655 (100年度判字第1655號)；Supreme Administrative Court Judgment 2012/438 (101年度判字第438號).

41 Article 25: The central government shall establish phased-in environmental quality and control standards with regard to societal needs and technology. Local governments may establish stricter management and control standards with regard to the natural and societal conditions within its jurisdiction to meet the standards in the foregoing paragraph. Such standards, after central government review, may be applied within said jurisdiction. Government entities at all levels shall adopt necessary measures to achieve the standards in the two foregoing paragraphs.

42 High Administrative Court Judgment 2009/548 (98年度訴字第548號：) .

43 Government entities at all levels shall fully enforce environmental laws and regulations and interdict and punish violations thereof in accordance with the law.

44 High Administrative Court Judgment 2010/268 (99年度訴字第268號：); High Administrative Court Judgment 2008/445 (97年度訴字第445號).

Finally, in terms of the amount of liability in cases of soil pollution, the polluter should be held liable for not only compensation cost but also remediation costs.[45] Also, under the detailed allocation of remediation costs, the polluter should bear the "ultimate" liability for "all" of the remediation cost, even if the government or the related remediation funds may share part of the cost in the first place.[46]

2.2 The supplementary role of BEA provisions

Most citations to the BEA concentrate on Articles 2, 3, 28, and 4 II-III. There are a few articles less frequently cited during the litigation.

2.2.1 The BEA as a whole

The second paragraph of Article 1 outlines the application hierarchy of the BEA and other legal statutes: "The regulations of other laws shall apply to those matters not regulated by this Act". Some refer to this clause and argue the BEA as the new law should prevail over the Waste Management Act enacted earlier.[47] Yet, it is unclear how the abstract nature of the BEA can be applied in real cases.

Besides, several cases only refer to the BEA as a whole without mentioning individual clauses. For instance, some claim that the environmental pollution at stake is a violation of the "general value" promoted by the BEA.[48] Moreover, some argue that the protection of an "ecological protection zone" should be under the scope of the BEA.[49] Finally, one case uses the BEA to see if the BEA defines the concept of significant impact on the environment.[50]

2.2.2 The legislative purpose clause of the BEA (Article 1)

Article 1 of the BEA provides the legislative purpose of the BEA, which is primarily "to raise the quality of the environment, advance the health and well-being of citizens, preserve environmental resources, and pursue sustainable development by promoting environmental protection". Further arguments of plaintiffs and defendants focus on the link between this state legislative purpose to other provisions in the BEA and other environmental legislation.

In terms of the internal harmonization of such legal purposes, one party argues that the articles in this BEA, such as Article 5[51] and 16,[52] go in the same direction and fit the

45 Supreme Administrative Court Judgment 2007/01954 (96年度判字第01954號); Supreme Administrative Court Judgment 2007/01953 (96年度判字第01953號).

46 High Administrative Court Judgment 2011/260 (100年度訴字第260號) .

47 High Administrative Court Ruling 2011/1504 (100年度裁字第1504號).

48 High Administrative Court Ruling 2009/2404 (98年度裁字第2404號).

49 High Administrative Court Judgment 2012/28 (101年度訴更一字第28號); High Administrative Court Judgment 2010/723 (99年度訴字第723號); High Administrative Court Judgment 2009/2270 (98年度訴字第2270號).

50 High Administrative Court Judgment 2010/484 (99年度訴字第484號).

51 Article 5: Citizens shall uphold environmental protection concepts and lessen the environmental impact of daily life. In terms of consumer behaviour, citizens shall, as a principle, practice green consumption. In terms of daily life, citizens shall carry out waste disposal reduction, separation and recycling. Citizens shall actively carry out environmental protection and be responsible for assisting the government in implementing measures related to environmental protection.

52 Article 16: With a high quality, comfortable and harmonious environment as the goal and on the basis of total environmental resource management concepts, government entities at all levels shall carry out reasonable plans for land development and use and promote such plans.

same purpose as Article 1.[53]

With regard to the legal purpose of the BEA and the larger body of environmental legislation, there are divergent arguments. One side is of the opinion that the National Park Act is different from the BEA in many aspects, including normative purpose, nature, and competent authorities.[54] The opposing argument is that while formally the legislative purposes of different environmental legislations look different, substantially, all of them have the same goal as the BEA.[55]

2.2.3 The general responsible clause of the key players [Article 4(I)]

The joint responsibility among key players (citizens, enterprises, and government entities) is provided in Article 4(1).[56] In one case, a party refers to Article 5 of the draft Bill of the BEA (i.e. Article 4(1) of the BEA) and argues that indeed as a citizen, he has a duty to reduce environmental pollution and to meet environmental protection requirements. In this case, he has already fulfilled his duty as a citizen, and thus it would be unreasonable for him to be fined by the competent authority.[57]

2.2.4 The BEA after Article 5

In general, the main legal basis of a plaintiff's or defendant's claim is usually Articles 1 through 4 of the BEA (with the exception of 51 similar cases referring to Articles 28, 2, and 3). This article will discuss relative cases and rulings according to the provision's sequence.

A. Normative effects of the BEA

First, the plaintiff's request to dismantle the related equipment on the buildings refers to both the citizen's assistant role to government in Article 5(2)[58] and to Article 16[59] of the BEA and other substantive legislations as its claim's legal bases.[60] Yet, the defendant argued that the aforementioned legal bases, including those of the BEA, do not confer the *legal right of the public law*.[61] In another case, the plaintiff claims the right under Articles 15 to 18 of the BEA,[62] but the defendant does not consider these Articles relevant to the issue

53 High Administrative Court Judgment 2009/00504 (98年度訴字第 00504號) .

54 High Administrative Court Judgment 2006/03899 (95年度訴字第03899號」).

55 High Administrative Court Judgment 2010/484 (99年度訴字第484號).

56 Article 4(1): "Citizens, enterprises and government entities at all levels shall jointly share the duties and responsibilities of protecting the environment".

57 High Administrative Court Judgment 2001/755 (90年度訴字第755號).

58 "Citizens shall actively carry out environmental protection and be responsible for assisting the government in implementing measures related to environmental protection".

59 With a high quality, comfortable and harmonious environment as the goal and on the basis of total environmental resource management concepts, government entities at all levels shall carry out reasonable plans for land development and use and promote such plans.

60 High Administrative Court Ruling 2008/02148 (97年度裁字第02148號).

61 High Administrative Court Judgment 2006/02355 (95年度訴字第02355號：).

62 Article 15: Government entities at all levels shall collect, survey and assess information on the condition of the natural, social and human environment within its jurisdiction, build an environmental information system and provide such system for checking.The environmental information system in the foregoing paragraph shall be open to the public on a regular basis.Article 16: With a high quality, comfortable and harmonious environment as the goal and on the basis of total environmental resource management concepts, government entities at all levels shall carry out reasonable plans for land development and use and promote such plans.Article 17: Government entities at all levels may, with respect to natural conditions, actual needs, and preserving the rights of indigenous peoples, adopt necessary measures or limit human activity and use within designated areas to protect the natural, social and human environment.Article 18: Government entities at all levels shall

at hand.[63] Similar normative effects or legal effects of the BEA are also raised with regard to Articles 16 and 25 (along with Article 3 and 4).[64]

Whether such normative effects are applicable to the government is also taken into consideration. The plaintiffs try to use Article 24 and Article 37 in different cases to substantiate their legal claim and legal right to require government to take certain actions.

B. Environmental Citizen Suit

Article 34 of the BEA[65] is relevant to the Environmental Citizen Suit. One argument regarding how to trigger Article 34 of the BEA and the Article 23 of the Environmental Impact Assessment Act[66] (the citizens' suits clause of the EIA Act) is that it should be based on the legal requirement of "negligent in enforcement" and "the negligent behaviour of the competent authority in fulfilling its implementation duties"[67]. In this regard, the interpretation of Article 34 of the BEA should be construed together with the EIA Act. Simply showing that a party is "negligent in enforcement" under the Article 34 of the BEA is not sufficient for bringing an Environmental Citizen Suit.

With regard to the standing issue, the Article 34 of the BEA confers the right to "persons [citizens] or public interest groups". Yet, one argument is that that the persons or citizens should be interpreted in a broad manner, which means both *victim citizens* and other non-victims can bring such lawsuit.[68] Also, such suit right is conferred on both "persons [citizens] or public interest group[s]" under the EIA Act, BEA, Air Pollution Control Act, and Soil and Ground Water Act.[69]

C. Conferring right on local government to take action

According to Article 39 of the BEA, "government entities at all levels shall fully enforce environmental laws and regulations and interdict and punish violations thereof in accordance with the law". In this regard, local government in one case refers to this provision and justifies its role in intervening the environmental affairs.[70]

actively protect wildlife, ensure biodiversity, protect forests, estuaries and wetland environments, and maintain a diverse natural environment, while also enhancing water resource conservation, water and soil conservation, and revegetation and greenification work.

63 Supreme Administrative Court Judgment 2010/450 (99年度判字第450號)；High Administrative Court Judgment 2008/00112 (97年度訴字第00112號).

64 High Administrative Court Ruling 2005/4 (94年度停更一字第4號).

65 If a government entity at any level is negligent in enforcement, persons or public interest groups may, in accordance with laws and regulations, name said competent authority as a defendant and directly file a lawsuit with the Administrative Court.

66 For those competent authorities that have still failed to carry out implementation in accordance with the law within sixty days after receipt of the written notification, the victims or public interest groups may name the competent authority at issue as a defendant and directly file a lawsuit with an administrative court based on the negligent behaviour of the competent authority in fulfilling its implementation duties in order to seek a ruling ordering the competent authority to carry out implementation.

67 High Administrative Court Judgment 2008/1170 (97年度訴字第1170號).

68 High Administrative Court Judgment 2009/00504 (98年度訴字第 00504號).

69 High Administrative Court Judgment 2004/02614 (93年度訴字第02614號).

70 High Administrative Court Judgment 2008/01418 (97年度訴字第01418號)；Supreme Administrative Court Judgment 2009/117 (98年度判字第117號).

3. The Legal reality of the BEA: Judge's position

In the previous part, it seems that in spite of the concentration on the use of Articles 1 through 4 of the BEA, in general, either plaintiffs or defendants in many environmental cases try to give reference to the BEA as their legal basis. From the statistic in Table 1, the court's attitude appears to be "no condemnation in spite of accusation". The judge only takes into account and replies to the accusation in 83 cases (out of the 134 cases). If the 51 similar cases are taken into account, then the court's response rate to the BEA is even lower than 1/2. (83-50/134-50=33/84)

3.1 Court's general opinion towards the BEA

The cornerstone principles concerning the legal effects of the BEA have been clarified in the 51 similar cases and other cases. These cases indicate that a judge's stance on the related provisions in the BEA, including Articles 2, 3, 4, 28 and 47, is that they have merely a policy declaration function. These provisions do not confer any specific legal right or legal interests of citizens,[71] nor do they give citizens any legal right of claim.[72] Thus, in order to claim the right to legal standing, the citizen is required to prove damages under not only the BEA but also some other "substantive" act.[73] Thus, a successful legal claim for compensation for loss of money, life, goods, or other property or right, in the form of money or other remedy, should not be based purely on the BEA.[74]

However, there are also other less clear messages in court judgments or rulings. In many cases, the court may re-state the *plain* provisions of the BEA and refer to the BEA's provisions in the judge's ruling or judgment.[75] [76] It is unknown how these provisions affect their final judgment or ruling. For instance, in these cases, the court just referred to Articles 1 to 3 of the BEA and then Articles 7 and 24,[77] and then proceeded to state the final holding without expounding upon the relationship between the BEA provisions and the judicial holding. Therefore, it is unclear how the BEA provisions affect the judgments.

3.2 Court's Opinion on the Provisions of the BEA

To put it more specifically, the claim of standing based on Article 2 is weak. Such reasoning from judges was used to reject the *standing* of citizens to launch legal suits to claim their direct interests in the aforementioned historical monuments rulings.[78] (See Section II.1.(1) of this article.).

71 High Administrative Court Ruling 2007/00095 (96年度停字第00095號); High Administrative Court Judgment 2004/23 (93年度訴更字第23號).

72 High Administrative Court Ruling 2007/00081 (96年度停字第00081號); High Administrative Court Judgment 2004/23 (93年度訴更字第23號)；High Administrative Court Judgment 2003/374 (92年度訴字第374號).

73 High Administrative Court Ruling 2007/00081 (96年度停字第00081號); High Administrative Court Ruling 2007/01979 (96年度裁字第01979號).

74 Supreme Administrative Court Judgment 2005/729 (94年判字第 729 號).

75 Supreme Administrative Court Judgment 2012/55 (101年度判字第55號); High Administrative Court Judgment 2010/658 (99年度訴字第658號); High Administrative Court Judgment 2011/598 (100年度訴字第598號).

76 Supreme Administrative Court Judgment (101年度判字第973號); Supreme Administrative Court Judgment (101年度判字第55號).

77 Supreme Administrative Court Judgment 2012/973 (101年度判字第973號).

78 High Administrative Court Ruling 2007/00095 (96年度停字第00095號).

With regard to Article 3 and the polarized opinion of its legal interpretation, the court begins by adopting the position that Article 3 of the BEA should not be interpreted in a way that makes the environment the first priority. Instead, the BEA should be interpreted together with the Constitutional "equal treatment clause", which means economic development should be given the same value as environmental protection.[79] If the measure at hand could be beneficial to the environment, there is no way to infringe the second paragraph of Article 3. (However, in the event that economic, technological, or social development has a seriously negative impact on the environment or endangers the environment, the protection of the environment shall prevail).[80] (For further detail regarding the claim, see section II.1.(2) of this article.)

As for the allocation of responsibility between polluters and the government, as described in Article 4(2)(3), the judge considers that the determination of "polluter" should take into account both Article 4(2) and other substantive rules.[81] This opinion also responds to the supplementary function of the BEA in determining the substantive legal claim. Furthermore, in a case with both polluters and the government, the court exempts the government and holds that "[t]he owners of the land that has been fly-tipped with gross negligence" should be held liable.[82] Apart from these court opinions, some judges merely repeat the relationship between Article 4(2) and 4(3) in a plain way: the government should be held liable for the damage when the real polluter is unknown.[83]

Finally, for the rest of Articles cited by the plaintiffs and defendants, the court provides these further opinions:

> 1. Article 34:[84] When bringing an Environmental Citizen Suit, it is not necessarily only the "victim citizen" who has such right to sue. In spite of the fact that some citizens have not been harmed by environmental damage, they are also eligible and have standing to bring the Citizen Suit.[85] (Yet, it should be noted that the right to bring an Environmental Citizen Suit still relies on the individual substantive law's provisions, such as that in the Air Pollution Control Act.[86] Thus, such reasoning still conforms to the judge's attitude of the BEA's *supplementary* role in conferring legal standing.)

79 Supreme Administrative Court Judgment 2012/55 (101年度判字第55號).
80 Supreme Administrative Court Judgment 2012/55 (101年度判字第55號).
81 High Administrative Court Ruling 2006/02127 (95年度裁字第02127號).
82 High Administrative Court Judgment 2010/268 (99年度訴字第268號).
83 Supreme Administrative Court Judgment 2005/729 (94年判字第 729 號) .
84 If a government entity at any level is negligent in enforcement, persons or public interest groups may, in accordance with laws and regulations, name said competent authority as a defendant and directly file a lawsuit with the Administrative Court.
85 High Administrative Court Judgment 2011/598 (100年度訴字第598號).
86 Article 81 of the Air Pollution Control Act:"When a public and private premises violates this Act or related orders determined pursuant to the authorization of this Act and the competent authority is negligent in enforcement, victims or public interest groups may notify the competent authority in writing of the details of the negligent enforcement. For those competent authorities that have still failed to carry out enforcement in accordance with the law within sixty days after receipt of the written notification, the victims or public interest groups may name the competent authority at issue as a defendant and file a lawsuit directly with an administrative court based on the negligent behaviour of the competent authority in the execution of its duties in order to seek a ruling ordering the competent authority to execute its duties".

2. Article 24 of the BEA and the Environmental Impact Assessment Act: During the screening process, the government's duty and role under the EIA process established in Article 24[87] would justify parties in the case in question conducting a more complex form of environmental impact assessment under the Environmental Impact Assessment Act.[88] Under this court opinion, the court just refers to BEA as *supplementary* proof of its opinion on the screening process under the Environmental Impact Assessment Act.

4. Conclusion

From the analysis of this article, we can identify a huge gap between the expectation and the judges' positions toward the BEA. For instance, the most cited provisions, such as Articles 2, 3, 28 and 4(2)-(3), may only have suggestive effects, instead of legal binding effects. Apparently, the real effect of the BEA in the mind of many judges is not as strong as expected by interested persons and environmental non-governmental organizations. More critically, the main purpose of the BEA is to address and control environmental pollution, but it has resulted in unnecessary legal battles and confusing legal precedents instead.

Even if the original purpose of the BEA was merely to address environmental governance by moving beyond the traditional and narrower approach of pollution-oriented and sector-specific legislations, the real effects, particularly the "legal" effects seem to be weak in the court's view. The opinion in large number of cases suggested that the BEA may only have a supplementary function to other "substantive" environmental law. It seems the original purpose behind BEA has not been achieved. Whether the litigation process will result in the functional disappearance of the BEA remains to be seen.

Yet, the practical weakening of the BEA does not mean it cannot have other effects, such as political effects in individual cases. In fact, its potential political effects could be strongly correlated to the policy-oriented nature of the BEA. In spite of the potential political effects of BEA, this author would contend that the BEA may only play a supplementary role in policy decisions rather than a primary role, just as its "legal" role has been largely supplementary rather than substantive. Taking the recent anti-nuclear activities as an example, I discovered a trend in which NGOs attempt to bypass the nuclear free home land clause[89] in the BEA and use the Referendum Act[90] approach instead.[91] It is clear that when talking about the political effects, resorting to public poll or populist ideas could draw more attention than relying on the BEA. Therefore, no matter how high the expectations of the BEA may be, in reality it seems that the BEA occupies only a weak position in environmental governance.

87 The central government shall establish an environmental impact assessment system to prevent and reduce the negative impact of government policies or development activities on the environment.

88 High Administrative Court Judgment (96年度訴更二字第32號) .

89 Article 23 of the BEA: "The government shall establish plans to gradually achieve the goal of becoming a *nuclear-free country*. The government shall also strengthen nuclear safety management and control, protections against radiation, and the management of radioactive materials and monitoring of environmental radiation to safeguard the public from the dangers of radiation exposure".

90 Referendum Act, 2009.06.17, available at: http://law.moj.gov.tw/Eng/LawClass/LawAll.aspx?PCode=D0020050.

91 E.g., Et-today News, DPP promotes the Nuclear Free Homeland via the approach of Citizen Actions and Proposing related Draft Bills, available at: http://www.ettoday.net/news/20130108/149716.htm.

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Principle 10 and Developments in Asia

Noriko Okubo

Abstract

This paper discusses the legal developments of Principle 10 of the Rio Declaration (Participation Principle in environmental matters) in Asian countries. This Principle could also contribute to ensuring the environmental rule of law. However, implementing Principle 10 depends on the social and cultural conditions of each country and area. Therefore, it is important to analyze the common characteristics and issues of each region, and to share good practices. In many developing countries in Asia, participation rights have been strengthened dramatically since 20 years. In contrast to this rights-based approach, it is a characteristic of Japan to adopt a kind of voluntary-based approach and to have many experiences in environmental education. It may be important to combine appropriately the rights-based approach and the voluntary-based approach in Asia. In this sense, it would be useful to consider fostering Principle 10 by a regional instrument in Asia, such the Aarhus Convention in the UNECE region.

Keywords: Principle of Participation, Access to Justice, Voluntary Based Approach

1. Developments in international schemes

Public participation is essential to the promotion of sustainable development. As Principle 10 of the Rio Declaration of 1992 states, environmental issues are best handled with the participation of all concerned citizens, at the relevant level. Public participation contributes to the protection of the right to live in a healthy environment which is a fundamental human right. It is also an important instrument of "environmental democracy". Due to the limited resources of public administrations, public participation is indispensable for better policy decision-making and for effective implementation of environmental law. In addition, public participation from the earliest stage promotes public acceptance of the environmental policy and leads to a reduction in conflicts later.

In order to accelerate action in terms of implementing Principle 10, the United Nations Economic Commission for Europe (UNECE) on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters was adopted in 1998 in the Danish City of Aarhus, and hence is known as the Aarhus Convention. It requires parties to guarantee the procedural rights of access to information, public participation in decision-making, and access to justice. Effective public participation depends on full, accurate, and up-to-date information. Access to justice ensures that participation occurs in reality and not just on paper.[1] Therefore, it is important to guarantee these three access rights in an integrated way. Here, the author call them jointly the "Green Access Rights".

1 UNECE, 2014.

The Aarhus Convention is open to any state to join. As of 16 January 2015, however, all 47 Parties were from the UNECE region. The Governing Council of the United Nations Environment Programme (UNEP) adopted the Guidelines for the Development of National Legislation on Access to Information, Public Participation, and Access to Justice in Environmental Matters (the Bali Guidelines) on February 26, 2010 in order to promote Principle 10. Like the Convention, these Guidelines have three pillars. However, their content is much-more abstract and gives more flexibility and discretion to legislators. In this sense, the Guidelines focus particularly on developing countries[2] and emphasize the importance of capacity building within each pillar. Although the Bali Guidelines are not legally binding, Japan should also respect them, especially as a then member of the Governing Council. The importance of Principle 10 was also reaffirmed in Articles 43 and 44 of the Rio+20 outcome document, entitled "The Future We Want".

The measures and methods used to implement Principle 10 differ from country to country. They depend on the social and cultural conditions of each country and region. They vary depending on the field, as well as the social and cultural conditions. Therefore, it is important to make a comparative study of the various countries and regions, and to share their good practices. The Latin-American and Caribbean countries, for example, are now planning to have their own regional instrument in relation to Principle 10 in the framework of the Economic Commission for Latin America and the Caribbean (ECLAC).[3] In contrast, there has been no movement in Asia until now to have its own regional instrument on the Green Access Rights. Even though there have been remarkable developments in the environmental law in this region following the Rio Summit of 1992[4], the problem of deficient implementation still remains. There are various reasons for that, such as the lack of detailed regulation, insufficient financial resources, and corruption among officials.[5] The guarantee of the Green Access Rights could contribute also to improving the effectiveness of the law and to ensuring the environmental rule of law through the involvement of the public in this process.

In Asian countries, the Green Access Rights have been strengthened dramatically in the last 20 years. In some countries, for example, environmental courts have been established.[6] In order to promote this tendency, it is very important to analyse and discuss the common characteristics and issues of each region and to share those good practices. In the following sections, this article aims to analyse the recent remarkable developments with regard to Principle 10 in Asian countries, focusing on legal systems promoting public participation and access to justice because legal systems on access to information are relatively similar in comparison with the other two pillars.

2. Developments in the reform of environmental law and public participation after 1992

2.1 Constitutional provision of the environmental right and participation principle

2 See UNEP HP at <http://www.unep.org/civil-society/Implementation/Principle10/tabid/105013/Default.aspx> (last accessed on March 5, 2015).

3 Declaration on the application of Principle 10 of the Rio Declaration on Environment and Develop ment (A/CONF.216/13), available at <http://www.cepal.org/rio20/noticias/paginas/3/54423/Declaracion-eng-N1244043.pdf> (last accessed on March 5, 2015). See also CEPAL HP at < http://www.cepal.org/cgi-bin/getprod.asp?xml=/rio20/noticias/paginas/8/54448/P54448.xml&xsl=/rio20/tpl/p18f.xsl&base=/rio20/tpl/ top-bottom.xsl> (last accessed on March 5, 2015).

4 Okubo, 2005.

5 Sakumoto, 2011.

6 Pring and Pring, 2009.

The environmental right to live in a healthy environment is guaranteed nowadays by constitutions, case law, and the particular environmental laws of many countries. The Aarhus Convention assumes the recognition of environmental rights and aims at contributing to their effective guarantee through the Green Access Rights, UNECE, 2014.

Constitutions in Asian countries include various provisions about environmental protection, such as environmental rights and the obligation of the state or the people to protect the environment. Even though these constitutions guarantee environmental rights, they are normally expressed very simply. For example, Article 35 of the Constitution of the Republic Korea states that "all citizens shall have the right to a healthy and pleasant environment" (paragraph 1), and "the substance of the environmental right is determined by act (paragraph 2).

In South Asian countries, environmental rights may be guaranteed as a part of the right to life by case law.[7] For example, India's Constitution actually establishes the obligation of the state (Article 48A) and the citizens (Article 51A) to protect the environment and contains no explicit provisions on environmental rights. But judicial precedents have established the interpretation that environmental rights are included in the right to life in Article 21, and courts have ruled that in the event of the pollution of an environment essential to maintaining quality of life, people have the right to demand that such pollution be eliminated under Article 32. Recognizing environmental rights as basic human rights, therefore, has made it possible to use constitutional lawsuits to address environmental damage. Article 32 empowers the Supreme Court to issue the appropriate direction, order, or writ of mandamus, and other rules to address infringements of constitutionally guaranteed human rights. These provisions have been used in a growing number of cases to seek redress in the courts against violations of environmental rights.[8]

In contrast, the 2007 Constitution of Thailand had various and detailed provisions, such as a community right to participate in the management of natural resources and the environment (Article 66), the setting up of a natural resource management plan with public participation (Article 85), and the participation of the public in local environmental management (Article 290). In particular, Article 67 guaranteed the public's right of participation in the conservation of the environment and the right of a community to sue a government agency. It stated also that any project or activity which may seriously affect a community's environmental quality is not permitted without the conducting of an EIA (Environmental Impact Assessment), a HIA (Health Impact Assessment) with a public hearing, and a hearing of an independent organization, including representatives from environmental NGOs.

This provision has played a paramount role in the case of Map Ta Phut, one of the biggest industrial parks in Rayong Province.[9] Despite the serious air and water pollution involved, the government announced the third development plan, with 76 new projects earmarked for this area, in 2007. The local network of residents litigated against the National Environmental Council. The administrative Court of Rayong Province ordered the council to designate this area as a pollution regulation area (March 3, 2009). However, new projects did not stop after the area designation. Therefore, the Stop Global Warming Association and local people sought an injunction to prevent them. The plaintiffs insisted

7 Razzaque, 2004; Dutta, 2015.
8 Ito, 2006.
9 Muanpawong, 2015; Miyakita, Nakachi, Hanada, et al., 2011.

that it was unconstitutional to carry out these projects without the EIA and HIA procedures, as required by the Constitution of Thailand. On September 29, 2009, Thailand's Central Administrative Court issued a temporary suspension order, and the Supreme Administrative Court also issued temporary suspension order (592/2009) for 65 projects (December 2, 2009).

2.2 Reform of environmental law after the Rio Summit and public participation

Since the Rio Earth Summit, there have been remarkable reforms and developments of environmental laws, including provision for public participation, in Asian countries. Many Central and West Asian countries have already ratified the Aarhus Convention (e.g., Kazakhstan and Armenia etc.). Even though no countries in other parts of Asia are yet party to this Convention, the implementation of Principle 10 has been strongly promoted in wider regions for the last two decades, and now some countries in East and Southeast Asia are interested in ratifying it.

First, some countries have introduced the provision for public participation principle in their principle environmental laws. For example, in Thailand, the Enhancement and Conservation of National Environmental Quality Act, B.E.2535 (1992)[10], guarantees the right to be informed in order to lodge a complaint against the offender for the purpose of public participation (Section 6). In Indonesia, the law concerning environmental protection and management (Law No. 32/2009)[11] enshrines the right to the environment as a part of human rights (Article 3, g. and Article 65(1)). Chapter X provides several relevant provisions on rights, obligations, and prohibitions. Article 65 (2), in particular, states that "everybody shall be entitled to environmental education, information access, participation access and justice access in fulfilling the right to a proper and healthy environment". It is characteristic of this law that it assures the right to submit an objection to any business predicted to affect the environment, and to report the alleged consequences of environmental pollution (Article 65 (3), (5)). In addition, Article 66 ensures that anybody struggling for the right to a proper and healthy environment may not be charged with a criminal or civil offense. This could contribute to an effective guarantee of participation rights.

In East Asia, the new Environmental Protection Law of the People's Republic of China (2014)[12] reflects a remarkable development. There is a special chapter for access to information and public participation (Chapter 5). According to Article 53, citizens, legal entities, and other organizations have the right to obtain environmental information, and participate in and supervise the activities of environment protection in accordance with the law. In addition, competent environmental protection administrations are obliged to improve public participation procedures and to facilitate citizens' participation in, and supervision of, environmental protection work. It is a common trend of European law to

10 The text of this law is available in English at <http://www.pcd.go.th/info_serv/en_reg_envi.html> (last accessed on March 5, 2015).

11 The text of this law is available in English at < http://faolex.fao.org/docs/pdf/ins97643.pdf#search='Indonesia%2C+the+law+concerning+environmental+protection+and+management'> (last accessed on March 5, 2015).

12 The English version of this law compiled by EU is available at <https://www.chinadialogue.net/Environmental-Protection-Law-2014-eversion.pdf#search='Environmental+Protection+Law+of+the+People%E2%80%99s+Republic+of+China'> (last accessed on March 5, 2015). See also Wang, 2015.

specify an organization explicitly as the subject of participation rights. More concretely, Chapter 5 includes provisions for access to information held by an administration (Article 54), access to emissions information held by the business sector (Article 55), participation in EIA procedures (Article 56), the right to complain about environmental pollution (Article 57), and access to justice for social organizations (Article 58).

The number of Strategic Lawsuits Against Public Participation (SLAPPs)[13] has increased in some Asian countries.[14] It is a civil complaint or counterclaim filed against non-governmental individuals or groups because of their communication to a government body or the electorate on an issue of some public interest or concern. Therefore, it is important to specify the right to lodge a complaint.

Second, there are some countries that specify the role of environmental NGOs and promotion of its activities. From this viewpoint, the Enhancement and Conservation of National Environmental Quality Act in Thailand establishes a registration system for environmental NGOs and provides a register of NGOs that have received government assistance or support. The requirements for the registration are not strict: a) having the status of a juristic person; b) being directly engaged in environmental activities and; c) being apolitical or non-profitmaking (Section 7). According to Section 8, the registered NGOs may request of the government the various supports for a public relations campaign, environmental research, and providing legal aid to victims of pollution, etc. In addition, it is unprecedented that they may nominate private sector representatives for the National Environment Board (Section 8).

Third, it is a common characteristic of several Asian countries to strengthen and uphold the rights of communities in relation to environmental matters. Thailand specified this in its 2007 Constitution. In Indonesia, the law concerning environmental protection and management states that communities have the equal and broad right and opportunity to participate actively in environmental protection in the form of social control, providing suggestions, opinions, or recommendations, making objections or complaints, or providing information or reports (Article 70). This law also ensures the participation of communities in the EIA and the SEA (Strategic Environmental Assessment) (Article 18, 26). The notion of communities here is a wide one. It includes not only the affected communities, but also the environmental activists or parties affected. Moreover, Article 26 states that the involvement of communities should be based on the principle of provision of information transparently and completely. Finally, Article 91 ensures the right of communities to file class actions in their own interests or the public interest in relation to issues of environmental pollution or damage.

The Aarhus Convention and the Bali Guidelines do not specifically mention communities' rights. However, the definition of the public according to the Convention is extensive and also includes communities. Nevertheless, the importance of the community-based approach in Asian countries should be noted.

2.3 EIA and public participation

The formality of public participation has been always criticized not only in Asian countries, but also in other regions, and meaningful and proactive measures for public

13 Pring, 1989.
14 Preston, 2013.

participation have been sought. The Aarhus Convention requires parties to ensure they challenge the substantive and procedural legality. This could contribute to improving the process of public participation. Guideline 9 of the Bali Guidelines states that countries should seek proactive public participation in a transparent and consultative manner.

There have been some remarkable developments in EIA law in Asia in this context. For example, India revised its Environmental Impact Assessment Notification in 2006.[15] It replaced the former public hearing with a public consultation. Key stakeholders, including gram panchayat (village councils), women, marginal groups, and community-based organizations are identified. The entire process is video recorded to ensure a fair process.

In Taiwan, the 2003 revised EIA Act[16] also strengthened the provision for public participation.[17] According to Article 11, the developer prepares a draft environmental impact assessment report based on the opinions of the competent authority, experts, groups, and local residents. The EIA Act also includes a provision for a citizen lawsuit that is similar to the US scheme (Article 23).

In September 2007, the Kaohsiung High Administrative Court ruled that the Taitung County government should force the developer of a tourist resort stop construction (the Mira Bay case).[18] This action was a public interest lawsuit brought by the Taiwan Environmental Protection Union, a leading environmental organization in Taiwan, and the reason for the court's decision was that the project had not undergone the requisite procedures based on the environmental impact assessment law. Many such lawsuits had been filed before, but this was Taiwan's first environmental public interest lawsuit in which the plaintiffs were victorious. However, the development project in the Mira Bay area has not been abandoned. There is still a pending case in the court.

Another important EIA case relates to the development plan for the Third Central Science and Industrial Park. The local residents and an environmental NGO filed a suit against the Environmental Protection Administration, Executive Yuan, they insisted that it was illegal because the risk assessment had been insufficient. In January 2010, the Supreme Administrative Court judged this EIA procedure to be invalid. However, the administration did not follow the judgment and continued to promote the development plan. The plaintiffs complained that this was a denial of the rule of law. Thus, there is an intense debate about the effectiveness of the EIA in Taiwan.[19]

3. Access to justice and the establishment of the environmental courts

3.1 Expansion of the legal standing and introduction of public interest litigation

There has been a clear tendency in Asia since the 1992 Rio Earth Summit to introduce legislation enabling public interest litigation. In the late 2000s, access to justice was significantly strengthened not only through the expansion of legal standing (locus standi), but also through the introduction of various new types of litigation and

15 S.O.1533(E), Environmental Impact Assessment Notification (14/09/2006).

16 The text of this law is available in English at < http://db.lawbank.com.tw/Eng/FLAW/FLAWDAT01.asp?lsid=FL016236> (last accessed on March 5, 2015).

17 Terao, 2011.

18 See also Yeh, 2010.

19 Lin, 2010.

improvement of provisional remedies. In addition, recently more countries have established an environmental court or specialized environmental divisions.

3.1.1 Southeast Asia

First, standing was expanded by case law in the Philippines in the 1990s. A well-known landmark decision was the Oposa case[20]. A group of children, including those of renowned environmental activist Antonio Oposa, brought the lawsuit to stop the destruction of the rain forests. The plaintiff children based their claims on the constitution, which recognizes the right to a "balanced and healthful ecology". The Supreme Court ruled that there was an intergenerational responsibility to maintain a healthy environment and that children might sue to enforce that right on behalf of both their generation and future generations.

Indonesia has institutionalized its public interest litigation procedures by legislative measures.[21] Indonesia's Law Concerning Environmental Management (1997) introduced the concept of the class action. Subsequently, the class action system was incorporated into the Law on Consumer Protection (Law No. 8 of 1999, Article 46), the Act on Forestry (Law No. 41 of 1999, Article 71), the Act Regarding Waste Management (Law No. 18 of 2008, Articles 36 and 37), and others. However, most lawsuits were dismissed because of the lack of procedural rules. On April 26, 2002, the Supreme Court promulgated the "Regulation of the Supreme Court of the Republic of Indonesia Concerning Class Actions". Subsequently, there have been some cases concerning pollution by haze and the conservation of cultural assets.

Chapter 13 of the current Law Concerning Environmental Management provided rich provisions on alternative dispute resolution (ADR) and litigation. The law gives community members the right to bring lawsuits for their own or the community benefit when they have suffered losses from pollution or environmental damage. In this event, "class action may be submitted in the case of representatives of groups and members of their groups sharing the same fact or incident, legal basis as well as kind of demand" (Article 91). Within the framework of executing responsibility for environmental protection and management, environmental organizations may reserve a right to file lawsuits in the interest of environmental conservation. There are requirements to qualify as an environmental organization. It is required that the organization is incorporated and its memorandum of association state that environmental conservation is the purpose of the organization's founding. In addition, the organization must have had at least two years of substantive activities (Article 92). These requirements are not so strict that they are similar to many European countries. As regards administrative lawsuits, it is remarkable that everyone has the right to bring them relating to incomplete documents for environmental impact assessment procedures, based on the Administrative Procedure Act (Article 93).

3.1.2 South Asia

Initiatives to use environmental public interest lawsuits have been spreading to countries around India, including Pakistan and Bangladesh, and one can discern a trend in the courts compensating for legislative and administrative dysfunction.

20 Oposa et al. v. Fulgencio S. Factoran, Jr. et al., G.R. No.101083 (S.C. July 30, 1993).
21 Sakumoto and Nyoman Nurjaya, 2010.

India is one of the countries where public interest lawsuits have been most used[22], and the courts play an important role not only in the environmental field, but also in protecting workers, women, and the other weak members of society. India's public interest lawsuits are constitutional lawsuits based on the constitution's provisions for protecting human rights. As mentioned above, Article 32 empowers the Supreme Court to issue the appropriate directions, orders for mandamus, and other orders to address infringements of constitutionally guaranteed human rights. These provisions have been used in a growing number of cases to seek redress in the courts against violations of environmental rights.

The characteristics of India's constitutional lawsuits[23] are, first, that even if a person cannot be regarded as a direct victim, plaintiff standing is broadly recognized for people who have a sincere concern for environmental protection. Second, courts issue orders to rectify unconstitutional and illegal actions by administrative authorities, and continually monitor the execution of those orders. In case of noncompliance, it is possible to guarantee their effectiveness by imposing penalties for contempt of court. Third, courts do not simply guarantee that existing environmental laws are observed. When environmental laws are inadequate, they can also take measures such as issuing guidelines to follow until new legislation has been passed, thereby performing a partial legislative function. Fourth, the avenue of judicial redress is opened broadly even to victims with no knowledge of lawsuit procedures. For example, a lawsuit might be initiated by the arrival at the Supreme Court of a letter which makes a plea about the tragedy of environmental damage.

While the use of public interest lawsuits goes back to the mid-1970s, environmental public interest lawsuits appeared in the mid-1980s. This was because increasingly serious political corruption and environmental problems had become the order of the day. Although public interest lawsuits in India had played a significant role in providing relief for the weak of society, those most harmed by environmental damage were the low-caste poor and forest-dwelling tribal peoples. After being discouraged by laws and administrative authorities, people held higher expectations for the courts as their only remaining redress. At this time, most important environmental lawsuits are public-interest lawsuits whose plaintiffs are environmental lawyers, and their judgments contribute greatly to the formation of environmental law.

There have been many notable decisions involving water pollution. In one case, for example, M. C. Mehta brought a suit against the Indian government and the many tanneries that were the primary cause of the Ganga River's pollution and demanded a ban on their discharging of effluents. The Supreme Court recognized a violation of the Water (Prevention and Control of Pollution) Act, criticized administrative officials for not using their regulatory authority, and ordered the closure of at least 80 tanneries that lacked effluent treatment facilities.[24] With the coming of the 1990s, Mehta filed a lawsuit to get administrative authorities to take action against people living along the Ganga River for disposing of municipal and human waste in the river. The court ordered the government to have all educational institutions provide environmental education.[25]

22 Razzaque, 2004.
23 Ito, 2006.
24 M.C. Mehta v. Union of India (1987) 4 S.C.C. 463.
25 M.C. Mehta v. Union of India [(1988) 1 SCC 471, AIR 1988 SC 1115].

3.1.3 East Asia

The introduction of environmental public interest lawsuits in East Asian countries has been slow relative to the rest of Asia. No environmental public interest litigation has been introduced in Japan[26] or in the Republic of Korea.

But Taiwan has introduced a citizen lawsuit system.[27] In conjunction with the rapid advance of democratization in the 1980s, environmental NGOs lobbied vigorously to have the US citizen suit system introduced into Taiwan, and thanks to their efforts, the 1998 amended Clean Air Act became Taiwan's first law to include provisions for citizen lawsuits. Subsequently, similar provisions for citizen lawsuits were incorporated into the Clean Soil and Groundwater Law and the Basic Environment Law. In more recent times, almost all new environmental laws contain provisions which allow for administrative lawsuits seeking injunctions to be filed compelling administrative agencies to enact the necessary measures against polluters.

Although the legal provisions underlying Taiwan's public interest lawsuits are influenced by US law, there are differences in the areas of plaintiff standing and cause of action. Under Taiwan's system, only victims and public interest organizations, and Environmental NGOs can initiate actions against environmental administrative agencies for inaction on all environment-related regulatory measures when administrative authorities have not properly controlled illegal acts.

In China, environmental public interest litigation has begun attracting attention since the 1990s.[28] In 2005, the State Council decided to promote the concept of environmental public interest litigation by social associations. Some cities, such as Guiyang City, have allowed the public prosecutor or NGOs to bring public interest cases to court based on the local by-laws or the opinion of the People's Court on a trial basis over the last few years. Moreover, the 2012 revised Civil Procedure Act allows relevant bodies and organizations prescribed by the law to bring a suit to the People's Court against such acts as environmental pollution, the harming of consumers' legitimate interests and rights, and other acts that undermine the public interest (Article 55). However, associations that fill the necessary legal requirements have been very limited in number.

The new environmental Protection Law of 2014 has entitled certain social organizations to file cases at the People's Court (Article 58).[29] Such qualified NGOs should meet the following requirements: (1) be registered with the civil affair department of the people's government at or above municipal level with sub-districts, in accordance with the law; and (2) have specialized in environmental protection public interest activities for five consecutive years or more, and have no law violation records. From the viewpoint of protecting the public interest, social organizations that file cases may not seek economic benefits from the litigation. In the past, there has been criticism that the courts sometimes have just rejected the new type of the case without providing a substantial review. It is remarkable that this article obliges the courts to accept cases filed by social organizations that meet the above criteria.

26 Böhm and Okubo, 2007.
27 Yeh, 2010.
28 See Wang, 2013.
29 See also Wang, 2015.

The requirements for the standing of NGOs seem rather strict. First, it is not easy to be registered. Second, the criteria for 'five years' activities' is more stringent than in many European countries. Third, the extent of the violation records is not clear. Therefore, the effectiveness of this new provision should be observed carefully. The Supreme People's Court issued its opinion concerning the strengthening of environmental litigation (in June 2014), and the interpretation of the application of environmental civil public interest litigation. The latter includes guidelines for the requirements of acceptance, announcement of the action, intervention, support of the public prosecutor, etc.

It is a common view that the Environmental Protection Law consolidates the requirements for environmental civil public interest actions, and it does not allow environmental administrative public interest activities. In November 2014, the Administrative Litigation Procedure Act was revised to expand the standing. However, the possibility of administrative public interest action has not been introduced. In China, it is commonly recognized that ensuring the administration's execution of the law is the role of the public prosecutor only. In some provinces, such as Guizhou Province, the public prosecutor is entitled to bring environmental administrative public interest actions. Therefore, it is likely that China in the near future will admit the standing of the public prosecutor at a national level. In other regions, for example, Brazil, standing is given not only to NGOs, but also to the public prosecutor who has litigated in most public interest cases.In this sense, it is not unusual to give the standing for administrative cases to the public prosecutor. However, it would be characteristic of China if it only gave it to the public prosecutor.

In contrast to Taiwan and China, the situation regarding access to justice has become deadlocked in Japan and the Republic of Korea. According to Korean case law, the standing for the EIA case has been admitted by the local people and the NGOs in the environmentally affected area. Plaintiffs may challenge the legality of the development project not only from the viewpoint of their own interest, but also in order to protect nature, such as in the Saemangeum dam case and the Four Great Rivers case. Any action by the plaintiffs plays a partial role as a public interest litigation.

3.2 Environmental courts and special procedures for environmental cases

As mentioned above, public interest litigation procedures have been utilized to some extent in many Asian countries. Standing has been one of the most difficult barriers for the effective guarantee of access to justice. However, it is not the sole problem. After expanding the standing concept, some countries have begun to improve their judicial review processes. Capacity building for judges is also one of the critical issues for the proper review of technical issues. Thus, several Asian countries have established an environmental court or a specialized division (e.g., China, India, Philippines and Thailand), and adopted a special procedure for environmental cases (e.g. India, Philippines and Thailand) over the last 10 years.

First, India has established the National Green Tribunal (NGT) based on the National Green Tribunal Act of 2010.[30] It consists of a judicial member and an expert member (Chapter 2). According to Article 16, any aggrieved person has standing. Although it seems at a glance that this act adopted the narrower approach to standing than case law, case law still allows standing to apply widely to communities and NGOs. Any person aggrieved by a decision of the tribunal may file an appeal to the Supreme Court (Article 21).

30 See also Dutta, 2015.

The court applies the principles of sustainable development, the precautionary principle, and the polluter pays principle. But there are no detailed rules for the application of these principles.

As it is a new system, its effectiveness should be observed. The Green Tribunal has already made several remarkable rulings. For example, on 16 April, 2013, it held that the purpose of public hearings was to involve members of the public in order to have their full participation, and the procedure was intended to render the decision fair and participative and not to thrust such a decision on people who may be unaware of the implications thereof.[31]

The judicial system in Thailand is a so-called dual system. The Court of Justice has jurisdiction over environmental civil and criminal cases, and the Administrative Court has jurisdiction over environmental administrative cases. The Supreme Court of Justice deals with between 200 and 300 environmental cases annually. In 2011, the environmental division was established for the purpose of specifying the contentious issues, expanding standing and capacity building for judges in environmental matters. It also issued the Guidelines for Environmental Litigation (9 March, 2011). These include provisions on such issues as the precautionary principle, provisional remedy, and *ex officio* status.

According to the Act on Establishment of Administrative Court and Administrative Court Procedure of 1999 (Administrative Court Procedure Act)[32], there are two instances in which the administrative court deals totally with several thousand environmental cases. On 29 June, 2011, the Supreme Administrative Court announced the "Recommendation of the President of the Supreme Administrative Court on Administrative Court Procedure concerning Environmental Issues". It provides various special measures for environmental cases, such as expanding standing, providing a provisional remedy without any application made by the plaintiff (Clause 4), and a supplemental judgment for future damages (Clause 12). Although, in general, a person who is aggrieved or who may inevitably be aggrieved has standing in other administrative cases (Section 42 of Administrative Court Procedure Act), the Supreme Court has interpreted this widely. The Guidelines also recommend to interpret standing with respect to community rights, the rights of indigenous people, and NGOs, all of which have environmental interests (Clause 3). Thus, environmental NGOs have brought public interest cases to the administrative court. In addition, 11 specialized environmental divisions have been established since 2011 at provincial and national level.

Third, the Philippines' Supreme Court has designated the 117 ordinary courts as environmental courts in order to protect environmental right effectively. In 2010, the Supreme Court issued the "Rules of Procedure for Environmental Cases".[33] These provide various innovative measures, such as citizen lawsuits, environmental protection orders, a Writ of Kalikasan, continuing mandamus, and anti-SLAPP clauses.

A Writ of Kalikasan is a remedy available to a natural person, NGO, or any public interest group on behalf of a person whose constitutional right to a balanced and healthful ecology is violated, or threatened with violation, by an unlawful act or omission of a public

31 Hon'ble National Green Tribunal, Jeet Kanwar & Anr. vs. UoI & Anr. [Appeal No. 10/2011].

32 See also the Administrative Court of Thailand, 2007. See also Muanpawong, 2015.

33 A.M. Np.09-6-8-SC. See Rationale to the Rules of Procedure for Environmental Cases and Annotation to the Rules of Procedure for Environmental Cases. See also Casis, 2010; Davide and Vinson, 2010; Ramos, 2011; Ramos, 2013; Okubo 2014a.

official, private individual, or entity, involving environmental damage of such magnitude as to prejudice the life, health, or property of inhabitants in two or more cities or provinces (Part III, Rule 7).

Continuing mandamus is a writ issued by a court in an environmental case, directing an agency or instrument of the government or officer thereof to perform an act decreed by a final judgment, which remains effective until the judgment is fully satisfied. It is in line with the ruling in the Manila Bay case, where the respondents were ordered to maintain a fund for the restoration and rehabilitation of Manila Bay. The court in the Manila Bay case did not specify an amount for restoration, but instead ordered the respondents to restore and rehabilitation Manila Bay whatever the costs.[34] It could contribute to improving on the inadequate implementation of the law.

4. Future perspectives

Green access rights have been strengthened in many Asian countries over the last 20 years in order to implement Principle 10. This kind of rights-based approach seems to be increasingly widespread and has become a global trend. On the one hand, there are also some common features to be seen in Asian countries, for example, stressing community rights and capacity building, and promoting public interest litigation. On the other hand, concrete measures to strengthen the green access rights differ from country to country.

In comparison with other countries, in general, public participation in Japan has been traditionally grounded in strong local initiatives, and effective voluntary activities have materialized in cooperation with private and governmental actors. These are the primary characteristics of the Japanese environmental policy. This could be called the Japanese Environmental Cooperation Model, a kind of voluntary-based approach in contrast to the rights-based approach of the Aarhus Convention.[35]

The Rio Earth Summit also encouraged progress in the Japanese legal system with regard to public participation. Several new measures have been introduced, such as a Consulting Committee and proposal system. The Act for the Promotion of Environmental Conservation Activities through Environmental Education was introduced in 2003. In 2011, this Act was revised. Article 1 specifies the promotion of partnership among various groups as being key to sustainable development and has established various legal schemes for fostering collaboration, such as partnership agreements (Article 21-4).[36] However, it is still a kind of voluntary approach.

It may be important to appropriately combine the rights-based approach and the voluntary-based approach in Japan in order to improve the effectiveness of public participation.[37] A Japanese model could contribute to effective implementation of legal provisions for public participation in Asia and other regions.

34 Metropolitan Manila Development Authority v. Concerned Residents of Manila Bay, G.R. Nos. 171947–48 [S.C. Dec. 18, 2008]. See also Velasco, 2009.
35 Okubo, 2015.
36 Okubo and Kobayashi 2012.
37 Okubo, 2014b.

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Criminal Offences against the Environment: The Emergence of International Environmental Criminal Law

Jörg Menzel

Abstract

The existence and emergence of an International Environmental Criminal Law is the topic of this chapter. The following topics are discussed: Definition of International Environmental Crime, jurisdiction of international courts for such crimes, the (often not sufficiently noticed) duty of states to penalize international crimes in their national laws, cooperation of states in the field of international crimes, and the discretion of states to extend their criminal jurisdiction with respect to transnational crimes. Attention is given to Singapore's recent legislation, which is based on an extraterritorial extension of criminal liability in order to fight the annual fires in Sumatra. It is shown that the interception between international environmental law and international criminal law is significant and that this field is not sufficiently discussed yet in the general literature on international law.

Keywords: International Environmental Crime, Extraterritorial, Criminal Liability

1. Introduction

International Law has generally developed substantially in recent decades, but two fields are among the most dynamic: International Criminal Law and International Environmental Law. International Criminal Law was basically born after Second World War with the Nuremberg Trials, but has been revitalized only since the early 1990s. International Environmental Law has slowly appeared since the 1960s, but also come into full swing in the early 1990s with and after the Rio Declaration of 1992. Around 25 years ago there was hardly any literature in both fields. Today, books, articles, journals, among others. fill libraries. The following short article aims to have a look at the interception of those two fields of law, indicating some topics and questions. Although "International Environmental Criminal Law" is still not much addressed in the standard literature of either field[1], its main subject is fairly clear: How do International Criminal Law or International Environmental Law respectively deal with criminal offences against the environment, particularly (but not exclusively) those of a transnational dimension.

Various questions may be asked, and the following ones shall be addressed here:

- Are there international environmental crimes?

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1 See e.g. Byung-Sun Cho, Emergence of an International Environmental Criminal Law, 19 UCLA Journal of Environmental Law & Policy 11 (2000); Frédéric Mégret, The Problem of an International Criminal Law of the Environment, 36 Columbia Journal of Environmental Law 195 (2011); Tara Smith, Creating a Framework for the Prosecution of Environmental Crimes in International Criminal Law, in: William A. Schabas, Yvonne McDermott, Niamh Hayes and Maria Varaki (eds.), The Ashgate Research Companion to International Criminal Law: Critical Perspectives (2012); see also René Provost, International Criminal Environmental Law, in: Guy S. Goodwin-Gill & Stefan Talmon (eds.), The Reality of International Law, Essays in Honor of Ian Brownlie, 1999, p. 439.

- Do International Courts have jurisdiction regarding environmental offences?

- Does international law impose duties to punish environmental offences?

- How do states and institutions cooperate with respect to environmental crimes?

- To which extent has states jurisdiction for transboundary environmental crimes?

Whereas this article generally focus on developments in the Asian region, the following remarks are mostly of a general nature. However, it will be shown that at least with respect to the question of national jurisdiction regarding transboundary pollution there are new developments in the ASEAN region which might be seen as path breaking.

2. Environmental offences as international crimes

It seems to depend on the definition of "international crimes", if there might be "international environmental crimes". The core of international crimes is the set of offences developed in international criminal law and now being codified in the Statute of the International Criminal Court (ICC), "Rome Statute". These are:

- Genocide,
- Crimes against humanity,
- War crimes,
- Aggression.

Without going into details it is evident that environmental offences are not the focus of those crimes, although it seems that all of the mentioned crimes can be committed through attacks on the environment[2]. A direct mentioning of environmental offences can only be found in the definition of war crimes in Article 8 (2)(b)(iv) of the Rome Statute, which defines as a war crime.

"Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly" excessive in relation to the concrete and direct overall military advantage anticipated".[3]

Apart from this there are numerous scenarios in which the destruction of the environment can be used to commit one of those crimes and therefore there has been some respective discussion even with respect to the Crime of Genocide[4]. However, until

2 For a detailed discussion see Steven Freeland, Crimes against the Environment - A Role for the International Criminal Court?, Droit de l'environnement dans le Pacifique: Problematiques et Perspectives Croisees / Environmental Law in the Pacific: International and Comparative Perspectives, New Zealand Association for Comparative Law and Association de Legislation Comparee des Pays du Pacifique, 2005.

3 On this provision see *Jessica C. Lawrence & Kevin Jon Heller*, The Limits of Article 8(2)(B)(VI) of the Rome Statute, The First Ecocentric Environmental War Crime, 2007. Available at www.ssrn.com. *Mark A. Drumbl*, International Human Rights, International Humanitarian Law, and Environmental Security: Can the International Criminal Court Bridge the Gaps? Available at www.ssrn.com.

4 See e.g. Mark Münzel, The Aché Indians: Genocide in Paraguay, WWGIA Document no. 11 (1975), available at www.iwgia.org/iwgia_files...files/Ache_Doc1.pdf. In 2014 the Aché people have filed a criminal complaint in an Argentinian court claiming Genocide committed against them in Paraguay and the court has accepted to hear the case based on universal

today no environmental offence has been a serious part of any international criminal law investigation by the ICC or other respective tribunals. It is still worth considering all the possible aspects of this approach, but one has to restrain oneself to this indication here. Best explored is the protection of the environment in wartime and time of armed conflict[5] and, unfortunately, there are famous historical case studies as the use of "agent orange". by the USA in the Vietnam War or the mass burning of oil fields by Saddam Hussein during the first Iraq War.

There are attempts to lobby for an extension of the list of crimes in the Rome Statute. With respect to offences against the environment the idea of a crime called "ecocide" or "geocide" has come up[6]. However, it seems fairly unlikely that the states will agree in the near future on such amendments to the current Rome Statute and therefore one will not further dig into such proposals.

Using a somewhat wider definition of international crimes, not restricted to those within the jurisdiction of the ICC under the Rome Statute, one often finds the discussion about piracy, terrorism, drug trafficking. However, none of those crimes seems to be immediately concerned about the environment, although environmental terrorism is an apparent danger[7]. Environmental terrorism is the attack on the environment for terroristic purposes. It should not be confused with "eco-terrorism", which is the term mostly used for (possible) attacks of extreme environmentalist activists and organisations, using terrorist approaches to draw attention to their agendas.[8]

There have been various attempts to establish a category of "international (or: transnational) environmental crimes". An example is the first draft of The International Law Commission's "Draft Articles on State Responsibility" (1973), in Article 19 (3)(c), which, however, was later omitted. The European Council has even prepared a draft convention, which explores a number of such crimes[9]. Other attempts can be added. The ILC's Draft Code of Crimes against the Peace and Security of Mankind (1996) has referred to damage to the natural environment as a possible war crime [Article 20 (g)]. A respective indication was also given by the International Court of Justice in its Advisory opinion on Nuclear

jurisdiction, Indian Country Today Media Network.com (report published on 18 August 2014); see http://indiancountrytodaymedianetwork.com.

5 See e.g. Yoram Dinstein, Protection of the Environment in International Armed Conflict, Max Planck UNYB 5 (2001), 523 – 549; Julian Watt, Law-making at the intersection of international environmental, humanitarian and criminal law: the issue of damage to the environment in international armed conflict, International Review of the Red Cross 92 (2010), pp. 593 - 646.

6 E.g. Marc Allan Gray, The International Crime of Ecocide, 26 California Western International Law Journal 215 – 271 (1996); see also the "Ecocide Project" at the Human Rights Consortium of the University of London and their report "Ecoside is the missing 5th Crime against Peace", http://www.sas.ac.uk/hrc/projects/ecoside –project; Lynn Berat, Defending the Right to a Healthy Environment: Toward a Crime of Geocide in International Law, 11 Boston University International Law Journal, 327 (1993).

7 On the international criminal law with respect to terrorism see Ilias Bantekas, International Criminal Law, 4th edition, Oxford and Portland 2010, Chapter 12.

8 See Elisabeth L. Chalecki, An New Vigilance: Identifying and Reducing the Risks of Environmental Terrorism, Report of the Pacific Institute, 2001, www.pacinst.org.

9 Council of Europe, Convention on the Protection of the Environment through Criminal Law (1998); for an earlier discussion of the European approach see Antonio Vercher, The Use of Criminal Law for the Protection of the Environment in Europe: Council of Europe Resolution (77) 28, 10 Northwestern Journal of International Law & Business 442 - 59 (1989/1990).

Weapons in 1996[10]. In a recent report, the Environmental Investigation Agency (EIA) has defined International Environmental Crime as follows:[11]

3. "What is international environmental crime?

For the purpose of this report, International Environmental Crime can be defined across five broad areas of offences which have been recognized by bodies such as the G8, Interpol, EU, UN Environment programme and the UN Interregional Crime and Justice Research Institute. These are:

1. Illegal trade in contravention to the 1973 Washington Convention on International Trade in Endangered Species of Fauna and Flora;

2. Illegal Trade in ozone-depleting substances (ODS) in contravention of the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer;

3. Dumping and illegal transport of various kinds of hazardous waste in contravention of the 1989 Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and Other Wastes and Disposal;

4. Illegal, unregulated and unreported (IUU) fishing in contravention to controls imposed by various regional fisheries management organisations (RMFOs);

5. Illegal logging and trade in timber when timber is harvested, transported, bought or sold in violation of national laws (There are currently no binding international controls on the international timber trade with the exception of an endangered species, which is covered by CITES).

This list seems to be helpful, as it contains lists typical areas of concern. However for the purpose of this paper, the author suggests to use a more abstract definition as follows:

"International Environmental Crimes are criminal offences against the environment,

- for which general principles of international law or international treaties request a criminal liability to be imposed by international organizations or states that are bound by the respective international law,

- which are stipulated in national laws with respect to crimes committed transnationally or with transnational effect."

Such a definition is narrow in the sense that it uses the word "crime" only in the sense of criminal offence (and not as a somewhat more untechnical term) but it is broad in the sense that it does not provide a list of concrete offences and is therefore open for an evolutionary development. It is not reduced to crimes under international law, but may include unilaterally stipulated national criminal laws that address the particular topic of transnational crime.

4. International courts and international crimes

To the best of the authors knowledge the only International Court with direct jurisdiction in criminal law, the competence to impose criminal punishment, is the International Criminal Court in The Hague. As mentioned above, this court can only investigate four sorts of crimes and none of those is easy to apply addressing the protection

10 ICJ, Nuclear Weapons Advisory opinion (1996), ICJ Reports 226, 243.

11 EIA, Environmental Crime. A threat to our future, London 2008 (www.eia-international.org).

of the environment[12]. In some extreme cases, the involvement of the ICC might be possible, but until now this remains a theory. The extension of the jurisdiction of the ICC through an amendment to the Rome Statute with respect to environmental offences is also an option, but politically quite unlikely to materialize in the near future. Even more unrealistic seems to be the establishment of a special “International Environmental Criminal Court” within the nearer future. The proliferation of International Courts has some recent tradition, but the author assume there is not much appetite of states at the moment to continue this trend with the establishment of a specialized International Environmental Criminal Court or a general International Environmental Court[13].

Other international courts might be involved in environmental cases and even in cases regarding the criminalization and punishment of environmental offences[14]. The International Court of Justice, the International Court of the High Seas, regional Human Rights Courts or other regional courts as the European Court of Justice might all be addressed under respective circumstances. However, they all cannot directly convict people or legal entities[15], but only decide on the obligation of states to use criminal jurisdiction or the limits of such jurisdiction.

5. International law obligations to punish environmental offences

A significant number of international environmental treaties impose a duty of states to impose criminal sanctions on environmental offenders. In fact, most of modern treaties contain such provisions. Maybe the Convention on Illegal Trade in Endangered Species (CITES) and the Basel Convention on Transboundary movements of hazardous waste are among the most prominent of such instruments, but many others could be mentioned[16]. The tendency is particularly developed in Europe: Whereas the European Convention on the Protection of the environment through Criminal Law, which has already been mentioned, has not come into force. There are already substantial obligations of member states under the European Union Directive on the protection of the environment through criminal law[17] in this respect, although it should be noted that much of the European Union Environmental (Criminal) Law is itself motivated by the attempt to implement obligations stemming from global environmental treaties.

Considering the fact that obligations regarding domestic criminal law is such a common tool used in environmental treaties it seems surprising that nearly no attention is paid to this aspect of environmental treaty law in the general literature on international environmental law. Although it is true that those treaty obligations are often not very precise and leave space for national discretion when implementing them in national criminal and environmental law, more analysis in this field is urgent. Comparative analysis of required forms of legislation as well as the need to effectively enforce them through investigative bodies, criminal prosecutors and courts can help to increase pressure on member states to take their respective obligations under international law seriously.

12 See again Freeland (note 2), who at least identifies some possibilities; Tim Stephens, International Courts and Environmental Protection, Cambridge 2009, pp. 54 – 56.

13 The discussion about an International Environmental Court is summarized by Stephens (note #), from p56.

14 See the comprehensive analysis by Stephens (note 12), passim.

15 Many states have introduced criminal liability of legal entities in areas like environmental crimes. For the discussion see e.g. Cho (note #), pp. 27 – 31. Germany is lacking behind current develop ments insofar as it still sticks to the principles that crimes can only be committed by human beings.

16 For a listing and discussion of various types of such obligations see Cho (note 1), at pp. 15–18.

17 Directive 2008/99/EC of 19 November 2008.

6. International cooperation in fighting environmental crime

Duties of states to cooperate in criminal matters based on international law may be based in bilateral or multilateral treaties. Duties to cooperate are a standard topic of international environmental treaties and may apply to criminal investigations and so on. In addition, numerous international organizations have become active in activities to combat environmental crime – and particularly transnational environmental crime – in recent years. This seems particularly important, as it is common wisdom that environmental law does not suffer most from a lack of laws but from a lack of effective enforcement of laws.

- UNEP[18] runs Secretariats for the Basel and CITES Conventions and strongly supports cooperation of law enforcement bodies and other relevant institutions and players in the field. It also organizes training programs for judges and prosecutors.

- The Interpol General Assembly has adopted a resolution stating that "there is a vital need for a global response to combating environmental crime and Interpol should play a leading role in supporting the international enforcement efforts"[19]. Accordingly, Interpol has significantly increased its activities in the field in recent years and established an "Environmental Crime Unit". [20]

- Various networks have been established internationally and regionally in Europe, Asia and elsewhere.[21]

- Nongovernmental Organizations have been active as well.[22]

As many states with endangered environment are developing countries, there is also need for extensive development cooperation. However, a significant challenge insofar is that it is often not enough to train respective authorities (ministerial and administrative personnel, police, judges and prosecutors etc.) in dealing with environmental offences, but that a main problem is a general lack of rule of law and good governance due to a general weak public service, low salaries and capacities, corruption, political interferences and so on. Even in states with a low level of rule of law there might be dedicated Ministers of Environment and qualified staff in ministries and respective administrative and judicial bodies, but the Ministry of Environment will often be political weak in comparison to Ministries in charge for destructive industries etc., as well as politicians or military involved in environmental crimes as illegal logging, mining and so on. Therefore the effectiveness of all specific capacity building will often be hampered by the general conditions, under which all public service is operating. Therefore, effective reform and significant improvements are

18 UNEP, Transnational Environmental Crime – a common crime in need of better enforcement (2013). Accessed at www.unep.org/eag.

19 INTERPOL General Assembly Resolution AG-2010-RES-O3 (2010).

20 INTERPOL, Environmental Crime. International Criminal Police Organization – INTERPOL (2012). Accessed at http://www.interpol.int/Crime-areas/Environmental-crime/Environmental-crime.

21 International Network for Environmental Compliance and Enforcement; European Union Network for the Implementation and Enforcement of Environmental Law; Asian Environmental Enforcement and Compliance Network.

22 E.g. ISISC, The Protection of the Environment through Criminal Law (A/CONF.213/NGO/10). In: Statement submitted by the International Institute of Higher Studies in Criminal Sciences (ISISC) and the International Association of Penal Law, a non-governmental organization in special consultative status with the Economic and Social Council, 12th United Nations Congress on Crime Prevention and Criminal Justice, 12-19 April 2010, Salvador, Brazil (2010). Accessed at https://cms.unov.org/llsulinkbase/contenttree.aspx?nodeID=3406.

extremely difficult in states where the rule of law is generally in short supply. As the title of this book indicates, good environmental governance generally needs a well-developed rule of law.[23] It should be mentioned however, that also some of the most developed states and such states that generally are highly graded when it comes to rule of law sometimes have difficulties in the effective fight against environmental offences. For example, in Germany there is also widespread criticism of a deficit in enforcement ("Vollzugsdefizit") of environmental criminal law and despite all its credits for high rule of law standards Singapore is still is a major hub in the global illegal trade in endangered species.

7. National Jurisdiction and transboundary environmental offences

One of the most interesting topics in an emerging International Environmental Criminal Law is the right of national jurisdictions to criminalize transnational or extraterritorial environmental offences. As criminal law until today is overwhelmingly national law, a respective international law is particularly concerned with demarcating those national jurisdictions. Generally, there are various principles in international law with respect to jurisdiction. They are most discussed in International Criminal Law, but also apply to International Environmental Law. The main principles are:

- Territoriality Principle,
- Active Personality Principle,
- Passive Personality Principle,
- Protective Principle,
- Universality Principle.

Whereas the "territoriality principle" is the main starting point (every state has due to its territorial sovereignty the right to criminalize action taking place within its territory[24]), all other principles are additions and subject to some controversy regarding their extent. The active personality principle means that a state has criminal jurisdiction for crimes committed by its own citizens, even if the crimes are committed abroad. The passive personality principle is based on the concept that a state has the right to punish people (also foreigners) who have made their own citizens the victims of crimes. The protective principle legitimizes a state's jurisdiction because the crime affects important public goods or interests of that state. Universal jurisdiction finally means that some crimes are considered so grave that any every state can punish perpetrators whoever committed them and wherever they were committed. By their very nature all principles except the territoriality principle are designed to allow for imposing criminal liability for acts committed outside the state's own territory. Whereas the territoriality principle was followed fairly strictly in early modern times, the use of other principles has expanded in recent times. [25]

The relevance of the scope of jurisdiction is evident when it comes to transboundary environmental offences. This is particularly true for states[26] which are

23 See generally Michael Trebilcock and Ronald J. Daniels, Rule of Law Reform and Development. Charting the Fragile Path of Progress, 2008.

24 Exceptions largely being based on certain immunities of foreign or international entities.

25 For more details see e.g. Bantekas, International Criminal Law (note 7), Chapter 15.

26 Those are not only the fully developed countries, but also rising economies as – in Asia – Malaysia

home to transnational companies that might commit offences against the environment in stateless areas (high seas)[27] and the developing world, where they are probably not much challenged in their behavior due to insufficient legal frameworks, weak law enforcement, corruption, etc. The possibility to be punished back home for such misbehavior abroad[28] is crucial for transnational environmental protection. The active personality principle as well as the protective principle and universality principle can be used – and are increasingly used – to address this issue. [29] Germany stipulates extraterritorial criminal liability for a number of environmental offences in its Criminal Code, [30] and there are also some specific laws in that respect, e.g. for activities in Antarctica. [31] Restrictions of the import and export of goods that are dangerous for the environment or have been produced in ways damaging the environment will also be enforced through criminal liability in many national jurisdictions or e.g. European Union law.

National legislation with extraterritorial effect in environmental criminal law will often be motivated in its core by the obligations stemming from international treaties. However, it should be noted that this technique also gives states the opportunity to act unilaterally, maybe also in order to compensate for solid international solutions. Although the unilateral approach is often somewhat dismissed by authors, it should be seen not only as legally allowed (in principle) but also as legitimate and sometimes useful. [32]

Within Asia (and more specifically Southeast Asia) Singapore is now at the forefront of addressing environmental offences with transnational effect through criminal law. In 2014 it adopted a new law designed to fight the transboundary haze pollution, largely stemming from Indonesia's burning forests in Sumatra on an annual basis. Singapore had already been the main player to push for regional cooperation in this matter, resulting in the ASEAN Agreement on Haze Pollution. [33] Dissatisfied with the lack of practical success of this approach Singapore has now added a unilateral approach, extending significantly

or China, which are home to many companies doing business around the region and the world.

27 Among the international environmental criminal law issues in the law of the sea are ship-source pollution and fisheries related criminal activities, see for example Bantekas (note 7), pp. 310–312 and 314–316.

28 The approach is also followed in other fields, as in the global fight against corruption. Many developed country now punish the bribing of foreign officials by their own transnationally operating corporations. Another example is the protection of children from sexual abuse. Many developed countries now punish sexual abuse by own citizens in other countries, trying to address the problem of abusive "sex tourism". Some destination countries for such abusers even use this approach in campaigns. Some years ago the Cambodian government did install banners on roadsides with the slogan "Abuse a child in this country and go to jail in your own" (quoted from memory). Legally speaking, a similar approach can be followed with respect to environmental crimes.

29 For more details see e.g. Jörg Menzel, Internationales Öffentliches Recht, Tübingen 2011 (in German).

30 See e.g. § 5 No. 11a StGB (German Criminal Code), according to which any German citizens, who is involved in causing a nuclear explosion anywhere in the world, is punishable under German law, even if his action is considered legal in the country, where the crime takes place.

31 Regarding Antarctica see BGBl. 1994 I, 2593. Other German laws cover e.g. activities on the High Seas (e.g. waste dumping) or on the deep seabed. On the USA see David Hunter / James Salzman / Durwood Zaelke, International Environmental Law and Policy, 2nd edition 2002, Chapter Nineteen: "Extraterritorial Application of Domestic Environmental Law".

32 For a balanced discussion see Daniel Bodansky, What's so Bad about Unilateral Action to Protect the Environment?, 11 EJIL 339 – 347 (2000).

33 This is explored in detail by Daniel Heilmann in this volume.

civil and criminal liability for those responsible for the fires and the haze. [34]The relevance of this law will be most significant for Singaporean companies and Singaporean individuals participating in haze producing activities abroad (particularly in Indonesian Sumatra), but it extends to all entities who are in any way Singapore linked and even anyone causing haze which affects Singapore (protective principle). Although this is a sweeping approach, particularly when it comes to criminal liability, from my perspective this new and path breaking law is acceptable under the international law, at least if used in a proportional way. However, a problem of the law seems to be in the area of rules of evidence, proof and presumptions, but that is a rule of law concern not to be discussed here.[35]

8. Perspectives and Conclusion

International Environmental Criminal Law, properly defined, is emerging. In this short article I have tried to show that there is plenty to discuss and to develop. Asia is in the middle of this development. Some Southeast Asian states are still suffering from exploitation of their natural resources, flora and fauna by internationally organized criminal activities. Asian states are also the markets that make offences against the environment in other parts of the world so lucrative, just think of the poaching of elephants and rhinos in Africa which is motivated by the enormous money that can be made with ivory in states like China.

Arguing in favor of a more sophisticated approach to International Environmental Criminal Law does not mean to lobby for harsher punishment all the time. Even in this important field prosecution and punishment need to meet human rights standards for the judicial process and remain proportional to the guilt of offenders. Requesting the death penalty for illegal logging (as was politically discussed in Indonesia a few years ago) does not seem to be the way forward and is simply populist politics. Generally speaking criminal law is not a king's path to the protection of the environment. It is, however, an important element of a comprehensive policy to tackle today's dangers to nature, flora and fauna around the world. It is not enough to label certain activities as "environmental crimes", it is necessary to effectively treat them as such. And due to the globalization of the criminal activities it is necessary to globalize the fight against them in a globalized way. Increased cooperation as well as a well-balanced unilateral extraterritorial application is one way of doing so even it is clear that such an approach may face significant enforcement and implementation problems. However, the fact that some of the big goals as amending the Rome Statute of the ICC with respect to a special environmental crime ("ecocide") or the establishment of a specialized International Environmental (Criminal) Court" seem unlikely to materialize in the near future should not overshadow the whole discussion. Concrete steps can be taken to give more teeth to International Environmental Law through better criminal law and cooperation in criminal law enforcement.

34 For an analysis Alan Khee-Jin Tan, The „Haze" Crisis in Southeast Asia: Assessing Singapore's Transboundary Haze Pollution Act 2014, Singapore, NUS / Law Working Paper 2015/002.

35 For details see Tan (note 34).

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The Role of the Cambodian Parliament in Tackling Energy Issues

Sang-Bonn Soth

Abstract

Cambodia adopts a bicameral parliamentary system that includes two chambers, the National Assembly and the Senate. Each chamber has ten expert commissions respectively. The effort in tackling environmental issues, particularly energy issues could be done individually and collectively. Currently, legal and institutional mechanisms are in place for parliamentarians to assume their roles. However, the practice of parliamentary work has not yet been uniformed for many reasons. These reasons range from insufficient legal frameworks; the limited capacity of individual members; and the limited financial resource to political constrains. For these reasons, the important roles of the Parliament in tackling energy issues are unknown to the public. The scope of this paper extend from international legal sources, to the Cambodian Constitution, to the substantive laws, and other relevant legal regulations which are enforced in Cambodia. From the institutional perspective, it focuses on the organization, functioning, as well as practices that are undertaken by the Parliament. This paper draws the spotlight on several key factors that are crucial for citizens to better understand and realize the roles of parliaments. While at the same time, ensuring that policy and law-makers alike understand the importance of their roles in representing the interest of citizens, especially in addressing energy issues.

Key Words: Energy policy, Electricity, Role of Parliament, Cambodian Law

1. Introduction

Cambodia is a country in South East Asia with a population of approximately 15 million people. The country covers an area of 181,035 km^2,and is bounded on the East by Vietnam, on the North by Laos and Thailand, on the West by Thailand, and to the Southwest by the Gulf of Thailand. The lowland plains around the Mekong River and the Tonle Sap Lake dominate it. Cambodia experiences tropical climate and is subject to both southeast and northwest monsoons. There are two main seasons in Cambodia. The rainy season usually occurs from May to October and coincides with the southeast monsoon while the dry season usually occurs from November to April. The northwest monsoon brings a cool, but dry air in the above period.

Cambodia is an agricultural country, where 85% of the people live in rural areas with agriculture as the main source of subsistence. The livelihood depends largely on

agriculture that includes farming, fishing, livestock, and forest and non-forest products. In recent years, the country has largely been able to produce sufficient food to meet domestic demand and has begun exporting large amounts of rice. However, there are still some problems in the country such as food insecurity and malnutrition which challenge and hamper the long-term economic and social development.[1]

As more than 85% of Cambodians live in the rural areas, they mostly use firewood as the base of their daily energy needs. The firewood (as biomass energy) is used for daily cooking; heating for their cattle at night; and for other purposes such as for heating and extracting sugar palm, etc. Most poor families who live in rural areas spend most of their time to collect firewood for their daily consumption. For lighting, those people use kerosene and lead-acid rechargeable batteries for household appliances. In general, energy plays very important roles in the development of a country. However, energy in Cambodia is still very costly. Limited accessibility, poor service provision, limited security and stability are great barriers to the rapid development of the economy of the country.

Cambodia's economy still enjoys a steady growth since 2000, despite the shortage of energy, the impact of global economic downturn, and instability in neighbouring countries. Real growth for 2014 is estimated to reach 7.2% which was driven by the growth in the garment, construction, and services sectors. According to the World Bank, political stability gained after the political agreement in July 2014 which ended the year-long political deadlock in Cambodia. This allow Cambodia to enjoy economic growth at a rate of 7.5% in 2015. [2]

The economic growth in the recent years is remarkable for Cambodia whilst most countries in the region are still surviving from the economic crisis which started in 2007. The economic growth helped reduce the poverty level in Cambodia from 47 % in 1994 to 25% in 2005.

The economic growth reflects the effort of the government to lift up the image of Cambodia and to eradicate poverty. The World Bank appreciated the efforts of the government and expected that Cambodia achieved the Millennium Development Goal (MDG) of decreasing its poverty by 50% in 2009. However, the vast majority of families who escaped poverty could only improve their living conditions in a very limited way. The World Bank states that the poverty rate was still 18.6% in 2012, with almost 3 million poor people and over 8.1 million people who belonged under the near poor level. About 90% of them live in the countryside.[3]

1 Retrieved from http://worldbank.org/en/country/Cambodia/overview on 14 March 2015.
2 *Ibid.*
3 *Ibid.*

2. Situation concerning Energy Supply

Cambodia relies on mix sources of energy for all sectors such as for residential usage, agriculture, commercial, administrative purposes, industry, tourism and for other purposes. According to the report on the Global Status of renewable energy, until 2011, only 34% of Cambodians had access to grid electricity. These were mostly in cities, while approximately nine million people in remote areas rely on other sources of energy[4]. Until 2012, Cambodia had only 2.4% of its energy consumption which was sourced from renewable energy.[5] The US's Energy Information Administration (EIA), has affirmed that Cambodia relies on sources of energy ranging from biomass, fossil fuel that comprises of natural gas, petroleum, coal to clean energy (solar power) to renewable energy (hydropower), electricity and other sources.[6]

In terms of electricity, Cambodia depends on four types of electricity. Generation facilities include hydropower plants, diesel power plants, thermal power plants using coal and power plants using wood and other biomass. As of 2010, Cambodia relied 3% of its energy from hydropower, 2% from coal energy, 53% from diesel oil/ high fuel oil, and 42% from imported electricity. Cambodia imports electricity from Thailand, Vietnam and Laos. Among the 42% imported electricity, 67% is imported from Vietnam, 32% is imported from Thailand and only 1% is imported from Laos.[7]

The National Policy Strategy and Action Plan on Energy Efficiency noted that in 2009, four main sectors shared remarkable consumption of energy. These included residential and commercial sectors, which had a share of 37% and 33% respectively. The industry sector had a share of 20% whilst the administrative sector's share was 8%.[8]

3. Current Challenges

Although the government has made continuous efforts to improve the energy supply situation, the Cambodian Energy Sector is facing a number of challenges from technical, structural, to policy, as well legal. Outstanding challenges that attract the attention of the general public are summarized below:

- The prices of electricity in Cambodia are still high because it depends largely on imported fossil fuels. Although the government has put continuous efforts into expanding the capacity and the coverage of electricity supply in the recent years to meet the electricity demands, electricity costs remain to be among the highest in the world, whilst the access rate to the grid is one of the lowest in Asia.[9]

4 REN21. 2014. Renewables 2014 Global Status Report, Paris, 2014. p. 135.
5 *Ibid*, REN21, p. 120.
6 Retrieved from http://www.eia.gov/countries/country-data.cfm?fips=CB on December 21, 2014.
7 EAC, Report on Power Sector of the Kingdom of Cambodia; 2014, p. 28.
8 National Policy, Strategy and Action Plan on Energy Efficiency in Cambodia;2013.
9 World Bank, Cambodia: Energy Sector Strategy Review; April 2006, p. 3.

● The major challenges in the Cambodian energy sector are low energy access; great dependence on traditional biomass for cooking; rising demand; persisting shortages;inefficiency in old generating equipment; uncompetitive market structure; and lack of market for renewable energy technologies/business models.

● Renewable energy usage is negligible in the energy mix because of the lack of financing; there is no legal framework; missing incentives for energy efficiency and renewable energy investment; the lack of institutional and educational capacities as well deficiency in public awareness.

4. Solutions

Cambodia as well as other developing countries in Asia still enjoys a steady economic growth in the twenty first century despite the global financial crisis. A healthy economic performance in Cambodia and in Asia primarily requires stable energy supply to stabilize the economic development. The ADB's policy paper on energy affirmed that energy demands an increase of almost to double size between 2006 and 2030. Such demands may not be met simply by fossil fuels. Asia and the Pacific may face serious consequences if the consumption of fossil fuels will increase, while that at the same time it may cause a rise in atmospheric temperature and significant climate change.[10] In order to respond to the demands while at the same time coping with climate change, Cambodia needs to have a systematic solution and options to ensure sustainable economic development for the nation. Cambodia therefore has the following solutions and options as listed:

4.1 Policy option

Cambodia developed its first energy policy in 1994 with the support of the Asian Development Bank (ADB). The Royal Government of Cambodia had formulated an energy sector development policy which aimed to provide adequate supply of energy throughout Cambodia at a reasonable and affordable price.[11] Secondly, to ensure reliable and secure electricity supply at a reasonable price, it facilitated investment in Cambodia for the development of national economy.[12] This policy also aimed at encouraging exploration and developing the energy resources which are environmentally and socially acceptable and at the same time needed to supply all sectors of Cambodia's economy.[13]

The continuous support of ADB for policy development; developing energy infrastructure and indigenous energy sources; promoting energy efficiency; and creating markets conducive to foreign investments were another inspiration for Cambodia to

10 Asian Development Bank, Energy Policy; June 2009, p. 1.
11 Draft Cambodian Energy Sector Strategy, p.14.
12 *Ibid.*
13 *Ibid.*

polish its energy policy in 1995. This policy aimed at managing the demand-side, environmental protection, rural electrification and renewable energy development.[14] Although there were some existing legal frameworks to govern energy issues, in 2000, the Royal Government reviewed the energy policy and took into consideration the recommendations of ADB on the development of independently regulated and privatized energy markets, which would lead to more efficient uses of energy which are low cost and would attract more private investment.[15]

In the current mandate, the royal government continues its mission and is committed to provide an adequate supply of energy throughout Cambodia at reasonable and affordable prices. It encourages the efficient use of energy and strives to minimize the detrimental environmental affects resulting from energy supply and consumption. The Royal Government aims at providing at least 70% of all households in Cambodia to have access to grid quality electricity by the year 2030 and a 100% of the villages in Cambodia to have access to electricity of any type by 2020. With a view to this commitment, the Royal Government bestowed the power to the Ministry of Industry, Mines and Energy to implement two plans namely: the Energy Sector Development Plan 2005-2024 and the Rural Electrification Master Plan which focuses on the use of renewable energy.[16]

Under the present policy, the Royal Government is committed to improve Kamchay Hydropower Plant with a capacity of 193.2 megawatts; Third Kirirom Hydropower Plant with a capacity of 18 megawatts; Atai Hydropower Plant with capacity of 120 megawatts; Stoeng Russeychrum Krom Hydropower Plant with a capacity of 103 megawatts in addition to the total capacity of 338 megawatts. In addition to the hydropower energy, the government is also committed to connect the Coal-fired Power Plant in Preah Sihanouk with a capacity of 100 megawatts for the public use as well.[17]

Furthermore, the Royal government is committed to the development of the generation, development of transmission and power trade with neighboring countries. Based on these goals, the Royal Government is expanding transmission, distribution networks, connects several locations and operates them according to their geographical potentials. According to the National Strategic Development Plan for 2014-2018, the Royal Government plans to produce approximately one thousand Million Kilowatt Hours (MKwh) per year from 2014 to 2018 to meet the energy demands. The Royal Government aims at generating electricity for the country from 5,219 MKwh in 2014 to 6,263 MKwh in 2015 and to 9,019 MKwh and 10,823MKwh for 2016 and 2018.[18]

14 *Ibid*. ADB, Energy Policy, p. 4.
15 *Ibid*. ADB, Energy Policy, p. 5.
16 Royal Government of Cambodia, National Strategic Development Plan 2014-2018, p. 69.
17 *Ibid*.
18 *Ibid*. Royal Government of Cambodia, p. 10.

In order to achieve the such objective, the Royal Government increased and planned to continuously increase the budget allocation to support the energy sector. For example, the Ministry of Industry Mines and Energy received 29,248 Million Riels for 2014; increase to 31,289 Million Riels; and 33,464 Million Riels and 35,628 Million Riels for 2015 until 2018 respectively.[19] At the same time, the Electricite Du Cambodge (EDC) is also tasked to promote access to electricity supply services and encourage the private sector to participate in investing in rural power supply services and in particular, encourage the use of new technologies and renewable energy.

The Royal Government is also committed to expand its regional cooperation, within the framework of the Great Mekong Sub-region to enhance the implementation of the Power Trade Plan and to participate in the implementation of ASEAN Power Grid.[20]

4.2 Legal Analysis (Regulation Governing Energy)

4.2.1 Legal Framework

Currently, the management of energy sector in Cambodia is in the hand of the Ministry of Mines and Energies (MME), the successor of the Ministry of Industry, Mines and Energies.[21] This ministry was created in 2013 and has been bestowed with power to lead and manage the mines and energy sources in Cambodia including petroleum, gases and electricity.[22]

According to Article 5 of the Law on the Creation of the Ministry of Mines and Energies, the Electricity Authority of Cambodia (EAC) that was created by the electricity law (adopted in 2001) is under the supervision of the Ministry of Mines and Energies. The EAC is a legal person and public entity which has the power to act as the regulator. It is an autonomous body that monitors the electric power sector throughout the country.[23]

Prior to the establishment of the Ministry of Mines and Energies, the Electricity Law was passed in 2001 with the aim of regulating the power sector, protecting consumers and ensure a reliable and adequate supply of electricity at a reasonable cost. The law also sought to promote private investment and ownership of power facilities, and to encourage competition in the sector.[24] This law covers all relevant activities concerning the supply of electricity, the provision of service and the use of electricity

19 *Ibid*. Royal Government of Cambodia, p. 126.
20 *Ibid*. Royal Government of Cambodia, p. 69.
21 Royal Kram No. NS/RKM/1213/017 on the establishment of the Ministry of Mines and Energies;December 2013.
22 Ibid, Royal Kram No. NS/RKM/1213/017, Art. 2.
23 *Ibid.*
24 Retrieved from www.eac.gov.kh on March 14, 2015.

and other associated activities in the energy sector.[25] This law also includes rights and obligations (including penalties) of the service providers as well as the consumers in order to establish fair conditions in the business and the use of electricity in Cambodia.[26]

The Electricity Law bestowed the power to the Ministry of Mines and Energy to set and administer the government policies, develop strategies and planning in the energy sector. Practically, the ministry extended its role to detailed planning, involvement in the licensing and procurement process and to managing the rural and provincial electrification programs.

Beside this aforementioned law, there are other legal regulations concerning energy issues, which aim at promoting energy efficiency in Cambodia.

On the ministry level, the Ministry of Mines and Energy manages to set the policy, development, planning, formulating strategic plans, technical standard and other determinations concerning the power sector such as: privatization of public utilities; promotion of the use of indigenous energy resources in the generation of electricity; promotion of efficiency in generation, transmission, distribution, consumption of electricity; and reaction taken to create comprehensive electricity conservation program in Cambodia.[27]

Besides the Electricity Law, the Investment Law is also important because it enables the investors to participate in the provision of reliable, safe and secure energy.[28]

4.2.2 Institutional Framework

Prior to the establishment of the Ministry of Mines and Energy in 2013, there were four main institutions which deals with energy in Cambodia: 1) The Ministry of Industry, Mines and Energy whose function is on policy making, planning and developing strategies; 2) The Electricity Authority of Cambodia whose function is to regulate and enforce regulations; craft procedures and standards for electricity-relevant investment program; defines tariff rates and licensing; 3) The Electricity du Cambodge (EDC) which generates, transmits and distributes electricity mostly in Phnom Penh; and the 4) Cambodia National Petroleum Authority which was bestowed with powers to manage and develop both downstream and upstream of oil and gas.

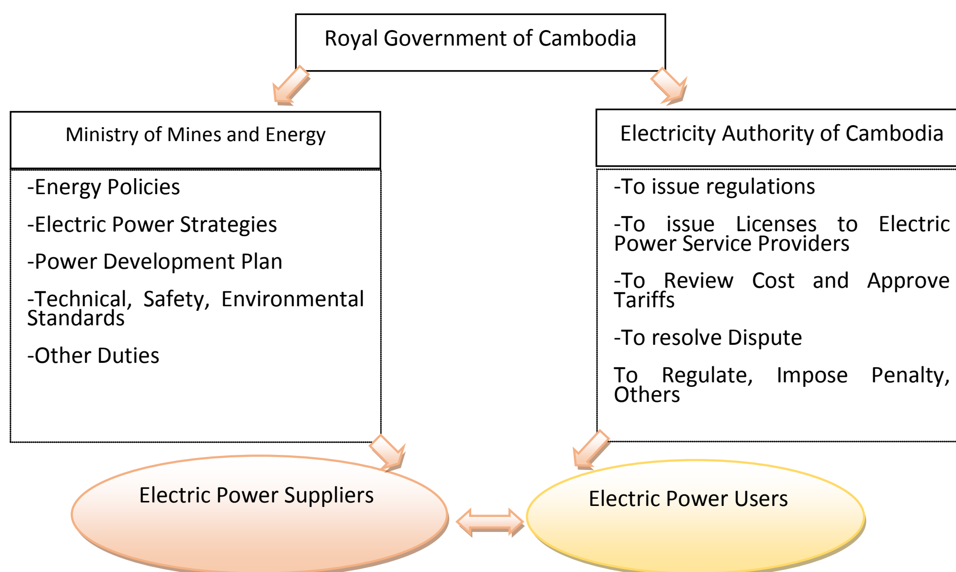
According to Article 6 of the Law on the creation of the Ministry of Mines and Energies, all mines and the energy sectors that were formerly under the supervision of the Ministry of Industry, Mines and Energies are now under the supervision of the Ministry of Mines and Energies. There are two main institutions dealing with the

25 Article 1 of Electricity Law of the Kingdom of Cambodia.
26 The Electricity Law was promulgated by Royal Kram No.NS/RKM/0201/03 on February 02, 2001.
27 Report on the power sector of the Kingdom of Cambodia, Compiled by Electricity Authority of ambodia;2013 Edition, p10.
28 Investment Law promulgated in 1994.

mining and energy sectors in Cambodia namely: the Ministry of Mines and Energy and the Electricity Authority of Cambodia.

The Ministry of Mines and Energy (MiME) is given the authority to set and administer the government policies, strategies, and planning and technical standards for the power sector. Whereas, the Electricity Authority of Cambodia is responsible to issue rules, regulations and procedures to monitor, guide, coordinate the operators in the energy sector (both suppliers and consumers). This includes requiring the suppliers and consumers to follow the policy, guideline and technical standards. This authority ensures that the provision of services and the use of electricity are performed efficiently, qualitatively, sustainably and in a transparent manner.[29]

Figure 1: Separation of role between MiME and EAC (Source: Report on Power Sector for the Year 2013)



In addition to these national institutions, the government also allows private and international partners to do business in the energy sectors. The involvement of the private sector through licensing to supply electricity for particular zones or locations creates a more competitive environment for public institutions and for the energy sector. There are eight types of licenses that can be issued and regulated by the Electricity Authority of Cambodia: the Generation License, the Transmission License, the Distribution License, the Consolidated License, the Dispatch License, the Bulk Sale License, the Retail License and the Subcontract License.[30]

29 EAC, Report on power sector of the Kingdom of Cambodia; 2014, p. 7
30 EAC, Report on Power Sector of the Kingdom of Cambodia; 2014, p. 19.

Other development partners include ADB, which is a leading international bank in the energy sector. The investment in energy access of the Asian Development Bank increased to a cumulative total of 4.8 billion from 2008 to 2013. This investment is expected to provide new connections to modern energies for the Cambodian citizens nationwide.

In 2012, ADB signed project No. 28191 with EDC, the so-called Provincial Power Supply Project. It is aimed at expanding the availability of reliable power supply in eight provincial towns and villages along the transmission route to the Vietnam border and to create a suitable management and operating organization in the provincial towns. This provincial project will strengthen the capacity of the EDC to be more financially viable and thereby encourages privatization in this sector.[31] Moreover, in 2013, the Electricite du Cambodge signed an agreement on Rural Energy Project with ADB to get financial and technical supports to address the power and non-power energy supply in rural Cambodia through (i) electrifying up to 13,700 households in Svay Rieng province; (ii) promoting the use of the improved cooking stoves with high efficiency in rural areas; and (iii) developing the capacity of EAC in overseeing the power sector.[32]

Capacity and institutional building in the electric sector, as well as providing opportunities to rural areas to access to electricity and energy, are the main purposes of the abovementioned projects. This project also aimed at stabilizing and securing supply of electric power in Cambodia through the effective and proper management of the electric power, technical standards and distribution system. Main activities of the projects are: dispatching of experts, provision of necessary equipment and materials to support the implementation of the project and technical trainings in Japan for Cambodian personnel related to the projects. Electricity Authority of Cambodia (EAC) and Electricite Du Cambodge (EDC) and particularly the staff of these two organizations are the main direct beneficiaries of the projects.[33]

5. The Role of parliament in tackling energy issues

Parliament is the heart of democracy in a democratic country. Cambodia adopts a bicameral parliamentary system, where parliament consists of the National Assembly and the Senate. At present, the National Assembly consists of 123 members, 68 members from the ruling party, the Cambodian People's Party (CPP), and 55 members from the opposition party, the Cambodia National Rescue Party (CNRP). The Cambodian Parliament has ten expert commissions in each chamber and they have a very important role in tackling not only political issues, but also energy issues. In general, parliament assumes three main roles that include legislation, monitoring and representation.

31 ADB, Validation Report; December 2012, p. 2.
32 Retrieved from Adb.org/projects/details?page=details&ptoj_id=45303-001on March 15th, 2015.
33 *Ibid.*

5.1 Law-making

Cambodia has a Civil Law tradition, which means the law is made by the parliament and promulgated by the King in a written[34] and systematic manner. Laws and regulations in Cambodia must be in strict conformity with the Constitution.[35] Moreover, although Cambodian citizens are the master of their own country, and are the source of all state powers, they exercise the power through the National Assembly, the Senate, the Royal Government and the Judiciary. The legislative, executive and judicial powers are separate.[36]

The three institutions such as: the National Assembly, the Senate and the Government have a mandate to initiate legislation in Cambodia. Each institution may initiate a draft or propose bills and may involve citizens and stakeholders in various modes including public hearing, expert hearing, workshop or seminar on particular issues.

Until recently, it was rather difficult to gain an access to a systematic database of the parliaments to understand the process of law making or to find figures concerning laws adopted by the parliament. For example, it is hard to get information about which laws or what laws are proposed by the parliament and which of these laws are relevant to energy issues.

The Cambodian parliament adopted more than three hundred laws since the first election of 1993 after the fall the Khmer Rouge regime and the UNTAC mission. The Senate had reviewed and provided recommendation to 312 laws among the 340 laws which were submitted between the years 1999 to 2014.[37] The National Assembly and the Senate had bestowed power concerning energy issues to Commission 9, the commission on "public transport, civil aviation, post, telecommunication, industry, mines, energy, commerce, land planning and construction". For parliament, this commission is in charge of energy issues in Cambodia. So far, the Cambodian Parliament has proposed approximately ten (10) laws including Internal Regulations of the National Assembly; and Internal Regulations of the National the Senate; the Law on the Election of the National Assembly; the Law on the Prevention and Control of HIV/AIDS[38]; Law on Monogamy[39]; Law on the Statute of Civil Servants of Legislative Bodies[40]; The Law

34 Principle 21 of the Internal Regulation of the National Assembly; 1993.
35 Article 150, the Cambodian Constitution; 1993.
36 Article 51, the Cambodian Constitution;1993.
37 The Secretariat General of the Senate, Legislation department, list of law 1999-2014; September 2014.
38 This law was proposed by the National Assembly and promulgated by the Royal Kram N[0.] NS/RKM/0702/015.
39 This law was proposed by the National Assembly and promulgated by the Royal Kram N[0.] NS/RKM/1006/029.
40 This law was proposed by the Senate and promulgated by the Royal Kram N[0.] NS/RKM/0203/007.

on the Senate[41]; Election Law on the Congress between the National Assembly and the Senate[42]; Law on the Statute of Parliamentarians.[43] There is no law relevant to energy issue, which was proposed by the Cambodian parliament yet.

In other countries, parliament may encourage government to set or improve targets for energy development. They may work with other parliamentary groups of like-minded members or may work with relevant commissions to propose a set of policy recommendation for government to review and response. Also, parliamentarians might question the relevant Minister or Secretary during question time.[44]

5.2 Monitoring

One of the most important functions of the modern parliaments is to make the government accountable. Parliament may monitor activities of the government through reports submitted by the National Audit Authority or by governmental institutions. In the field of energy, the Ministry of Mines and Energy is to submit the report to the parliament so that it is informed of its activities. Furthermore, parliaments may invite relevant representatives of the Ministry to clarify issues on the commission level or in a plenary session (if the parliaments find that it is necessary to do so). Moreover, lawmakers can organize field visits to their own constituencies or to relevant sites to see how energy development can impact communities and transform lives. The field visit of Parliamentarians is an excellent tool of monitoring where they meet citizens and relevant authorities to explore impacts on the ground and witness, both the impacts and the developments.[45]

In addition to the above methods, monitoring can also be focused on two main aspects that include the implementation of laws and the allocation funds for proper enforcement of the laws passed by the parliaments. To ensure proper implementation of laws, parliament may monitor actions of the government by checking if the government have sufficient human resources and detail policies or guidelines to be provided to the government department that is tasked to enforce energy-related laws. On another note, the parliament needs to make sure that the funding has been sufficiently allocated in the state budget or whether there is any tax incentive for energy sectors. The parliament need to make sure that the budget allocation is sufficient to achieve the goal and to

41 This law was proposed by the Senate and promulgated by the Royal Kram N0. NS/RKM/0605/020.
42 This law was proposed by the Senate and promulgated by the Royal Kram N0. NS/RKM/.
43 This law was proposed by the National Assembly and promulgated by the Royal Kram N0. NS/RKM/1006/026.
44 UNDP, Renewable Energy for Parliamentarians: How-To Guide, p. 51. Retrieved from http://www.undp.org/content/dam/undp/library/Democratic%20Governance/Parliamentary%20Development/HOW-TO- GUIDE%20- %20Renewable%20Energy%20for%20Parliamentarians.pdf.
45 *Ibid*. UNDP, Renewable Energy for Parliamentarians, p. 61.

improve energy issues and that the government spends the budget transparently and efficiently to promote and develop the energy sector.[46]

Cambodian Parliament has more or less assumed its monitoring role through the above methods. For instance, the Commission 9, which is in charge of energy issues of the Senate, conducted field visits 25 times to its own constituency and to the energy construction sites nationwide since the establishment of the institution in 1999.[47] Although this figure is still small considering the existence of the institution for 16 years, it is obvious that the senators noted the importance of the field visits and they stepped up visits from time to time to find out the problems at the grassroots level.

5.3 Representing

Parliamentarians may act in the name of citizens once they collect all concerns from citizens of their own constituencies or from other constituencies.[48] They may act as the bridge between their constituents and the government. Although they do not have direct authority to address concerns of the citizens, parliamentarians can refer the concerns or questions to relevant authorities within the parliament and beyond. Parliamentarians may also share information with their own constituency or communicate to other constituencies about the advantages and disadvantages of energy projects. Furthermore, they can work collaboratively with development partners to advocate on the importance or the impacts of the energy projects.[49]

The Commission 9 who is in charge on energy issues of the Cambodian Parliament assumes its representation role. However, activities of the commission have not been yet systematically recorded, thus making it for the researchers difficult to obtain information when needed.

6. What have been the shortcomings?

6.1 Human resource factor

In order to have proper functioning on the part of the parliament to tackle energy issues, parliament should have capable staff who understands the importance of laws and procedure. This is important with a view of involving citizens and stakeholders at different stages of the law in drafting and reviewing processes. Parliament also needs to have a highly committed and capable chairperson for all commissions as well as specialized person/expert or departments to shape the ideas of democratic parliaments. This means that in each commission, there should be an expert person who is well informed of the procedure to conduct public hearings or expert hearings. The Cambodian

46 *Ibid*. UNDP, Renewable Energy for Parliamentarians, p. 65.
47 Report on monitoring role of the Commission 9th of the Senate; December 1st 2014.
48 Article 77 of the Cambodian Constitution; 1993.
49 *Ibid.* UNDP, Renewable Energy for Parliamentarians, p. 68.

parliament, particularly the Senate, shows signs of urgency for the need of such expertise to ensure a proper involvement of stakeholders in the law-making and reviewing processes. The Secretariat General of the Senate has been working collaboratively with relevant development partners to build up capacity of staff-members, particularly, to train those assistants attached to the secretariat to the commissions to be an expert in citizens/stakeholders involvement in the law-making and reviewing processes.

6.2 Financial factor

Another factor to determine active actions of the parliament in tackling energy issues depends on the finances. Whatever role the parliament may assume in practice, either organizing public hearing or expert hearing, it requires not only physical or mental efforts, but also financial resources (when it is organized outside the institution and whether it is big or small setting with the participation of citizens within a constituency or with domestic experts or foreign experts). In short, parliament needs sufficient financial resources to exercise its functions. For this reason, article 81 and article 105 of the Cambodian Constitution states that the National Assembly and the Senate have an autonomous budget for the conduct of their functions respectively.

Nonetheless, article 31 of the new Internal Rule of the Senate also affirms the financial resource of the Senate and bestows the Commission on Economy, Finance, Banking, and Auditing a duty to review and provide recommendations on the Senate's draft Annual Budget Law prepared by the Secretariat General. According to article 3 of the financial principle for the operation of the Senate of the 3rd mandate adopted as of March 5th, 2013, each expert commission is entitled to a budget allocation of 18 million Riels (approx. USD 4.500) as allowance and 10 million Riels (which is approximately USD2.500) per month for its entire operation. Although there is no hint that any part of the budget allocation is for a particular purpose, the allocation could be used for public hearings or expert hearings on energy issues if the expert commissions are willing to do so. In the absence of a clear guideline on the usage of the budget allocation, proper management of the budget lies largely on the understanding and the commitment of the chairperson of the commission and the coordination capacity of the assistants to the commission.

6.3 Political factor

Political factors could also be a critical barrier for the Cambodian Parliament to exercise its role. Some members of parliament are politically sensitive on most topics, thus, they are reluctant to propose ideas to tackle energy issues or to involve citizens/ stakeholders in the law-drafting and reviewing processes. Besides, laws declared as urgent by the government are also critical for a proper involvement. Article 113 of the Constitution as amended on March 1999, requires the Senate to examine and make recommendations on the drafted laws or proposed laws that have been adopted by the

National Assembly not more than one month and in an emergency situation (urgent laws); this period shall be reduced to five days only.

The same article requires that the process of sending the draft law or proposed law back and forth between the Senate and the National Assembly shall be completed within one month. This period shall be reduced to ten days in the case of the national budget and finance laws and to two (2) days for an urgent law. According to this provision, while most laws are made not in a transparent way, citizens and other stakeholders are not well-informed, thus cannot be involved at different stages of the law drafting and reviewing process.

In addition to the so-called urgent laws, failure to maintain proper involvement of stakeholders is also driven by ignorance of recommendations that have been made. This means that some recommendations are not taken into serious consideration or that there is no further action taken. Although the problems are identified and recommendations for improvement have been made by stakeholders at different stages of the process.

7. Conclusion

This desk study indicates that Cambodia enjoys economic growth despite the world's economic downturn in the last decade. However, the economic growth in Cambodia needs energy supply to meet the demands of businesses, households, industry, and the agricultural sectors.

Whilst Cambodia is at the stage of exploration of fossil fuel and also at an early stage to develop renewable and clean energies, its import of fossil fuels or other sources or energy from the neighbouring countries is badly needed to satisfy the short term need. For the long run, however, Cambodia needs to rely on other reliable sources of energy to ensure a sustainable development. Although sustainable energy like hydropower and biomass have potential in Cambodia, proper management is needed to balance the need of energy, development and the impact on society and environment.

Although there are policies and a legal framework to govern the energy sector, practically, the supply of energy in Cambodia is still fragmented and the transmission grid has not been properly installed nationwide.

The cost of energy supply is relatively higher than in the neighbouring countries due to imported fuel. Other factors that contribute to the high cost of energy include the small and incomplete system, leaks and corruption.

The Royal Government has made laws and regulations. Institutions have been created to take care of energy issues. Moreover, parliament plays a very important role to promote the energy sector through new laws. Its role in legislating, monitoring and representing the interest of citizens is important. However, parliament needs to work without political interference, with sufficient funds and with the involvement

of other stakeholders. The parliamentarians will then propose energy-related laws, debating, rejecting or commenting on draft energy-related bills and are in a position to strictly monitor the enforcement of energy-related laws and to represent the concerns of citizens. The role of parliament is important to improve all sectors, not only the energy sector. But, the success depends on the capacity of the MPs, the political commitment and sufficient financial resources.

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