Environmental Rule of Law in Asia

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Editors-in-Chief

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The Board of Editors, under the auspices of **University of Cebu-School of Law and Konrad-Adenauer-Stiftung, Ltd. (KAS),** published this book entitled "Environmental Rule of Law in Asia" which is a compilation of articles and/or papers contributed by different authors. However, the views and/or opinions of said authors do not necessarily reflect those of the Board of Editors, KAS and the University of Cebu-School of Law.

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FOREWORD

This publication offers a curated collection of essays that arise out of the 2017 and 2018 meetings of the Konrad Adenauer Stiftung's (KAS) informal network of Asian Environmental Lawyers. As the name indicates, this intergenerational group, which meets annually, is interested in all issues relating to governing the environment and is a forum for members of the legal fraternity from Asian to exchange experiences, best practices and ideas related to current and emerging issues in environmental law and policy.

Before introducing the publication, as the Director of the Rule of Law Programme Asia, I would also take this opportunity to briefly summarize in general the works of KAS specifically the Rule of Law Programme. KAS is a German foundation which aims to promote democracy and international co-operation and has been doing so, with considerable success, for more than 50 years. One of its core pillars is the KAS Rule of Law Programme, which has a truly global dimension, with dedicated regional offices in Asia, Europe, Latin America, Sub-Saharan Africa and Middle East/Northern Africa. The Asia regional office for the Rule of Law Programme Asia is located in Singapore, though its activities involve and take place across the full panoply of the countries that make up this region. By way of example, in 2018-19, the Rule of Law Programme Asia organized events in Hong Kong, India, Japan, Nepal, Philippines, Singapore, South Korea, Sri Lanka, Thailand and Vietnam, on topics covering rule of law and religion, environmental law, migration and refugee rights, constitutionalism and digital rights. The KAS Rule of Law Programme Asia has managed to draw participants from all over the Asian region and the world.

The publication covers a variety of topics ranging from land use regulation, smart cities, energy and indigenous people's rights. All of these topics are relevant to the work of KAS given that we are committed to the cause of sustainable development that takes into account environmental protection. We also acknowledge the dangers that natural and man-made disasters can bring to human societies. In pursuing this, KAS Berlin has established an office on Global Resources Policy and its coordinator will reach out to our regional programmes focusing on Environment, Energy Security and Climate Change in Asia, Latin America and Sub-Saharan Africa by delivering programmes with a specific focus on environmental matters.

As a political foundation involved in democracy promotion, KAS strives to ensure that the rule of law as an overarching norm is sustainably imbedded in the social reality in the countries that it works in. In that sense this publication could not have come at a more opportune time. The management of climate change is a raging global governance debate today and experts recognize that Asia will be among the hardest hit. Low lying and crowded coastal cities in many South and Southeast Asian countries are most at risk, and the hundreds of millions of people who live there are particularly vulnerable.[1] Any danger arising out of climate change in Asia threatens its peace, security and social order. While the linkages between climate change and rule of law may not meet

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the eye at the first instance, it poses a grave danger to all of humanity. The significance of climate change was underscored by Prime Minister Lee Hsien Loong in his 2019 National Day Rally speech, where he said "Climate change may seem abstract and distant for many of us, but it is one of the gravest challenges facing humankind". We believe this publication is our contribution to bring attention and awareness to the issue of environmental protection that has the potential to determine the destiny of humankind.

Let me take this opportunity to sincerely thank the editors, Prof. Rose-Liza Eisma-Osorio at the University of Cebu, School of Law, Philippines, and Assoc. Prof. Linda Yanti Sulistiawati, at Faculty of Law and Center for Asia-Pacific Studies, Universitas Gadjah Mada, Yogyakarta, Indonesia, long time partners and friends of the Rule of Law Programme Asia as well as the authors, who have contributed to this publication. I would also like to thank my colleague, Ms. Susan Chan, Regional Project Executive, for her support in bringing out this publication.

Singapore, 23 August 2019,

Gisela Elsner

Director Rule of Law Programme Asia
Leiterin Rechtsstaatsprogramm Asien

Konrad-Adenauer-Stiftung Ltd

An Empirical and Historical Review on Regulation of China's Urban Landscape and Open Spaces

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During the 69 years of the new country, China's urban landscape construction has made great achievements attributed to the high level of awareness of central government and the making of related laws and regulations. This article explains the making of related law and regulations into two stages: 'administrative instruction' and 'legalization'. Each stage differentiates the types of legislation and reviews the evolution of law making from administrative commands to the provisional regulations and finally, to the administrative regulation. This article elaborates the progress on provisions and legislative techniques by contrasting the two regulations above. Thereafter, it points out that the existing regulatory system on urban landscape is incomplete by analyzing the Urban Landscape Ordinance and understanding its horizontal and vertical systems. Finally, this paper foresees the possible impacts and challenges to existing laws, regulations and technical standards in the changing environment and suggests that old regulations should be revised, supplemented, or even abolished as to form an urban landscape legal system which will be unified, coordinating, prescient and enforceable.

Key words: landscape, administrative instruction, legislation, Urban Landscape Ordinance

Introduction

China will celebrate its 70th anniversary of the Chinese urban landscape industry in 2019. During the past years, the construction of urban landscape has been developing and rarely influenced by politics. Urban landscape professionals and academic experts have established various theoretical systems in this course of practice and study. However, little attention has been paid to the exploration of the legislative process and the attribution of the legislation on urban landscape construction. Half of the scheduled time has passed since the government started the society legalization project in 2004.[1,2] So people are quite concerned about: "whether the current law is reliable or not; would it be able to reach the deadline; and could it guide urban landscape construction in a scientific, systematic and prospective way?" As the urban landscape laws consist of very unique and professional regulations and rules, experts from legal science have shown little interest. Therefore, this paper attempts to discuss the influence of legislation on urban landscape construction through the sorting of historical information and comparison of core regulations.

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[1] General Office of the State Council, P.R.C. (2004). *Outline for Promoting Law-based Administration in an All-round way*. Beijing: China Legal Publishing House.
[2] State Council Information Office. (2008, February 28). *China's Efforts and Achievements in Promoting the Rule of Law.*

1. A brief history of urban landscape legislation

1.1 Definition of Legislation

Law, in general definition of Chinese legal system, is the whole of law, comprising of constitution, statutes, legal and judicial interpretation, and regulating documents with legal effectiveness that administrations issued to enforce statutes; while law in narrow definition means the regulating documents with legal effectiveness made according to legislative procedures by the special body with national legislative power (i.e. the National People's Congress and its Committees).[3] In this paper, the legislation refers to general definition. Because of its complexity, the analysis in this paper is restricted to the primary and fundamental administrative regulations.

1.2 Administrative Instruction Stage[4]

1.2.1 Before the new country (-1949)

In the administrative instruction stage, urban landscape construction was closely related to the administrative instructions and even personal opinions of leaders. Chairman Mao attached significant importance to China's landscape construction and ecological improvement both in the revolutionary war period and after the new China.[5] In March 1932, he signed on the *Resolution Decision on Tree Planting Movement of Chinese Soviet Republic People's Committee of Provisional Central Government*, encouraging people in Soviet Areas to make wasteland and bare hills green by planting trees every spring. Mao emphasized this when he addressed a conference in 1934: "We should initiate a tree planting activity movement, calling on every countryman to plant 10 trees and make them alive in rural area." He also insisted on ecological construction of the Shaan-Gan-Ning border region and preparation of public planting plan when staying in Yan'an. In his mind, tree planting was one of the ten main tasks of border region Cooperatives and it should be achieved to make local wasteland and hills green in 10 years, he also appealed that 100 trees be planted per household. Bo Yibo, another founders of the new China, also advocated tree planting and forestation. In April 1949, he suggested to launch 'greeny campaign' when attending the First National Congress of New-democratic Youth League.[6] The proposal is far-sighted in the circumstance of civil war. The 1949 Yellow River Flood inundated nearly 16.7 million acres of cropland, which was why famous silviculturist Liang Xi recommended natural disaster reduction through forestry and later promoted the establishment of Ministry of Forestry and Cultivation.[7]

After new China was founded, urban landscaping experienced the following five periods.[8]

[3] Haijing Cao. (2004). *Legislation system comparison between China and foreign countries*. Beijing: The Commercial Press, pp. 9-10.
[4] At this stage, lurban landscape construction mainly relies on administrative orders rather than laws.
[5] New China refers to the People's Republic of China established in 1949.
[6] Comrade Yibo Bo calls on young people in North China to study and work at the same time. (1949, March 3). *People's Daily*.
[7] Xi LIANG. (1950, March 10). Tree planting in this spring. *People's Daily*.
[8] Shanghua Liu. (1999). *Landscape and gardens in China from1949 to 1999.* Beijing: China Architecture & Building Press, pp. 3-17.

1.2.2 Reconstruction Period from 1949 to 1959

In September 1949, the Ministry of Forestry and Cultivation was established according to the *Organic Act of the Central People's Government of P. R. China*, to manage fairs on country greening. It was also granted the power to issue relevant administrative rules and regulations. In 1952, the Ministry of Construction and Engineering was set up to take charge of the construction of urban parks and landscape construction. In the First Five-year Plan period (1953-1957), urban landscaping was brought into national economic plan. New municipal parks and nurseries, green lands community and Institutes significantly changed the appearance of cities. In December 1955, Chairman Mao proposed to eliminate wasteland and bare hills in 12 years and to make every possible area green. Also in 1956 and 1959, he brought forward plans of "Turn the Nation Green" and "Landscape Gardenization" separately. After the establishment of the Ministry of Urban Development in 1956, urban landscape construction policy shifted from centralized green space (especially grand parks) to decentralized nurseries and every potential green land. Under the background of Great Leap Forward, trees were widely planted in the whole country.

1.2.3 Fluctuation Period from 1960 to 1965

Impacted by failures of natural disasters and economic failures, funds for landscaping were scarce; so people took the guiding principle of "combining urban agriculture within garden and parks", breeding vegetables and fowls in gardens and turning nurseries into arable land. It was not surprising that urban green land decreased by one third in 1962 as compared to 1959. In October 1962, the State Council released the *Direction on Certain Issues of Urban Construction and Management* to insure the financing course for urban landscaping through an administrative order.

1.2.4 Destruction Period from 1966 to 1976

During the Cultural Revolution,[9] China's urban construction was interrupted and severely damaged. For example, Beijing city planning was forcibly suspended in 1967. People made use of every bit of space: green spaces in residential areas and institutions were occupied. Classical gardens, historical relics, trees and flowers were completely destroyed in many cities. What's more, urban landscape administrations were oppressed with that Ministry of Construction and Engineering and Ministry of Construction Material Industry were merged into State Infrastructure Revolution Committee and 92% of officials who worked in these two ministries were sent to rural areas for "amendment". According to statistics, the total invaded area of urban green land was more than 44,000 acres in 22 provincial regions, which took up one fifth of the total urban green land.

During the long 20 years from 1957 to 1976, legislation in whole China ceased. The National People's Congress (NPC) had not enacted any law except the Constitution (which was replaced by the 1982 Constitution). Civil laws were renamed as "civil policies" and criminal laws were replaced by "criminal policies" or "guidelines and policies on fighting against the enemy".[10]

[9] The "cultural revolution" from May 1966 to October 1976 was a social movement launched by Mao Zedong.
[10] Jinguo Liu. (2007). *Society transition and legislation governing in China*. Beijing: China Legal Publishing House, p. 102.

There was no practice of administrative law making, neither was there any administrative enforcement of laws. The government ruled the country with policies and directions.

1.2.5 Legislation Interim from 1977 to 1982

Generally speaking, China is a policy society in Mao Zedong's era,[11] when the Chinese Communist Party depended on its traditional political mode – to manage the country with policies, as stated: "Under the circumstance that the law system is imperfect, the principle for judiciaries is that laws should be obeyed if they are existed and New-democratic policies should be followed if there are no corresponding laws".[12] After the Cultural Revolution, the social order was returned to normal and government management was more based on legislation. The real administrative law appeared as the remarkable event when the *Regulations of PRC on punishments in public order and security administration* was revalidated in 1980. In 1978, the State Council constituted the *Opinions on Strengthening Urban Construction*, [hereinafter, "the Opinion"] to resume urban landscape construction. The Opinion mentioned indicators of urban landscaping for the first time, such as the per capita area of green space, green space rate in new cities and reconstruction of old urban areas, the percentage of green coverage, etc. In 1981, the *Decision on Launching Nationwide Tree Planting Campaign* was passed in the fourth Session of the Fifth National People's Congress. March 12th was set as the National Arbor Day in the Decision; and afterwards, China's urban landscape construction has vigorously developed.

1.3 Legalization Stage

The quick development of urbanism requires applicable legal system and technical policies. In 1982, the Ministry of Urban-Rural Environment Protection promulgated the *Provisional Ordinance on Urban Parks and Landscape Management* which is the first ministerial regulation on urban landscape. It also marks the era when Chinese urban landscape stepped into the Legalization. However, the role of the Provisional Regulation was limited because it was in a transitional period when administrative instructions were still effective and the central governmental policies productive-oriented guideline on urban landscaping landscape could still be destructive. It was not until the *National Conference on Urban Parks* in October 1986 when "self-sufficient gardening" and "combining urban agriculture within garden and parks" were not treated as guidelines for urban gardening and landscape. The first rush of urban landscape was going with the "comprehensive improvement review on urban environment" in 1992 according to the *Suggestion on Strengthening the Comprehensive Improvement on Urban Environment* by the Ministry of Construction; however, 12,000 acres of green land had been reinvaded till 1993 because of the boom of economy development zones and real estates. In order to strengthen the legislative position on urban landscape, the State Council issued *Urban Landscaping Landscape Ordinance* in 1992. Besides the promotion of domestic administrative regulations, international environmental laws and treaties also played an active role in bringing positive ecological ideas to public. Based on United Nation's Convention on Biological Diversity, China's Agenda for 21st Century was released in which general strategies, countermeasures and plans of sustainable

[11] Dingjian Cai & Dan Liu. (1999). From policy society to legislative society – also discussing the negative impacts of policies to legislation construction. Laws in China and foreign countries.
[12] Direction by the Communist Party of China on Abolishing the Complete Literatures on Six Laws of the Kuomintang and Identifying the Judicatory Principles in Liberated Regions, 1949.

development were proposed. Thereafter, sustainable development and a people-oriented concept became the basic guidelines for all industries sectors. The Ordinance was an advanced piece of legislation since it had embodied the ecological and people-oriented legal tenets before the concept of sustainable development was realized by Chinese.

2. Legal system took shape

In China, sources of law include constitution, statutes, administrative regulations, ministerial regulations, local ordinances and rules, etc. which have different legal effects. The legal system proper is a macro-concept which is the current legislative organic whole composed of law departments based on legal criterion.[13] The legal system in this article is a micro-concept, taking the administrative regulation with the highest legal effect as the core with other relevant ministerial regulations, and local regulations, etc. Divided by different administrative bodies, it identifies the regulations, and rules issued by the central government as horizontal system as the core regulation, and ordinances and rules issued by local governments as vertical system of the core regulation.

2.1 Evolution of the core regulation

Provisional Regulation on Urban Parks and Landscape Management was just a ministerial regulation with limited legal effect, so it might not be able to solve conflicts that involve different departments or interest groups. It was common that some local landscape agencies leased out or sold the green land under the condition of inadequate budgets. Some institutions invaded the green land by any kind of means to establish courtyards and/or to build buildings. And others cheated city planning bureaus by declaring planned green common as built zone when applying land use plan. For example, it was recorded that there were 6o acres invaded areas of green land in total in Changchun City in late 1980s and early 1990s.[14] Hence, some deputies to NPC and members of the national committee of CPPCC (the Chinese People's Political Consultative Conference) submitted a proposal on making Urban Park Act and Urban Green Act. After public feedback in 1985 and 1986, *Urban Parks and Landscaping Management Ordinance (Draft for Approval)* was submitted to the State Council. Then landscape management was divided from the ordinance in order to avoid confusion with urban parks management.[15]

From the ministerial provisional regulation to the administrative regulation, the legal effect was greatly improved and the regulated contents and legislative techniques were more mature. The legal tenets were shifted from mere urban beautification to ecological and human health. The green space classification and quantitative indicators were just described principally rather than given quantitative targets which avoided unreasonable unified quantitative standards as well as insured the functioning role of industry standards on various landscape design instead of regulation. It was more reasonable on designing an admittance qualification system of landscape design and construction. And it focused more on forest protection instead of the disposal right of forests, for example, deforestation was strictly prohibited. In the new *Regulation*, clauses which exceeded authority and for political purpose were deleted, and concepts such as administrative illegality,

[13] Jian FAN. (2001). The Law. Nanjing: Nanjing University Press, p. 3-6.
[14] Qijia Yang. (1991, July 20). Stop invading green land. *People's Daily*.
[15] Shanghua Liu. (1999). *Landscape and gardens in China from1949 to 1999*. Beijing: China Architecture & Building Press, p. 81.

administration reconsideration, and market admittance were added consistent with other rules and regulations. (Table 1)

The changes of the clauses show some improvements of legislative techniques:

The clauses in the regulation become more concrete, more precise and more operable;

The process was more scientific and democratic to decide, draft and constitute the regulation;

Attentions were paid to the criterion and other aspects of the legislation to be consistent with other laws, which would make the legislation more scientific and systematic.

Table 1. The changes and improvements of the Ordinance to the Provisional Regulation

Adjusted Object		Provisional Regulation on Urban Parks and Landscaping Management	Urban Parks and Landscaping Management Ordinance	Improvements	
				Clause content	Legislative Technique
General Rules	Legislative targets	Urban beautification	Ecological environment	Pay attention to ecosystem and urban citizens health	-
	Applicable Scope	Based on regions and types	Based on regions	-	Improved legislative basis, issued *the Urban Planning Law*
	Implement Guarantee	Citizen obligations	Incorporated in national economy and social development plan	No more compulsory moral discipline	Precise and operable
	Implementation Subjects	Unclear	Urban construction departments and forestry departments affiliated to the State Council	Explicit horizontal and vertical management systems	Changed legislative criterion
Planning & Construction	Technique Indicators & Tree Planting	Range limits were quantified	Principal description	————	Reasonable decision
	Design & Construction	Unclear	Qualification admittance	Standardized Management	Improved legislative criterion
	Green space Types	Zoos and botanical gardens	Fence green land and greenbelts, Institute	No principal criterion on green land with	Concrete and precise criterion

			owned green space	high design requirements	
Management	Forest Disposal Right	Location Possession	————	Clauses of Exceeding Authority	Reasonable legislation
	Benefit & Protection	Benefit right	Protection and no destroy	————	————
	Market Admittance	————	Approved by industrial and commercial administrations	Compensation for using public resources	Changed legislative criterion
	HR Troop Construction	Descriptive clauses	————	Political mandatory clauses	Reasonable legal clauses
Punishment Rules	Illegal Behaviors	Destroy	Design, construction, invasion, destroy and administrative illegality	————	Precise criterion, changed legislative criterion
	Punishment Reconsideration	———	People who are punished have the right to apply for reconsideration.	————	Changed legislative criterion

2.2 Horizontal system of the core regulation

There is only one core regulation of urban parks and landscaping in China, the Urban Landscape Ordinance. Its horizontal system contains *Regulation on Indictors of Urban Landscaping Layout and Construction* (1993), *Regulation on Urban Zoos Management* (1994), *Regulation on Amusement Parks Management* (2001), *Management Measurements on Controlling Line of Urban Green Land* (2002), *Decision on Amendment of 'Regulation on Urban Zoos Management' by Ministry of Construction* (2004). Industry technique standards were issued sequentially to guide urban landscape construction. These standards include *Standard for Design of Parks CJJ48-92* (1992), *Standard for Planning and Design of Urban Road Landscaping CJJ 75-97* (1998), *Standard for Basic Terminology of Landscape* Architecture CJJ/T 91-2002 (2002), *Standard for classification of urban green space CJJ/T 85-2002* (2002), which together with the above regulations, form the regulating system for urban landscape. From current perspective, the horizontal system is imperfect in the following aspects:

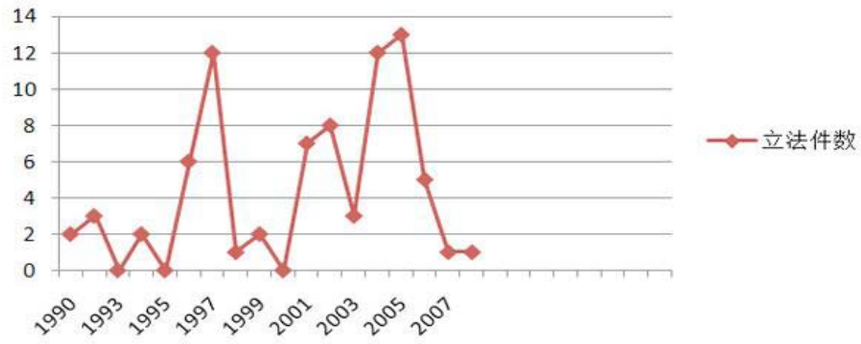
- Instructions for landscape should balance urban and rural development rather than focus in the cities;
- Construction indicators should be improved from quantity to quality, from two-dimension space to three-dimension space;

- Features of the time should be in the adjusting objects, such as industries, mining wasteland, and golf courses;
- Landscape management should be extended from minimization management merely satisfying safety demand to delicacy management, and
- Some immature regulations should be abolished and replaced. For example, the quantitative indicators in the *Provisional Regulation on Urban Parks and Landscaping Management* were abstracted to from the *Regulation on Indictors of Urban Landscaping Layout and Construction*, which will be invalid in 2010.

2.3 Vertical system of the core regulation

The horizontal system embodies the adjusting legal objects and their scope; while the vertical system explains the time and scales that local governments respond to the core regulations. Local governments are entitled to issue local rules and ordinances according to the *Urban Landscaping Ordinance*. Currently, there are one administrative regulation, one military regulation, 80 local regulation, 23 local government rules and two local standard documents effective in China.[16] In Table 2, it fluctuated when local governments issued urban landscape legislation with the years 1997, 2002 and 2005 experiencing intensive peak.

Figure 1. Numbers of local governmental regulations and rules issued during 1990-2008



Local landscape legislation should be based on two conditions - legislative demand of adjusting objects and mature legislative criterion, and local legislation is closely related to local social and economic development. In 1997 and 2002, urban construction was vigorous in China, though the situations may be different in cities. Local rules and ordinances were required to regulate urban construction and landscape. As the revenue quickly increased, local governments were able to spend more on public facilities such as parks and city nurseries. And as the legislative human resource became competent and the legislative techniques became more mature, it provided technical guarantee to urban landscaping legislation. However, we have to admit that there are some deficiencies in the vertical system, such as limited coverage, differing rule or regulation for legal subjects or objects, and different legal effects of the same level regulations.

[16] Peking University Center for Legal Information. (u.d.). http://vip.chinalawinfo.com/index.asp. Collecting date: 2015.02.15.

3. New features and new problems of the legislation in the new era

3.1 More closely combination of administrative indicators and plans

The above-mentioned *Regulation on Indictors of Urban Landscaping Layout and Construction*, a policy equivalent to relative law during the planned economy period, played a tremendous role in the years of administrative orders. It quantified indicators such as the per capita area of public green land, urban green coverage rate, urban green space rate, ratios of different types of green space, and percentage of production green land as well as planned schedule to reach the targets. In fact, it was a matter of a goal or a plan, which is different from the local landscape regulations that pay more attention to differentiate indicators and plans. The authors hold a favorable view as to whether the central government should unify the national standards of the green indicators or not. It is a general issue to set down the national indicators for landscape as it shall affect China's ecological strategy. As landscape is a public resource, its quantification rights in different cities should be centralized by central government. It is wise to take the quantification indicators as thresholds for local governments in case landscape would be constructed in an arbitrary and excessive trend in different cities after decentralization. In addition to the quantification indicators, it is necessary to make plans according to specific spatial objects in order to achieve the overall goal. Thus, the indicators and the plans together constitute a comprehensive legislative system.

3.2 Emergence of Legislative democratization

Legislation Democratization mainly includes two aspects: one is the democratization of a country's legislative activities themselves in legislative subject, legislative scope, and legislative process and the other specifically refers to the public participation in the legislative process.

In the past, experts and the administrative departments played a rather important role in making administrative regulations. Since the 1990s, a large amount of experimental laws and regulations had been worked out filled with departmental interests, due to the ignorance of the express function for public opinions of the legislative administrations. Meanwhile, anticipated legal effects could not be achieved because of the deterioration of execution, judicial, and law-abiding environments.[17]

In 21st century, the scientific outlook on development and some humanistic philosophy are considered when constituting laws and regulations, which facilitates the legislative executors paying more attention to adjusting the rights and interests of the legal objects. One-way irreversible administrative instructions turned into consultative clauses with justiciability. Legislation Democratization was also witnessed when local governments made rules and regulations on urban landscape construction, for instance, public opinions were accepted in the process of decision-making stage and legislative drafting stage.

Take Shanghai for example, the residents in more than 1,500 residential areas in the city were disturbed by pests and diseases of *metasequoias*. However, the *Urban Landscaping Ordinance* could not provide a proper solution on this conflict since it continues the expression of

[17] Zhongsheng Chen. (2008, February). More emphasis on legislation research in China. Modern Law Science, 109.

the highest value of trees and contains no clauses on tree relocation and no definitions of approval conditions on tree-felling when these are against the residents' interests. Fortunately, during the draft of the *Shanghai Landscaping Ordinance*, legislative hearings were held in residential areas for the first time and eventually formed the regulatory document after investigations on this problem.[18] In the Ordinance, trees could be relocated and chopped if they disturb the residents. And it clearly defined the obligations of the administrative units and also clearly assigned the implementing subject who takes the responsibility to relocate or fell trees. This is a big step forward in the local legislation history as well as a bold attempt on reversing the current administrative legislations which emphasizes administrative instructions rather than the appeal of legislative objects. Public participation at both legislative research and legislative drafting stages has opened the door to legislation democratization.

3.3 New situation, new background and new problems

3.3.1 The content of the statute falls behind the development of the science and technology

There is only one law highly related to urban landscape construction, which is the *Urban and Rural Planning Act of the People's Republic of China of 2008*. It is derived from the *Urban Planning Act of the People's Republic of China,* which was enacted in 1989. The Act embodied the urban landscape planning into the overall urban planning for the first time, providing legal protection for urban green land use and landscape promotion. The new law continues the legal structure of its predecessor and includes no new provisions on landscape construction. Meanwhile, the urban landscape administrative clauses, technical standards, guiding principles and indicators were far behind the development of science and technology.

In the middle of the twentieth century, people used the number of trees, the number and size of parks, and the number of annual tourists as indicators to measure the achievement of landscape construction. In the late 1970s, indicators such as per capita public green area and green coverage rate were proposed as new measurements. And in recent years, the *"Study on Urban Living Environment Green Indicators Group"*, jointly funded by the National Natural Science Foundation and the Ministry of Construction, was a breakthrough to identify new indicators to define the performance of urban living environment.[19] But new indicators such as the vertical green space, three-dimensional green volume mentioned in the new study rarely appear in the existing rules and regulations on landscaping. The simple two-dimensional quantitative indicators such as the green coverage rate and green land rate are unable to meet the guiding principles and the quantitative criteria of present ecological construction. Some concepts of ecological planning are inclined to urban planning, breaking through the traditional procedure in which green land is arranged after zoning is worked out.

3.3.2 Imperfect classification system

The classification standard of urban land use is different from that of urban green land, which leads to the failure of regulative control. For example, in recent years, the golf course is very popular in China. It would not be clearly classified to any types of land use. According to its

[18] Liping Yao. (2007, January 16). Public opinions heard, annoying metasequoias move. Xinmin Evening Post.
[19] Shaozeng Wang. (2005). Urban landscape planning. Beijing: China Agriculture Press, pp.130-133.

landscape, it should belong to green land; however, its commercial quality is against the public service nature of green land. Due to its twofold characteristics, it is difficult to classify the golf course and it is possible for decision-makers to abuse their power for money to invade public green land for the golf course. It is estimated by Beijing Landscape Construction Authority that there are at least 7 large golf courses with an area over 3,600 acres located in the isolated great greenbelt of Beijing. The privatization of public land and space has been a very serious problem.[20]

Nowadays, land use types can be transformed, and its value can be updated. For example, industry and mining wasteland can be recycled and updated through ecological reconstruction, which has become a trend of saving land resources. Although roofs and walls are not 'landscape' in the traditional sense, these 'landscapes' could also express the value of modern ecological civilization and show the update of quantitative measurement of ecological construction. Since landscape is a public resource, it is the duty of the government to determine its minimum volume and to reflect the more advanced techniques of it in the legislative system.

4. Conclusions

In the past 70 years, China's urban landscape construction has made great achievements following the quick economic development. At the end of 2007, as for urban built-up area, the green coverage area was 5 million acres and the green coverage rate was 35.3%, the green land was 4.44 million acres and the green land ratio was 31.3%; the urban green land area was 1.3million acres and the per capital figure was 8.98 square meters.[21] The 1949 data showed that there were 112 urban parks and green land with an overall area of 11,800 acres in China.[22] Anyway, administrative instruction and administrative regulations have successfully guided the nation to gain a fundamental accumulation for urban landscape industry.

It was a landmark in the social legalization course of China that the government shifted to landscaping legislation from administrative instructions. The core regulations of landscape, the *Provisional Regulation on Urban Parks and Landscape Management* and the *Urban Landscape Ordinance*, reflect the legislative conditions and legislative levels during the respective periods. The following horizontal and vertical systems were gradually improved, which presented some new features in the legislative procedures. With the emergence of new things and new phenomena, the definition of the adjusted objects of rules and regulations also changed. By comparing the *Provisional Regulation* and the *Ordinance*, we could see the significant improvement of the legislation. In addition, based on the development of landscape construction, the government should update the current law system and industry standards accordingly and form a unified, coordinated, predictable and practicable control system. According to the objective proposed in 2004 of establishing a county governed by law in a decade, the reform of the administrative legislation had been accomplished by the year of 2014. And the update of urban landscape law has also entered an era of rule of law.

[20] Xiaopeng Yang. (2008). Study on Beijing isolation areas policies - history, implementation and problems. Tsinghua University Doctoral Dissertation, p. 88.
[21] 2007 construction statistics of cities, counties, towns and villages. Ministry of Housing and Urban-Rural Development. 2008.
[22] Shanghua Liu. Landscape and gardens in China from1949 to 1999. Beijing: China Architecture & Building Press. 1999: 3.

References

2007 construction statistics of cities, counties, towns and villages. *Ministry of Housing and Urban-Rural Development*. 2008.

Comrade Yibo Bo calls on young people in North China to study and work at the same time. *People's Daily*, 04-03-1949.

Dingjian Cai & Dan Liu. (1999). From policy society to legislative society – also discussing the negative impacts of policies to legislation construction. *Laws in China and foreign countries*, p. 2.

Direction by the Communist Party of China on Abolishing the Complete Literatures on Six Laws of the Kuomintang and Identifying the Judicatory Principles in Liberated Regions, 1949.

General Office of the State Council, P.R.C. (2004). *Outline for Promoting Law-based Administration in an All-round way*. Beijing: China Legal Publishing House.

Haijing Cao. (2004). Legislation system comparison between China and foreign countries. *Beijing: The Commercial Press*, 9-10.

Jian FAN. (2001). *The Law*. Nanjing: Nanjing University Press, 3-6.

Jinguo Liu. (2007). Society transition and legislation governing in China. *Beijing: China Legal Publishing House*. p. 102.

Liping Yao. (2007, January 16). Public opinions heard, annoying metasequoias move. *Xinmin Evening Post*.

Qijia Yang. (1991, July 20). Stop invading green land. *People's Daily*.

Peking University Center for Legal Information. (u.d.) http://vip.chinalawinfo.com/index.asp. Collecting date: 2015.02.15.

Shanghua Liu. (1999). Landscape and gardens in China from1949 to 1999. *Beijing: China Architecture & Building* Press.

Shanghua Liu. (1993). Landscape and gardens in China from1949 to 1999. *Beijing: China Architecture & Building Press*. 3.

Shaozeng Wang. (2005). Urban landscape planning. *Beijing: China Agriculture Press,* 130-133.

State Council Information Office. (2008, February 28). *China's Efforts and Achievements in Promoting the Rule of Law*.

Xi Liang. (1950, March 10). Tree planting in this spring. *People's Daily*.

Zhongsheng Chen. (2008). More emphasis on legislation research in China. *Modern Law Science*, 02, 109.

Xiaopeng Yang. Study on Beijing isolation areas policies - history, implementation and problems. *Tsinghua University Doctoral Dissertation*. 2008: 88.

Land Allocation and Sustainable Land Management

Eathipol Srisawaluck*

Since 1935, successive governments have adopted policies to allocate land to the farmers and the poor as a key to poverty alleviation. A large number of beneficiaries however, have sold their lands both during and after the period when land transactions are prohibited. Once sold, farmers then requested for land allocation from the State again. The various approaches to land allocation measures have originated from different policies of the government. To overcome this problem, the State declared in 1982 that land allocation will only be through land reform measures. However, as a result of the assignment of laws and policies to many government agencies working on land allocation, it created impartiality between the people who will be entitled to it in terms of land holdings, land use and effects on natural resources and environment. The National Land Policy Committee (NLPC) has introduced a policy to address problems of forest encroachment. This policy aims at helping the poor by allocating the land to the community rather than the individual. Moreover, only rights to utilize land have been granted. The study confirms the land allocation policies have impact on land tenure situation, land utilization and natural resources and environment. The study also makes recommendations on appropriate land allocation measures, criteria for determining eligibility for land allocation, land rights and documents and land utilization.

Keywords: land, land allocation, land reform, land rights, farmers, the poor

1. Introduction

The agricultural sector is one of the major economic sectors of Thailand, making land an essential factor of production that most people wish to own. Demand for land has increased parallel to the growing demand and growth in consumption of the people. Hitherto, the increase in output from the agricultural sector has been through continued expansion of production acreage rather than through application of higher level of technology. Currently, Thailand has an agricultural area of about 23.87 million hectares or 46.80% of the country's land area.[1] In the earlier periods, land allocation was the way to solve the problem of landlessness. A cooperative was established in 1935 to allocate land for members on a hire-purchase basis. There are settlement projects for the people who are displaced from the flood zones and the poor under the Land for the Livelihood Act in 1942. During those periods, there were around sixteen (16) government departments working on land settlement. After the Cabinet Resolution of June 22, 1982, the land allocation responsibilities of the various agencies were either terminated or were not allowed to expand. The government department responsible for the land distribution is the Agricultural Land Reform Office (ALRO), while others operate to maintain the original work or operate in specific areas only.

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[1] Office of Agricultural Economic, Agricultural Statistics of Thailand, 2018.

Another form of land allocation policy was the Prime Minister Office *Regulation of the Community Land Settlements* in 2010. The policy was to provide arable lands to poor farmers. The concept is to allow people to manage and use the land collectively for housing and for production. The community has a collective duty to take care for natural resources and the environment, as well as comply with the conditions of the law and its regulations. The general expectation is that this will help reduce the incidence of land rights disputes between the State and the people. In principle, by creating access to land for the poor, the Community Land Settlements may be instrumental in reducing inequality. The additional benefits will be that the State will now have the cooperation of the communities in protecting forest resources against further encroachment, in preventing forest fires as well as in restoration activities.

In 2011, the Royal Decree was issued on the establishment of the Land Bank Management Institute (LABAI), a public organization, as part of the government's policy to tackle poverty by making land available to poor farmers and to ensure that there is fair land distribution. One of the mandates of the LABAI is to provide support for community management of common lands, arable lands and lands used for housing. The LABAI will provide loans for land acquisition and development to the farmers as well as the poor who wish to utilize on land. In principle, LABAI will also support community organizations or networks of community organizations in land management and also offer assistance on issues that concern provision of land rights.

More recently in 2014, under the Prime Minister Office Regulation, the National Land Policy Committee was established. The mandate of the Committee, chaired by the Prime Minister is to formulate policies and plans that will provide direction on efforts in land and soil management. The Committee reports directly to the Prime Minister any discrepancies between the policy framework and the actual measures carried out by the government agencies. In principle, the existence of this Committee will contribute to the integration of measures undertaken by various government agencies and the people as well as provide recommendations to the Cabinet on how to improve, revoke or amend the various legal instruments and regulations governing land and soil. This National Land Policy Committee will be supported by the Land Policy Committee Bill in the near future.

In the meeting 1/2017 on February 6, 2017, the National Land Policy Committee approved the draft strategy for the management of land and soil resources which will serve as a framework for the preparation of plans, policies and management of land and soil resources. The third strategy focuses on land allocation for the socially disadvantaged while the fourth is on management of land and soil. The Committee will oversee the land settlement plans of public lands. It will have the power to allow people who reside on public lands to stay and utilize the land as a collective as opposed to granting individual land rights. Such a policy may solve encroachment and occupation of public lands as well as ensure that public lands will remain so as no one can transfer land rights.

2. Land Allocation Laws and Policies

As mentioned above, the various approaches to land allocation measures have originated from different policies. The relevant laws can be summarized into three groups:

(1) Land allocation in accordance with the intent of the law, such as land allocation in accordance with the Land Code, land allocation according to the Land for the Livelihood Act of 1968 and land allocation under the Agricultural Land Reform Act of 1975;

(2) Land allocation to address encroachers problems or land allocation in accordance with government policy, such as land allocation under the National Forest Act of 1964; land allocation under the Veterans Administration Act of 1967; land allocation in accordance with the Prime Minister Office Regulation of the Community Land Settlements in 2010; the Royal Decree on establishment of the LABAI in 2011 and the Prime Minister Office Regulation of the National Land Policy Committee in 2014; and

(3) The use of public land by government agencies and the State enterprises to generate income to address land needs of the poor during the interim period, when there are no plans to use the land for a period of time such as the Department of the Treasury, the Royal Irrigation Department, Port Authority of Thailand, the State Railway of Thailand and the Electricity Generating Authority of Thailand.

The similarities or differences between the various forms of land allocations

Table 1. The similarities or differences between the various forms of land allocations

Laws	Type of Land		Beneficiaries	Areas	Rights on Land	Land Documents	Condition/ Limitation
	State	Private					
1. The Land Code.	✓		The poor/ Encroachers	8 ha.	Ownership	Title deed or N.S. 3	10 Years
2. Land for the Livelihood Act, 1968.	✓		The poor	8 ha.	Ownership	Title deed or N.S. 3	5 Years
3. Agricultural Land Reform Act, 1975.	✓	✓	Farmers	8-16 ha.	Ownership/ Prohibited transfer	Title deed or N.S. 3	Forever
4. The National Forest Act, 1964.	✓		Encroachers	3.2 ha.	Permit	Occupation permit	5-30 Years
5. The Veterans Administration Act, 1967.	✓		Veterans	4 ha.	Ownership	Title deed or N.S. 3	None
6. The State Land Act, 1975.	✓		Encroachers	2.4 ha.	Rent	Contract	30 Years
7. The Prime Minister Office Regulation of the Community Land Settlements 2010.	✓		Community	Not defined	Permit	Community document	Depending on the conditions of the Act
8. The Royal Decree on establishment of the Land Bank Management Institute (Public Organization) 2011.		✓	Farmers/ The poor	Not defined	Ownership	Title deed or N.S. 3	None
9. The Prime Minister Office Regulation of the National Land Policy Committee 2014.	✓		The poor/ Encroachers	Depending on the conditions of the Act	Permit	Occupation permit or Contract	5-30 Years

The major observations from the above table are:

(1) The type of land to be supplied

Almost all agencies allocated public lands to the poor, farmers and the encroachers. Only the Agricultural Land Reform Office and the Land Bank Management Institute (Public Organization) can buy land from the private owners for allocation to the farmers and the poor.

(2*) The beneficiaries who are entitled to land*

These are divided into 3 groups.

The first group is farmers and the poor. Land Code, the Land for the Livelihood Act of 1968, the Agricultural Land Reform Act of 1975 (the definition of the term "farmer" as well as the poor), and the Royal Decree on establishment of the Land Bank Management Institute (Public Organization) of 2011 aim to help farmers and the poor for land settlements.

The second group is people who have encroached public land. The Land Code, the Agricultural Land Reform Act of 1975, the National Forest Act of 1964, the State Land Act of 1975, and the Prime Minister Office Regulation of the National Land Policy Committee of 2014 – all these policies tackle the problem of encroachment on the public lands by formally acknowledging the status of the occupants contingent upon agreement not to further expand areas already encroached and occupied.

The third group is veterans and veteran's family and soldiers. The Veterans Administration Act of 1967 provides for the provision of State land to veterans, veteran's Family and the soldiers. With the provision of the Prime Minister Office Regulation of the Community Land Settlements of 2010, communities may apply for community land documents similar to the way the Prime Minister Office Regulation of the National Land Policy Committee of 2014 grants land use rights to the communities but not granting ownership rights.

(3) The size of the land to be provided

Under the Agricultural Land Reform Act of 1975, beneficiaries will only be granted the maximum of 16 ha. Under the Land Code, those who occupy the land after enforcing the Land Code shall have the right to own up to 8 hectares of land unless approved by the Governor.

The Land for the Livelihood Act of 1968 allocates no more than 8 ha to each beneficiary. The ceiling under the National Forest Act of 1964 is not more than 3.2 ha., and under the Veterans Administration Act of 1967 is no more than 4 ha. Individual lease issued by the Department of Treasury is not more than 2.4 ha. Depending on the regulations of agencies, the National Land Policy Board allows the maximum is 8 ha.

The Prime Minister Office Regulation of the Community Land Settlements of 2010, the Royal Decree on establishment of the Land Bank Management Institute (Public Organization) in

2011, do not specify the size of the land which will depend upon the land availability and the number of the community's members. On average however, the area is very small.

(4) Land rights

The Land Code, the Land for the Livelihood Act of 1968, and the Agricultural Land Reform Act of 1975 state that the public lands that are no longer reserved for any uses can be allocated to the farmers and the poor. The same as the Veterans Administration Act of 1967, and the Royal Decree on establishment of the Land Bank Management Institute (Public Organization) in 2011. In these cases, ownership rights are granted.

This is different from the National Forest Act of 1964, the State Land Act of 1975, the Prime Minister Office Regulation of the Community Land Settlements of 2010, and the Prime Minister Office Regulation of the National Land Policy Committee of 2014, which are aimed to preserve public lands. Ownership on land allocated is therefore not granted.

(5) Documents and restrictions on land rights

The Veterans Administration Act of 1967 and the Royal Decree on establishment of the Land Bank Management Institute (Public Organization) of 2011 granting a title deed or utilization certificate (N.S. 3). There are no conditions to prohibit the transfer of land rights to the person who has been allocated the land. Until the beneficiary is granted this ownership, the beneficiary must comply with the rules, procedures and conditions of possession and benefit of the designated.

The ownership of the land from the Land Code is a title deed or a utilization certificate (N.S. 3). There are conditions for land transfer for 5-10 years if issued a deed or a utilization certificate (N.S. 3) from the survey. The Land for the Livelihood Act, 1968 provides for the ownership of land to the members of the cooperative and the estate as a land title deed or a utilization certificate (N.S. 3) and prohibits the transfer of land rights for a period of 5 years.

The Agricultural Land Reform Act of 1975 provides land ownership as a title deed or utilization certificate (N.S. 3) when a farmer leases a land and pays a full hire-purchase payment. However, the land may not be divided or assigned to other person except inheritance to legal heirs or transfer to a farmers' institution or to Agricultural Land Reform Office (ALRO) for the purposes of agricultural land reform.

Those who have been allocated land under the National Forest Act of 1964 will be granted a land use permit for a period of five to thirty (5-30) years. The State Land Act of 1975 must enter into a Land Lease Agreement with the Department of Treasury Rental agreement not exceeding thirty (30) years. By providing a community document, the community will receive a written permission to make use of land maximum period of 30 years and get a community document. The National Land Policy Board provided the community a letter authorizing land use in accordance with the law of that land where the community is located. The maximum period of time must not exceed 30 years. The rules, methods and conditions of possession and the prescribed benefits must be complied with.

3. The Advantage and the Impact of Land Allocations

The result of laws and policies assigned many government agencies working on land allocation creates impartiality between the people who will be entitled to it. This section analyzes the advantages and impacts of various land allocation in terms of land holdings, land use and effect on natural resources and environment.

3.1 Effects on land holdings

The people who received land with no restrictions of land transfer can apply for loan by using land as collateral. However, there are disadvantages in terms of loss of land rights by forced collateral to pay debts or be deceived of the lender in various ways. The restrictions on land rights received under agricultural land reform are imposed to prevent the loss of land rights for farmers. When a farmer receives a document of permission to utilize on land (ALRO 4-01(or ownership on land, he will be prohibited to divide or assigned to other person except inheritance to legal heirs or transfer to a farmers' institution or to ALRO for the purposes of agricultural land reform. It is believed that the prohibition of land transfer has the effect of preventing farmers from losing their land rights. Nonetheless farmers have been known to transfer their land to others by selling their ALRO 4-01. Some farmers are still working on the land but as tenants not as owners. The disadvantage of prohibiting the transfer of land rights is that it creates difficulties of accessing formal sources of credit. Only the Bank for Agriculture and Agricultural Co-operatives (BAAC) to provide loan to ALRO farmers.

The permission to utilize the public land for a period of time can prevent the loss of land. However, there are disadvantages of grantee to find loans as the land cannot be used as collateral. Again, only the Bank for Agriculture and Agricultural Cooperatives (BAAC) provides loans by accepting group insurance. There are still risks however, given changes in the socio-economic status of the beneficiaries. If there is no follow-up and management over a period of time, land may be sub-divided or land transfers. The case of the transfer of the land documents received by land reform beneficiaries (ALRO 4-01) is a clear example.

There are important questions: When the permission for a period of 5-30 years expires would there be a renewable permit, or how many times to renew the permit. Do the responsible agencies plan to return the land to the state, for any purpose? However, if the permission to utilize the state land is renewed, it is not much different to the permanent property rights. It may be the same as granting the right to lease the land according to the Civil and Commercial Code. The land use fees should be revised and may be standardized similar to other types of public land.

3.2 Effects on land use

The purpose of all land allocation is to provide land as a factor of production for farmers or the poor. The Veterans Administration Act, 1967 is no different that it also aims to provide land to veterans, veteran's Family and the soldiers so that they can make use for agricultural production. Members of communities that have been allocated land to use collectively are also to use land for agricultural production and not for other purposes. There can be exceptional cases where a small segment of the land can be used for the purpose of earning some extra income.

It is well known that agricultural production faces risks from two uncontrollable variables: climate and the fluctuations of market prices. What does not change on the other hand, are rises in prices of inputs. It is therefore not surprising the majority of agricultural producers are poor. The study of "The Role of Land in the Future"[2] found that returns on land use from other activities in Nakhon Nayok province were almost 4 times higher than the revenue from land use for agriculture. In Chachoengsao province the return on land use in non-agricultural sector is 20 times higher. In another study on the social and economic changes in agricultural land use in the agricultural land reform area of Phuket Province,[3] the income from resort business is almost 4 times higher than that of agriculture.

One on-going debate is whether or not to allow farmers or the poor to use their land for other businesses to increase their income as opposed to restricting land use only for agriculture. The general public may find this unacceptable however given that these are perceived to be encroachers. As such any allowance should only be limited for agricultural production. Permission to use for non-agricultural activities is not only in contradictions with the prevailing regulations, but may also set bad examples encouraging more encroachment.

Overall, land allocation to farmers and the poor alone may not be enough to solve poverty because the income from agriculture alone is not sufficient. Beneficiaries of land allocation projects need additional support with infrastructure, in particular, water resources, transportation, production factors, technology and credits for production and consumption. There should also be measures to promote other income earning opportunities and restrictions should be relaxed to allow the use of part of the land for purposes other than agriculture. How much land use will be appropriate and consistent with the intent of the law, the land and socio-economic conditions of each locality must be studied.

3.3 Effects on natural resources and environment

According to the cabinet resolution of April 19, 1960, land is to be classified with 250,000 square kilometers or 24.960 million hectares set aside as forest reserves. The results of land classification of that time were that forest areas covered 29.920 million hectares which was more than what was targeted for reserves. This means that land that could be allocated to farmers increased by 4.8 million hectares and the next 6 years from 1960 to 1966 should complete the land classification. As the population increases, the forest area may decrease to 20 million hectares or about 200,000 square kilometers. Of this total area, 100,000 square kilometers should consist of watershed forests. In the next six years, the Royal Forest Department will have sufficient budget to improve the maintenance, protection, and replanting of forests.

These targets were never achieved. The land classified as permanent forest and national forest reserves were occupied by people. The Cabinet resolution on June 22, 1982 assigned the Ministry of Agriculture and Cooperatives, the Department of Lands, Department of Military Map

[2] Petipong Pungboon Na Ayudhya and Team. (2016). *'The Study of the Role of Land in the Future'*. The Thailand Research Fund, Final Report, p. 325.
[3] Thongpol Bhromasaka Na Sakolnakhon and Team (2014). *'Social and Economic Change in Agricultural Land Use in the Land Reform Area, Phuket Province'*, The Thailand Research Fund, Final Report pp. 69-70.

and related agencies to complete the survey and classification of land by 1987 under the supervision of the Land Development Board. Suitable forest land was to be preserved and declared as the National Forest Reserves. The government agencies working on public land can continue, but they cannot expand the areas to be allocated. The only exception was in the case of agricultural land reform and land development. The government agencies other than ALRO and the LDD must prepare the action plans or projects to complete their work within 5 years.

In 1985, the cabinet resolution on December 3, 1985 endorsed the national forest policy that forest area coverage should be 40% of the country's area. In 1992, the government issued the Office of the Prime Minister Regulation on the Resolution of Land Encroachment in the State Land 1992, (repealed and issued the regulation in 2002 and 2004) and established the Committee for the Elimination Invasion of Public Land to setup measures and subcommittees to prove the right of possession of state land.

The National Land Policy Committee is currently implementing measures to prevent the loss of land for the people. The policy is to allocate land for the communities but not granting individual ownership. It is expected that the impact on natural resources and environment will be minimized and that encroachment of public land will be reduced. In line with the 12th National Economic and Social Development Plan (2017-2021), the State has been promoting sustainable land use to? develop the production system and generate income of the community.

4. Proposals for Land Allocation to the People

4.1 Types of land to be allocated to the people

Presently land resources especially the public land were limited so it should be primarily utilized for public benefit. The government policy should be to reduce or terminate of public land to be allocated. Implementation guidelines may be divided into 3 parts:

(1) State land already allocated to people and in the process of land ownership under the existing law, such as land allocation of the Department of Land, Department of Social Development and Welfare, Department of Cooperative Promotion and the Agricultural Land Reform Office (ALRO) should expedite their work. There should be measures to monitor whether the beneficiaries have abided by the conditions of the law which granted them either use rights or ownership rights;

(2) The use of public land for allocation should be land where there are already problems of encroachment and occupation. The land allocation should be in line with the policy of the National Land Policy Committee (NTC). Granting permission to live and benefit in state land should be in accordance with the law governing land administration, with a duration from 5-30 years; and

(3) Focus should also be to generate the supply of land from private land that exceeds the rights under the Agricultural Land Reform Act, private land rent and abandoned land to land distribution and reduce social inequality. The Agricultural Land Reform Office (ALRO) should purchase land that exceeds the ceilings or land that is not used or underutilized for purposed of

allocation. The Land Bank Management Institute (Public Organization) should assist the mortgagee or seller of land who is about to lose out to become landless nationwide outside the land reform area.

As already mentioned, the land allocation to farmers and the poor for a period of time may become permanent, the area will be more urbanized, and the land cannot be returned to the state. There should be some measures:

(1) The permission for use of public land for a period of time should only granted if there is clear guidelines as to the number of times permits can be renewed when they expire, whether or not there are plans to return the land to the state, and for any purpose. Should the occupants be asked to move, the agencies will have to work out plans to move, to where and when; and

(2) However, if the intention is to allocate land to farmers and the poor on a permanent basis by continuing to renew the permits, the land use fees or compensation shall be the same or similar to what is already charged by other public agencies.

The next thing to consider is to set up an agency that will monitor the compliance with licensing criteria and conditions. There is a risk of land sub-divisions or transfer due to the social changes of the land grantees. The system should be established to monitor report and warn the licensee to comply, including measures to enforce against violators starting from warning to actual punishment. In the future, this system should be the same standard for land management, so it should be studied to cover public land throughout the country.

4.2 Who will be entitled to receive the land?

There are similar qualifications concerning the people who are eligible for land allocation. They must be Thai nationality or head of family, good conduct and honest, have a healthy body, diligent and able to work in agriculture. They must have no land or have small parcel of land that is not enough for a living and agree to abide by the rules, regulations and conditions set forth. However, future land allocation cannot be considered just the above features as most of the farmers, unlike in previous times have become part-time farmers or manage their farms by hiring services for the various tasks.

Many laws should change the definition of farmers, as well as communities that have the right to receive land that is consistent and rapidly changing economic and social environment. The ability to utilize land efficiently is one of the key considerations. The poor people who want to have land but have no land use plan may need to knowledge and skills in farming. This issue should be brainstorming from all concerned parties including those who are potential beneficiaries over the definition of the above terms.

4.3 Land use

Beneficiaries should be allowed to use part of the land to pursue a career other than agriculture to increase income and reduce the burden on the state budget. Proportion of appropriate use of land between agriculture and non-agricultural land may be determined by the condition of

the land and the social economy in each area. It may be necessary to amend the relevant laws and regulations. If there are extra benefits, it should be paid back to society, such as rent, fees, remittances, income, funds or taxes.

The scale of production should be increased to achieve economy of scale. This could increase the bargaining power throughout the production process and the supply chain.

4.4 Land rights and property rights

The principle of prohibiting the transfer of land rights is to protect the farmers and the poor who received the land not to easily lose their land. The *Agricultural Land Reform Act, 1975* has more intensive protection measures, but some of the farmers illegally sell their land with ALRO 4-01 documents. The National Land Policy Committee setup a policy to allocate public land for the farmers and the poor people as a community instead of individual households to prevent using land titles as collateral for loans or land transfer. Any changes to the rights and land holdings must be made through the responsible community committee.

In the long run, if the beneficiaries are to be allowed to use land on a permanent basis, land should be allocated on a leasehold basis. The tenure security should be accepted as collateral in the impaired assets market.

4.5 Related laws

The draft law of National Land Policy Committee BE .... " *is now in the review process of the Special Commission of the National Legislative Assembly*." This law will ensure that the policies of land and soil are unified and effective. The laws relating to land allocation for the people include the *Land Code*, The *Land for the Livelihood Act, 1968*, and the *Agricultural Land Reform Act, 1975* were subject to amendment due to the change of economic, social and environment of the country. The laws should be reviewed and amended, certain laws may need to be repealed, such as qualification and conditions of the person entitled to the land, restrictions on the rights of land. The other choice is to make a single new law of land allocation that will replace the present related laws.

To reduce the concentration of land holdings, speculation on land and land abandoned, the government should propose a draft of the *Land Bank Act*, BE to the National Legislative Assembly to develop the land market and make use of land appropriately, including financial support for agricultural land reform. The Land Bank could become a mechanism of the state to reserve land for economic benefits or support the implementation of rural or urban development policies or the development of state infrastructure.

4.6 Organization related to land allocation

The fact that many government agencies working on land allocation is a consequence of several laws and policies of the governments. The lack of unity of the agencies involved in land management has been altered to some degree. There is an alternative to keep the agency as it is and draft the new *Land Allocation Act* as a central law with comprehensive enforcement

framework, covering all types of land relevant with the policies of the National Land Policy Board. The other idea is a policy to integrate the existing government agencies working on land allocation in accordance with the new *Land Allocation Act*.

In addition, there are numbers of statutory funds related to land and assistance to farmers and the poor. The idea of pooling funds related to land allocation to farmers and the poor is another issue that may be raised. Presently, the policy of the State policy is against the establishment of more funds and aims to dissolve existing funds to the minimum so that the administration of the state budget is in the single system.

5. Suggestions

There are a lot of details of the operations of the agencies that need to be collected and analyzed. There are issues to be resolved, so that the suggestions are as follows.

(1) It is important to study the criteria for allowing people to stay in the public land. If it is permanent stay, there should be an agency responsible for monitoring compliance with specific licensing criteria and conditions. There should be a system of reporting, follow-up, warning, including measures to enforce against violators as the same standard for state land throughout the country;

(2) Rules and regulations relating to the definition of farmers and the poor, as well as the communities that are eligible for land with current and changing economic and social conditions should be revisited. The definition of eligibility for land acquisition may include land use plans, payment period and the concept of land turnover to be able to help other poor;

(3) The regulations to promote or allow the land recipient to use part of the land based on the potential of the land to create income other than agriculture should be reviewed. By doing so, local communities should be considered and benefited from those activities. There must be a mechanism to pay back the surplus to the local communities and society;

(4) The laws relating to the land allocation should be revised to improve the land administration. The new land allocation law may be enacted as a central law. This will result in the revocation of other laws that conflict or contradict each other, or to integrate the existing government agencies related to land allocation together. The funds related to land allocation to farmers and the poor should be pooling to be unity and efficiency and

(5) The economic measures such as taxes should be applied to reduce incentives for speculation. The land tax law should be progressive to promote land use for maximum benefit. Land information should be used as a tool for land management, particularly the information of land holdings on the state land.

References

Laws and Regulations

The Land Code

The Land for the Livelihood Act, 1968

The Agricultural Land Reform Act, 1975

The National Forest Act, 1964

The State Land Act, 1975

The Veterans Administration Act, 1967

The Prime Minister Office Regulation of the Community Land Settlements 2010

The Royal Decree on establishment of the Land Bank Management Institute (Public Organization), 2011

The Prime Minister Office Regulation of the National Land Policy Committee, 2014

The Prime Minister Regulation on the Resolution of Land Encroachment in the State Land, 1992

Documents

Eathipol Srisawaluck and Team, Final Report on 'The Study of Suitable Community Land Rights', support by The Thailand Research Fund, June 2007.

Eathipol Srisawaluck and Team, Final Report on 'The Study of mechanism for the Resolution of Land Encroachment in the State Land', support by The Thailand Research Fund, June 2010.

Petipong Pungboon Na Ayudhya and Team, Final Report on 'The Study of the Role of Land in the Future', support by The Thailand Research Fund, June 2016.

The 12th National Economic and Social Development Plan (2017-2021).

Thongpol Bhromasaka Na Sakolnakhon and Team, Final Report on 'Social and Economic Change in Agricultural Land Use in the Land Reform Area, Phuket Province', support by The Thailand Research Fund, June 2014.

Land Grabbing in Indonesia

Linda Yanti Sulistiawati*

This research depicts the situation of land grabbing in Indonesia, which started from the year 1825 to 1830, when the Dutch began implementing a policy concerning the local's agriculture, known as cultuurstelsel and its continuation of land grabbing in a different form until these recent years. Farmers and indigenous people are pressured to plant certain crops (in this case palm trees to produce palm oil). The research shows the growth of land used for palm oil plantations, and analyzes the current legal framework, which protects land and farmers. It concluded in a result that describes massive growth of palm oil plantations in various areas in Indonesia, and the inadequacy of the current legal framework in protecting land and farmers. The research suggests for all stakeholders, including the Government, and investors, to side with the farmers and indigenous people in respecting their ancestral land, not to change the land use of their land against their will. Legal framework for land needed to be revisited and reinforced to protect indigenous land against land grabbing.

Keywords: land grabbing, ancestral land, agricultural land, oil palm plantation

Introduction

In the recent years, the world has witnessed an increasing global demand for food, biofuels, and other natural resources as a result of the significant growth of human population. This societal pressure has led to an arising activity for acquisition of lands, an action also referred as *land grabbing*. A term that was made popular by society groups which helped to draw attention to the controversy land deals.[1] Land grabbing is a way for transnational corporations as well as foreign governments have proposed to solve by setting up huge plantations of food and agricultural products for biofuel.[2] A wave of deals for lands, favourably described as "market led agrarian reform" by Deininger,[3] often involves countries with economic strength that are poor in natural resources.[4]

The acquisition of farmland became popular among certain governments worried about their future ability to feed themselves. However, it also became a favourable way for investors to limit their assets against inflation, particularly in a context in which the markets remained

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[1] Fortin, C. J. (2011). "The Biofuel Boom and Indonesia's Oil Palm Industry: The Twin Processes of Peasant Dispossession and Adverse Incorporation in West Kalimantan." Global Land Grabbing Conference 6-8 April 2011. Nova Scotia, Canada: Land Deals Politics Initiative, 1.

[2] Sape, G. (2013). Building Community Resistance Against Land Grabbing: Documentation of Cases in Selected Communities in Asia. Penang: Pesticide Action Network Asia and the Pacific, 7.

[3] Deininger, K. (2010). "Large scale land acquisition: What is happening and what can we do?" Presentation at Land Day – Global Donors Platform on Rural Development. Rome, p.1217.

[4] Curry, M. (2016). "Mark Enabling Conditions for Structures of Domination: Java's Colonial Era "Cultivation System" and Indonesia's Palm Oil Plantation System in Comparative Analysis." Asian International Studies Review Vol. 17 No. 2, 56.

unreliable and were providing at best low returns.[5] Major countries and corporate entities have started to acquire areas that are relatively inexpensive in foreign countries, which are mostly located Africa and South-East Asia. These large-scaled land investors are targeting areas often referred as *reserve agricultural land*, which are areas classified as "empty", "marginal", or "idle" land.[6] This same view often overlooks the reality that few areas can genuinely be deemed unoccupied or unclaimed. Fortin[7] claimed that, "In truth, 'virtually, no large-scale allocations can take place without displacing or affecting local populations' (ILC 2009, 3)". As the occurrence of land grabbing is increasing at a significant pace, official claim by the state over 'non-private lands' undermines and violates the rights of people who have been living and working in these geographic spaces.[8] Foreign investment in agricultural land is actually not a new phenomenon, as large foreign-owned plantations exist in parts of most part of the globe, and in many cases, are remnants of the colonial era.[9] The objective was to ensure a better security of supply, and to respond to the requirements of their food industry clients by "enforcing compliance with standards related to food safety".[10] Conflicts in regards to land grabbing in South East Asia, in Indonesia in particular, has been associated with the expansion of large agribusiness investment in cash crops, i.e. "the so-called 'boom oil palm plantation', for which the global market demand has been increased in".[11]

1. Land Grabbing and Its Importance

As the interest in commercially-produced biofuels derived from a variety of agricultural crops is significantly growing,[12] biofuels are currently being promoted as an alternative energy source. Fortin[13] further contends on "FAO's (2008a) finding that biofuels can, not only lead to greater energy security and help mitigate climate change by reducing dependence on fossil fuels, but also help foster agricultural development in a sector that has been in a slump for decades". Though, with all the positive outcomes are promised from such modern cultivation culture, land grabbing is still a subject in an on-going debate in both scientifically and socially manner.

[5] Ibid. at 251.
[6] *Supra* Note 1, 11.
[7] *Ibid.* at 2.
[8] Borras, S. J. & Franco, J.C. (2010a). "Contemporary Discourses and Contestations around Pro-Poor Land Policies and Land Governance." Journal of Agrarian Change 10 (1): 1-32, 11.
[9] Smaller, Carin and Howard Mann. (2009). A Thirst for Distant Lands: Foreign Investment in Agricultural Land and Water. Winnipeg, Canada: International Institute for Sustainable Development (IISD), 1.
[10] Reardon, T. and Berdegué, J. A. (2002). "The Rapid Rise of Supermarkets in Latin America: Challenges and Opportunities for Development." Development Policy Review 20 (4).
[11] Hall, H. & Li. (2011). Powers of Exclusion: Land Dilemmas in Southeast Asia. Singapore: NUS Press.
[12] *Supra* Note 1.
[13] *Ibid.* at 2.

Figure 1. Deforestation in Riau, Sumatera

Picture taken from WWF Singapore, 'WWF calls for zero burn laws as hotspot analysis fingers pulp and palm oil industries', 27 June 2013

Every now and then, crops are being redirected to biofuel production, more lands are being used for cultivation, and other areas deemed 'marginal' are increasingly being brought into agricultural. Forest that were homes to a variety of species of plants and animals are losing its status from continuance of deforestation. Attempting interest of several major states, coated with extensive government subsidies directed towards agribusiness behind the booming global demands for biofuels is the main reason of this reshaping rural landscapes in developing countries.[14] For the estimated 86% of rural people that depend on agriculture for their livelihood, and with three out of every four of the world's two billion or more poor living in rural areas,[15] 'land grabbing' and the agricultural 'development' that is expected to follow, is resulting in uneven outcomes characteristic of development in highly differentiated settings.

2. Land Grabbing in Indonesia

2.1 History

Dutch colonization plays a major role in the lives of Indonesians, including in the field of the topic in question. Looking back to the year 1825 to 1830, the Netherlands began implementing a policy concerning the local's agriculture, known as *cultuurstelsel* in its colonial territory of Dutch East Indies (now Indonesia).[16] The cultivation system then was applied, leading to a barbaric activity referred as "Sistem Tanam Paksa" by Indonesians. In conducting this system, indigenous

[14] *Ibid.*
[15] World Bank. (2007). World Development Report, 2008: Agriculture for Development. Washington D.C.: World Bank, 3.
[16] Fasseur, C. (1981). The Cultivation System and Its Impact on the Dutch Colonial Economy and the Indigenous Society in Nineteenth-century Java. Leiden, 137.

people or what is called as *adat people* in Java were forced to work in the fields to cultivate cash crops such as coffee sugar canes, and pepper, for many hours in a day against the nominal plant wage.[17] Effects were later felt as many Indonesians workers became ill due to starvation and even death.

The controversial policy later received many protest from the Dutch people, consequently the brutal system was later put to an end in 1870.[18] To maintain the colonial's income from crops plantation and settling the dispute of land ownership, a new program was then established alongside a new regulation about lands under *Agrarische Wet* 1870. This new ethical system of formal plantation-based agriculture followed from 1870 until independence in 1945 – excluding the hiatus of World War II.[19]

The transition to independence following the War did nothing to alleviate the adverse incorporation of agrarian labour as instituted and maintained under the Dutch colonists. Pierre van der Eng[20] details "the extent and severity of famines in the 1950s and 1960s that occurred across Indonesia and argues that official state discourse, censorship and disruption of data collection ensured that action to alleviate the crises was suppressed."

Since the late 1960s, the Indonesian state has laid claim to the nation's forested areas (the second largest in the world), which accounts for over 70% of the archipelago's land mass.[21] "The Suharto state, which Li[22] considers as 'modelled base on the Dutch colonialization,' used force and the insistence on a rigid doctrine of national development. This also controlled flows of information by purging liberal academic professionals in the social and agricultural sciences and replacing them with a new generation trained in American neoclassical economics"[23], and the "palm oil oligarchy" established under the Suharto regime (1966-1998)[24] has since left a legacy of corruption, cronyism, and incompetence of governance.[25] This view was later aggravated during the world's economy crisis, where the results were affected directly towards Indonesian market in 1998, leading to the resignation of Soeharto in the so-called *Reformasi* era. The palm oil sector and land grabbing, however, still growing steadily until now.

[17] Van Schendel, W. (Editor). (2016). Embedding Agricultural Commodities: Using Historical Evidence, 1840s–1940s. New York: Routledge: Taylor Francis Group, 31.
[18] *Supra* note 16.
[19] *Supra.* note 5 at 56.
[20] Pier Van der Eng (2012, 1).
[21] Peluso, N. (1992). Rich Forests, Poor People: Resource Control and Resistance in Java. Berkeley: University of California Press, 5.
[22] Li, T. M. (2007). The Will To Improve : Governmentality, Development, and the Practice of Politics. London: Duke University Press, 61.
[23] White, B. (2005). "Between Apologia and Critical Discourse: Agrarian Transitions and Scholarly Engagement in Indonesia." Social Science and Power in Indonesia (Equinox Publishing) 107-142, 109.
[24] Aditjondro, G. J. (2001). "Suharto"s Fires. Suharto"s Cronies Control and ASEAN-wide Palm Oil Industry with an Appalling Environmental Record." Inside Indonesia (65). Accessed September 2017. http://insideindonesia.org/content/view/492/29.
[25] McCarthy, J.F. (2006). The Fourth Circle: A Political Ecology of Sumatra's Rainforest Frontier. Stanford, California: Stanford University Press, p.8.

2.2 Current situation

Figure 2. A labour pushing cart with palm oil products

Photo taken from Mongabay Haze Beat, 'How effective will Indonesia's palm oil permit freeze really be?', 4 May 2016

Indonesia is presently the site of a booming agricultural sector, and as the world's largest producer of oil palm, its plantations are expected to triple in area over the next decade, as the country vows to become the world's largest producer of biodiesel.[26] Even though oil palm trees are not a problem, the rapid expansion of oil palm plantations across Southeast Asia, and particularly Indonesia, could cause the destruction of rainforests, as well as a lot of social problems, including food security challenges.[27] The expanding oil palm sector has resulted the forested lands in Sumatera and Kalimantan increasingly becoming sites of contestation,[28] where a 2009 data showed that 65% of plantation areas were located in Sumatera, 26% in Kalimantan, 3% in Sulawesi, and the rest spreads around Indonesia including Java and Papua.[29] These numbers increased rapidly by the following years, placing Kalimantan as the biggest oil palm plantation in the world of 1.8 million hectares that is now sitting in the border of Indonesia and Malaysia called the Kalimantan Border Oil Pam Mega Project.[30] In support of plantation expansion policies, the

[26] McCarthy, J. F. (2010). "Processes of inclusion and adverse incorporation: oil palm and agrarian change in Sumatera, Indonesia." The Journal of Peasant Studies 37 (4), 823-4.
[27] Pye, O. (2009). "Palm Oil as a Transnational Crisis in South-East Asia." Austrian Journal of South-East Asian Studies (Society for South-East Asian Studies) 2 (2), 2013.
[28] *Supra* note 22.
[29] Riyanto, B. (2010). "Overview of palm oil industry in Indonesia." Pricewaterhouse Coopers, 2.
[30] AGRA. (2013). Building Community Resistance Against Land Grabbing: Documentation of Cases in Selected Communities in Asia - Indonesia, Sri Lanka, Pakistan, the Philippines and Malaysia. Penang, Malaysia: Pesticide Action Network Asia and the Pacific, 8.

Indonesian Department of Agriculture has also identified approximately 27 million hectares of "unproductive forestlands" that could be offered to investors for conversion into plantations.[31]

Table 1. Land area and palm oil production in Indonesia 2000 to 2006 (1000 tons)

	Area (1000 Hectares)				Palm Oil Production (1000 Tonnes)			
Year	Public	Private	Small-holder	**Total**	Public	Private	Small-holder	**Total**
2000	588	2 403	1 167	**4 158**	1 461	2 403	1 905	**5 770**
2001	610	2 542	1 561	**4 713**	1 519	4 079	2 798	**8 396**
2002	632	2 627	1 808	**5 067**	1 607	4 588	3 427	**9 622**
2003	663	2 766	1 854	**5 284**	1 751	5 173	3 517	**10 441**
2004	665	2 781	2 120	**5 567**	1 988	6 359	3 847	**12 194**
2005	678	2 915	2 357	**5 950**	2 237	7 883	4 501	**14 621**
2006	679	3 022	2 549	6 250	2 328	8 541	5 612	16 841

Adapted from Indonesian palm oil in numbers, Indonesian Palm Oil Board and Ministry of Agriculture, 2007, Jakarta: DHB Printing, p.7

A follow up issue arises in regards to violation of rights of the people who have spent their lives living and working in the affected areas of land grabbing. "The terms 'unproductive,' 'idle,' or 'under-utilized' land remain highly contested, however, given the ample evidence pointing to how such lands play an essential role in the livelihoods of the poor".[32] In Indonesia, it has long since been established that such lands provide livelihoods to millions of local farmers and "under a variety of tenurial relations, be they individual or collective, 'customary,' or otherwise".[33]

When considering the issue of property rights on allowing rural landholders to transform 'dead' capital into productive land, the findings are mixed and reveal uneven outcomes that point to "the need for a more textualized analysis than the individualisation thesis advanced by neoliberal land policies".[34] At a fundamental level, the greatest shortcoming of a model that views land and property rights strictly in terms of commodity and land markets is that it overlooks that landed property rights are not things, but are in fact social relations that are linked to dynamic processes of wealth creation that sustain diversified rural livelihoods.[35] Neoliberal land policies thus fail to capture this vital feature of rural communities.

[31] Colchester, M. et al. (2006). Promised Land : Palm Oil and Land Acquisition in Indonesia Implications for Local Communities and Indigenous Peoples. England: Forest Peoples Programme and West Java, Indonesia: Sawit Watch.
[32] Cotula, L., Dyer, N. & Vermeulen, S. (2008). "Fuelling exclusion? The biofuels boom and poor people's access to land." IIED, FAO, and IFAD, London/Rome.
[33] *Supra* note 21.
[34] Fortin, E. 2005. "Reforming Land Rights: The World Bank and the Globalization of Agriculture." Social and Legal Studies 14 (2): 147-177.
[35] *Supra* note 8 at 9.

Oil palm plantation widespread in Indonesia is also said to be the main reason of biodiversity loses in the nation.[36] A region used to be known with various endemic forest dwelling species is now facing a sad turn with the ongoing deforestation for the sake of oil palm plantation. Not only they have replaced forests and, to a lesser extent, pre-existing cropland, conversion of logged forests to oil palm plantations also decreases the species richness of forest birds by 77% and 73%.[37] Although oil palm plantations could have been created on lands devoted to uses, in practice, companies still overtake fertile soil which are often located in forests.

Moreover, evidence of environmental destruction and degradation is cited in many situation in regards to land grabbing, whether from building of infrastructure on natural habitats, use of inorganic chemicals in farming, deforestation, and commercial farming. A real-life case for an example, a situation that took place at a plantation site in Buol, Central Sulawesi. Not only the villagers are forced to step away from their homes and cramped in a provided single room with their families, many of these people didn't receive compensation as promised,[38] a broken promise made by a big company with denial of ever making agreement beforehand as their defence. In Buol, the deforestation and planting of oil palms along river banks and on hillsides both within and outside the concession caused severe soil erosion, with much of the soil ending up in the fast-flowing river.[39]

3. Land Grabbing and Oil Palm Plantation

Palm oil, being a multi-purpose vegetable oil, and is one of the most rapidly expanding equatorial crops,[40] and with the United Nations Food and Agriculture Organization data shows that at least 56% expansion occurred in Indonesia alone until 2005. Furthermore, based on several researches, there are four evidences that land grabbing has taken place in Indonesia's oil palm sector:

First, millions of hectares of land have been converted to large-scale oil palm production in recent years, with the bulk of this expansion taking place in Indonesia.[41] In 1990 the presence of oil palm plantations in Sumatra and Kalimantan was negligible. The growth the skyrocketed in each decade, where between 2007 and 2010 over 190,000 hectares (ha) per year were cleared for cultivation. From 528,000 ha in 2000 the extent of industrial oil palm coverage only on peatland had reached 1,285,000 ha by 2010 and is expected to continue accelerated growth.[42]

[36] Koh, L. P. & Wilcove, D.S. (2008). "Is oil palm agriculture really destroying tropical biodiversity?" Journal of the Society for Conservation Biology.
[37] Peh, K. S.-H., Sodhi, N.S., de Jong, J. Sekercioglu, C.H. Yap, C. A.-M. & Lim, and S. L.-H. (2006). "Conservation value of degraded habitats for forest birds in southern Peninsular Malaysia." Biodiversity Research.
[38] GRAIN. (2014). Peasant's Long Fight to Roll Back Palm Oil Land Grab in Indonesia. Barcelona: GRAIN, 2.
[39] *Ibid.* at 3.
[40] Budidarsono, S., Susanti, A. & Zoomers, A. (2013). "Oil Palm Plantations in Indonesia: The Implications for Migration, Settlement/Resettlement and Local Economic Development." InTech.
[41] Cramb, R. & McCarthy, J.F. (2016b). "Characterising oil palm production in Indonesia and Malaysia." In The oil palm complex: Smallholders, agribusiness and the state in Indonesia and Malaysia, by R., and J.F. McCarthy Cramb, 27-77. Singapore: NUS Press, 29–31.
[42] Miettinen, J., Hooijer, A., Tollenaar, D., Page, S. and Malins, C. (2012). "Historical Analysis and Projection of Oil Palm Plantation Expansion on Peatland in Southeast Asia." White Paper No. 17 for the International Councilon Clean Transportation, 20.

Second, international investments, especially from Malaysia and Singapore, has played a critical role in the expanding Indonesian oil palm sector, and cross-border flows of capital and labour have helped create what Cramb and McCarthy call a "sub-regional oil palm complex".[43]

Third, state actors have worked assiduously to make land for oil palm available to companies, and to bias policy regimes in favour of capital (for Indonesia)[44].

Fourth, strong global demand for palm oil for it's widely uses including for cooking oil, as an ingredient in soap, margarine, and a variety of other products, has been the core reason to the expansion of oil palm production, and much of that demand has come from East and South Asia.[45]

4. Indonesia's Legal Framework in Protecting Local Farmers

In order to control and maintain the activity of land grabbing in Indonesia for oil palm plantation, several legal products have been established by the government of Indonesia.

First, under the Indonesian constitution *Undang Undang Dasar Negara Republik Indoneisa* 1945, Article 33 (3) states that, "*The land, the waters and the natural resources within shall be under the powers of the State and shall be used to the greatest benefit of the people*." It is clear in this stance that the people are being deprived away from the benefit of their homelands, with little to no compensation to the damages occurred. The Constitution identifies the state as sole agent that has the authority to determine the threshold of what national interest falls onto. This is in reliance to Article 18(B)(2) and 28(I)(7) that recognises indigenous peoples' rights and unwritten customary rights also known as *adat law*.

Second, Law Number 39 of 1999 the *Undang Undang Hak Asasi Manusia* which is an end product from ratification of the Universal Declaration of Human Rights (UDHR). Human rights are one of the main focus in Indonesia, however violations keep happening in many aspect of Indonesian lives, accordingly with the land grabbing issue.

Third, Agrarian Law of 1870 the *Undang Undang Pokok Agraria* is a set of laws derived from the Dutch's *Agrarische Wet*. This law mainly regulates on land ownership, rights of use, and leasing of land in Indonesia.

[43] Cramb, R. & McCarthy, J.F. (2016a). "Introduction." In The oil palm complex: Smallholders, agribusiness and the state in Indonesia and Malaysia, by R., and J.F. McCarthy Cramb, 1-26. Singapore: NUS Press, 1– 2, 16; see also Teoh, C. M. (2013). "Malaysian corporations as strategic players in Southeast Asia's palm oil industry." In The palm oil controversy in Southeast Asia: A transnational perspective, by O. and J. Bhattacharya Pye, 19-43. Singapore: ISEAS Publishing.

[44] Potter, L. (2016). "Alternative pathways for smallholder oil palm in Indonesia: International comparisons." In The oil palm complex: Smallholders, agribusiness and the state in Indonesia and Malaysia, by Cramb and McCarthy, 155-188. Singapore: NUS Press, 162– 63; Zen, Z., Barlow, C., Gondowarsito, R. & McCarthy, J.F. (2016). " Interventions to promote smallholder oil palm and socio-economic improvement in Indonesia." In The oil palm complex: Smallholders, agribusiness and the state in Indonesia and Malaysia, by Cramb and McCarthy, 78-108. Singapore: NUS Press.

[45] *Supra* note 41 at 28; McCarthy, J.F. & Zen, Z. (2016). "Agribusiness, Agrarian change, and the fate of oil palm smallholders in Jambi." In The oil palm complex: Smallholders, agribusiness and the state in Indonesia and Malaysia, by Cramb and McCarthy, 109-154. Singapore: NUS Press.

Fourth, Law Number 41 of 1999 the *Undang Undang Kehutanan*, regulates the whole aspect of forest in Indonesia. This includes the usage, status, function, management, and prohibitions on forestry scope.

Fifth, Constitutional Court Decision Number 35 of 2012 under the *Putusan MK* 32/PUU-X/2012 that decides to distinguish between "*state's forest" & "local (adat) forest"* that is stated under Article 5(1) of Law No. 41 of 1999.

Sixth, Law Number 32 of 2009 the *Undang Undang Perlindungan dan Pengelolaan Lingkungan Hidup* is a product of rule that regulates on how the Indonesian environment should be preserved.

5. What is Missing?

Research has pointed to several implications for development in the context of the current oil palm boom and the land grabbing happening in Indonesia. First point to consider is a policy for a well-coordinated master plan for land that covers the concern for human rights. A stricter rule that governs large-scale investors is needed during this increasing agricultural production, yet still consider 'rural development and poverty reduction'. It is necessary to examine the whole procedures of acquisitioning lands, in order to minimize any misconduct during this process. Subsequently, civil society whose main concern is human rights and land rights shall not be intermingling with corruptive activities.

Another point of implication is in regards to a clearer legal framework on land rights, including ownership and user rights. Although Indonesia has a law on this matter, however this law was derived during the Dutch colonialization. Many changes have occurred from the establishment of *Agrarische Wet* 1870 until the present day, and various revision is needed to broaden the aspect of the law in question. Thus, this outdated legal framework needs either to be revised or even changed into a more recent one.

Further, an anti-corruption land movement and the restriction of many institution involvement shall be considered to protect land and environment rights. As for the reasons aforementioned, the government shall take into account the acquisition happening in several places in Indonesia that are contributing negative impacts to the environment. Such activities may involve with forest fire and water pollution.

Finally, alternative solutions for land grabbing for palm oil plantation. Palm oil plants don't necessarily need fertile soil to grow on, nor does it need to take space only in forested areas. In solving this implication, institutions need to consider using least fertile land in arid areas of Indonesia, such as in eastern part of the country. Different methods in planting palm oil trees should also to be taken into consideration, without resulting too much damage for either the people or the environment.

6. Conclusion

It has reached to a situation that the cultural aspect of land has slowly been forgotten, where lands are treated as a commodity, where it means as home and living sources for the poor. “The commodification of land, which the global phenomenon of land-grabbing is accelerating, entails risks that go far beyond what the current proposals for regulating it seem willing to recognize”.[46] It is apparent that Indonesia’s policy in farming has not changed drastically since the Dutch occupation. Small farmers and local community are those who are suffering, as they are often viewed as the lowest in this industry. Protection for farmers and indigenous people of their lands have to be prioritized. The government need to side with them, market need to side with them, and *adat* (customary) law needs to side with them.

Unfortunately, there is still no clear legal framework in land rights, nor a masterplan of land use which includes human rights in Indonesia. As simple as a combination of extremely detailed prescriptions for how life should be organised today with a resistance to any visions of the future that might seem too much like ‘‘planning’’,[47] can be practiced at this time of palm oil boom. This fact propelled land grabbing in an extensive scale all over the country. There is a need for a clear and comprehensive plan of land use, together with a clear and updated regulation on land rights in Indonesia.

The next big step to take now is to visualise beyond what seems as easy as making policies on land deals and find ways to overhaul activities that are making the peasants even more struggling. Lastly, an encouragement to come up with answers on how to make profitable farming facilities which are environmentally friendly, human rights obedient, legally acceptable, and economically viable for all stakeholders; and find out whether a modernization would able to assist such farming activities.

[46] de Schutter, O. (2011). "How not to think of land-grabbing: three critiques of large-scale investments in farmland." The Journal on Peasant Studies 38 (2), 274.
[47] Hall, D. 2011. "Land Grabs, Land Control, and Southeast Asian Crop Booms." The Journal of Peasant Studies 38, No.4 (The Journal of Peasant Studies 38, No.) 837-57, 608.

References

Aditjondro, G. J. (2001). "Suharto‟s Fires. Suharto‟s Cronies Control and ASEAN-wide Palm Oil Industry with an Appalling Environmental Record." *Inside Indonesia* (65). Accessed September 2017. http://insideindonesia.org/content/view/492/29.

AGRA. (2013). *Building Community Resistance Against Land Grabbing: Documentation of Cases in Selected Communities in Asia - Indonesia, Sri Lanka, Pakistan, the Philippines and Malaysia*. Penang, Malaysia: Pesticide Action Network Asia and the Pacific.

Borras, S. Jr., & Franco, J.C. (2010a). "Contemporary Discourses and Contestations around Pro-Poor Land Policies and Land Governance." *Journal of Agrarian Change* 10 (1): 1-32.

Borras, S. J. M. & Franco, J.C. (2011). *Political Dynamics of Land-Grabbing in Southeast Asia: Understanding Europe's Role*. Amsterdam: Transnational Institute in the context of the Just Trade project.

Budidarsono, S., Susanti, A. & Zoomers, A. (2013). "Oil Palm Plantations in Indonesia: The Implications for Migration, Settlement/Resettlement and Local Economic Development." *InTech*.

Cotula, L., Dyer, N. & Vermeulen, S. (2008). "Fuelling exclusion? The biofuels boom and poor people’s access to land." IIED, FAO, and IFAD, London/Rome.

Cramb, R., & McCarthy, J.F. (2016a). "Introduction." In *The oil palm complex: Smallholders, agribusiness and the state in Indonesia and Malaysia*, by R., and J.F. McCarthy Cramb, 1-26. Singapore: NUS Press.

Cramb, R., & McCarthy, J.F. (2016b). "Characterising oil palm production in Indonesia and Malaysia." In *The oil palm complex: Smallholders, agribusiness and the state in Indonesia and Malaysia*, by R., and J.F. McCarthy Cramb, 27-77. Singapore: NUS Press.

Colchester, M. et al. (2006). *Promised Land : Palm Oil and Land Acquisition in Indonesia Implications for Local Communities and Indigenous Peoples*. England: Forest Peoples Programme and West Java, Indonesia: Sawit Watch.

Curry, M. (2016). "Mark Enabling Conditions for Structures of Domination: Java’s Colonial Era “Cultivation System” and Indonesia’s Palm Oil Plantation System in Comparative Analysis." *Asian International Studies Review Vol. 17 No. 2* 56.

Deininger, K. (2010). "Large scale land acquisition: What is happening and what can we do?" *Presentation at Land Day – Global Donors Platform on Rural Development*. Rome.

de Schutter, O. (2011). "How not to think of land-grabbing: three critiques of large-scale investments in farmland." *The Journal on Peasant Studies* 38 (2): 249-279.

FAO. 2008a. *The State of Food and Agriculture – Biofuels: Prospects, Risks, and Opportunities*. Rome: FAO.

Fasseur, C. (1981). *The Cultivation System and Its Impact on the Dutch Colonial Economy and the Indigenous Society in Nineteenth-century Java*. Leiden.

Fortin, C. J. (2011). "The Biofuel Boom and Indonesia's Oil Palm Industry: The Twin Processes of Peasant Dispossession and Adverse Incorporation in West Kalimantan." *Global Land Grabbing Conference 6-8 April 2011*. Nova Scotia, Canada: Land Deals Politics Initiative.

Fortin, E. (2005). "Reforming Land Rights: the World Bank and the Globalization of Agriculture." *Social and Legal Studies* 14 (2): 147-177.

GRAIN. (2014). *Peasant's Long Fight to Roll Back Palm Oil Land Grab in Indonesia*. Barcelona: GRAIN.

Hall, D. (2011). "Land Grabs, Land Control, and Southeast Asian Crop Booms." *The Journal of Peasant Studies 38, No.4* (The Journal of Peasant Studies 38, No.) 837-57.

Hall, H., and Li. (2011). *Powers of Exclusion: Land Dilemmas in Southeast Asia*. Singapore: NUS Press.

Li, T. M. (2007). *The Will To Improve : Governmentality, Development, and the Practice of Politics*. London: Duke University Press.

Koh, L. P. & Wilcove, D.S. (2008). "Is oil palm agriculture really destroying tropical biodiversity?" *Journal of the Society for Conservation Biology*.

McCarthy, J.F., and Z. Zen. (2016). "Agribusiness, Agrarian change, and the fate of oil palm smallholders in Jambi." In *The oil palm complex: Smallholders, agribusiness and the state in Indonesia and Malaysia*, by Cramb and McCarthy, 109-154. Singapore: NUS Press.

McCarthy, J. F. 2010. "Processes of inclusion and adverse incorporation: oil palm and agrarian change in Sumatera, Indonesia." *The Journal of Peasant Studies* 37 (4).

—. 2006. *The Fourth Circle: A Political Ecology of Sumatra's Rainforest Frontier.* Stanford, California: Stanford University Press.

Miettinen, J., Hooijer, A., Tollenaar, D., Page, S. & Malins, C. (2012). "Historical Analysis and Projection of Oil Palm Plantation Expansion on Peatland in Southeast Asia." *White Paper No. 17 for the International Councilon Clean Transportation*.

OECD. 2008. *Biofuel Support Policies: An Economic Assessment*. OECD Publishing.

Peh, K. S.-H., Sodhi, N.S., de Jong, J., Sekercioglu, C.H., Yap, C. A.-M. & Lim, S. L.-H. (2006). "Conservation value of degraded habitats for forest birds in southern Peninsular Malaysia." *Biodiversity Research*.

Peluso, N. (1992). *Rich Forests, Poor People: Resource Control and Resistance in Java*. Berkeley: University of California Press.

Potter, L. (2016). "Alternative pathways for smallholder oil palm in Indonesia: International comparisons." In *The oil palm complex: Smallholders, agribusiness and the state in Indonesia and Malaysia*, by Cramb and McCarthy, 155-188. Singapore: NUS Press.

Pye, O. (2009). "Palm Oil as a Transnational Crisis in South-East Asia." *Austrian Journal of South-East Asian Studies* (Society for South-East Asian Studies) 2 (2).

Reardon, T. & Berdegué, J. A. (2002). "The Rapid Rise of Supermarkets in Latin America: Challenges and Opportunities for Development." *Development Policy Review* 20 (4).

Riyanto, B. (2010). "Overview of palm oil industry in Indonesia." (Pricewaterhouse Coopers).

Sape, G. (2013). *Building Community Resistance Against Land Grabbing: Documentation of Cases in Selected Communities in Asia*. Penang: Pesticide Action Network Asia and the Pacific.

Smaller, C. & Mann, H. (2009). *A Thirst for Distant Lands: Foreign Investment in Agricultural Land and Water*. Winnipeg, Canada: International Institute for Sustainable Development (IISD).

Teoh, C. M. (2013). "Malaysian corporations as strategic players in Southeast Asia's palm oil industry." In *The palm oil controversy in Southeast Asia: A transnational perspective*, by O. and J. Bhattacharya Pye, 19-43. Singapore: ISEAS Publishing.

Van Schendel, W. (Editor). (2016). *Embedding Agricultural Commodities: Using Historical Evidence, 1840s–1940s*. New York: Routledge: Taylor Francis Group.

White, B. (2005). "Between Apologia and Critical Discourse: Agrarian Transitions and Scholarly Engagement in Indonesia." *Social Science and Power in Indonesia* (Equinox Publishing) 107-142.

World Bank. (2007). *World Development Report, 2008: Agriculture for Development*. Washington D.C.: World Bank.

Zen, Z., Barlow, C. Gondowarsito, R. & McCarthy, J.F. (2016). " Interventions to promote smallholder oil palm and socio-economic improvement in Indonesia." In *The oil palm complex: Smallholders, agribusiness and the state in Indonesia and Malaysia*, by Cramb and McCarthy, 78-108. Singapore: NUS Press.

"Singapore Smart City" and "ASEAN Smart Cities Network" – A Different Style of Sustainability

Koh Kheng-Lian*

> "We took a first step… with the establishment of the ASEAN Smart Cities Network under our ASEAN Chairmanship… In future, the development of technology will not be driven top-down by state institutions, but by a trilateral collaboration between the State, the private sector and consumers." [1]
>
> Vivian Balakrishnan, Foreign Minister of Singapore in "Foreign Policy in an age of Technological Disruption", The Strait Times, 1 February, 2019.

Introduction

Singapore has taken the initiative to further promote its sustainable city concept to the next stage – "Smart Nation" or "Smart City". Singapore is a city state – hence, the term 'Smart Nation' or 'Smart City' is used interchangeably. In 2018, Singapore initiated the "ASEAN Smart Cities Network". The smart city concept is in line with the global initiative – United for Smart Sustainable Cities (U4SSC), led by the International Telecommunication Union (ITU) and the Economic Commission for Europe (ECE) which was launched at the ITU-ECE Forum on "Shaping Smarter and More Sustainable Cities: Striving for Sustainable Development Goals" held on 18-19 May, 2016 in Rome, Italy.[2] Singapore was among some cities selected by U4SSC for this initiative.

The article explores the development of the "Singapore Smart City", and the newly established "ASEAN Smart Cities Network" initiated by Singapore as the Chair of the 2018 ASEAN Summit. It was endorsed and adopted at the 33rd ASEAN Summit held in Singapore from 11 – 15 November 2018 (below). The focus is on the rapid urbanization of cities and the climate change impacts - all of which have brought about challenges which require finding urban solutions, such as reduction of Greenhouse Gases (GHGs) emissions, energy efficiency, urban flood control, healthcare, air and water management, and much else besides. Technological and digital solutions can be utilised to find solutions to enhance the quality of life, an essential aspect of sustainable development. The article is 'work-in- progress', as currently the area is still in the throes of 'construction' even in Singapore which had its beginnings way back in 1980s, though the term " smart" was not used (*infra*). There is much news, almost daily, in the media of the development of smart cities in Singapore and other parts of the world.

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[1] *Excerpt of the speech of FM Balakrishnan made on 1 February 2019*.

[2] According to the global initiative – U4SSC – "Smart Cities" focuses on the integration of information and communication technology (ICT) in urban operations which are built on existing international standards and key performance indicators. *"ICTs have become central to innovation in almost every sphere of social and economic activity, making collaboration essential in maximizing the contribution of ICTs to sustainable development,"* said ITU Secretary-General Houlin Zhao.

The 'Smart Cities Concept' (SCC) appears in different contexts underlying 'a different style of sustainability'. The Singapore concept is to capitalize on the digital age to improve the quality of living on all fronts. It is only about five (5) years ago that innovation and transformation technology has burgeoned worldwide. The defining moment has come to consider the impacts of the Fourth Industrial Revolution, and much more – which brings in its train of great advantages in improving the quality of life as well as dire forebodings, such as experienced in the political (for example, the alleged rigging of the United States elections via technology by Russia – a subject of current investigation), economic, social and cultural spheres. More recently, in July 2018, the Singapore cyber-attack of SingHealth in which 1.5 million patients' health histories were hacked including that of its Prime Minister Lee Hsien Loong (*infra*), provides an example that cyber security laws are not full proof and that gaps, mistakes, and governance issues must be considered. Nonetheless, cyber security laws are vital if smart cities are to thrive.[3]

The negative impacts pose challenges for all stakeholders including governments, the private sector and the ordinary citizens. To find solutions, capacity building of the Internet of Things ("IoT") is vital to build an inclusive digital nation which literally embraces all – even the elderly are not excluded – at least in Singapore, where the government's *Skills Future-SG*[4] include basic courses on digitalisation to cope with Singapore's smart nation development in daily living and in work places. The aim is to improve the 'quality of life' inclusive of all citizens.

On 1 June 2018, Lawrence Wong, Minister of National Development, speaking at a convention *The Growth Net* in New Delhi, India, recognises that much more needs to be done,[5] such as upgrading basic infrastructure, and using information and digital technology to improve quality services. He said: *"After all, cities are all about people. Whatever we do has to be centered on making lives better for everyone."* Will smart cities really do so in all instances as some find technology mind-boggling and some, particularly the older generation, prefer the traditional way of doing things. They may not know how 'to press here and press there' as it were, and even if they did, they may not want to do it, just in case they press the wrong button. Also, the zetabytes of data can be overwhelming and confusing. Be that as it may, smart cities are marching on, with relentless on-going trials, pilot studies and on-going operations. There is hope over the rainbow that if digitalisation is accomplished the quality of life will improve.[6]

[3] Singhealth Cyber Attacks: How it Unfolded. (2018). Retrieved from https://graphics.straitstimes.com/STI/STIMEDIA/Interactives/2018/07/sg-cyberbreach/index.html ; COI for Singhealth Cyber Attacks. (2018). Retrieved from https://www.channelnewsasia.com/news/singapore/singhealth-cyberattack-committee-inquiry-staff-hack-10744182 – *"A series of gaps in SingHealth's mission-critical IT systems and staff missteps contributed to Singapore's most serious breach of personal data that happened in June this year*", according to Solicitor-General Kwek Mean Luck on Friday (Sep 21).

[4] Skills Future – SG. Retrieved from http://www.skillsfuture.sg/emergingskills.

[5] Speech by Minister Lawrence Wong. (2018). Retrieved from https://www.mnd.gov.sg/newsroom/speeches/view/speech-by-minister-lawrence-wong-at-the-growth-net-summit-in-new-delhi.

[6] Singapore's smart city push cannot create Smart Nation without everyone's buy-in. (2018). Retrieved from https://www.theedgesingapore.com/singapores-smart-city-push-cannot-create-smart-nation-without-everyone.

1. The 'genesis' of 'Smart City' concept'

The term "smart city" has been used by global *technology* firms, particularly since 2005 for "the application of complex information systems to integrate the operation of urban infrastructure and services such as buildings, transportation, electrical and water...".[7]

This concept was then initiated by the former U.S. President, Bill Clinton who introduced the notion of a smart city technology in 2005 through the Clinton Foundation in which Cisco the equipment manufacturer pledged to use its technical knowhow to make cities more sustainable. He challenged the network equipment maker Cisco to use its technical know-how to make cities more sustainable.[8]

What it called the 'Connected Urban Development Programme' involved working with the cities of San Francisco, Amsterdam and Seoul on pilot projects to prove the technology's potential. In 2010, when Cisco's pledge to the Clinton Foundation expired, it launched its Smart and Connected Communities division in order to commercialize the products and services that it had developed. The company International Business Machines ("IBM")[9] had a similar vision to use information technologies to make cities smarter.[10]

What has all this to do with environment? Yes, as pointed out by the Clinton Foundation "to make cities more sustainable". Smart cities are within the scope of sustainable development in United Nations (UN) Agenda 21.[11] The United Nations Development Programme PHAROS System describes SCC as a different style of sustainability.[12] By 2050, the UN anticipates that 66% of the world's population will live in cities and Goal 11 of the United Nations Sustainable Development Goals (UNSDGs) is to "make cities and human settlements inclusive, safe, resilient and sustainable".[13]

The United Nations Commission for Europe (UNECE), and other stakeholders formulated the following definition of "Smart Sustainable Cities":[14]

[7] IBM Smarter Cities: A Case Study for Singapore's Smart Nation Agenda. (2015). Retrieved from https://www.slideshare.net/TimGreisinger/ibm-smarter-cities-case-studies-for-singapore.

[8] Falk, T. (2012). Topic: Innovation (information age and 'Smart Cities' technology: topic of IT companies. "Rise of the Wise: Next Steps for Smart Cities". *Clinton Foundation*. Retrieved from https://stories.clintonfoundation.org/rise-of-the-wise-next-steps-for-smart-cities-46ab905fb003 on December 9, 2013.

[9] IBM, Cisco and the Business of Smart Cities. (u.d). Retrieved from https://www.information-age.com/ibm-cisco-and-the-business-of-smart-cities-2087993/; *IBM had a similar vision to use information technology to make cities smarter. But while Cisco and IBM both have a smart cities focus, different strategies are involved* Retrieved from: https://www.cisco.com/ c/en/us/about/ consulting-thought-leadership/what-we-do/industry-practices/public-sector/our-practice/urban-innovation/connected-urban-development/further-cud-information/thought-leadership/clinton-global-initiative.html.

[10] A strategic view on Smart City Technology: The Case of IBM Smart Cities during Recession. (2014). Retrieved from https://www.sciencedirect.com/science/article/pii/S0040162513002266.

[11] Weaver, K.T. (2015). *Smart Grid Awareness*. Retrieved from https://smartgridawareness.org/tag/agenda-21/

[12] The Association for Sustainable Innovative Development in Economics, Environment and Society (ASIDEES). Retrieved from: https://enterprise.pharosnavigator.com/static/content/en/27/ Partners.html.

[13] United Nations Sustainable Development Goals Number 11: Sustainable Cities and Communities. Retrieved from: http://www.undp.org/content/undp/en/home/sustainable-development-goals/goal-11-sustainable-cities-and-communities.html.

[14] Carriero, D. (2016). *United Smart Cities: Towards Sustainable Cities in the ECE.* Housing and Land Management

A smart sustainable city is an innovative city that uses ICTs and other means to improve quality of life, efficiency of urban operation and services, and competitiveness, while ensuring that it meets the needs of present and future generations with respect to economic, social, environmental as well as cultural aspects.

Based on this definition and building on previous measurement standards and indicators, ITU and UNECE have developed a comprehensive list of key performer's indicators (KPIs) to monitor the progress achieved by cities towards sustainable city transitions. These are in line with the UNECE-ITU Smart Sustainable Cities KPIs which will assist cities evaluate their performance against UN SDGs.[15]

Singapore was among some cities selected for this initiative, using this set of KPIs to evaluate their performance against the UN SDGs (other cities are Dubai (United Arab Emirates), Goris (Armenia), Montevideo (Uruguay) and Buenos Aires (Argentina).

Following the notion of a smart city above, the "Rome Declaration", 2016 arising from the conference of ITU-UNECE held in Rome, is premised on the role of ICTs as enablers of sustainable development. In the Introduction to the 10-point Rome Declaration it states: "…Hence, cities need to become smarter, technological solutions deployed to address a wide range of common urban challenges. Smart sustainable cities benefit from improved energy efficiency, reduced environmental pollution, increased social inclusion."[16]

Below is the 10-point Declaration:

1. Promote the use of the ITU-UNECE KPIs;
2. Encourage the adoption of internationally agreed standards;
3. Mobilize experience and promote knowledge sharing;
4. Enable smart participative governance;
5. Foster harmonization;
6. Build capacities;
7. Implement pilot and flagship activities;
8. Enhance urban planning to reduce environmental pollution, improves people's lives, increase social cohesion;
9. Develop a global index for Smart Sustainable Cities based on the U4SSC initiative to initiate smart city transitions and promote urban sustainable development; and
10. Boost U4SSC as a global platform for advocacy.

Unit of the United Nations. Retrieved from https://www.unece.org/fileadmin/DAM/hlm/projects/SMART_CITIES/Presentations/Domenica_Carriero_-_United_Smart_Cities.pdf.

[15] KPIs on Smart Sustainable Cities – ITU. Retrieved from https://www.itu.int/en/ITU-T/ssc/pages/kpis-on-ssc.aspx.

[16] Enterprise IOT Insights. Retrieve from https://enterpriseiotinsights.com/20160527/smart-cities/itu-unece-smart-cities-tag29.

The Declaration promotes the use of internationally agreed KPIs and technical standards in service of sustainable development objectives in the urban context, and highlights the value of inclusive e-governance models and peer-learning among city leaders.[17]

2. Singapore: "Smart Nation" and "Smart City"

2.1 Our vision: Why "Smart Nation"?

The Singapore Smart Nation Initiative was launched by PM Lee Hsien Loong on 24 November 2014 and precedes that of the U4SSC which was initiated in 2016. As it is a new and evolving concept, it is important to quote in *extensor* the relevant parts from Prime Minister Lee Hsien Loong's speech, so that a clear understanding can be had to appreciate the policies and strategies of the government and what is expected of the whole nation, if it is to be successfully developed. It is a long process during which mistakes may occur due to lack of knowledge, lack of good governance. Lessons are to be learned as it evolves:[18]

"Our vision is for Singapore to be a Smart Nation – a nation where people live meaningful and fulfilled lives, enabled seamlessly by technology, offering exciting opportunities for all. We should see it in our daily living where networks of sensors and smart devices enable us to live sustainably and comfortably. We should see it in our communities where technology will enable more people to connect to one another more easily and intensely. We should see it in our future where we can create possibilities for ourselves beyond what we imagined possible.…"

"We are making a home for all Singaporeans, young and old. Not just the technologically savvy, but everyone. We want to transform our lives for the better, and we have what it takes to achieve this vision…"

Our future

The Smart Nation is not just a slogan – It is a rallying concept for all of us to work together to transform our future together. I have just described a few ideas, these are just scratching the surface because there are endless possibilities waiting to be dreamed of.

We will only make this a Smart Nation if we get everybody active, engaged, excited, wanting to make this happen. When enterprises seize opportunities to provide a service or build a product that makes our lives better, when programmers build apps that help communities to bond, when neighbours step up to check on their neighbours through

[17] UN News Centre. (2016). *Sustainable Development Agenda.* Retrieved from https://www.straitstimes.com/singapore/vision-of-a-smart-nation-is-to-make-life-better-pm-lee.

[18] Woo J. J. (u.d.). Smart Nation: "*A Policy and Organisational Perspective"*, Lee Kuan Yew School of Public Policy (LKY School), National University of Singapore. See also: https://www.smartnation.sg/whats-new/press-releases/strategic-national-projects-to-build-a-smart-nation; https://www.pmo.gov.sg/newsroom/pm-lee-hsien-loong-smart-nation-initiative-launch.

the HDB Smart Elderly monitoring system when it sounds the alarm….The Government will lay the foundation – we will build the infrastructure, facilitate innovation and create the framework for all of us to contribute. One way in which we are going to do this, is to open up our maps, our databases of places and information about them, so that the public can share their geo-spatial information, can share meaning, can use what is there and can contribute and put information into the system.

Imagine if we can tap on everyone's local knowledge and anyone can contribute data: animal sightings, traffic incidents, potential hazards for cyclists, even the best mee pok [Chinese noodles dish with pork] *or nasi lemak* [a Malay rice dish cooked with coconut milk, accompanied with anchovies, chicken, egg and special chilli paste].

Today, we are going to launch a new project called Virtual Singapore, the idea is to develop an integrated 3D map of Singapore enriched with layers of data about buildings, land and the environment. It will be a platform to bring the Government, Citizens, Industry and Research Institutions together to solve problems, for example to simulate wireless coverage or effects of heavy rain. What that means is to find out where it floods when it rains.

What we will do

*To realise this vision, I think we have to pull the pieces together from all over the Government. We will set up a Smart Nation Programme Office. Today, the Government departments are all variously doing their own thing – LTA, URA, MOM and so on. Our research institutes are doing their own things, R&D institutes like A*Star are doing things like helping NLB sort books at night using robotics and sensors, quite interesting programmes, but we need to bring them together. We can go much further if we can put it together, to identify issues, prototype ideas, deploy them effectively to benefit the whole nation.*

We will have a Smart Nation Programme Office and it will do this – take in perspectives and ideas from many sources, make sure that we take a whole-of-Government, whole-of-nation approach to building a Smart Nation. To make sure that it works, I am going to put this Office in the Prime Minister's Office, and I am putting Minister Vivian Balakrishnan in charge and I will take a personal interest….

Let us make it happen together! Thank you very much."[19]

The speech was not a rhetoric, but a serious commitment. PM Lee set the framework and gave a few ideas on how to proceed. He outlined the role of the government and that of the whole nation – it is all embracing. Cognisant that a vital element of a Smart Nation is the use of technology and this can be subject to deliberate and vicious attack by hacking, he assured cyber security (below). As outlined in his speech, the government will strategize the operation.

[19] See, **Annex**, for a fuller account of the speech.

Fast forward on 21 August 2017, Singapore announced its Strategic National Projects to build a Smart Nation:[20]

"The Smart Nation initiative is about harnessing the full power and potential of digital and smart technologies to create new jobs and business opportunities, in order to make our lives more convenient, and our economy more productive, through more efficient Government and business processes. But beyond that, a Smart Nation is about creating new opportunities in a digital age, and transforming the way people live, work and play, so that Singapore remains an outstanding global city….

At a broader level, Smart Nation is about achieving efficiencies and effectiveness, be it leveraging sensors and data to better manage traffic or monitor security threats. Cost savings brought about by digitisation is also key to growing businesses…"

PM Lee also spoke of "Smart Cities" at an ASEAN-Australian meeting where Australia donated A$30 million (S$30.5 million) as an investment to an ASEAN-Australia initiative on smart and sustainable cities, reported on 18 March 2018:[21]

"The challenge with smart cities is to make the implementation and to change the ways in which our cities and our administrations operate to make full use of the technology… which would widen the footprints for our residents, our citizens, to be able to use the facilities across borders and for the administrations to be able to learn from each other's experiences."

There are challenges to implementation in Singapore and other smart cities in-the-making face including geopolitical and anti-globalisation threats, technology disruptions, apart from an aging population. As an illustration of an impending disruption – in traditional jobs (Artificial Intelligence or AI and robots are taking the place of humans in the workforce) has led to growing self-employment, such as in being freelancers as private car drivers, or sport coaches. It was reported[22] that there are now 223,000 residents that are self-employed. What if these freelancers fall ill and have prolonged illness and loss of income. There is now a new type of insurance for freelancers against income loss.[23] But how many can afford to pay the insurance premium.

The SCC calls for an examination of the policies behind and the legal regulations that are or may be required. In Singapore and ASEAN there is as yet no comprehensive legislation. As the concept straddles many diverse areas – environmental protection, efficient use of natural resources, energy, transport, water, e-commerce, e-banking (which in Singapore impacts on

[20] Strategic National Projects to Build a Smart Nation. Retrieved from https://www.smartnation.sg/whats-new/press-releases/strategic-national-projects-to-build-a-smart-nation.
[21] Funding Smart Cities Not an Issue. Retrieved from https://www.todayonline.com/world/funding-smart-cities-not-issue-implementing-ideas-says-pm-lee.
[22] *The Straits Times*, 22 June 2018.
[23] Terms and Conditions for Freelancer Insurance. ETIQA Insurance. Retrieved from https://www.etiqa.com.sg/wp-content/uploads/2018/07/GigaCover-FLIP-Insurance-Policywording.pdf.

virtually the whole citizenry), AI (artificial intelligence – in health sector to better predict and diagnose and treat patients), robotic jobs (in an age of shrinking population), health, education and even the way the ordinary citizen does his or her shopping, legislation may have to be sectorial and in some cases, it may be simply be an amendment of existing legislation to incorporate SCC

2.2 Digital Government Blueprint (DGB)

One of the aims of the ASEAN Charter[24] is "people-centered and people-oriented", an inclusive approach to include the ordinary citizenry. As a member of ASEAN, the DBG reflects its vision of inclusiveness that sets the backstage for the development of a Smart City – a digital literacy which encompasses not only the government, the private but the citizenry. It aims first to make literacy in digitalization.

The vision of the DGB was outlined at the inaugural *Smart Nation Innovations Week Opening Symposium* on 5 June 2018 with the tagline: "Digital to the Core, and Serves with Heart". It aims to build stakeholder-centric services that cater to citizens' and businesses' needs.[25]

There are three (3) main pillars to create a "Digital to the Core, and Serves with Heart". It means using data, connectivity and computing decisively to transform the way citizens and businesses are served, and the way public officers are enabled to contribute fully to their work; and "serves with heart" is one that is able to automate work where possible, in order to provide a personal touch in a way that enriches the citizen's experience. Harnessing digital technology will allow the Government to build stakeholder-centric services – better designed policies, services and infrastructure – that cater to the needs of people and businesses. For the public service, this means becoming a digitally-confident workforce which is supported by a digitally-enabled workplace and digital tools.

The DGB sets out a number of strategies:

- Integrating services around citizen and business needs;
- Strengthening integration between policy, operations and technology;
- Building common digital and data platforms;
- Operating reliable, resilient and secure systems;
- Raising our digital capabilities to pursue innovation; and
- Co-creating with citizens and businesses, and facilitating adoption of technology.

It also spells out concrete milestones and the KPIs of the areas on a staggered basis as technology advances and evolves. It is the whole-of-government, private sector and people approach.[26]

[24] The ASEAN Charter. Retrieved from https://asean.org/storage/images/archive/ publications/ASEAN-Charter.pdf.
[25]The Digital Government Blueprint. Retrieved from https://www.tech.gov.sg/digital-government-blueprint/.
[26] Launch of the Digital Government Blueprint: "A Singapore Government that is Digital to the Core, and Serves with Heart." (2018) Retrieved from https://www.smartnation.sg/whats-new/press-releases/launch-of-digital-government-blueprint--a-singapore-government-that-is-digital-to-the-core--and-serves-with-heart#sthash.44wtWBDR.dpuf.

The Government will first focus on technology domains, such as communications infrastructure, data analytics, robotics, and cybersecurity. This covers various enterprises. As our focus is on the impact on environment some illustrations in this area are below.[27]

2.3 Illustrative examples and work- in-progress toward a Smart Nation

This section demonstrates some of Singapore's efforts to gearing up for a Smart Nation, with *focus on impact on environmental sustainability*. There are other aims of a Smart Nation or Smart City such in economic development, e-commerce which are not within the scope of this article.

The list is not exhaustive as, for example, the introduction of block-chain technology for decentralisation and distribution of energy grid, electronic and driverless cars are the things to come. In the meanwhile, Singapore is on its way to the making of a Smart Nation or Smart City. They range from establishing new mechanisms, building infrastructure to smart household appliances. Below are some examples:

2.3.1 Singapore Personal Access (Account SingPass)

The background to the making of a Smart Nation is to promote literacy in digitalization and IoT. The 'peoples approach' to a Smart Nation digitalization had its beginnings in the introduction of the Singapore Personal Access (SingPass) account in 2003, which enables a Singapore citizen to access some 60 state agencies. It involves verification for digital transactions involving sensitive data such as CPF (Central Provident Fund) account. Sing Pass has been upgraded to Sing Pass Mobile using biometrics (thumb print, fingerprint or iris recognition). As Smart Nation is given top priority, the Smart Nation and Digital Government Group (SNDGGs) was established under the Prime Minister's Office and Technical Agency.[28] It came into effect on 1 May 2017. It enables the Government to be more integrated and responsive in its strategy and processes for Smart Nation and Digital Government (SNDG). The following organisational changes were established:[29]

- The Smart Nation and Digital Government Office (SNDGO) under the Prime Minister's Office (PMO) comprising staff from the *Digital Government Directorate* of the Ministry of Finance (MOF), the *Government Technology Policy* department in the Ministry of Communications and Information (MCI), and the *Smart Nation Programme Office* (SNPO) in the PMO.

[27] Singapore to Spend up to 2.6 Billion Dollars on ICT. Retrieved from https://sbr.com.sg/economy/news/singapore-spend-26b-ict-projects
[28] Why Smart Nation? Retrieved from https://www.smartnation.sg/why-Smart-Nation/sndgg.
[29] Formation of the Smart Nation and Digital Government Group. Retrieved from https://www.pmo.gov.sg/newsroom/formation-smart-nation-and-digital-government-group-prime-minister%E2%80%99s-office.

- The *Government Technology Agency* (GovTech), a statutory board under MCI [Ministry of Communication and Information], is placed under the PMO [Prime Minister's Office] as the implementing agency of SNDGO.[30]

2.3.2 BCA (Building Authority of Singapore) Skylab

On 20 July 2015, the first state-of-the-art 360 degree rotatable laboratory in the tropics that is able to test any orientation of the sun and wind for a building was launched. It was developed in collaboration with the Lawrence Berkeley National Laboratory in California, which has a similar rotating lab suited for a temperate climate. It has more than 200 sensors to measure performance metrics, such as energy performance, indoor environmental quality, outdoor environmental parameters and building automaton system indicators. It is part of a programme to promote green building. Its tower incorporates features such as sun pipes that direct sunlight to lower floors and water-cooled air conditioning systems, reducing energy use by 35 % compared to others. The Academic block provides an experimental environment. It builds capacity for IoT for resource management.[31]

(a) *Digital technology in construction and industry*

The construction industry in land scarce Singapore and the hope of every Singaporean to own property make it very much a people's concern about the impact of technology on the construction industry. Hence any transformation of the construction sector, which can bring down cost, is crucial not only for the investor but the ordinary citizen. In a digitalised society in Singapore, the Integrated Digital Delivery (IDD) into the construction industry in the near future will dispense with paper work and cut down costs. Desmond Lee, Second Minister for National Development, revealed that a plan for digitalisation of the industry is in progress and by 2020, 40 of the 60 construction sites will be in operation. Under IDI designers, builders and facility managers can communicate digitally and this will do away with paper work and cut down time. The plan aims to raise the competencies of some 150 firms by developing skills such as virtual collaboration, AI and data analytics. This will result in lower costs, higher quality and faster construction (time cut by 35-39 %) – there are now 12 demonstration sites.

(b) Urban flooding-innovative flood detection project

As climate change brings about frequency of extreme weather conditions and Singapore has been experiencing such conditions in terms of heavy rainfall causing floods even in areas which hitherto were flood-free. It is now closely monitoring floods, and the innovative flood detection project below which uses technology is a boon.

The project was launched with a number of trials on 18 November, 2015. A smart system for flood detection was tested, according to a joint statement by Public Utilities Board (PUB);

[30] *Id*. See more: https://www.smartnation.sg/whats-new/press-releases/formation-of-the-smart-nation-and-digital-government-group-in-the-prime-ministers-office#sthash.6QyhBBMz.dpuf.
[31] World's First High-Rise Rotatable Laboratory for the Tropics. Retrieved from https://www.bca.gov.sg/skylab/.

Meteorological Service Singapore (MSS) and National Environment Agency (NEA). It uses image analytics technology to scan real-time PUB CCTV footage and detect images with flood waters.[32]

About 170 CCTVs and 200 water level sensors make up the PUB flood monitoring system. This system operates around-the-clock and alerts the public when water levels in drains and canals hit a certain level.[33]

When connected, one can get real-time information on the monsoon conditions – the public can go to the website or contact PUB's 24/7 Call Center at 1(800) CALL-PUB.[34]

(e) 'Smart home system' and smart household items

There is now a growing trend for businesses to develop home automation towards a new digital life style or an 'intelligent living' with use of new technology that can control lighting, temperature and efficient use and maintenance.[35]

The government and the private sector are encouraging the use of smart household items as part of sustainability in line with improving the quality of life. Two illustrative examples may be given.[36] It is part of a bottom-up approach to engage the people in the Smart Nation process, as evidenced in the speech of PM Lee Hsien Loong (*supra*).

(f) The "Smart Shower Programme"

Moving from the public sector to the household sector which is also enjoying the advancement of technology, an example is the programme on Smart Shower. It aims to study and validate the effect of smart shower devices in conserving water during showers.

An experiment conducted on some 500 households in 2015 indicated that households can save about 5 litres of water per person per day while taking their showers, when provided with real-time information on consumption coupled with optimal goal setting. This can potentially save approximately 3% of their monthly water usage in each household.

As from 2018, PUB deployed these devices. It covers a 2-year period in new homes under a demonstration project with the Housing Development Board (HDB). A total of about 10,000

[32] Asia One (2015). Retrieved from http://www.asiaone.com/singapore/smarter-flood-detection-system-monsoon-season-undergo-trials.
[33] Smarter Flood Detection System on Trial, Marrying CCTV with Image Analytics (2015). Retrieved from https://wildsingaporenews.blogspot.com/2015/11/smarter-flood-detection-system-on-trial.html#.XAd8wDERWUk.
[34] Kelleher, J. (2017). Innovative Flood Detection project launches trials as Singapore heads into Monsoon season. *Open Gov Asia*. Retrieved from https://www.opengovasia.com/innovative-flood-detection-project-launches-trials-as-singapore-heads-into-m.
[35] A slow welcome for Smart Homes in Singapore. Retrieved from https://www.straitstimes.com/tech/a-slow-welcome-for-smart-homes; See also: http://www.smartautomation.com.sg/?gclid=EAIaIQobChMIp5Sr8d2t3wIVjSQrCh2gtw45EAAYASAAEgKsXfD_BwE.
[36] Smart Nation, Smart Senior Citizens. *Smart Watches for the Elderly*. (2018). Retrieved from https://www.straitstimes.com/singapore/first-to-get-pubs-smart-shower-device;

flats to be completed from 2018 to 2019, where home purchasers had chosen smart shower sanitary fittings under HDB's Optional Component Scheme (OCS).

Colour codes are used to indicate varying water consumption levels.[37] One can download the Smart Shower Programme brochure from the website.[38] There are also home fittings which are now water-efficient.[39]

(g)"Smart Mat"

Dr. Poh Kok Kiong, a senior lecturer at the School of Engineering in Nangyang Polytechnic, has developed a smart floormat to assist healthcare professionals and caregivers to monitor the elderly and those in need of care. Described as a "working prototype with local electronics firm Apps-Connect Pte Ltd" (company that connects applications through innovation and technology), the "IoT Night Watcher" can be placed anywhere such as beside a bed. When stepped on it can capture an image of the person's activity or inactivity. For example, if the person enters the bathroom and does not come out after sometime, it could be that he or she has fallen. The device will be available, soon. This is one of the many examples of ongoing experiments to improve the quality of life through technology.

(h) "What 'smart' lamp posts can do…"

The Government Sunday Times graphics[40] showed lamp posts in the One-north and Geylang turned into "smart" fixtures to collect and communicate environmental, crowd and vehicular data to government agencies, for better urban planning and management. The project is expected to cover over time to more than 100,000 lamp posts. According to report the "Facial detection, camera and artificial intelligence-based video analytics systems mounted on lamp posts will have the ability to index faces to determine gender, race and age, as well as perform facial matching against databases.

Crowd analytics the lamp post-mounted systems will be able to analyse crowd congregation and dispersal patterns to determine situations, such as unruly crowds, train breakdowns or traffic congestion. Autonomous vehicle 'real-time kinematic' technologies mounted on lamp posts will provide line-of-sight connection to self-driving vehicles, to determine their precise location for navigation and to avoid collisions. Personal mobility device camera and artificial intelligence-based video analytics systems mounted on lamp posts will be able to determine if a mobility device or bicycle is travelling at more than 15kmh on footpaths, which is illegal. The data will be captured and an alert will be sent to the relevant agency. Environmental sensors mounted on lamp posts will be able to collect environmental data, including temperature, humidity, air quality and rainfall. The data is sent to self-driving cars to improve their situational awareness of road conditions.

[37] Hong, J. (2018). *First to get PUB's Smart Shower Device*. Retrieved from https://www.straitstimes.com/singapore/first-to-get-pubs-smart-shower-device.
[38] Smart Shower Programme. Retrieved from https://www.pub.gov.sg/savewater/athome/smartshowerprogramme.
[39] Wong, D. (2018). *More home fittings are water-efficient*. Retrieved from https://www.straitstimes.com/singapore/environment/more-home-fittings-are-water-efficient.
[40] Govtech Sunday Times: *What Smart Lamp Posts Can Do?* (2018). Retrieved from: https://www.straitstimes.com/sites/default/files/attachments/2018/04/08/ST_20180408_ITLAMP_R3_3893583.pdf.

(i) New Digital District in Punggol

In line with the Smart Nation development a new 'Digital District' of about 50 hectares is being planned with construction commencing in 2019. Located in Punggol North (northeast of Singapore) it will be an integrated approach that combines amenities of the community, industry, business and university. Deputy PM Teo Chee Hean said the Government may relocate the current Cyber Security Agency of Singapore (now situated at the Ministry of National Development Complex in Maxwell road). DPM Teo said this would help create a new cluster of cyber-security technology firms in Punggol covering areas such as data analysis, AI and IoT. With a new university situated there, it is expected to encourage and support research and development in technology between academia, industry and business. It is also expected to attract experts from all over the world. Some 28,000 jobs are expected to be created incrementally from 2023 as it is being developed. A new cluster of cyber and technology will be developed.[41]

2.4 CybersecurityAct of 2018

The DGB assures that cybersecurity strategy for ICT and smart systems will be developed, and that personal data will be protected through a "robust set of safeguards, including access control…". To further strengthen the DBG an overarching new legislation to protect and licence certain regimes, namely, the Singapore Cybersecurity Act 2018[42] was passed by Parliament on 5 February 2018 and assented to by the President on 2 March 2018. As much of Singapore Smart City is based on IoT, this is an overarching legislation.

The Singapore model is expected to take a lead in the ASEAN Smart Cities Network. The ASEAN Leaders' Statement on Cybersecurity Cooperation[43] was adopted in recognition of the growing urgency and sophistication of transboundary cyber threats. The ASEAN Member States have been tasked to closely consider and recommend feasible options of coordinating cybersecurity policy, diplomacy, cooperation, technical and capacity building efforts among various platforms of the three pillars of ASEAN (the ASEAN Political-Security Community, the ASEAN Economic Community or AEC and the ASEAN Socio-Cultural Community or ASSC).[44]

The Cybersecurity Act is timely to address the rapidly evolving threats. The Act imposes requirements on certain business to implement protection against cybersecurity risks in computer systems. It requires or authorizes the taking of measures to prevent, manage and respond to cybersecurity threats and incidents, to regulate owners of critical information infrastructure, to regulate cybersecurity service providers. 'Critical information infrastructure' (CII) covers seven

[41] Cheng, K. (2018). *New Punggol Digital District to create 28,000 jobs*. Retrieved from https://www.todayonline.com/singapore/new-punggol-digital-district-create-28000-jobs-open-gradually-2023
[42] Digitize ASEAN 2018. *No.9 of 2018; see,* Experience Singapore. (2018). Mapping a cyber future: How Singapore and ASEAN are harnessing the possibilities, while addressing the challenges, of digitalisation. Issue 67, July-Sep 2018, *Singapore Business Federation.* Retrieved from https://www.sbf.org.sg/digitize-asean-2018-to-examine-the-impact-of-digitalisation-on-asean-development.
[43] ASEAN Leaders' Statement on Cybersecurity Cooperation. (2018). Retrieved from https://asean.org/asean-leaders-statement-on-cybersecurity-cooperation/.
[44] ASEAN Community Councils: The Three Pillars of the ASEAN Community. Retrieved from https://asean.org/asean/asean-structure/asean-community-councils/.

types of computer or computer system that is necessary for continuous delivery of an essential service, and the loss or a compromise of the computer or computer system will have a debilitating effect on the availability of the essential services. These essential services relate to: energy, info-communications, water, healthcare, banking and finance, security and emergency services, aviation, land transport, maritime, functioning of Government and media.

The Cyber Security Agency (CSA) was established on 1 April 2015 before the Cybersecurity Act of 2018. CSA engages with various industries and stakeholders to heighten cyber security awareness as well as to ensure the development of Singapore's cyber security. It is the national agency overseeing cybersecurity strategy, operation, education, outreach, and ecosystem development. It is part of the Prime Minister's Office and is managed by the Ministry of Communications and Information. Among its responsibility, it protects critical sectors – such as energy, water, and banking and ensures effective coordination and deployment in our response to cyber threats.[45]

Another significant milestone of cyber security is the recent establishment of the ASEAN-Singapore Cybersecurity Centre of Excellence (ASCCE) in order to respond to the growing threats of cyber security.[46] This would be important for the newly established ASEAN Smart Cities Network (below). Deputy Prime Minister Teo Chee Hean, at the third annual Singapore International Cyber Week 2018 stated that the Cyber Capacity Programme would be expanded, as well as its training. This augurs as Singapore and ASEAN are developing smart cities which require protection from cybercrimes and mishaps.[47]

3. ASEAN Smart Cities Network

Singapore took over as the Chair of the ASEAN Summit[48] in 2018, and chose its theme – Innovation and Resilience. In this regard, it established the ASEAN Smart Cities Network (ASCN) comprising 26 cities across the ASEAN member countries during the 32nd ASEAN Summit on 1 May 2018. It was officially launched at the 2018 ASEAN Summit in Singaporean 10 November 2018. Its core elements are set out below:[49]

- To develop plans specific to the selected smart cities;
- Specific projects to be undertaken from 2018-2025;
- Outline key principles and identify core outcomes;

[45] Singapore's Cybersecurity Strategy: Singapore Common Criteria Scheme (2016). Retrieved from https://www.csa.gov.sg/programmes/csa-common-criteria; See also: https://www.pmo.gov.sg/newsroom/transcript-speech-prime-minister-lee-hsien-loong-founders-forum-smart-nation-singapore.

[46] Baharudin, H. (2018). *New Cyber Security Center to Boost ASEAN's Capabilities*. Retrieved from https://www.straitstimes.com/singapore/new-cyber-security-centre-to-boost-aseans-capabilities.

[47] DPM Teo Chee Hean at the Opening of the 3rd Singapore International Cyber Week. Retrieved from https://www.pmo.gov.sg/newsroom/dpm-teo-chee-hean-opening-3rd-singapore-international-cyber-week.

[48] The ASEAN consists of ten ASEAN Member States (AMS), namely Brunei Darussalam, Cambodia, Indonesia, Lao PDR, Malaysia, Myanmar, Philippines, Singapore, Thailand and Viet Nam.

[49] The Business Times – *Resilience and Innovation: 33rd ASEAN Summit and Related Summits, November 11 -15, 2018, Singapore*, section on "Towards smart cities in ASEAN", pp 6-7; "Cooperating to counter cyber threats", p 8, 13 November 2018. Retrieved from tps://asean.org/storage/2018/04/Concept-Note-of-the-ASEAN-Smart-Cities-Network.pdf.

- Adopt framework in November 2018 at 33rd ASEAN Summit;
- ASEAN cities can pair up with ASEAN's external partners to cooperate on smart cities network (India);

The rationale of ASCN is that with 90 million population expected to urbanize by 2030 and "middleweight" cities of between 200,000 and 2 million residents forecast to drive 40% of the region's growth, such rapid urbanisation is not without its challenges as it has implications on important issues such as city congestion – water/air quality, poverty, rising inequalities, urban-rural divide, citizen security and safety. Technological and digital solutions can be utilised to resolve these issues and to enhance equality and accessibility of services, thereby improving citizens' lives across the urban-rural continuum, creating new opportunities and to ensure that no one is left behind, i.e. people-to-people ASEAN.

The ASCN is envisioned as a collaborative platform where up to three cities from each AMS, including capitals – with room for expansion when it matures – work towards the common goal of smart and sustainable urban development. It will include National Representatives to synergize development efforts across all levels. Its primary goal will be to improve the lives of ASEAN citizens, using technology as an enabler. By focusing on our people, it will adopt an inclusive approach towards progress.

The ASCN aims to be developed from each city's existing blueprints or action plan. The Singapore DGB can be used as a guideline.

The ASCN member cities and their National Representatives will jointly craft an ASEAN Smart Cities Framework that (i) articulates ASEAN's definition of a "smart city"; (ii) outlines key principles; and (iii) identifies core outcomes. The Framework will not impose on existing national development plans. It will be a normative document that guides the smart city development in each ASCN city, which is specific to each city's local and cultural context.[50]

An initial draft of this framework was prepared by Singapore and circulated to AMS in March 2018. The member cities and National Representatives discussed a revised draft framework during the Smart Cities Governance Workshop (SCGW) held in May 2018 in Singapore. The framework was targeted for endorsement at the first ASCN meeting in July and adoption by the ASEAN Leaders at the 33rd ASEAN Summit in November 2018.

The project aims, *inter alia*, to combat issues like pollution, sanitation and city congestion by making use of technological and digital solutions.

Each ASEAN Member State nominates a National Representative to the Network. In addition, each city also nominates a Chief Smart City Officer. There is thus representation at both the national and municipal levels. The table below lists the Chief Smart City Officers who are each city's main point of contact with the Network, as set out below:

[50] Concept Note on ASEAN Smart Cities Network (23 March 2018). Retrieved from https://asean.org/storage/2018/04/Concept-Note-of-the-ASEAN-Smart-Cities-Network.pdf.

Table 1. List of Chief Smart City Officers

City	Chief Smart City Officer	Designation
Bandar Seri Begawan	Haji Ali Matyassin	Chairman, Bandar Seri Begawan Municipal Department
Battambang	SoeumBunrith	Deputy Governor, Battambang Province
Phnom Penh	Seng Vannak	Chief of Administration
Siem Reap	Ly Samreth	Deputy Governor, Siem Reap Province
Makassar	Ismail Hajiali	Head of Communications and Information, Makassar City Government
Banyuwangi	Budi Santoso	Head of Informatics, Communications and Encryption, Banyuwangi Government
DKI Jakarta	Dian Ekowati	Head of Communications and Informatics Office
Luang Prabang	SoukanBounnyong	Mayor
Vientiane	BouchanKeosithamma	Deputy Director of Public Works and Transport, Vientiane Capital
Johor Bahru	Maimunah Jaffar	Head, Planning and Compliance
Kuala Lumpur	Datuk Najib bin Mohamad	Executive Director (Planning)
Kota Kinabalu	Stanley Chong Hon Chung Tantinny Fung Chew Li	Director of City Planning Department, Dewan Bandaraya Kota Kinabalu Town Planner, City Planning Department, Dewan Bandaraya Kota Kinabalu
Kuching	JulinAlen	Principal Assistant Director, State Planning Unit, Chief Minister Department, Sarawak
Nay Pyi Taw	Myo Aung	Permanent Secretary, Nay Pyi Taw Development Committee
Mandalay	Ye Myat Thu	Committee Member, Mandalay City Government
Yangon	Tin Tin Kyi	Director of Urban Planning Division Representative, Yangon City Development Committee
Cebu City	Nigel Paul C. Villarete	City Administrator
Davao City	Mgen Benito Antonio T De Leon Afp Rowena Henedine Dominguez-Narajos	Head Public Safety and Security Command Center Information Technology Officer II
Manila	Mario ZapatosOblefias	Head, Electronic Data Processing, Manila City Hall
Singapore	Tan Chee Hau	Director(Planning & Prioritisation) Smart Nation and Digital Government Office, Prime Minister's Office
Bangkok	ChaiwatThongkamkoon	Director-General, Office of Transport and Traffic Policy and Planning
Chonburi	SeksanPhunboonmee	Policy and Plan Analyst, Energy Policy and Planning Office, Ministry of Energy
Phuket	PassakonPrathombutr	Senior Executive Vice President, Digital Economy Promotion Agency
Da Nang	Nguyen Quang Thanh	Director, Da Nang Department of Information and Communication
Hanoi	Nguyen Duc Chung	Chairman, Hanoi People's Committee
Ho Chi Minh City	Tran Vinh Tuyen	Vice Chairman, Ho Chi Minh City People's Committee
Source: ASEAN Smart Cities Framework.[51]		

Thanh Thuy, Editor-in-Chief, Viet Nam News, Vietnam, in "Focus on people to build smart cities"[52] was critical of the ASCN's focus on cities: "..a serious lack of attention is paid to those

[51] ASEAN Smart Cities Framework. (2018, July 8). Retrieved from https://asean.org/storage/2012/05/ASEAN-Smart-Cities-Framework.pdf.
[52] *The Straits Times*, 1 Dec 2018.

on the ground… to measure for improving the lives of the poor and destitute. The aim is 'that no one is left behind.'

There is real danger that if left behind there will be disruptions in the workforce. On a broader front, now that the ASEAN Smart Cities Network has been established – that this must include not only those living in 'cities' but must extend to not only "urban centres but also the poor and destitute in rural and provincial areas."

Her criticism raises some questions whether the ASCN should extend its scope to the whole country to include the provincial and rural areas; would this be too ambitious to be effective; are the needs of the rural areas in each particular country different from those of its urban areas requiring different policies, strategies and operations; if there is overlap of needs should the smart city concept of each country embrace and include 'rural' needs.

So far as Singapore is concerned, it is a city state and the "Smart Nation" or "Smart City" concept covers the whole country.

4. Conclusion

"Singapore Smart City" and the "ASEAN Smart City Network"

In the context of environmental sustainability, the Smart City concept as envisaged by Singapore and ASEAN has great potential to push the frontiers of innovative and resilient cities. It is not without problems and requires a 'whole-of-society' and 'whole-of-ASEAN' approach to see what can be integrated and what space should be left to individual cities to develop, as no one suit fits all and must be specific to the needs of each city.[53]

But there are common areas of interest such as cyber security and these require cooperation among ASEAN members for protection. Also, while cities are the focus and digitalisation is required which is inclusive and no one is to be left behind, yet as pointed out by Thanh Thuy the present concept and scope seem to leave the rural communities who are generally living in poverty out of the smart cities mainstream. What impact will the smart cities have on them, particularly in terms of loss of livelihood and all the other aspects of digitalisation that would raise the quality? This has to be taken into account and the development of 'smart cities' should over time be extended to the rural communities, depending on their needs which may not par with those living in cities. A study should be conducted to see the impacts and what measures can be taken to mitigate any adverse or consequential impacts caused by smart cities.

Finally, it should be mentioned that at this initial stage ASEAN is gearing up for the ASCN which is undertaking a study to evaluate ASEAN's readiness for the Fourth Industrial Revolution. This is evidenced by the development of the ASEAN Digital Integration Framework.[54]

[53] "Smart – city solutions for Asia need not be grandiose projects." (2018). *The Straits Times*. Retrieved from https://www.straitstimes.com/opinion/smart-city-solutions-for-asia-need-not-be-grandiose-projects.
[54] ASEAN Digital Integration Framework. Retrieved from https://theaseanpost.com/article/key-greater-asean-digital-integration; See also: http://customstrade.asia/tag/asean-digital-integration-framework/

It aims to strengthen linkages between innovation ecosystems to spark new collaborations and solutions, and address the demand from the increasingly sophisticated and growing consumer base in the region. The study recognises the need for ASEAN to take a holistic and long-term perspective in assessing and building its readiness for the new era, by addressing related challenges and developing capabilities to capitalise on the new opportunities presented. Also, ASEAN has taken the positive and important step as seen in the ASEAN Leaders' Statement on Cybersecurity Cooperation.

On a broader scale, the smart cities in Singapore and ASEAN complement C40 Cities (which focuses on mega cities)[55], Rockefeller 100 Resilient Cities Network[56] and other networks such as Global Cities Cool Alliance.[57] These various 'cities' deal with some of the common urban problems that SSC and ASCN try to grapple with attempting to achieve the aims of the Paris Agreement[58], UN SDGs[59], and its 2030 Agenda.[60]

On a higher level, it envisions humanity at its next frontier. It is still at an early stage. Singapore and ASEAN should embrace change but with caution when we write humanity's next chapter as new laws, policies and governance must be in place to accommodate all the changes. Innovation, resilience and an adaptive approach should be the guidance.

[55]Lin, J. (2018). *Governing Climate Change: Global Cities and Transnational Lawmaking*, 2018, CUP.
[56] Rockefeller 100 Resilient Cities. Retrieved from https://www.rockefellerfoundation.org/our-work/initiatives/100-resilient-cities/.
[57] Global Cool Cities Alliance. Retrieved from https://globalcoolcities.org/about-us/.
[58] The Paris Agreement of the United Nations Framework Convention on Climate Change Retrieved from http://unfccc.int/focus/indc_portal/items/8766.php.
[59] United Nations Sustainable Development Goals, United Nations Development Program. Retrieved from http://www.undp.org/content/undp/en/home/sustainable-development-goals.html.
[60] The Agenda 21. The Sustainable Development Knowledge Platform. Retrieved from https://sustainabledevelopment.un.org/outcomedocuments/agenda21.

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References

ASEAN Documents

ASEAN Charter
ASEAN Community Councils: The Three Pillars of the ASEAN Community
ASEAN Digital Integration Framework
ASEAN Leaders' Statement on Cybersecurity Cooperation
ASEAN Smart Cities Concept Note

UN Documents

The Agenda 21 of the United Nations
The Paris Agreement of the United Nations Framework Convention on Climate Change
United Nations Sustainable Development Goals

Journals

Baharudin, H. (2018). *New Cyber Security Center to Boost ASEAN's Capabilities*. Retrieved from https://www.straitstimes.com/singapore/new-cyber-security-centre-to-boost-aseans-capabilities.Carriero, D. (2016). *United Smart Cities: Towards Sustainable Cities in the ECE*. Housing and Land Management Unit of the United Nations.

Falk, T. (2012). *Topic: Innovation (information age and 'Smart Cities' technology: topic of IT companies. "Rise of the Wise: Next Steps for Smart Cities"*.

Lin, J. (2018). *Governing Climate Change: Global Cities and Transnational Lawmaking*, 2018, CUP.

Thanh T. (2018, December 1). Viet Nam News, Vietnam, in "Focus on people to build smart cities". *The Straits Times*.

Woo, J. J. (u.d.). Smart Nation: "*A Policy and Organisational Perspective"*. Lee Kuan Yew School of Public Policy (LKY School), National University of Singapore.

Online articles

ASEAN Digital Integration Framework. Retrieved from https://theaseanpost.com/article/key-greater-asean-digital-integration; See also: http://customstrade.asia/tag/asean-digital-integration-framework/

Asia One (2015). Retrieved from http://www.asiaone.com/singapore/smarter-flood-detection-system-monsoon-season-undergo-trials.

A slow welcome for Smart Homes in Singapore. Retrieved from https://www.straitstimes.com/tech/a-slow-welcome-for-smart-homes; See also:

http://www.smartautomation.com.sg/?gclid=EAIaIQobChMIp5Sr8d2t3wIVjSQrCh2gtw45EAAYASAAEgKsXfD_BwE.

A strategic view on Smart City Technology: The Case of IBM Smart Cities during Recession. (2014). Retrieved from https://www.sciencedirect.com/science/article/pii/S0040162513002266.

Carriero, D. (2016). United Smart Cities: Towards Sustainable Cities in the ECE. Housing and Land Management Unit of the United Nations. Retrieved from https://www.unece.org/fileadmin/DAM/hlm/projects/SMART_CITIES/Presentations/Domenica_Carriero_-_United_Smart_Cities.pdf.

Cheng, K. (2018). *New Punggol Digital District to create 28,000 jobs*. Retrieved from https://www.todayonline.com/singapore/new-punggol-digital-district-create-28000-jobs-open-gradually-2023

COI for Singhealth Cyber Attacks. (2018). Retrieved from https://www.channelnewsasia.com/news/singapore/singhealth-cyberattack-committee-inquiry-staff-hack-10744182 – "A series of gaps in SingHealth's mission-critical IT systems and staff missteps contributed to Singapore's most serious breach of personal data that happened in June this year", according to Solicitor-General Kwek Mean Luck on Friday (Sep 21).

Enterprise IOT Insights. Retrieve from https://enterpriseiotinsights.com/20160527/smart-cities/itu-unece-smart-cities-tag29.

Experience Singapore. (2018). Mapping a cyber future: How Singapore and ASEAN are harnessing the possibilities, while addressing the challenges, of digitalisation. Issue 67, July-Sep 2018, Singapore Business Federation. Retrieved from https://www.sbf.org.sg/digitize-asean-2018-to-examine-the-impact-of-digitalisation-on-asean-development.

Falk, T. (2012). Topic: Innovation (information age and 'Smart Cities' technology: topic of IT companies. "Rise of the Wise: Next Steps for Smart Cities". Clinton Foundation. Retrieved from https://stories.clintonfoundation.org/rise-of-the-wise-next-steps-for-smart-cities-46ab905fb003 on December 9, 2013.

Formation of the Smart Nation and Digital Government Group. Retrieved from https://www.pmo.gov.sg/newsroom/formation-smart-nation-and-digital-government-group-prime-minister%E2%80%99s-office.

Global Cool Cities Alliance. Retrieved from https://globalcoolcities.org/about-us/.

Funding Smart Cities Not an Issue. Retrieved from https://www.todayonline.com/world/funding-smart-cities-not-issue-implementing-ideas-says-pm-lee.

Govtech Sunday Times: *What Smart Lamp Posts Can Do?* (2018). Retrieved from: https://www.straitstimes.com/sites/default/files/attachments/2018/04/08/ST_20180408_ITLAMP_R3_3893583.pdf.

Hong, J. (2018). *First to get PUB's Smart Shower Device*. Retrieved from https://www.straitstimes.com/singapore/first-to-get-pubs-smart-shower-device.

IBM Smarter Cities: A Case Study for Singapore's Smart Nation Agenda. (2015). Retrieved from https://www.slideshare.net/TimGreisinger/ibm-smarter-cities-case-studies-for-singapore.

IBM, Cisco and the Business of Smart Cities. (u.d). Retrieved from https://www.information-age.com/ibm-cisco-and-the-business-of-smart-cities-2087993/; IBM had a similar vision to use information technology to make cities smarter. But while Cisco and IBM both have a smart cities focus, different strategies are involved Retrieved from: https://www.cisco.com/ c/en/us/about/ consulting-thought-leadership/what-we-do/industry-practices/public-sector/our-practice/urban-innovation/connected-urban-development/further-cud-information/thought-leadership/clinton-global-initiative.html.

Kelleher, J. (2017). Innovative Flood Detection project launches trials as Singapore heads into Monsoon season. Open Gov Asia. Retrieved from https://www.opengovasia.com/innovative-flood-detection-project-launches-trials-as-singapore-heads-into-m.

KPIs on Smart Sustainable Cities – ITU. Retrieved from https://www.itu.int/en/ITU-T/ssc/pages/kpis-on-ssc.aspx.

Launch of the Digital Government Blueprint: "A Singapore Government that is Digital to the Core, and Serves with Heart." (2018) Retrieved from https://www.smartnation.sg/whats-new/press-releases/launch-of-digital-government-blueprint--a-singapore-government-that-is-digital-to-the-core--and-serves-with-heart#sthash.44wtWBDR.dpuf.

Rockefeller 100 Resilient Cities. Retrieved from https://www.rockefellerfoundation.org/our-work/initiatives/100-resilient-cities/.

Singapore's Cybersecurity Strategy: Singapore Common Criteria Scheme (2016). Retrieved from https://www.csa.gov.sg/programmes/csa-common-criteria; See also: https://www.pmo.gov.sg/newsroom/transcript-speech-prime-minister-lee-hsien-loong-founders-forum-smart-nation-singapore.

Singapore to Spend up to 2.6 Billion Dollars on ICT. Retrieved from https://sbr.com.sg/economy/news/singapore-spend-26b-ict-projects.

Singapore's smart city push cannot create Smart Nation without everyone's buy-in. (2018). Retrieved from https://www.theedgesingapore.com/singapores-smart-city-push-cannot-create-smart-nation-without-everyone.

Skills Future – SG. Retrieved from http://www.skillsfuture.sg/emergingskills.

Singhealth Cyber Attacks: How it Unfolded. (2018). Retrieved from https://graphics.straitstimes.com/STI/STIMEDIA/Interactives/2018/07/sg-cyberbreach/index.html

"Smart – city solutions for Asia need not be grandiose projects." (2018). The Straits Times. Retrieved from https://www.straitstimes.com/opinion/smart-city-solutions-for-asia-need-not-be-grandiose-projects.

Smarter Flood Detection System on Trial, Marrying CCTV with Image Analytics (2015). Retrieved from https://wildsingaporenews.blogspot.com/2015/11/smarter-flood-detection-system-on-trial.html#.XAd8wDERWUk.

Smart Nation, Smart Senior Citizens. *Smart Watches for the Elderly*. (2018). Retrieved from https://www.straitstimes.com/singapore/first-to-get-pubs-smart-shower-device.

Smart Shower Programme. Retrieved from https://www.pub.gov.sg/savewater/athome/smartshowerprogramme.

Speech by Minister Lawrence Wong. (2018). Retrieved from https://www.mnd.gov.sg/newsroom/speeches/view/s

Strategic National Projects to Build a Smart Nation. Retrieved from https://www.smartnation.sg/whats-new/press-releases/strategic-national-projects-to-build-a-smart-nation.

Terms and Conditions for Freelancer Insurance. ETIQA Insurance. Retrieved from https://www.etiqa.com.sg/wp-content/uploads/2018/07/GigaCover-FLIP-Insurance-Policywording.pdf.

The Association for Sustainable Innovative Development in Economics, Environment and Society (ASIDEES). Retrieved from: https://enterprise.pharosnavigator.com/static/content/en/27/Partners.html.

The Business Times – Resilience and Innovation: 33rd ASEAN Summit and Related Summits, November 11 -15, 2018, Singapore, section on "Towards smart cities in ASEAN", pp 6-7; "Cooperating to counter cyber threats", p 8, 13 November 2018. Retrieved from tps://asean.org/storage/2018/04/Concept-Note-of-the-ASEAN-Smart-Cities-Network.pdf.

The Digital Government Blueprint. Retrieved from https://www.tech.gov.sg/digital-government-blueprint/.

United Nations Sustainable Development Goals Number 11: Sustainable Cities and Communities. Retrieved from: http://www.undp.org/content/undp/en/home/sustainable-development-goals/goal-11-sustainable-cities-and-communities.html.

UN News Centre. (2016). Sustainable Development Agenda. Retrieved from https://www.straitstimes.com/singapore/vision-of-a-smart-nation-is-to-make-life-better-pm-lee.

Weaver, K.T. (2015). Smart Grid Awareness. Retrieved from https://smartgridawareness.org/tag/agenda-21/

Why Smart Nation? Retrieved from https://www.smartnation.sg/why-Smart-Nation/sndgg.

Wong, D. (2018). *More home fittings are water-efficient*. Retrieved from https://www.straitstimes.com/singapore/environment/more-home-fittings-are-water-efficient.

Woo J. J. (u.d.). Smart Nation: "A Policy and Organisational Perspective", Lee Kuan Yew School of Public Policy (LKY School), National University of Singapore. See also: https://www.smartnation.sg/whats-new/press-releases/strategic-national-projects-to-build-a-smart-nation; https://www.pmo.gov.sg/newsroom/pm-lee-hsien-loong-smart-nation-initiative-launch.

World's First High-Rise Rotatable Laboratory for the Tropics. Retrieved from https://www.bca.gov.sg/skylab/.

ANNEX: Continuation of Transcript of Speech by Prime Minister Lee Hsien Loong at Smart Nation launch, 24 November 2014:[61]

We need the right organisations, the right skills, the right mindsets to be a Smart Nation. We have to start with our education system. We are equipping students with up-to-date knowledge and skills to use the technology. But schools must also teach students how to create the technology of the future; teach them to code, to prototype and build things, to fail fast and learn quickly, to use the latest gadgets, the latest tools and be up with the latest technology.

We need the skills, we need the education, and the "can-do" spirit of experimenting and risk-taking.

There is work being done on this all over the world. I just read an article – there is an American group which is designing a $10 robot, $10 for school children to learn how to programme robots. It can find out where it is, it can follow lines, it can move forward, move back, can turn, can measure distances using infrared, and you can programme it graphically. So if you want to turn the light on, you pull a LED icon, put it there, put the green light, it lights up. Children can do that. Our children can do that. We have kids in school who do very well at robot soccer. We never win, or we have so far not won at the real World Cup, but at the robotics world cup championships, we do very well.

...So we need the skills, we need the education, and the "can-do" spirit of experimenting and risk-taking. This is what makes Silicon Valley special: the world leader in technology innovation, a constant churn of ideas, of new business models. The Chinese are getting there too. I was in Shenzhen a few months ago, and visited Tencent, 腾讯, in Shenzhen. They are one of the big IT companies in the world now. If you walk around and talk to their people and soak up the mood, you would think you were in Silicon Valley. It is informal, it is casual, lots of energy, lots of new things going on – some will succeed, some will fail, but a passion to change the world. They put up screens showing all the places where people are using QQ or Wechat, and it is all over the world. I think we need that passion and that excitement to move.

Within the Government, we are reviewing how to manage the careers of our technologists and engineers, because we need to strengthen our own capabilities within the Government. We cannot just be outsourcing everything. Yes, we need to bring in expertise from the industry, but we need our own expertise too, not least to be able to specify what we want and to be able to interact fruitfully with the industry. In particular we will build up the IDA, because it has a key role in spearheading the development of a Smart Nation. Build up, meaning not just the headcount, but growing a culture and the mindset of experimentation. Being willing to try new approaches, disrupt existing ways of doing things; try, fail fast, learn the lessons, turn around quickly; constantly pushing the boundaries, inside the Government, outside the Government....

Smart Nation is a lot of possibilities, I think, a lot of excitement, particularly for young people. This is our country, this is our future. My question to young people would be: Do you want to be part of this movement, to build a Smart Nation? Come together, design the solutions, test the ideas, give us the feedback, imagine it, let's decide on it, let's make it happen.

Conclusion

We are making a home for all Singaporeans, young and old. Not just the technologically savvy, but everyone. We want to transform our lives for the better, and we have what it takes to achieve this vision – the capabilities and the daring to pull it all together and make a quantum leap forward. I am looking forward to living in a Smart Nation – better living for all of us; stronger communities in our society; and more opportunities for all....

20 Dec 2018

[61] Transcript of Speech by Prime Minister Lee Hsien Loong at Smart Nation Launch, November 24, 2014. Retrieved from: https://www.smartnation.sg/whats-new/speeches/smart-nation-launch#sthash.2aNlNgAa.dpuf.

"Singapore Smart City" and ASEAN Smart Cities Network"- A Different Style of Sustainability

Energy Transition Scam in Taiwan: Wrong Legal Strategy?

Anton Ming-Zhi Gao*

The Democratic Progressive Party, long time advocates of a nuclear-free homeland, won the presidential and parliament election in January 2016, its first win in Taiwanese history. In the past two (2) years, there has been an increasing number of intensive policy initiatives in the name of 'energy transition'. However, there is not yet much correlating legal development. This article attempts to provide an overview of the key legal measures that promote energy transition, and to provide a critical review of the legal architecture for energy transition since 2016. The current finding reveals that the Taiwanese government has tried to exclude not only the renewable energy (RE) industries, but also law professors and experts, from both the decision-making and legislative processes. The economic and technological think tanks dominate the revisions of all RE-related legislations. This challenges the occurrence of an effective transition, by obfuscating the rule of law and governance, and instead, making a sham of this important energy transition.

Keywords: energy transition, Renewable Energy Development Act of 2009, Electricity Act of 2017, renewable energy certificate, *energiewende*.

Introduction

Policy Development. The Democratic Progressive Party (DPP), long time advocates of a nuclear-free homeland, won the presidential and parliament election in January 2016, its first such win in Taiwanese history. As with the previous political regime change in 2000,[1] energy is the key focus of the new government's agenda. In the past two years, there has been an increasing number of intensive policy initiatives in the name of 'energy transition'. It began with the idea of a 'new energy policy'[2] put forth by the Ministry of Economic Affairs on 25 May 2016. Then a series of policy initiatives was developed, including: '2016 White Paper on Energy Industry Technology (September 2016)',[3] 'New Energy Development Guideline

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[1] For instance, the cease of the construction of nuclear power plants was a very controversial movement at that time. The New York Times (2000). *Taiwan Ends Construction of Its 4th Nuclear Plant*. Retrieved from http://www.nytimes.com/2000/10/28/world/taiwan-ends-construction-of-its-4th-nuclear-plant.html.

[2] MOEA, New Energy Policy (經濟部部長李世光，經濟部施政重點，105.05.25，新能源政策), Retrieved from http://www.moeaboe.gov.tw/ECW/populace/content/wHandMenuFile.ashx?file_id=7

[3] White Paper on Energy Industry Technology (September 2016) (2016 年能源產業技術白皮書，105 年 9 月). Retrieved from http://www.moeaboe.gov.tw/ECW/populace/content/wHandMenuFile.ashx?file_id=1663.

(April 2017)',[4] 'Four Year Promotion Plan for Wind Power',[5] and 'Two Year Plan for Photovoltaic (PV)'.[6] These policy initiatives are all based on energy transition. The government further proposed a plan entitled the 'Energy Transition White Paper' and claimed that it would strive to establish a bottom-up approach to involve the general public during the formulation process in June 2016. A web-based discussion platform was therefore established.[7] From this aspect, it seems as if the 'policy documents' are ready for the implementation of the energy transition works. However, prior to the publication of the Energy Transition White Paper, two important developments occurred in November 2017. The Premier Office announced an 'Electricity Security Strategy',[8] while the Ministry of Economic Affairs (MOEA) announced its new plan to encourage residents to participate in the solar roof programme.[9] In sum, the government's efforts being exerted to achieve its target of approximately 5% to 20% renewable electricity in use by 2025.[10] The purpose of these efforts are also associated with the DPP's policy goal of stopping the operation of all nuclear power plants by 2025.[11]

Legal Developments. In spite of the image envisaged in these wide-ranging policy papers, Taiwan now face a serious 'legal' bottleneck to further enhancing the growth of the key player during the energy transition: renewable electricity. For instance, many PV projects developed on farmlands in the past few years have faced serious legal challenges and already are subject to dismantling and removal.[12] Furthermore, legally built wind turbines in one industrial park were dismantled in 2016 after a protest against its 'dangers to the public'.[13] Recently, offshore wind power development also faced legal turmoil, including environmental impact

[4]New Energy Development Guideline(April 2017) (能源發展綱領，經濟部，中華民國 106 年 4 月修正). Retrieved from http://www.moeaboe.gov.tw/ECW/populace/content/wHandMenuFile. ashx?file_id=1206.

[5]Four Year Promotion Plan for Wind Power 風力發電 4 年推動計畫，經濟部，中華民國 106 年 8 月 Retrieved from http://www.moeaboe.gov.tw/ECW/populace/content/wHandMenuFile.ashx?file_id =4107.

[6] Two Year Plan for Photovoltaic 太陽光電 2 年推動計畫，經濟部，Retrieved from http://www.moeaboe.gov.tw/ECW/populace/content/wHandMenuFile.ashx?file_id=4112.

[7]Energy Transition White Paper (2018). Retrieved from http://energywhitepaper.tw/.

[8]Electricity Security Strategy (產業穩定供電策略) *Retrieved from https://www.ey.gov.tw/DL. ashx?s...u...0495-4cf6-a42c-16aa05c37f2c.pd.*

[9] Bureau of Energy, Ministry of Economic Affairs (2017). *Citizen PV Roofs Programme*, Retrieved from http://www.moeaboe.gov.tw/ECW/populace/news/News.aspx?kind=1&menu_id=41&news_id =11866.

[10] Lin, J (2015). *Taiwan to generate 20% of power from renewables by 2025.* Taiwan News. Retrieved from http://www.taiwannews.com.tw/en/news/3095302.

[11]Nuclear-Free Homeland Policy (2018). Retrieved from *https://www.swp.energy/nuclear-free-homeland/.*

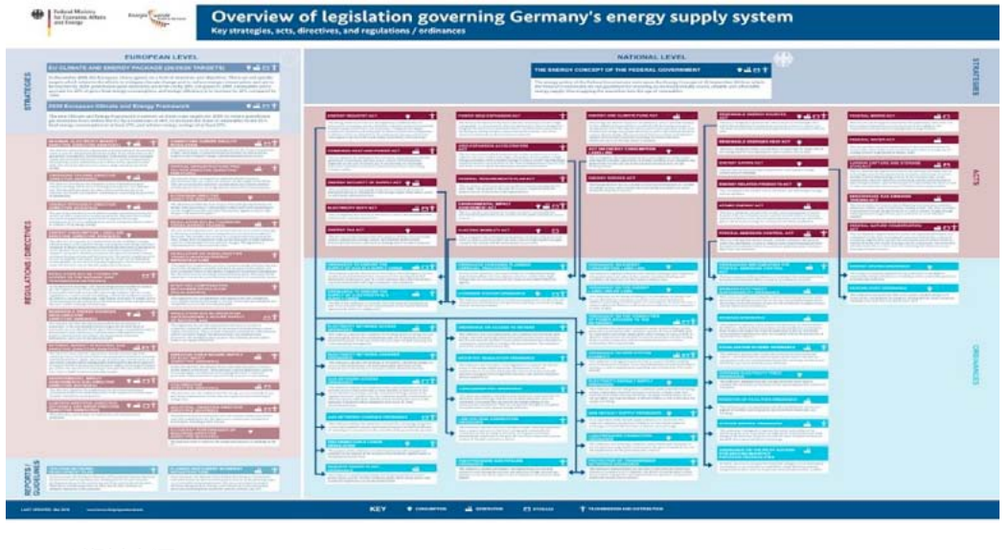
[12] Focus Taiwan (2017). *Lawmaker warns of solar power impact on agriculture: Solar Power Moves Ahead in Taiwan Despite Obstacles*. Retrieved from https://topics.amcham.com.tw/ 2017/10/solar-power-moves-ahead-in-taiwan-despite-obstacles/.

[13]〈中部〉彰濱風機今拆 1 座 520 抗爭可望取消- 地方- 自由時報電子報 (Turbine to be removed in Chunghua, protest on May 20th may be cancelled) Retrieved from news.ltn.com.tw/news/local/paper/1101647 2017 年 5 月 12 日.

assessment, strategic environmental assessment, localization, and tendering.[14]

Compared with the emphasis and important role of the law during the energy transition in Germany, the rule of law in the numerous, above-mentioned policy documents is noticeably absent. Thus, this author was inspired to investigate the 'legal architecture' during Taiwan's energy transition. Could such architecture provide the needed support to further the development of Taiwan's renewable electricity?

Figure 1. 圖一、德國能源轉型法制架構圖



（資料來源：See http://www.bmwi.de/Redaktion/EN/Publikationen/gesetzeskarte.html）

The main purpose of this article is to provide an overview of key legislative tools which can further advance Taiwan's renewable electricity goal of 20% by 2025, and to provide a critical review of such objective. Preliminary analysis of this article revealed a lack of consideration of the rule of law in this process, which could seriously impede the implementation of the energy transition roadmap.

1. Key Legal Measures to Promote RE Before 2016

Before analysing the recent legal measures to advance RE development, there is a need to elaborate on the key promotional efforts of the existing legal regime with respect to RE. From the recent series of policy initiatives, one issue may be raised: the existence of RE before 2016.

There are two milestone measures that happened before 2016 - one in 2003 and the other in 2009. These two programs facilitated the prioritization of Taiwan's RE policies - wind power

[14] Green Impact (2017). *What Shadows Offshore Wind Power Industry despite the Significant Inflow of Foreign Investment?*. Retrieved from http://greenimpact.cc/en/article/53yzk/what-shadows-offshore-wind-power-industry-despite-the-significant-inflow-of-foreign-investment.

and PV. From the statistics below, it is clear that the 2003 measure incentivized the production of wind power, while the 2009 measure did the same mainly for PV, but also wind power.

Table 1. The evolution of PV and wind power in Taiwan 2003 (Unit: MW)

Year	Wind Power	PV
2003	8.5	0.5
2009	374.3	9.5
2015	646.69	842.04
2016	682.09	1,061.38
2017 (September)	694.7	1430.8

Source:http://www.moeaboe.gov.tw/ECW/populace/web_book/wHandWebReports_File.ashx?type=pdf&book_code=M_CH&chapter_code=K&report_code=05)

1.1 Tai-Power's 2003 RE Purchase Scheme

A 'temporary' feed-in tariff scheme was developed by the Tai-Power Corporation (Tai-Power). Tai-Power voluntarily enacted its 'Feed-in Tariff Ordinance' in 2003.[15] According to Article 6 of this Ordinance, the buy-back tariff for all renewable electricity was established as 2 New Taiwan Dollars (NTD)/kWh. This scheme was intended to promote several RE types: PV, marine energy, wind, geothermal, small hydropower, and biomass (excluding municipal waste incinerators).[16] However, due to the fixed incentive of 2 NTD/kWh, wind power plants were the main beneficiaries.[17]

1.2 The Foundation to Promote Renewable Electricity in Taiwan: Renewable Energy Development Act of 2009.

Since 2001, Parliament continued its discussions of the Renewable Energy Development Act (REDA), which was passed immediately after the National Energy Conference of 2009. In general, even though this Act is called 'renewable energy', the measures mainly focus on the development of a German-style feed-in tariff scheme for 'renewable electricity'. It also reflects the fact that of the 23 provisions, only one deals with renewable heating and renewable transportation fuel. With a view to improving the previously insufficient 2-NTD/kWh feed-in tariff, which was mainly based on an avoidance cost, the new feed-in tariff scheme would be mainly based on the actual cost of each renewable electricity installation.[18] The major measures in this Act to promote different forms of renewable energy have been illustrated in Table 2.

[15] Tai-Power Feed-in Tariff Ordinance (2003).
(民國 92 年 11 月 11 日台電公司發佈台灣電力公司再生能源電能收購作業要點) Retrieved from http://energy.ie.ntnu.edu.tw/policy/download/d48b750a63d455fccb3c8ab06e0dbe41.
[16]Art. 2 of Tai-Power Feed-in Tariff Ordinance (11 Nov. 11, 2003).
[17]Anton Ming-Zhi Gao: Application of German Energy Transition in Taiwan: A Critical Review of Unique Electricity Liberalization as a Core Strategy to Achieve Renewable Energy Growth, Energy Policy Volume 120, September 2018, PagesAt p.20.
[18]Id., at p.23-24.

Table 2: Main measures to promote renewable energy under the renewable energy act

Measure	
Main mechanisms	RE Development Fund for R&D, investment subsidy, demonstration subsidy, and feed-in tariff
	Feed-in tariff (FIT)
	Investment subsidy for installations and demonstration installations
	Interconnection (grid connection) obligation for utilities
Others	RE target
	Tax incentives for import of renewable installations
	Green procurement

(Source: Compiled by the author)

2. An Overview and Critical Review of the Legal Architecture for Energy Transition since 2016

2.1 July 2016: Public Hearing on the Revision of REDA

For any legislation such as REDA, there is always a need for frequent updates and revisions in order to respond to the latest situation and resolve any barriers discovered during implementation. Prioritizing revisions and improvements to REDA also make sense in terms of its causal link with RE prosperity in the past few years. Therefore, two (2) months after the inauguration of the President on 20 May 2015, MP Lai held a public hearing on the need to revise REDA to meet the needs of RE development. At its conclusion, the panel committed the MOEABOE to prepare a draft of the revised REDA within 2 months.[19] However, due to the change of focus of the new government's energy transition agenda from RE to electricity liberalization, there has been no follow-up.

2.2 July 2016: Electricity Liberalization as the Core of RE Promotion

The proposed REDA revision and reform was a distraction to the initiative to liberalize Taiwan's electricity market. The government's perspective is that the monopolistic structure of Tai-Power is a barrier and threat to the rapid growth of RE. Thus, conferring the freedom and right for RE developers to compete in the market could be the best way to further motivate RE development.[20]

Governmental justification for promoting liberalization is based on the presumption that vertically-integrated structures and state monopolies are not conducive for RE development.[21] The

[19] Public hearing on the New Government's challenge and opportunities in promoting RE. (2016). (20160728 新政府推動再生能源之機遇與挑戰公聽會| PeoPo 公民新聞)
Retrieved from https://www.peopo.org/news/315677
[20] Executive Yuan, R.O.C. (Taiwan)-Electricity Act, Retrieved from https://english.ey.gov.tw/News_Hot_Topic.aspx?n=16A2DB4D12C02510&sms=BD450CA810662F3D
[21] Ferry, T. (2016). *Taiwan Undertakes Power Market Reforms*. Retrieved from http://topics.amcham.com.tw/2016/11/taiwan-undertakes-power-market-reforms/

central idea behind such an approach is the perception that a direct-selling arrangement, via either direct line or third-party access (wheeling) to the transmission and distribution line of the incumbent for renewable electricity, could free up the current single-buyer model and the feed-in tariff scheme, thus forcing renewable electricity developers to sell all electricity produced to the state-owned vertically-integrated electric company, Tai-Power. Instead, it gives more freedom to RE developers to access their end consumers directly[22].

In a promotional video clip on Youtube, an analogy is given for this idea, equating the current regulated electricity market to farmers having only one vegetable buyer. If the farmers are forced to sell all of their harvest to this single buyer, there is no incentive for them to grow more, as they do not have the freedom to supply to other customers.[23] Therefore, the idea may also lead to another unique presumption: that the FIT regime, a regime forcing RE developers to sell all RE to one or a few grid operators, would dis-incentivize RE developers from entering the market. This would completely change the dominant perception in literature on the successful role of FIT in facilitating RE development.[24]

The new Electricity Act was passed in January 2017.[25] Does it really contribute to the further development of RE?

3. Critical review

3.1 Misunderstanding the Role of REDA

Interestingly, during the process of deliberalization through the new Electricity Act (EA), the government and renewable NGOs seemed to ignore REDA's role and achievement over the past few years. Only several experts including this author raised the important issue of REDA and its contribution to the golden age of Taiwan's RE.[26] Even after revising the EA, in order to implement its new business market models, there is still a need to revise REDA, yet the government has delayed this. Although REDA was listed as a priority bill for the congressional term of September 2016, which will be elaborated upon later, the government has now opted to address it instead during its first congressional term (February - August) of this year.[27]

[22] Focus Taiwan News Channel (2017). *Taiwan passes law to liberalize green energy supply,* Retrieved from http://focustaiwan.tw/news/aeco/201701110029.aspx; See also: Taipei Times, Minister touts amendments to *Electricity* Act, 21 July 2016, http://www.taipeitimes.com/News/biz/archives/2016/07/22/2003651506

[23] Apple News: What blocks the green energy development? heagedmorethan50yearsoldElectricityActshouldbe blamed (【特企】綠能卡在哪？原來我們的電業法已經超過 50 年！), 17December2016, Retrieved from http://www.appledaily.com.tw/realtimenews/article/new/20161217/1011868/.

[24] Anton Ming-Zhi Gao: Application of German Energy Transition in Taiwan: A Critical Review of Unique Electricity Liberalization as a Core Strategy to Achieve Renewable Energy Growth At 17, 18.

[25] Laws and Regulations Database of the Republic of China. Retrieved from http://law.moj.gov.tw/Eng/LawClass/LawContent.aspx?PCODE=J0030011.

[26] Taiwan's Energy Transition Turns Out to be a Renewable Scam (2017). Retrieved from https://energylawtaiwan.wordpress.com/2017/11/02/taiwans-energy-transition-turns-out-to-be-a-renewable-scam/.

[27] The Prior Bills of the Congress (立院新會期執政優先法案出爐| 要聞| 即時 - 聯合新聞網), 23February2017, https://udn.com/news/story/1/2302770.

3.2 The viability of a new business model

Simply speaking, the new business model created by the EA is composed mainly of new players of renewable electricity generators and renewable electricity retailers. Under this new business model, RE generators are given the right to sell directly to and freely negotiate price with end users, while RE retailers might serve as mediums to match the supply and demand of RE generators and end users.[28] Thus, this business model is workable only for those REs which can compete with traditional electricity generators, such as onshore wind power and hydropower, but not for more expensive REs like PV, geothermal, biomass electricity, and offshore wind power. However, due to certain limitations, new business models are unlikely to be established.[29] For instance, apart from price, cumbersome rules concerning grid connection and usage may impact development.

3.3 The flawed procedure to revise the law

One might ask why the legislature would make a law which seems only to pretend to facilitate RE development. If there is further discussion and deliberation during the legislative process between July 2016- January 2017, such a ridiculous situation might be avoided. Originally, in September 2016, the new government wished to give more transparency to legislation affecting international trade and other important issues by announcing that all ministerial legislative proposals made after October 2016 would be subject to a minimum two-month public deliberation and opinion-collection process.[30] Yet the draft EA bill violated the government's commitment by going from Bureau to Ministry, and receiving Cabinet approval, within just one week.[31]

Again, such serious flaws could be remedied if the Congress would have heard expert opinions during the three months of November 2016 to January 2017. Yet, in spite of opposition from RE industries or NGO criticizing the lack of incentive to sell RE in the free market,[32] the DPP used its majority position in the Parliament and passed the Electricity Act.

[28] Application of German Energy Transition in Taiwan: A Critical Review of Unique Electricity Liberalization as a Core Strategy to Achieve Renewable Energy Growth, p. 28-31.

[29] *Id*., at 31-38.

[30] TheAnnouncementoftheTheExecutiveYuanon5September2016 (中華民國 105 年 9 月 5 日院臺規字第 1050175399 號函)

[31] Gao, A.M. (2016, October 19). The Revision of the Electricity Act lack of Due Process, Apple Daily News, 19 October 2016 (高銘志，行政程序嚴重瑕疵的電業法修法，蘋果日報，2016.10.19) Retrieved from www.appledaily.com.tw/appledaily/article/forum/20161019/37421395/

[32] CommonWealth Magazine, The Revision of Electricity Act is not good enough to promote Renewables, 29 December 2016 (發展再生能源電業法修正不夠力，天下雜誌)，2016-12-29 *Retrieved from www.cw.com.tw/article/article.action?id=5080170*

4. February 2017: The Promotion of the Renewable Electricity Certificate (REC)

As there is lack of further legal development accompanying the new updated EA, it is unlikely to be utilised to buy the 'certified' green electricity on the market.[33]The government began to promote its newer idea of a 'renewable electricity certificate'. In mid-April 2017, the preparatory Office for Taiwan Renewable Electricity Certificate was established.[34] On 19 May 2017 (one day prior to the new President's inauguration ceremony), the issuance of 268 certificates within just one month was announced.[35]At the end of June 2017, the day before implementation of the REC platform on mainland China, the issuance of an additional 2,544 certificates was announced.[36]Since that time, however, there have been no further developments related to the much more important issue of 'trade volume' of those issued certificates. So far, only 45 certificates have been traded to three buyers,[37] in contrast to the 12,146 certificates which have been issued.[38] Due to such slow progress, the local government also has attempted to bypass RE development at the central government level by seeking help from the US's important REC player, the Center for Resource Solutions (CRS),[39] to develop its own, more internationally compatible certificate.[40]

4.1 Legal basis

In terms of its legal basis, this is arguably a very peculiar situation. Compared with the legal bases of most countries associated with their energy-related legislations, such as Germany's Energy Industry Act (ENWG) and Renewable Energy Act (EEG),[41] Taiwan's T-REC is legally based on the non-energy-related legislation of the Commodity Inspection Act.[42] The certificates

[33] TEIA, Google explained why the green electricity in Taiwan is not green enough, 2 February 2017. (跟你想的不一樣 Google 解釋台灣綠電為何『不夠綠』」環境資訊中心 TEIA，2017.02.02). *Retrieved from* http://e-info.org.tw/node/202601.

[34] TEIA, Taiwan Renewable Energy Certificate Centre will issue the first green electricity ID soon, 21 April 2017 (再生能源憑證中心揭牌業者搶第一張綠電『身分證』」，環境資訊中心 TEIA，2017.04.21) *Retrieved from http://e-info.org.tw/node/204379.*

[35] BSMI, MOEABSMI is issuing renewable energy certificate, 19 May 2017 (「經濟部標準檢驗局發行首批『再生能源憑證』係"金"耶！　邁向綠色能源新紀元」，經濟部標準檢案局新聞稿，2017-05-19) *Retrieved from* http://www.bsmi.gov.tw/wSite/ct?xItem=69769&ctNode=1510&mp=1.

[36] BSMI, BSMI already issuing 2544 renewable energy certificates, 30 June 2017(「經濟部標準檢驗局持續推動綠能發展，共累計發出「再生能源憑證」2544 張」，經濟部標準檢案局新聞稿，2017-06-30」Retrieved from https://www.bsmi.gov.tw/wSite/ct?xItem=70504&ctNode=1510&mp=1.

[37]National Renewable Energy Certification Center. Retrieved from https://www.trec.org.tw/certification_trade_situation.

[38]*Id.* See above. https://www.trec.org.tw/certification. Accessed on 13 December 2017.

[39]Center for Resource Solutions. Retrieved from https://resource-solutions.org/.

[40]UDN News, Changhua country's training course for CRS launched, 27 August 2017(彰化推綠電培養人才 CRS 綠電認證培訓開課」，聯合新聞網，2017.08.27) *Retrieved from https://udn.com/ news/story/7325/2666327.*

[41]Electricity Labelling and Guarantees of Origin (2017). Retrieved from *https://www.energybrainpool.com/.../Agenda_Electricity_Labeling_and...*

[42]The Commodity Inspection Act Amended (2007). Laws and Regulations Database. Retrieved from http://law.moj.gov.tw/Eng/LawClass/LawContent.aspx?PCODE=J0100001.

issued under T-REC seem to be quite a unique 'commodity' or 'product' under Art. 14 of the Commodity Inspection Act.[43] If the use of such a legal regime is that simple, why would the government exert such efforts to pass the GHG (greenhouse gas) Reduction and Management Act of 2015 to introduce the carbon-trading system? Following the same line of thought, the Taiwanese government has only to expand the definition of 'commodity' to include greenhouse gases into the scope of the Commodity Inspection Act.

Finally, it remains unclear if REC trading would be subject to the rigid trading rules under existing financial regulations.

4.2 Continuing to Ignore the Importance of the Renewable Energy Act During the Energy Transition Process

In addition to phasing out nuclear power, the core of the energy transition is to develop RE which will replace nuclear power plants and traditional fossil fuel power plants.[44] As understood from Germany's situation, routine revision of REDA could provide updated and needed support to RE development. Since the publication of the 2000 Renewable Energy Act, Germany has conducted at least five (5) revisions.[45] The latest version of the 2017 Renewable Energy Act includes more than 100 provisions and the full text is over 100 pages.[46]

Let us consider the role of Renewable Energy Act in Taiwan. Taiwan's REDA is based on the Germany Renewable Energy Act of 2000, and was passed by Parliament in 2009. Therefore, at the time of this passage, REDA was already obsolete. The legislative intensity is not sufficient to deal with complex RE issues. More alarmingly, REDA has been implemented for almost eight (8) years now without *any* revisions.

[43]Article 14 of Commodity Inspection Act: *"In order to upgrade the management of commodity or service in terms of quality, environment, safety or health, the BSMI may implement certification system in connection with products or management systems. In order for the BSMI to handle applications for product certification or management system certification to be filed by relevant manufacturers and firms under the preceding Paragraph, the regulations governing the conditions and procedures for filing the application, and the term of validity, the issuance/revocation/rescission of the certificate (new and/or replacement), and other relevant matters shall be prescribed by the competent authority."*

[44]Morris, C. (2015). *Power from fossil fuel drops to 35-year low in Germany. https://energytransition.org/.../fossil-fuel-power-at-35-year-low-in-germany/.*

[45]Electricity Feed-in Act (1991)；Renewable Energy Sources Act (2000)；Renewable Energy Sources Act (2004)；Renewable Energy Sources Act (2009)；Renewable Energy Sources Act (2012)；Renewable Energy Sources Act (2014)；Renewable Energy Sources Act (2017).

[46] 2017 Renewable Energy Sources Act. Retrieved from https://www.clearingstelle-eeg.de/files/node/8/EEG_2017_Englische_Version.pdf.

Even so, REDA contributes to the golden age of solar PV and on shore wind power: PV grew from one to three digits, while on shore wind output almost doubled in its volume, compared to before REDA.[47]

4.3 The government's attitude and position towards such crucial energy transition legislation.

After the inauguration of the President on 20 May 2017, 'once/ever/ephemeral' was the focus of the new government. For instance, the Bureau of Energy, Ministry of Economic Affairs (MOEABOE) hosted an expert meeting to deliberate REDA's revision in June 2016.[48] Also, Parliament hosted a public expert hearing on the revision of REDA in July 2016.[49]

Yet, how can it also be 'ephemeral'? After this initial interest in revising REDA, the focus changed to the promotion of the Electricity Liberalization Billon 26 July 2016.[50] In October 2016, the President attempted to unite the two initiatives by again emphasizing the importance of the Electricity Bill in promoting RE.[51] On MOEABOE's website, the Electricity Bill was listed as the 'significant policy', and a special highlighted block for 'Electricity Bill Revision Zone 電業法修正專區' was created.[52] Within the intense discussions and debates surrounding the Electricity Bill,

[47]Unit: (MW)

Year	wind power	PV
2009	374.29	9.51
2010	475.89	22.02
2011	522.69	117.89
2012	570.99	222.51
2013	614.19	392.02
2014	637.19	620.08
2015	646.69	842.04
2016	682.09	1,061.38

[48] MOEABOE, Expert Consulting Meeting, 3 and 30 June 2016. (再生能源發展條例(修正草案)專家諮詢會，開會時間：6/3(星期五)，上午十點到十二點，開會地點：再生能源電能躉購制度研究辦公室(臺北市中山區復興北路 2 號 11 樓之 7)；再生能源發展條例修正草案專家諮詢會(第 3 場)，開會時間：105/6/30(星期四) 上午 10 時，開會地點：能源局 11F-0 辦公室(復興北路 2 號 11 樓之 0).

[49] Public Hearing on the challenges and opportunities to promote renewable energy, 28 July2016, taking place in the 201 conference room of the Parliament.(立法院公聽會,「新政府推動再生能源之機遇與挑戰」，105.7.28.，會議地點：立法院紅樓二零一會議室).

[50] The Electricity Act Reform 電業法修正專區，經濟部能源局網頁，Retrieved from http://www.moeaboe.gov.tw/ECW/populace/content/SubMenu.aspx?menu_id=3124.

[51]「蔡總統拍板電業法拚本會期過關電業兩階段改革」President Tsai targets a two-phased progressive Electricity Act Reform in this Legislative Yuan session，聯合新聞網 UDN.
Retrieved from https://www.udn.com/news/story/10388/2030469?from=udn-relatednews_ch2.

[52] The Electricity Act Reform 電業法修正專區，經濟部能源局網頁，Retrieved from

MOEABOE secretly completed the first draft bill of the REDA and posted it on its website for public consultation. Due to the lack of promotion of this issue, in spite of the emphasis by myself and related experts in the parliament hearings,[53] the REDA revision received neither media nor NGO attention.

After the passage of the Electricity Bill in January 2017, the REDA revision should have been the priority bill for the 2017 first-half-year term of Parliament. The reason for this prioritization is very simple. Many new business models created under the new Electricity Bill cannot be realized without revision of REDA. For instance, the introduction of the new players, renewable electricity retailers, under the new Electricity Act is still prohibited under the current Art. 8 of the 2009 REDA.[54,55] If liberalization and the creation of new business models under the new Electricity Act were to be such an important impetus for RE development, the government should have named REDA revision as its priority bill.

Interestingly, it is not. The realization of the new Electricity Act is seemingly not so urgent now, compared to several months ago. The government only listed the aforementioned Infrastructure Act as a priority bill.[56] In fact, the Green Energy Construction under the Infrastructure Act may be also related to RE development.[57] However, its long-term vision to

http://www.moeaboe.gov.tw/ECW/populace/content/SubMenu.aspx?menu_id=3124.

[53]「切莫頭痛醫腳綠電自由化要修的不是電業法」蘋果即時新聞，The Electricity Act Reform isn't the answer for liberalization of the renewable energy market. 2016.10.13，
Retrieved from www.appledaily.com.tw/realtimenews/article/new/20161013/967671/；
「黃士修觀點：別上當了，電業法修法是假議題！」，風傳媒，Don't fall for it! The Electricity Act Reform isn't the real issue! 2016.12.08，
Retrieved from http://www.storm.mg/article/197863

[54]「專家：電業法等於沒修不如修再生能源條例」Experts say that the Electricity Act Reform isn't as effective as reforming the Renewable Energy Development Act，聯合新聞網，經濟日報，2016.12.01，https://udn.com/news/story/6/2140791

[55]電業法修正學者批綠電自由化「不自由」Scholars criticize the liberalization of renewable energy in the Electricity Act Reform for not being "liberal"，聯合財經網

[56]立院新會期執政黨拚經濟 The ruling party vows for economic development in the new Legislative Yuan session，自由時報電子報，2017.02.14，Retrieved from *news.ltn.com.tw/news/focus/paper/1077941*

[57] Forward-Looking Infrastructure 前瞻基礎建設計畫-行政院，行政院全球資訊網，infrastructure.ey.gov.tw/
前瞻基礎建設特別條例第四條（前瞻基礎建設之項目）Article 4 本條例所定前瞻基礎建設之項目如下：一、軌道建設。二、水環境建設。三、綠能建設。四、數位建設。五、城鄉建設。六、因應少子化友善育兒空間建設。七、食品安全建設。八、人才培育促進就業之建設。
The items of forward-looking infrastructure specified by this Act are as follows:
1.Railway infrastructure.
2.Water environment infrastructure.
3.Green energy infrastructure.
4.Digital infrastructure.
5.Urban-rural infrastructure.
6.Infrastructure for friendly child-rearing space in response to the low birth rate.

address RE concerns, such as the construction of offshore wind power harbours, may not be very helpful in relieving the legal barriers faced by PV and onshore wind power developers. Suddenly and shockingly, conferring freedom for RE generators to sell directly to the market is not a priority, despite the recent passage of this Act.

Finally, after the end of the 2017 first-half-year term of Parliament, the REDA revision is again on the agenda. The MOEABOE hosted another public disclosure meeting on 17 August 2017 to announce the proposed REDA revisions.[58] The new premier also listed this revision as a priority bill of this term of the Cabinet Office.[59]

Could this revision facilitate RE development from the current 5% to the goal of 20% by 2025, within such a short period of time? According to my comprehensive analysis, [60]this revision may be very helpful for the development of small hydro-power plants, but it may not be very helpful for other RE producers.

This article identifies five areas in which the proposed revisions are lacking (五缺).

1. The continued lack of a link to the new business models under the new Electricity Act.[61] Perhaps, the government has begun to realize that the new business model may not be very helpful in fostering RE development. Therefore, it has decided against its promotion by not promulgating accompanying provisions in the REDA.

7.Food safety infrastructure.
8.Infrastructure for cultivating talent and promoting employment.

[58]再生能源發展條例修法說明會 Public meeting for the Renewable Energy Development Act，經濟部能源局網站． Retrieved from http://www.moeaboe.gov.tw/ECW/populace/news/Board.aspx?kind=3&menu_id=57&news_id=9778.

[59]「政院列 72 項*優先法案*將提一例一休勞基法政院版修正」The Executive Yuan lists 72 priorities in the new legislative yuan session，中時電子報．2017.09.18. Retrieved from http://www.chinatimes.com/realtimenews/20170918003356-260407.

[60]*「高銘志觀點：端不出牛肉的再生能源修法案，成了一盤空心菜」，Gao's Perspective :The lack of "beef" in the Renewable Energy Development Act Reform 風傳媒，2017.08.16，* Retrieved from *http://www.storm.mg/article/315348；*「高銘志觀點：看不到台灣轉型未來的再生能源修法案」Gao's Perspective: No vision for the energy transition in the Renewable Energy Revision，風傳媒，*2017.08.17.* Retrieved from http://www.storm.mg/article/315389.

[61]「高銘志觀點：看不到台灣轉型未來的再生能源修法案」Gao's Perspective: No vision for the energy transition in the Renewable Energy Revision，風傳媒，*2017.08.17.* Retrieved from http://www.storm.mg/article/315389.

亦即，再生能源售電業，仍舊無法購得其轉賣所需之綠電，此一商業模式並不可行。或許，政府也體會到，其實在電業法下創設之再生能源售電業，應該不具實際發展之可行性，故間接透過此次「不修法」，廢掉再生能源售電業之商業模式。若是如此，則是否政府應一併配套，提出電業法修正草案，廢除再生能源售電業之角色？

This implies that renewable energy retailers continue to lack the ability to accumulate enough renewable energy sources for sale. The government probably realized that the renewable energy retailers created under the Electricity Act lack practicability, hence neglected revisions or reforms to the Renewable Energy Development Act to ensure that "no renewable energy is to be sold".

2. The role of RECs is not mentioned in the REDA revision.[62]

3. There are no special provisions in the revision which address the current turmoil regarding solar panels on farmlands and future plans to promote solar roofs for all citizens.[63]

4. The Taiwanese government has recently established a very ambitious goal for developing offshore wind power. However, the government fails to include any related provisions in this revision to address concerns related to loans, environmental impact assessments, localization, and grid connections.[64]

5. Perhaps, the most important challenge is the government's seeming lack of interest to hear the needs of the RE industries. The above problems all call into focus the government's "top-down", "ivory tower", and "unilateral approach" in pushing forward its RE agenda over the past two years. Lack of understanding of the RE industries' needs has led to the RE industries' opposition to all energy transition reforms.

5. Conclusion

The DPP's nuclear-free homeland advocacy has already turned from a policy perspective in the Environmental Basic Act of 2002,[65] to a legally-binding target in the new Electricity Act of 2017.[66] The nuclear phase-out schedule is definite. Thus, the replacement nuclear power with clean energy should be a priority at this moment.

The government has proposed a 50% gas-fired, 30% coal-fired, and 20% RE electricity

[62]「高銘志觀點：端不出牛肉的再生能源修法案，成了一盤空心菜」Gao's Perspective :The lack of "beef" in the Renewable Energy Development Act Reform，風傳媒．2017.08.16．Retrieved from http://www.storm.mg/article/315348.

不過，若要修法，到底要修什麼法呢？今年三月二十九日能源局邀請德國專家來分享德國導入再生能源憑證之經驗，其相關法規，主要是類似台灣電業法之德國能源工業法及再生能源法。

If REC is to be included into the law, which law should be amended? On March 29th, 2017, experts from Germany have shared their experience regarding renewable energy certificate, in which they have related regulations in their Renewable Energy Act and Energy Industry Act. These acts are similar to that of Taiwan's Electricity Act.

[63]賴揆主持會議討論綠能屋頂全民參與行動方案 Premier Lai hosts meeting discussing civil participation in the green roof project，行政院全球資訊網新聞傳播處，Retrieved from *https://www.ey.gov.tw/News_Content2.aspx?n=F8BAEBE9491FC830&sms=99606AC2FCD53A3A&s=7477CB360BBBA338.*

[64] Q&A: Are the DPP's Renewable Energy Efforts a Sham? Retrieved from *htttp://greenimpact.cc/en/article/53yzk/what-shadows-offshore-wind-power-industry-despite-the-significant-inflow-of-foreign-investment.*

[65]Article 23: *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. Basic Environment Act.*

[66]The Electricity Act Amended. (2017). Article 95: *The nuclear-energy-based power-generating facilities shall wholly stop running by 2025.*

mix by 2025. However, RE industries have faced much controversy during the past two years, and coal-fired power plants have increased in number at a greater rate than have gas-fired plants. The role of traditional fossil fuel power plants has become even more important due to the controversial issues surrounding RE development. This is definitely not the main purpose and intention of the government's energy transition roadmap. However, in order to meet the energy needs and maintain energy security, traditional fossil fuel is developed faster and more easily within a short period of time.

How can we change such an unexpected increase in the demand for fossil fuel? The rule of law, and better governance in RE-related legislations, is crucial and indispensable. Thus, there is a greater need to understand the legal barriers faced by RE industries, and in the search of possible legal solutions. However, the Taiwanese government has now attempted to exclude not only the RE industries, but also law professors and experts from the decision-making and legislative processes. The economic and technology think tanks dominate the revision of all RE-related legislations. As these think tanks are funded by the government, they dare not involve real opinions from the RE industries, and law professors and experts. These exclusions challenge the creation of energy transition-related legislation which serve the needs of the RE industries and meet legal requirements.

Ironically, the only winners are the government, which can successfully pretend to work very hard, and energy think tanks, who receive increased funding to oppose the RE industries and law professors and experts.

References

2016 Nian nengyuan chanyeh jishu baipishu [2016 White Paper on Energy Industry Technology] (2016, September). Retrieved from http://www.moeaboe.gov.tw/ECW/populace/content/wHandMenuFile.ashx?file_id=1663

Announcement of the Executive Yuan on 2016, September 5

Apple News. (2016, December 17). Lyu neng kazai na? Yuanlai womende dian yeh fa yijing chaoguo 50 nian! [What blocks the green energy development? Untouched for more than 50 years, the Electricity Act should be blamed]. *Apple Daily News*. Retrieved from http://www.appledaily.com.tw/realtimenews/article/new/20161217/1011868/

Bureau of Energy, Ministry of Economic Affairs. (2017). Citizen PV Roofs Programme. Retrieved from http://www.moeaboe.gov.tw/ECW/populace/news/News.aspx?kind=1&menu_id=41&news_id=11866

Bureau of Standards, Metrology and Inspection. (2017, September 8). Jingjibu biaojhun jianyan jyu fasing shou pi "zaisheng nengyuan pingjheng" si "jin" yeh! maisiang lyuse nengyuan sinjiyuan [MOEABSMI is issuing renewable energy certificate]. Retrieved from http://www.bsmi.gov.tw/wSite/ct?xItem=69769&ctNode=1510&mp=1

Bureau of Standards, Metrology and Inspection. (2017, September 8). Jingjibu biaojhun jianyan jyu chihsyu tueidong lyu neng fajhan, gong leiji fachu zaisheng nengyuan pingjheng 2544 jhang [MOEABSMI is issuing renewable energy certificate]. Retrieved from https://www.bsmi.gov.tw/wSite/ct?xItem=70504&ctNode=1510&mp=1

Bureau of Energy. The Electricity Act Reform. Retrieved from http://www.moeaboe.gov.tw/ECW/populace/content/SubMenu.aspx?menu_id=3124

Center for Resource Solutions. Retrieved from https://resource-solutions.org/

Chanyeh wunding gongdian tselyueh [Electricity Security Strategy] (2018). Retrieved from https://www.ey.gov.tw/DL.ashx?s...u...0495-4cf6-a42c-16aa05c37f2c.pd

Chen, W.-Z. (2017, February 2). Gen nisiang de buyiyang Google jiehshih Taiwan lyu dian weihebu gou lyu [Google explained why the green electricity in Taiwan is not green enough]. *Taiwan Environmental Information Center*. Retrieved from http://e-info.org.tw/node/202601

Chen, W.-Z. (2017, April 21). Zaisheng nengyuan pingjheng jhongsin jieh pai yehjhe chiang diyijhang lyu dian "shenfenjheng" [Taiwan Renewable Energy Certificate Centre will issue the first green electricity ID soon]. *Taiwan Environmental Information Center*. Retrieved from http://e-info.org.tw/node/204379

Chen, Y.-F. (2017, August 26). Lyu dian renjheng peisyun kecheng chidong peiyu rentsai [Changhua country's training course for CRS launched]. *United Daily News*. Retrieved from https://udn.com/news/story/7325/2666327

Chu, S.-W. (2016). Sinjhengfu tueidong zaisheng nengyuan jhih jiyu yu tiaojhan gongtinghuei [Public hearing on the New Government's challenge and opportunities in promoting RE]. *PeoPo Citizen Journalism*. Retrieved from https://www.peopo.org/news/315677

Chianjhan jichu jianshe jihua [Forward-Looking Infrastructure]

Executive Yuan. (2017). Electricity Act amendments promote green energy, transform energy industry. Retrieved from https://english.ey.gov.tw/News_Hot_Topic.aspx?n=16A2DB4D12C02510&sms=BD450CA810662F3D

Executive Yuan. (2016, October 29). Lai kuei jhuchih hueiyi taolun lyu neng wuding chyuanmin tsanyu singdong fang'an [Premier Lai hosts meeting discussing civil participation in the green roof project]. Retrieved from https://www.ey.gov.tw/News_Content2.aspx?n=F8BAEBE9491FC830&sms=99606AC2FCD53A3A&s=7477CB360BBBA

Feihejiayuan [Nuclear-Free Homeland Policy] (2018). Retrieved from https://www.swp.energy/nuclear-free-homeland/

Ferry, T. (2017, October 19). Solar Power Moves Ahead in Taiwan Despite Obstacles. Retrieved from https://topics.amcham.com.tw/2017/10/solar-power-moves-ahead-in-taiwan-despite-obstacles/

Ferry, T. (2016, November 4). Taiwan Undertakes Power Market Reforms. Retrieved from http://topics.amcham.com.tw/2016/11/taiwan-undertakes-power-market-reforms/

Focus Taiwan News Channel. (2017, January 11). Taiwan passes law to liberalize green energy supply. *Focus Taiwan News Channel*. Retrieved from http://focustaiwan.tw/news/aeco/201701110029.aspx; See also: Taipei Times. (2016, July 21). Minister touts amendments to Electricity Act. *Taipei Times*. Retrieved from http://www.taipeitimes.com/News/biz/archives/2016/07/22/2003651506

Gao, A. (2018, November 29). What Shadows Offshore Wind Power Industry despite the Significant Inflow of Foreign Investment?. Retrieved from http://greenimpact.cc/en/article/53yzk/what-shadows-offshore-wind-power-industry-despite-the-significant-inflow-of-foreign-investment

Gao, A. et al. (2018). Application of German Energy Transition in Taiwan: A Critical Review of Unique Electricity Liberalization as a Core Strategy to Achieve Renewable Energy Growth. *Energy Policy, 120*, 644-654

Gao, A. (2017, November 2). Taiwan's Energy Transition Turns Out to be a Renewable Scam. Retrieved from https://energylawtaiwan.wordpress.com/2017/11/02/taiwans-energy-transition-turns-out-to-be-a-renewable-scam/

Gao, A. (2017, August 16). Duan buchu niourou de zaisheng nengyuan sioufa an, chengle yipan kongsintsai [Gao's Perspective: The lack of "beef" in the Renewable Energy Development Act Reform]. *The Storm Media*. Retrieved from http://www.storm.mg/article/315348

Gao, A. (2017, August 17). Kanbudao taiwan jhuansing weilaide zaisheng nengyuan sioufa an [Gao's Perspective: No vision for the energy transition in the Renewable Energy Revision]. *The Storm Media*. Retrieved from http://www.storm.mg/article/315389

Gao, A. (2016, October 19). Singjheng chengsyu yanjhong siatsih de dian yeh fa sioufa [The Revision of the Electricity Act lack of Due Process]. *Apple Daily News*. Retrieved from www.appledaily.com.tw/appledaily/article/forum/20161019/37421395/

Gao, A. (2016, November 13). Chiehmo toutong yi jiao lyu dian zihyouhua yao sioude bushih dian yeh fa [The Electricity Act Reform isn't the answer for liberalization of the renewable energy market]. *Apply Daily News*. Retrieved from www.appledaily.com.tw/realtimenews/article/new/20161013/967671/

Germany's Renewable Energy Sources Act of 2017. Retrieved from https://www.clearingstelle-eeg.de/files/node/8/EEG_2017_Englische_Version.pdf

Guo, J.-Z. (2017, September 18). Jheng yuan lieh 72 siang yousian fa'an jiang ti yili yi siou laojifa jheng yuan ban sioujheng [The Executive Yuan lists 72 priorities in the new legislative yuan session]. *China Times*. Retrieved from http://www.chinatimes.com/realtimenews/20170918003356-260407

Huang, S.-S. (2016, December 8). Huang shih siou guandian: biehshang dang liao, dian yeh fa sioufa shih jia yiti! [Don't fall for it! The Electricity Act Reform isn't the real issue!]. *The Storm Media*. Retrieved from http://www.storm.mg/article/197863

Landler, M. (2000, October 28). Taiwan Ends Construction of Its 4th Nuclear Plant. *The New York Times*, Retrieved from http://www.nytimes.com

Legislative Yuan. (2016, July). *Public Hearing on the challenges and opportunities to promote renewable energy*. 201 conference room of the Parliament.

Liberty Times (2017, May 12). Jhang bin fong ji jin chai 1 zuo 520 kangjheng kewang chyusiao [Turbine to be removed in Chunghua, protest on May 20th may be cancelled]. *Liberty Times*. Retrieved from https://news.ltn.com.tw/news/local/paper/1101647

Lin, J. (2017, February 15). Taiwan to generate 20% of power from renewables by 2025. *Taiwan News*. Retrieved from http://www.taiwannews.com.tw/en/news/3095302

Liu, G.-Y. (2016, December 29). Fajhan zaisheng nengyuan dian yeh fa sioujheng bugou li [The

Revision of Electricity Act is not good enough to promote Renewables]. *Common Wealth Magazine*. Retrieved from www.cw.com.tw/article/article.action?id=5080170

Ministry of Economic Affairs. (2016). Taiyangguang dian 2 nian tueidong jihua [Two Year Plan for Photovoltaic]. Retrieved from http://www.moeaboe.gov.tw/ECW/populace/content/wHandMenuFile.ashx?file_id=4112

Ministry of Economic Affairs. (2017). Nengyuan fajhan gangling [New Energy Development Guideline]. Retrieved from http://www.moeaboe.gov.tw/ECW/populace/content/wHandMenuFile.ashx?file_id=1206

Ministry of Economic Affairs. (2017). Fongli fadian 4 nian tueidong jihua [Four Year Promotion Plan for Wind Power]. Retrieved from http://www.moeaboe.gov.tw/ECW/populace/content/wHandMenuFile.ashx?file_id=4107

Ministry of Economic Affairs. (2016, June). *Renewable Energy Development Act Expert Consulting Meeting*. Bureau of Energy Office 11F-0.

Morris, C. (2015, January 8). Power from fossil fuel drops to 35-year low in Germany. *The Global Energiewende*. Retrieved from https://energytransition.org/2015/01/fossil-fuel-power-at-35-year-low-in-germany/

National Renewable Energy Certification Center. Retrieved from https://www.trec.org.tw/

Nengyuan jhuansing baipishu [Energy Transition White Paper] (2018). Retrieved from http://energywhitepaper.tw/

Shangpin jianyan fa of 2007 [The Commodity Inspection Act 2007]

Sin nengyuan jhengtse [New Energy Policy] (2016, May 25). Retrieved from http://www.moeaboe.gov.tw/ECW/populace/content/wHandMenuFile.ashx?file_id=7

Taiwandianligongsih zaisheng nengyuan dianneng shougou zuoyehyaodian [Tai-Power Feed-in Tariff Ordinance of 2003]

Tsai zongtong paiban dian yeh fa pan benhuei chi guoguan dian yeh liangjieh duan gaige [President Tsai targets a two-phased progressive Electricity Act Reform in this Legislative Yuan session]. *United Daily News*. Retrieved from https://www.udn.com/news/story/10388/2030469?from=udn-relatednews_ch2

Tseng, W.-Z. et al. (2017, February 14). Liyuan sin hueichi jhihjhengdang pinjingji [The ruling party vows for economic development in the new Legislative Yuan session]. *Liberty Times Net*. Retrieved from http://news.ltn.com.tw/news/focus/paper/1077941

UDN. (2016, February 23). Liyuan sin hueichi jhihjheng yousian fa'an chulu [The Priority Bills of the Congress]. *United Daily News*. Retrieved from https://udn.com/news/story/1/2302770

Wu, F.-S. (2016, December 1). Jhuanjia: dian yeh fa dengyu mei siou buru siou zaisheng nengyuan tiaoli [Experts say that the Electricity Act Reform isn't as effective as reforming the Renewable Energy Development Act]. *United Daily News*. Retrieved from https://udn.com/news/story/6/2140791

Legal Recognition of Indigenous Knowledge Associated with Genetic Resources in the Philippines

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Indigenous knowledge is closely linked to the indigenous peoples' concept of ancestral domains which includes not only the physical environment but the spiritual and cultural bonds to the areas which the indigenous peoples possess, occupy and use. Their claim of community ownership over the natural resource base also covers sustainable traditional resource rights. On the other hand, the Philippines adheres to the Regalian Doctrine wherein the authority to grant access to and determine benefit sharing is still retained by the state. This study focuses on examining the existing international and domestic legal frameworks on the rights of the indigenous communities to the knowledge in the use of genetic resources as well as the benefits from the utilization of natural resource in their ancestral domains. A review of the current regulations should amplify and expand the rights of indigenous communities to maintain, protect and regulate access as well as to ensure fair and equitable share in the utilization of these natural resources.

Keywords: access and benefit sharing, indigenous cultural communities and/or indigenous people, genetic resources, indigenous or traditional knowledge, intellectual property rights, free and prior informed consent

Introduction

The Philippines recognizes and promotes the rights of indigenous cultural communities and/or indigenous peoples (ICCs/IPs) within the framework of its Constitution.[1] Accordingly, one of these recognized rights is their traditional resource rights in their ancestral lands or domains. Their traditional resource rights therein are defined as the rights to sustainably use, manage, protect and conserve: a) land, air, water, and minerals; b) plants, animals and other organisms; c) collecting, fishing and hunting grounds; d) sacred sites; and e) other areas of economic, ceremonial and aesthetic value in accordance with their indigenous knowledge, beliefs, systems and practices.[2] Indigenous communities are considered as the natural stewards of the world's biological resources but often forgotten partners in biodiversity conservation.[3] Since indigenous cultural communities and/or indigenous peoples (ICCs/IPs) are closely associated with the natural environs within ancestral land or domain, these traditional use rights reflect the indigenous knowledge relevant for the sustainability of biological diversity within ancestral domains.

The concept of ancestral domains includes not only the physical environment but the spiritual and cultural bonds to the areas which the indigenous peoples possess, occupy and use and to which they have claims of ownership.[4] The indigenous concept of ownership over ancestral

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[1] 1987 Constitution, Article II, Section 22.

[2] Republic Act No. 8371, Section 3(o).

[3] Sobrevila, C. (2008). The Role of IPs in Biodiversity Conservation. IBRD and WB, Washington, USA.

[4] Supra note 1, Section 4.

domains in general refers to private but community property which belongs to all generations. As a property owned in common across all generations, such ancestral lands/domains cannot be sold, disposed or destroyed.

A seeming inconsistency on the indigenous concept of ownership arises when access is given to biological and genetic resources and to traditional or indigenous knowledge. Note that the term 'traditional knowledge' and 'indigenous knowledge' is used interchangeably in various international and domestic laws and in this article. In the Philippines. the existing law on the matter is the Indigenous Peoples Rights Act (IPRA) or Republic Act 8371. It provides that access to biological and genetic resources and to indigenous knowledge related to the conservation, utilization and enhancement of these resources within ancestral lands and domains of the ICCs/IPs will only be allowed pursuant to a free and prior informed consent of such communities. Such free and prior informed consent must be obtained in accordance with customary laws of the concerned community.[5] Thus, this article examines the right to grant access and determine benefit sharing over genetic resources in ancestral domain in the context of the indigenous concept of ownership.

The Philippines adheres to the Regalian Doctrine which is reflected in the 1987 Constitution that provides, "natural resources are owned by the state." These natural resources include all lands of the public domain, waters, minerals, coal, petroleum, and other mineral oils, all forces of potential energy, fisheries, forests or timber, wildlife, flora and fauna, and others.[6] The Regalian Doctrine enables the retention of state control over the exploration, development and utilization of natural resources. However, the claim of community ownership over natural resources within the ancestral domain by the ICCs/IPs has been well established. This claim of community ownership also covers sustainable traditional resource rights over the natural resources found within their territories.

Furthermore, international instruments have been instrumental in protecting the rights of indigenous peoples and local communities. The Convention on Biological Diversity's Nagoya Protocol on Access to genetic resources and the fair and equitable sharing of benefits arising from their utilization to the Convention of Biodiversity recognizes the importance of providing legal certainty with respect to access to genetic resources and the fair and equitable sharing of benefits arising from their utilization. The Protocol seeks to ensure the fair and equitable sharing of the benefits arising from the utilization of genetic resources. One of the main objectives of this article is to assess the incoherence in the domestic norms respecting natural resource ownership between the state and indigenous peoples.

Under the Nagoya Protocol, States Parties are required to take measures, as appropriate, in order to ensure that traditional knowledge associated with genetic resources that is held by indigenous and local communities is accessed with the prior and informed consent or approval and involvement of these indigenous and local communities, and that mutually agreed terms have been established.[7] Genetic resources are defined in the Convention of Biological Diversity as the parts of biological materials that contain genetic information of value and are capable of reproducing or

[5] Republic Act No. 8371, Section 35.
[6] 1987 Constitution, Article XII, Section 2.
[7] Nagoya Protocol, Preambular Text.

being reproduced. These include medicinal plants, agricultural crops, and the like wherein the components of which have an actual or potential use or value for humanity.

Indigenous people are known to derive indigenous knowledge from the genetic resources within ancestral domains. Genetic resources alone are not considered as intellectual property *per se*, and thus, cannot be directly protected as such. On the other hand, when a creation is directly derived from and based on genetic resources, this now falls within the intellectual property domain. With regard to indigenous peoples, these creations can be in the form of traditional knowledge.

Traditional knowledge, together with traditional cultural expressions, are generally regarded as conventional intellectual property (IP) systems as being in the public domain and so free for anyone to use.[8] Traditional knowledge may be considered as knowledge, know how, skills, innovations or practices that are passed between generations in a traditional context, and that form part of the traditional lifestyle of indigenous and local communities who act as the guardian or custodian.[9] However, traditional knowledge of indigenous peoples are non-conventional in the sense that it is a common property owned by the entire indigenous community. While the preservation of traditional knowledge is seen as critical to biodiversity conservation in that indigenous peoples often serve as the traditional stewards of the biological resources, it is also just as important to provide intellectual property protection to traditional knowledge derived from genetic resources.

The practice of 'biopiracy' of traditional knowledge has long been an issue, and which the current international legal and policy frameworks have sought to address. The WIPO considers biopiracy as a term sometimes used loosely to describe biodiversity-related patents that do not meet patentability criteria or that do not comply with the CBD's obligations, but this term has no agreed meaning.[10] This article finally focuses on examining the existing international frameworks on the rights of the indigenous communities to the knowledge in the use of genetic resources as well as the benefits from the utilization of natural resource in their ancestral domains. This is solely based on the fact that under the Constitution, the Philippines adopts the generally-accepted principles of international law as part of the law of the land and adheres to the policy of peace, equality, justice, freedom, cooperation, and amity with all nations.[11] In the aspect of intellectual property for the use of genetic resources, the Convention on Biodiversity and Nagoya Protocol, and the UN Food and Agricultural Organization's International Treaty on Genetic Resources for Food and Agriculture will be evaluated vis-à-vis the work of the WIPO especially in terms of ensuring against 'biopiracy'. Domestic legislation will also be looked into in order to determine whether existing laws in the Philippines are consistent with these international legal frameworks and can protect against the unsustainable practices.

1. The Indigenous Concept of Ownership

Ancestral domain is defined under the IPRA as

[8] Retrieved from <https://www.wipo.int/tk/en/resources/faqs.html> on December 1, 2018.
[9] *Ibid.*
[10] *Supra* note 8.
[11] 1987 Constitution, Article II, Section 2.

> "all areas generally those belonging to ICCs/IPs comprising lands, inland waters, coastal areas, and natural resources therein, held under a claim of ownership, occupied or possessed by ICCs/IPs, by themselves or through their ancestors, communally or individually since time immemorial, continuously to the present."

This includes ancestral lands, forests, pasture, residential, agricultural, and other lands individually owned whether alienable and disposable or otherwise, hunting grounds, burial grounds, worship areas, bodies of water, mineral and other natural resources, and lands which may no longer be exclusively occupied by ICCs/IPs but from which they traditionally had access to for their subsistence and traditional activities, particularly the home ranges of ICCs/IPs who are still nomadic and/or shifting cultivators.[12]

In contrast, the term ancestral lands refer to privately owned and managed lands. These refer to lands that are occupied, possessed and utilized by individuals, families and clans who are members of the ICCs/IPs since time immemorial, by themselves or through their predecessors-in-interest, under claims of individual or traditional group ownership, continuously, to the present.[13] The IPRA also recognizes in Section 57 thereof the priority rights of ICCs/IPs in the harvesting, extraction, development or exploitation of any natural resources within the ancestral domain.

The indigenous concept of ownership springs from an awareness that ancestral domains and all resources found therein shall serve as the material bases of their cultural integrity. Since this is a common resource property, the IPRA law itself provides that such community property cannot be sold, disposed or destroyed. The same law also provides that such ICCs/IPs have the right to control, develop and protect their sciences, technologies and cultural manifestations.[14]

However, the IPRA allows other entities to obtain and, thus, enables disposition of the biological and genetic resources so long as the requirement of free and prior informed consent are met. The administrative compliance will enable access to biological and genetic resources and to indigenous knowledge. However, the indigenous concept of ownership considers ancestral domains or lands as private but community property. Since these are commonly-held properties, there is no one owner. But rather, such belongs to all generations, which explains why these cannot be sold, disposed or destroyed.

Similarly, one of the three main objectives under the Convention on Biodiversity is to ensure the fair and equitable sharing of benefits arising out of the utilization of genetic resources. In particular, Article 15 of the Convention on Biodiversity recognizes that States have sovereign rights over their natural resources, and therefore the authority to determine access to genetic

[12] Republic Act 8371, Section 3(a).
[13] *Ibid.,* Section 3(b).
[14] Section 34. Indigenous Knowledge Systems and Practices and to Develop own Sciences and Technology. - **ICCs/IPs are entitled to the recognition of the full ownership and control and protection of their cultural and intellectual rights**. They shall have the right to special measures to control, develop and protect their sciences, technologies and cultural manifestations, including human and other genetic resources, seeds, including derivatives of these resources, traditional medicines and health practices, vital medicinal plants, animals and minerals, indigenous knowledge systems and practices, knowledge of the properties of fauna and flora, oral traditions, literature, designs, and visual and performing arts. {Emphasis supplied}

resources rests with the national government and subject to national legislation. The Convention also states that access to genetic resources shall be "subject to prior informed consent of the party providing the resources."[15] Further the Convention also provides that equitable sharing of benefits must occur on "mutually agreed terms."[16]

Aside from Article 15, the Convention has provided other substantive provisions particularly on Articles 16 and 19 thereof. In Article 16, Parties to the Convention must provide and/or facilitate access for and transfer to other Contracting Parties of technologies that are relevant to the conservation and sustainable use of biological diversity or make use of genetic resources provided that such technologies do not cause significant damage to the environment. Article 19 deals with effective participation in biotechnological research activities by countries which provide the genetic resources for such research. This article also considers the need for and modalities of a protocol setting out appropriate procedures, including, in particular, advance informed agreement, in the field of the safe transfer, handling and use of any living modified organism resulting from biotechnology that may have adverse effect on the conservation and sustainable use of biological diversity. In terms of elaborating the conditions set out in Article 19, the Cartagena Protocol on Biosafety was adopted in early 2000.[17]

Following the Cartagena Protocol, another protocol was developed specifically to support the fair and equitable sharing of benefits arising from access to genetic resources and associated traditional knowledge. The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits arising from their Utilization was adopted in 2010. Following this, countries are tasked to develop domestic legislation of access and benefit sharing in order to put this protocol into effect.[18]

The Philippines, as a biodiversity rich country, has developed a series of legislation and policies on access and benefit sharing even before the Nagoya Protocol. The first one was Executive Order 247, series of 1995 which prescribed the guidelines and established a regulatory framework for the prospecting of biological resources, their by-products and derivatives for scientific and commercial purposes, and for other purposes. This was issued pursuant to the policy of the State to regulate the prospecting of biological and genetic resources so that these resources are protected and conserved, are developed and put to the sustainable use and benefit of the national interest. Further, it sought to promote the development of local capability in science and technology to achieve technological self-reliance in selected areas.[19]

The Executive Order 247, s. 1995 provided that prospecting of biological and genetic resources shall be allowed within the ancestral lands and domains of indigenous cultural communities only with the prior informed consent of such communities; obtained in accordance with the customary laws of the concerned community. This shall be regulated by an Inter-Agency

[15] Convention on Biological Diversity, Article 15 (5).
[16] Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits arising from their Utilization to the Convention on Biodiversity, Article 5(1) [Adopted on 29 October 2010; entry into force on 12 October 2014].
[17] See Cartagena Protocol on Biosafety to the Convention on Biological Diversity [Adopted on 29 January 2000; entry into force on 11 September 2003].
[18] https://unctad.org/en/PublicationChapters/diaepcb2014d3_ch1_en.pdf
[19] Executive Order 247, s. 1995, Section 1.

Committee on Biological and Genetic Resources attached to the Department of Environment and Natural Resources. The Inter-Agency Committee was created to ensure the approval and monitoring of Commercial or Academic Research Agreements obtained for the prospecting activity.

There are two categories of research agreements. If the prospecting of biological and genetic materials is intended primarily for academic purposes, the agreement shall be an Academic Research Agreement. Only duly-recognized Philippine universities and academic institutions, domestic governmental entities, and intergovernmental entities may apply for an Academic Research Agreement. But if the research and collection of biological and genetic resources is intended, directly or indirectly, for commercial purposes, the agreement must be a Commercial Research Agreement.[20]

In 2001, the regulatory framework under Executive Order 245, s. 1995 was revised under the Wildlife Resources Conservation and Protection Act. Bioprospecting as regarded in this Act refers to research, collection and utilization of biological and genetic resources for purposes of applying the knowledge derived there from solely for commercial purposes.[21] Nevertheless, the Act also provided for guidelines on scientific researches on wildlife. It states that collection and utilization of biological resources for scientific research and not for commercial purposes shall be allowed upon execution of an undertaking/agreement with and issuance of a gratuitous permit by the Secretary or the authorized representative.[22] The implementing regulations of the Wildlife Act, Joint DENR-DA-PCSD Administrative Order, provides that the collection of wildlife for scientific research shall require the prior execution of an Affidavit of Undertaking by the applicant or a Memorandum of Agreement (MOA) between the Secretary or the Council and the proponent, and the issuance of a Gratuitous Permit (GP) by the Secretary or the Council. [23] In this regard, the Free and Prior Informed Consent (FPIC) of the IPs or prior clearance of the concerned Local Government Units (LGUs), Protected Area Management Board (PAMB), private land owner and/or other relevant agencies/institutions, where the collection shall be made shall also be obtained.[24]

The domestic legislation that are in place to allow bioprospecting can also be read together with the existing IPRA law. The provisions in these two laws seem to align, and these allow the research, collection and utilization of biological and genetic resources so long as there is a free and prior informed consent of the indigenous peoples.

2. The Rights of the Indigenous Peoples over genetic resources within ancestral domains

The Wildlife Resources Conservation and Protection Act of 2001 (Republic Act 9147) allows bioprospecting upon execution of a Bioprospecting Undertaking (BU).[25] The BU requires

[20] *Ibid.,* Section 3.
[21] Republic Act 9147, Chapter II, Section 5(a).
[22] *Ibid.,* Section 15.
[23] Joint DENR-DA-PCSD Administrative Order No. 01-2004, Rule 15.1.
[24] *Ibid.,* Rule 15.2.
[25] Lye, L.H. and R. Eisma-Osorio. (2018). Regulatory Measures on Access and Benefit Sharing for Biological and Genetic Resources: National and regional perspectives from the Philippines, Singapore and ASEAN. Chapter 13. *Routledge Handbook of Biodiversity and the Law*. Edited by Charles M. McManis and Burton Ong. Routledge, New York.

prior informed consent certificate from indigenous cultural communities, local communities, protected area management board or private individual or entity.

Free prior informed consent (FPIC) requirements ensure that indigenous communities are consulted, consent is given without undue pressure, and benefit sharing is ensured. One of the challenges in securing FPIC is the fact that IP communities are more likely to be highly marginalized and often require capacity building to improve awareness of their rights and responsibilities especially with respect to biodiversity conservation. In the case of the Aytas of Bataan Natural Park in the Philippines, the empowerment of indigenous communities as stewards of biological resources was a necessary element of the bioprospecting process for research into natural products conducted by a local academic institution and its foreign collaborators. Hence, bioprospecting research should not only include biodiversity and conservation, scientific development, development of drugs and other applications, but also community development while utilizing bioresources.[26] If done right, FPIC is a mechanism to protect indigenous knowledge.

Article 16 of the CBD also provides that in the case of technology subject to patents and other intellectual property rights, such access and transfer shall be provided on terms which recognize and are consistent with the adequate and effective protection of intellectual property rights. This must be seen in light of the principle of community intellectual rights under domestic laws. These community intellectual rights include intellectual property which cannot be taken without their free prior informed consent or in violation of their customary laws. The challenge here is to ensure against the taking not only without their consent but also taking such without violating their laws, traditions and customs.

Creations directly derived from and based on genetic resources fall within the intellectual property domain. The creations of indigenous peoples take the form of traditional knowledge. The Nagoya Protocol and the UN Food and Agricultural Organization's International Treaty on Genetic Resources for Food and Agriculture provide legal protections. An evaluation of the work of the WIPO show that there are measures to ensure against 'biopiracy'. The WIPO established the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) in 2000. As a result, members of the IGC agreed to develop an international legal instrument (or instruments) that would give traditional knowledge, genetic resources and traditional cultural expressions (folklore) effective protection.[27]

In terms of traditional knowledge, which is a living body of knowledge passed down from generation to generation within a community, it was acknowledged that current intellectual property rights (IPR) frameworks do not easily protect such. Hence, two types of protection are sought: (1) defensive protection, which aims to stop outsiders from acquiring IPR over traditional

[26] Cruz, L. (2010). *"Bioprospecting in the Ancestral Domain of Aytas in Bataan."* Presentation at the ASEAN Centre for Biodiversity. Retrieved from http://www.searca.org/index.php/news-and-events/searca-news/257-bioprospecting-is-key-to-biodiversity-conservation-research-and-development-and-community-development.
[27] World Intellectual Property Organization. Traditional Knowledge and Intellectual Property – Background. Retrieved from < https://www.wipo.int/pressroom/en/briefs/tk_ip.html>

knowledge; and (2) positive protection, which grants rights to communities to control uses of traditional knowledge and benefit from its commercial exploitation.[28]

In terms of genetic resources, its defensive protection aims at preventing patents being granted over genetic resources (and associated traditional knowledge) which do not fulfil the existing requirements of novelty and inventiveness. To do this, genetic resources and traditional knowledge databases, clearing house mechanisms and proper disclosure[29] are essential tools to ensure against 'biopiracy', which loosely refers to biodiversity-related patents that are not patentable or not in compliance with CBD.[30]

As regards UN Food and Agriculture Organization's International Treaty on Plant Genetic Resources for Food and Agriculture,[31] this international legal instrument aims to, among others, ensuring that recipients share benefits they derive from the use of these genetic materials with the countries where they have been originated. The treaty provides an innovative solution to access and benefit sharing. It established the Multilateral System which puts 64 important crops that account for 80% of plant-derived food in a freely accessible global pool of genetic resources. Those who access the materials must be from the Treaty's ratifying nations and they must agree to use the materials totally for research, breeding and training for food and agriculture.

Likewise, the Treaty prevents the recipients of genetic resources from claiming intellectual property rights over those resources in the form in which they received them, and ensures that access to genetic resources already protected by international property rights is consistent with international and national laws.[32] In essence, both the CBD and the UNFAO Treaty is considered as a top-down regulatory regime. This top-down approach is considered by some as the least-worst answer considering the enormous number of transactions under the global genetic resource facilitated access regime of the UN FAO.[33] Further, as discussed in the WIPO IGC, the ABS regime is also viewed to be incapable of dealing not only with enormous patents but 'biopiracy' concerns as well.[34] Consequently, domestic measures to regulate the access and benefit sharing from utilization of biological and genetic resources cannot be overemphasized.

Domestically, Intellectual Property (IP) legislation exists to protect and secure the exclusive rights of scientists, inventors, artists and other gifted citizens to their intellectual property and creations, particularly when beneficial to the people.[35] All patentable inventions are given protection under the Intellectual Property Code (IPC) of the Philippines. These include "any technical solution of a problem in any field of human activity which is new, involves an inventive

[28] Ibid.
[29] See World Trade Organization's Council on Trade Related Aspects of Intellectual Property (TRIPS).
[30] *Supra* note 26.
[31] Adoption on 3 November 2001, entry into force on 29 June 2004.
[32] UN Food and Agriculture Organization. Retrieved from: http://www.fao.org/plant-treaty/overview/en/.
[33] Dutfield, G. (2018). "If we have never been modern, they have never been traditional: Traditional Knowledge, Biodiversity, and the Flawed ABS Paradigm." Chapter 18. *Routledge Handbook of Biodiversity and the Law.* Edited by Charles M. McManis and Burton Ong. Routledge, New York.
[34] Robinson, D.F. (2018). "Is the Whole Greater than the Sum of its Parts?: A critical reflection on the WIPO IGC." Chapter 23. *Routledge Handbook of Biodiversity and the Law*. Edited by Charles M. McManis and Burton Ong. Routledge, New York.
[35] Republic Act No. 8293, as amended, Section 2.

step and is industrially applicable shall be patentable. It may be, or may relate to, a product, or process, or an improvement of any of the foregoing."[36] It is clear that there needs to be an inventive step before it can be subject to a patent. However, the law provides that plant varieties or animal breeds or essentially biological process for the production of plants or animals are non-patentable inventions.

The IPC likewise provided that although these are non-patentable, Congress may consider to enact a law providing *sui generis* protection of plant varieties and animal breeds and a system of community intellectual rights protection.

A proposed law, Senate Bill No. 35, was filed in 2004 to provide for the establishment of a system of community intellectual property rights protection. This was in response to the IPC provision as well as the need to recognize the more informal, dominant system of innovation rather than the dominant industrial model of innovation. It acknowledged that the existing legal framework for intellectual property rights (IPR) framework sidesteps the traditional knowledge of indigenous communities even if it is widely acknowledged that without the input of indigenous knowledge, many products used extensively throughout the modern world will not exist today.[37] Unfortunately, despite the introduction of this bill, there is no law passed to protect community intellectual rights to date. This becomes more problematic in the sense that genetic resources are considered as 'universal heritage'[38] as these are deemed necessary for food security and attainment of public health, including the mitigation and adaptation to climate change. Without such community intellectual rights protection, special protection for the collective cumulative intellectual right of ICCs/IPs over traditional uses of biological and genetic resources cannot be assured.

3. Domestic norms on ownership over natural resources

ICCs/IPs are considered as effective stewards of natural resources. Hence, ancestral domains or portions thereof, which are found to be necessary for critical watersheds, mangroves, wildlife sanctuaries, wilderness, protected areas, forest cover, or reforestation as determined by appropriate agencies with the full participation of the ICCs/IPs concerned shall be maintained, managed and developed for such purposes. The ICCs/IPs concerned shall be given the responsibility to maintain, develop, protect and conserve such areas with the full and effective assistance of government agencies. Should the ICCs/IPs decide to transfer the responsibility over the areas, said decision must be made in writing. The consent of the ICCs/IPs should be arrived at in accordance with its customary laws without prejudice to the basic requirements of existing laws on free and prior informed consent.[39]

Authority to regulate bioprospecting of biological and genetic resources is still retained by the State based on the Regalian Doctrine as can be gleaned from the above regulations for protection of critical watersheds and other protected areas. Although the current IPRA law recognizes the indigenous peoples' rights of ownership over ancestral domains and all resources

[36] *Ibid.,* Section 21.
[37] Retrieved from https://www.senate.gov.ph/lisdata/1169588!.pdf.
[38] *Ibid.*
[39] Republic Act No. 8371, Section 58.

therein, however, there are limitations and conditions provided by subsisting national laws. The Regalian Doctrine reserves to the State all natural wealth that may be found in the bowels of the earth even if the land where the discovery is made be private.[40]

This can lead to confusing interpretations. For instance, the IPRA grants ICCs/IPs the ownership and possession of ancestral domains and ancestral lands. This is further bolstered by the Supreme Court in the case of *Cariño v. Insular*, [41] which recognized the concept of 'native title'. Doctrinally, native title is described as the pre-conquest rights to lands and domains which, as far back as memory reaches, have been held under a claim of private ownership by ICCs/IPs, have never been public lands and are thus indisputably presumed to have been held that way since before the Spanish Conquest.[42] Despite rights given to indigenous peoples to utilize natural resources, authority to regulate activities, such as bioprospecting, is still retained by the state. This notwithstanding the fact that priority rights under Section 57, IPRA is recognized especially in the harvesting, extraction, development or exploitation of any natural resources within the ancestral domain.

One of the ways to reconcile the ICC/IP rights over ancestral domains or lands and state ownership of natural resources in the entire country is the recognition and promotion of Indigenous Community Conserved Areas or ICCAs. The ICC/IP rights to their ancestral domains includes the full recognition of ICCAs as well as the ICC/IP's right to maintain, protect and regulate access and prohibit unauthorized intrusion thereto. Further, ICCs/IPs shall have a fair and equitable share in the commercial profits of users of well-defined and confirmed ecosystem services provided by ICCAs in recognition and respect of the ICC/IP's right to benefit and share in the profits from allocation and utilization of the natural resources found in their ancestral domains.

Undoubtedly, indigenous knowledge is linked to the indigenous peoples' concept of ancestral domain or land. Such ancestral domain or land is distinctly recognized under existing domestic laws and jurisprudence. The UN Declaration on the Rights of Indigenous Peoples provides that the indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.[43] This right is also distinctly recognized in the Convention on Biological Diversity, which stipulates that the state shall foster the recognition and promotion of other conservation area governance types aside from protected areas. One such proposed governance type is the Indigenous and Community Conserved Area (ICCA), which has been subject of a proposed legislation in the 17th Congress of the Philippines.[44]

Nevertheless, the apprehensions about Indigenous and Community Conserved Areas (ICCAs) are primarily due to the fact that the current national framework on protected areas, which is the Expanded NIPAS Act,[45] might be used for the management of ICCAs. The creation of

[40] Agcaoili, O. (2016). *Law on Natural Resources and Rules of Procedure for Environmental Cases.* Rex Book Store, Manila.
[41] 7 Phil 132 (1906).
[42] Republic Act No. 8371, Section 3(l).
[43] United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), UN GA Resolution 61/295, September 13, 2007, Article 26(1).
[44] See House Bill 115, filed 30 June 2018.
[45] Republic Act No. 11038 (2018).

PAMBs for ICCAs will supplant the right of self-determination of ICCs/IPs. The right to self-determination is recognized under Section 13 of the IPRA, which states that, "[T]he State recognizes the inherent right of ICCs/IPs to self-governance and self-determination and respects the integrity of their values, practices and institutions. Consequently, the State shall guarantee the right of ICCs/IPs to freely pursue their economic, social and cultural development." This self-determination includes mechanisms on how they managed their ancestral domains or lands without unauthorized intrusions.

4. Conclusions

The rights of indigenous peoples to the biological and genetic resources within ancestral domains are communal rights. These are the indigenous commons which may be affected by the access and benefit sharing provisions found in international and domestic legislation. With the acknowledgement that indigenous knowledge and practices contribute to conservation of the country's biological resources, such knowledge should have proper legal recognition. A review of the current regulations on intellectual property rights should amplify and expand the rights of indigenous communities to extensively maintain control and exercise self-determination over the access to such biological and genetic resources in order to ensure positive protection.

Nevertheless, although sufficient legal and policy frameworks exist at the international level, domestic measures are still just as important to ensure protection against biopiracy. Seventeen years have passed since a proposed legislation was put forward in the Philippine Congress to protect community intellectual property rights. There is, thus, a need to revisit existing intellectual property legislation in behalf of indigenous people's rights to resources found within their ancestral domains in order to ensure the shift towards communal intellectual property regimes. Further, indigenous knowledge is closely interrelated to the concept of ancestral domains. The rights of indigenous peoples over their ancestral domain, thus, include the right to regulate access, and ensure against unwarranted interference in the way they manage the day-to-day affairs of these indigenous community conserved areas.

References

Books, Journal Articles and Online Articles

Agcaoili, O. (2016). *Law on Natural Resources and Rules of Procedure for Environmental Cases*. Rex Book Store, Manila

Dutfield, G. (2018). "If we have never been modern, they have never been traditional: Traditional Knowledge, Biodiversity, and the Flawed ABS Paradigm." Chapter 18. *Routledge Handbook of Biodiversity and the Law*. Edited by Charles M. McManis and Burton Ong. Routledge, New York

Lye, L.H. & Eisma-Osorio, R.-L.. (2018). Regulatory Measures on Access and Benefit Sharing for Biological and Genetic Resources: National and regional perspectives from the Philippines, Singapore and ASEAN. Chapter 13. *Routledge Handbook of Biodiversity and the Law*. Edited by Charles M. McManis and Burton Ong. Routledge, New York

Robinson, D.F. (2018). "Is the Whole Greater than the Sum of its Parts?: A critical reflection on the WIPO IGC." Chapter 23. *Routledge Handbook of Biodiversity and the Law*. Edited by Charles M. McManis and Burton Ong. Routledge, New York.

Sobrevila, C. (2008). *The Role of IPs in Biodiversity Conservation*. IBRD and WB, Washington, USA.

UN Food and Agriculture Organization. UN Food and Agriculture Organization's International Treaty on Plant Genetic Resources for Food and Agriculture Retrieved from: http://www.fao.org/plant-treaty/overview/en/.

World Intellectual Property Organization. Traditional Knowledge and Intellectual Property – Background. Retrieved from < https://www.wipo.int/pressroom/en/briefs/tk_ip.html>

Laws and Jurisprudence

1987 Constitution.

Cariño v. Insular, 7 Phil 132 (1906).

Convention on Biological Diversity.

House Bill 115 (filed 30 June 2018).

Joint DENR-DA-PCSD Administrative Order No. 01-2004.

Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits arising from their Utilization to the Convention on Biodiversity (Adopted on 29 October 2010; entry into force on 12 October 2014).

Republic Act No. 8293 (1997) or Intellectual Property Code, as amended.

Republic Act No. 8371 (1997) or Indigenous Peoples Rights Act.

Republic Act 9147 (2001) or Wildlife Conservation Act

Republic Act No. 11038 (2018) or Expanded National Integrated Protected Areas System Act

United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), UN GA Resolution 61/295, September 13, 2007

Myanmar's Indigenous Transnational Strategies: International Alternatives to Domestic Challenges

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The indigenous peoples of Myanmar hold an ambivalent relationship with the government of Myanmar, with sympathies towards an ongoing democratic transition counterbalanced by dissatisfaction with the lack of response to indigenous environmental grievances. In response to the uncertain nature of Myanmar's current political development, Myanmar's indigenous peoples have begun to explore international strategies with the hope that foreign actors can help drive the Myanmar government to address domestic indigenous grievances. This paper assesses the issues in using international strategies to resolve domestic indigenous issues.

Keywords: indigenous peoples, indigenous transnational strategies,

Introduction

Myanmar's national indigenous rights movement began in 2013 as part of preparations by several ethnic organizations for the 2014 ASEAN Peoples' Forum (APF) in Yangon. Under the leadership of the Asia Indigenous Peoples Pact (AIPP), representatives of various Myanmar ethnic organizations engaged in an APF workshop dedicated to the status of indigenous peoples within ASEAN.[1] In the time after the 2014 APF, those representatives formed the Myanmar Indigenous Peoples/Ethnic Nationalities Network (MIPENN).[2] According to the International Work Group on Indigenous Affairs (IWGIA), the effort of Myanmar indigenous activists produced a measure of reciprocation by the Myanmar government, with two national dialogues in 2017 regarding the rights of indigenous peoples that brought indigenous advocates together with representatives from the Ministry of Ethnic Affairs and the United Nations (UN).[3] Despite such progress, advocates for indigenous rights in Myanmar have pursued parallel international outreach efforts in the hope of obtaining support for their claims against the Myanmar state.[4] These outreach efforts involve the exercise of international legal mechanisms such as the UN Human Rights Council (HRC) Universal Periodic Review (UPR) and reference to indigenous rights norms articulated by international law.[5] The status of these international strategies are ongoing, and hence their value for the indigenous rights movement in Myanmar is uncertain.

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[1] Morton, M. (2017). Indigenous Peoples World to Raise Their Status in a Reforming Myanmar. ISEAS Yusof Ishak Institute Perspective 33(2017): 1-10.

[2] *Ibid.*; Promotion of Indigenous and Nature Together (POINT). (2018) Available at: http://www.point-myanmar.org/en_US/.

[3] International Work Group on Indigenous Affairs (IWGIA). (2018). Available at: https://www.iwgia.org/en/myanmar; Promotion of Indigenous and Nature Together (POINT). (2018) Available at: http://www.point-myanmar.org/en_US/.

[4] Liljeblad, J. (2018). Beyond Transnational Advocacy: Lessons from Engagement of Myanmar Indigenous Peoples with the UN Human Rights Council Universal Periodic Review. Vermont Law Review 43(1): 1-34.

[5] *Ibid.*

The present chapter seeks to inform the discourse over indigenous rights in Myanmar by clarifying the legal issues facing the exercise of Myanmar indigenous rights claims. The discussion explores the potential avenues to advance indigenous rights in Myanmar, and evaluates the challenges posed by each. The discussion organizes analysis into sections reviewing the challenges to Myanmar indigenous rights posed by domestic and ASEAN region law, followed by an exploration of potential alternatives offered by international law. Through such analysis, the discussion hopes to enrich understanding of the different legal strategies available to advance indigenous rights and the complexities associated with each one. In addition, the discussion also seeks to identify a framework for legal analysis of potential strategies to promote indigenous rights in contexts other than Myanmar.

1. Legal challenges domestically

Despite the progress made in the years following the 2014 APF, there continue to be domestic legal obstacles to aspirations for indigenous rights in Myanmar. These challenges are found in the Myanmar's 2008 Constitution and its 2015 Ethnic Rights Protection Law. The issues posed by each law are discussed individually below.

Constitution

The term "indigenous rights" is not integral within Myanmar law. The Myanmar government acknowledged the idea of indigenous rights by voting in favor of the UN Declaration on the Rights of Indigenous Peoples,[6] but in practice has avoided introduction of indigenous rights or indigeneity into national law and instead continues to employ the term "national races" articulated in its 2008 Constitution.[7] This poses an issue in that it impedes legal claims to indigenous collective rights for advocates in Myanmar, including self-determination and customary land use practices, recognized under the UNDRIP.[8]

Expectations that the situation will change are not promising: even though it was among the original signatories to the Universal Declaration of Human Rights (UDHR), Myanmar suffers from a poor record on human rights. It has not ratified or acceded to most human rights treaties, with the exceptions being the Convention on the Elimination of Discrimination Against Women (CEDAW), the Convention on the Rights of the Child (CRC), the Convention on the Rights of Persons with Disabilities (CRPD), and most recently the International Covenant on Economic, Social, and Cultural Rights (ICESCR).[9] In addition, the UN maintains concerns over the status of human rights in the country across a range of topics such as democratic reforms, electoral changes, discrimination against minorities and women, escalating ethnic conflicts, environmental

[6] United Nations (UN). (2018). United Nations – Indigenous Peoples. Available at: https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html.

[7] Myanmar Constitution. (2008). Available at: http://www.burmalibrary.org/docs5/Myanmar_ Constitution-2008-en.pdf

[8] Declaration on the Rights of Indigenous Peoples (DRIP). (2007). Available at: http://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/ UNDRIP_E_web.pdf.

[9] Asia-Pacific Forum. (2015). Myanmar's NHRI Expands Education and Prison Monitoring Activities < http://www.asiapacificforum.net/news/myanmars-nhri-expands-education-and-prison-monitoring-activities/> accessed 10 September 2015; Office of the High Commissioner for Human Rights (OHCHR). (2018a). Ratification Status for Myanmar. Available at: https://tbinternet.ohchr.org/layouts/TreatyBodyExternal/Treaty.aspx?CountryID=119&Lang=EN.

degradation, development inequality, arbitrary arrests and detentions, torture, sexual violence, forced displacement, and continuing restrictions on free expression, free association, and a free and independent media.[10] Moreover, Myanmar suffers from extensive corruption and the weak rule of law. Transparency International's Corruptions Perceptions Index lists Myanmar 156th out of 175 countries in 2014. Similarly, the World Justice Project, in calculating its Open Government Index assessing the extent of publicized government data, right to information, civic participation, and complaint mechanisms, ranked Myanmar 100th out of 102 measured countries.[11] In its Rule of Law Index, the World Justice Project factored in variables including constraints on government powers, absence of corruption, security, observance of rights, and enforcement, and found Myanmar ranked 92 out of 102 countries under study.[12]

These issues frustrate the aspirations of indigenous rights supporters with the Myanmar government since the presence of corruption and weak rule of law prevents the government from addressing indigenous complaints. In addition, the struggles with human rights indicates a state not willing to recognize the legal arguments of indigenous actors. Moreover, the reluctance to accept the concept of indigenous rights reveals a denial of indigenous identity.

2.1 Ethnic Rights Protection Law 2015

While Myanmar avoids "indigenous rights" in its laws, it does proffer some attention to "ethnic rights" in the form of the Ethnic Rights Protection Law passed in 2015 (ERPL). The ERPL ostensibly seeks to clarify the status and rights of Myanmar's ethnic groups, bypassing the 2008 Constitution's use of the term "national races" for the idea of "ethnic groups" who have resided continuously within Myanmar.[13] The ERPL, however, poses issues in terms of international standards for indigenous rights, particularly with respect to the 1992 Declaration on Minorities and UNDRIP.

To begin, the ERPL does not discuss the balance between individual and group rights. Both the Declaration on Minorities 1992 (Arts. 3 & 8) and DRIP 2007 (Preamble & Art. 1) note that an indigenous group can have group rights, but they cannot infringe on universal human rights of individuals within an indigenous group.[14] Such a guarantee is not in the ERPL 2015. Second, the DRIP 2007 (Arts. 3-5) provides for a right of self-determination that includes the right of indigenous people to decide their own political and legal status (e.g., the right to decide if they have a separate government, an autonomous zone, or sovereignty as a potential nation-state). Such a right is absent in the ERPL 2015. Third, DRIP 2007 (Art. 20) identifies rights for indigenous

[10] United Nations General Assembly (UNGA). (2015a). Situation of Human Rights in Myanmar, UN Doc A/HRC/RES/28/23. Available at: http://ap.ohchr.org/documents/dpage_e.aspx?m=89; United Nations General Assembly (UNGA). (2015b). Report of the Special Rapporteur on the Situation of Human Rights in Myanmar, Yanghee Lee, UN Doc A/HRC/28/72. Available at: http://ap.ohchr.org/documents/dpage_e.aspx?m=89.

[11] Transparency International. (2015) Myanmar. Available at: https://www.transparency.org/ country/#MMR

[12] World Justice Project < http://worldjusticeproject.org/ > accessed 1 September 2015.

[13] Ethnic Rights Protection Law (ERPL). (2015) Available at: http://www.myanmar-law-library.org/law-library/laws-and-regulations/laws/myanmar-laws-1988-until-now/union-solidarity-and-development-party-laws-2012-2016/myanmar-laws-2015/pyidaungsu-hluttaw-law-no-8-2015-law-protecting-ethnic-rights-burmese.html.

[14] Supra note 8; Office of the High Commissioner for Human Rights (OHCHR). (1992) Declaration on the Rights of Persons Belonging to National or Ethnic, Religious, and Linguistic Minorities. Available at: https://www.ohchr.org/en/professionalinterest/pages/minorities.aspx.

peoples to maintain their own political, economic, and social systems. These rights are tied to the right to self-determination, because the exercise of a right of self-determination indicates that the right-holder has a choice. The choice to determine political status can exist only if there is an alternative political, economic, or social system. The ERPL does not address such concerns. Fourth, the ERPL does not provide a right for an indigenous group to decide the criteria and process for membership in the group. Such a right is stated in DRIP 2007 (Art. 33), which allows an indigenous group the right to determine its own membership. This right is also associated with the right to self-determination, since it helps an indigenous group define its own identity.

Fifth, the ERPL is also missing protections listed in DRIP 2007. Specifically, DRIP 2007 (Art. 8) prescribes a state duty to prevent actions that

- deprive cultural integrity of indigenous people;
- take lands, territories, & resources from indigenous people;
- undermine rights of indigenous people;
- force assimilation of indigenous people into a majority population; or
- promotes or incites racial/ethnic discrimination against indigenous people.

None of these are stated in the ERPL 2015, which does not recognize a state duty of prevention. Sixth, the ERPL 2015 does not address the forcible removal of indigenous people from their lands, while DRIP 2007 (Art. 10) forbids forcible removal and requires states to obtain free, prior, and informed consent (FPIC) in asking indigenous peoples to leave their lands. Seventh, the ERPL 2015 does not allow a right of repatriation of ceremonial objects or human remains. DRIP 2007 (Art. 12), in contrast, grants indigenous peoples rights to regain ceremonial objects and human remains that were taken to other countries or stolen by non-indigenous people. Eighth, the ERPL 2015 also does not provide a right to histories or philosophies. It does provide a right to historical processes (ERPL 2015 Chapter III Art. 4), but this is not as broad as DRIP 2007 (Art. 13), which gives a right to indigenous people to maintain their own histories and philosophies. Ninth, the ERPL 2015 does not require the participation of an indigenous group in decisions that affect it. The ERPL 2015 requires that projects work with ethnic groups (ERPL 2015 Chapter IV: Art. 5), but this is not as expansive as DRIP 2007 (Art. 18), which calls for engagement by government with an indigenous group for all decisions affecting that group. Tenth, the ERPL 2015 does not address traditional ownership of land or traditional land tenure systems. These are included in DRIP 2007, which recognizes indigenous rights to land traditionally owned by indigenous peoples and indigenous rights based on traditional land tenure systems (DRIP 2007: Arts. 25-28).

In addition to the above, there are also parts of the ERPL 2015 that grant rights found in DRIP 2007 but which use descriptions or definitions of rights that do not meet the standards set forth in DRIP 2007. The significance of these deviations from DRIP 2007 deserve some attention for discussion. First, Chapter III of the ERPL 2015 provides rights to language, literature, fine art, culture, custom, religion, and traditional medicine (ERPL 2015 Chapter III: Art. 4). Chapter III, however, omits other rights recognized by DRIP 2007 such as indigenous rights to archaeological, historical, religious, & cultural sites, artefacts, & technologies (DRIP 2007 Arts. 11, 12, & 24). In addition, while the ERPL 2015 recognizes the right to preserve and develop traditional medicine, DRIP 2007 goes further to provide rights of conservation of plants, animals, and minerals used in

traditional medicine (DRIP 2007 Art. 24). In addition, DRIP 2007 also provides rights to maintain, protect, and protect the privacy sacred sites (DRIP 2007 Art. 12).

Second, the ERPL 2015 requires that projects shall inform, coordinate, be performed with ethnic groups (EPRL 2017: Ch. IV Art. 5). This, however, does not meet the standard of free prior informed consent repeatedly expressed in DRIP 2007 (DRIP 2007, Arts. 11, 19, & 32). Free prior informed consent, or FPIC, is an internationally accepted standard that ensures consent is obtained without coercion or influence, before an action and its consequences occur, and with full transparency regarding information about the topic at the center of consent. Third, the ERPL 2015 does not specify the procedural standards for dispute resolution, noting only that the Minister of Ethnic Affairs has responsibility to resolve disputes involving ethnic groups (ERPL 2017: Ch. V Arts. 9-15). This is short of the requirements set by DRIP 2007, which requires:

- fair, transparent, and effective mechanisms developed in conjunction with indigenous peoples (DRIP 2007: Art. 12);
- fair, independent, impartial, open, and transparent adjudication (DRIP 2007: Art. 27);
- effective consultation through representative institutions (DRIP 2007: Art. 30); and
- prompt, fair, & just procedures (DRIP 2007: Art. 40).

Fourth, in resolving disputes, the ERPL 2015 focuses on criminal penalties involving imprisonment or fines (ERPL 2015: Chapter VIII). This, however, overlooks the harm suffered by victims and so does little to address the damage experienced by an ethnic group. In contrast, DRIP 2007 recognizes the harm afflicted upon victims, with redress for damages experienced by an indigenous group via remedies which include:

- restitution for harms caused by violation of indigenous rights (Art. 11);
- fair & equitable compensation for harms caused by violation of indigenous rights (Art. 28);
- just & fair redress (Art. 32);
- mitigation of adverse environmental, economic, social, cultural, or spiritual damage caused by violation of indigenous rights (Art. 32); and
- effective remedies to resolve or mitigate harms caused by violation of indigenous rights (Art. 40).

Based on the above, the ERPL 2015 does not meet the international standards for indigenous rights set forth by DRIP 2007. As a result, it denies the legal tools articulated by international law intended to empower indigenous peoples. The ERPL 2015 may constitute an effort to provide greater recognition for ethnic group rights in Myanmar law, and thereby provides an indication of substantive steps shifting the relationship between the Myanmar state and the country's ethnic groups. It does not, however, recognize indigenous rights either as a concept or as a body of legal rights and so does little to satisfy indigenous interests in Myanmar.

3. Legal challenges in ASEAN region instruments

There is little relief from ASEAN regional law for the domestic indigenous rights issues described above, since ASEAN exercises a number of principles that frustrate potential attempts to utilize regional mechanisms to address Myanmar indigenous concerns. Specifically, there is the balance of rights and duties required by the ASEAN Declaration of Human Rights (ADHR), the absence of an ASEAN region legal institution for human rights, the adherence to an ASEAN principle of non-interference, and the ASEAN regional proclivity for "ASEAN values" enabling an exceptionalist view towards international human rights. To begin, ASEAN has an inclination to associate rights with duties. To some degree, there is an association between rights and duties recognized by the Universal Declaration of Human Rights (UDHR), with Article 29 stating that "everyone has duties to the community" and that everyone is subject to laws directed at protecting "the rights and freedoms of others" and serving "morality, public order, and the general welfare" (UDHR 1948: Art. 29). ASEAN, however, extends the constraint of rights with duties, in that the UDHR does not make the allowance of rights conditional upon the fulfillment of duties but the ADHR does (Bui 2016). Specifically, the ADHR states that "the enjoyment of human rights and fundamental freedoms must be balanced with the performance of corresponding duties as every person has responsibilities to all other individuals, the community, and the society" (ADHR 2012: Art. 6). In asserting a mandatory balancing of rights and duties, the ADHR creates a relationship wherein it is not possible to have one without the other. Prospects for an alternative interpretation are doubtful, since ASEAN regional instruments are skewed towards concerns over national law, security, and morality rather than human rights. Admittedly, other regional human rights mechanisms such as the European Court of Human Rights (ECHR) recognize that rights are not absolute, but the ECHR also limits state constraints on rights via a "margin of appreciation" doctrine that allows states to limit rights only so long as they maintain fundamental freedoms and arise from legal processes, meet legitimate aims of resolving conflicts between rights, and are proportional to the aims being sought.[15] ASEAN, in contrast, does not observe such principles.[16]

Next, outside the ADHR as a regional human rights instrument there is little in terms of a regional legal institution to address human rights claims. There is the ASEAN Intergovernmental Commission on Human Rights (AICHR), but AICHR does not function as a court, since it does not have a complaints mechanism to address human rights claims nor does it have powers to hold states accountable for human rights violations. Rather, AICHR has a purpose to "promote and protect human rights" and to "contribute to the realization of the purposes of ASEAN…to promote stability and harmony" (AICHR 2009: Art. 1.1 & 1.3). Also, AICHR binds itself to the ASEAN Charter, particularly with respect to the ASEAN principles of sovereignty, non-interference in the internal affairs of member states, and the right of member states to be free from external inference (AICHR 2009: Art. 2.1). The authority of AICHR is limited, with its mandate prescribed to activities focused on promotion, public awareness, advice, capacity-building, encouragement, information-gathering, and nurturing cooperation and common approaches with respect to human

[15] De Schutter, O. (2010). International Human Rights Law. Cambridge University Press; Yutaka, A.-T. (2002). The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR. Intersentia: New York.
[16] Bui, H. (2016) The ASEAN Human Rights System: A Critical Analysis. Asian Journal of Comparative Law 11(2016): 111-140.

rights within ASEAN and its member states (AICHR 2009: Art. 4). Hence, AICHR provides no means for victims of domestic human rights violations to pursue legal claims at a regional level.

The limitations of the ADHR and AICHR are a reflection of the nature of ASEAN itself: ASEAN has an aversion to involvement in the internal affairs of its respective member states. The principle of non-interference was made explicit in the 1976 Treaty of Amity and Cooperation in Southeast Asia (TACSE), which articulates in Article 2 that every member state has the right "to lead its national existence free from external interference, subversion, or coercion" and that the states of Southeast Asia would observe "non-interference in the internal affairs of one another" (TACSE 1976: Art. 2). ASEAN, in adopting the principles of TACSE, also set forth the aim to "promote regional peace and stability…in the relationship among countries in the region" (ASEAN 2018: Aims and Purposes). As a result, even as much as ASEAN allows for a regional conception of human rights in the ADHR, its founding precepts direct it away from regional actions to protect any notions of human rights within any of its individual member states.

Last, the nature of ASEAN region law with respect to human rights is tied to a sense of regional exceptionalism. During his tenure as Senior Minister of Singapore, Lee Kuan Yew asserted the notion of "Asian values" that held Asian cultures prioritized community harmony over individual liberties.[17] Such attitudes were also expressed in the 1993 Bangkok Declaration, in which representatives from ASEAN states agreed that arguments for universal human rights must consider "the significance of national and regional particularities and various historical, cultural, and religious backgrounds"[18]. In holding ASEAN as distinct from the global community and calling for an attendant unique treatment outside the international human rights system, ASEAN states created justification for their regional approach to human rights. The resulting implication is that as a region ASEAN has an underlying predisposition opposed to the exercise of claims such as indigenous rights contained within the international system of human rights.

4. Recourses in international human rights law

Despite the apparent challenges to Myanmar indigenous rights from both Myanmar domestic law and ASEAN region law, there are potential avenues in international law allowing paths of progress for Myanmar indigenous concerns. In particular, there are possible options via international human rights instruments and institutions. With respect to instruments, Myanmar's participation is admittedly limited, as it has only ratified the International Covenant on Economic, Social, and Cultural Rights (ICESCR), Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), Convention on Rights of the Child (CRC), and Convention on Rights of Persons with Disabilities (CRPD). Out of these treaties, however, only the ICESCR offers some accommodation for indigenous rights, with articles and a complaints mechanism relevant for indigenous rights complaints. With respect to institutions, there is the Human Rights Council (HRC) Universal Periodic Review (UPR) mechanism, which allows for input from non-state actors in evaluating state human rights records and hence offers a means of

[17] Zakaria, F. (1994) Culture is Destiny: A Conversation with Lee Kuan Yew. Foreign Affairs 73(2): 109-126.
[18] Chesterman, S. (2016) Asia's Ambivalence about International Law and Institutions: Past, Present and Futures. European Journal of International Law 27(4): 970; United Nations (UN). (1993) Final Declaration of the Regional Meeting for Asia of the World Conference on Human Rights, UN Doc.A/CONF.157/PC/59. United Nations: Para. 8.

advancing indigenous concerns. The possible utility of the ICESCR and UPR for Myanmar indigenous rights claims are discussed individually below.

4.1 ICESCR

The ICESCR ostensibly focuses on universal economic, social, and cultural rights generally, but there are several groups of rights in the ICESCR relevant to indigenous peoples. Specifically, it is possible to place within the ICESCR ideas relating to indigenous rights to self-determination; equal treatment; cultural life; land, territories, and resources; and indigenous traditional knowledge. First, with respect to the right to self-determination, Article 1 of the ICESCR explicitly states that "All peoples have the right to self-determination" in terms of deciding their own political status and pursuit of economic, social, and cultural development (ICESCR 1966: Article 1, Paragraph 1). For indigenous peoples, including those in Myanmar, this provides rights to decide their own political status relative to State Parties. In addition, the ICESCR extends self-determination to cover natural wealth and resources, stating that "All peoples may, for their own ends, freely dispose of their natural wealth and resources" without affecting obligations related to international economic relations (ICESCR 1966: Article 1, Paragraph 2). The ICESCR also adds that there this is a minimum level regarding the use of natural wealth and resources, with the words that "In no case may a people be deprived of its own means of subsistence" (ICESCR 1966: Article 1, Paragraph 2). The application of the term "all peoples" is separate from the use of the word "States" in reference to ICESCR State Parties, suggesting that the term "all peoples" is expansive and covers rights of groups separate from nation-states—including indigenous groups.

Second, it is possible to locate indigenous rights within the obligation on the part of Parties to apply equal treatment in Articles 2 and 3 of the ICESCR. Article 2 requires a State Party to ensure that the treaty's rights "will be exercised without discrimination of any kind as to race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status" (ICESCR 1966: Article 2, Paragraph 2). Article 3 expands this by requiring that each State Party guarantees "the equal right of men and women to the enjoyment of all economic, social, and cultural rights" in the ICESCR (ICESCR 1966: Article 3). In support of such protections against discrimination, the Committee on Economic, Social, and Cultural Rights (CESCR) states in its General Comment 20 that "discrimination constitutes any distinction, exclusion, restriction, or preference or other differential treatment…which has the intention or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of Covenant rights" (OHCHR 2009a: Paragraph 7). For indigenous peoples, the implication is that under the ICESCR all individuals within an indigenous group must be granted the same treatment as all individuals outside the indigenous group.

Third, the rights to equal treatment have implications for other rights in the ICESCR. According to the CESCR's General Comment 20, the principle of non-discrimination applies to the following rights:

- rights to adequate housing;
- rights to adequate food;
- rights to education;

- rights to health;
- rights to water;
- rights to benefits from scientific, literary, or artistic works;
- rights to work; and
- rights to social security.

The principle of non-discrimination means that enjoyment of the above rights cannot be denied to individuals simply because of their status as members of a group afflicted by "historical or persistent prejudice." In fact, General Comment 20 states that the promotion of equal access to the above rights will help to overcome discrimination against marginalized groups (OHCHR 2009a: Paragraph 8).

Fourth, the ICESCR also relates to indigenous rights to culture, with Article 15 including a right to "take part in cultural life" (ICESCR 1966: Article 15). State Parties are expected to enable enjoyment of the right to culture by taking steps "necessary for the conservation, the development, and the diffusion of science and culture" (ICESCR 1966: Art 15). This encompasses a respect for the freedom "indispensable for scientific research and creative activity" and "the encouragement and development of international contacts and co-operation in the scientific and cultural fields" (ICESCR 1966: Art. 15). The CESCR, in its General Comment 21, interprets the right to cultural life as placing a negative duty upon each State Party to abstain from interfering in the "exercise of cultural practices" or "access to cultural goods and services," as well as requiring a positive duty to ensure "preconditions for participation, facilitation, and promotion of cultural life, and access to and preservation of cultural goods" (OHCHR 2009b: Paragraph 6). General Comment 21 views the right to cultural life as a choice exercised by a person "individually, or in association with others" that "should be recognized, respected, and protected on the basis of equality" (OHCHR 2009b: Paragraph 7). Such language provides indigenous peoples a cultural choice as it gives them "the right to full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms" (OHCHR 2009b: Paragraph 7).

Fifth, CESCR General Comment 21 also connects the ICESCR to indigenous lands, stating that the right to cultural life includes the indigenous right to "land, territories, and resources which they have traditionally owned, occupied, or otherwise used or acquired" (OHCHR 2009b: Paragraph 36). Hence, a State Party to the ICESCR is expected to protect indigenous cultural values and rights "associated with their ancestral lands and their relationship with nature…in order to prevent the degradation of their particular way of life, including their means of subsistence, the loss of their natural resources, and, ultimately, their cultural identity" (OHCHR 2009b: Paragraph 36).

Sixth, General Comment 21 also articulates the principle of free, prior, and informed consent (FPIC), which calls upon upon each State Party to "respect the principle of free, prior, and informed consent of indigenous peoples in all matters covered by their specific rights" under the covenant (OHCHR 2009b: Paragraph 37). In describing the need for consent, General Comment 21 requires that a State Party must "recognize and respect the rights of indigenous peoples to own, develop, control, and use their communal lands, territories, and resources, and, where they have been otherwise inhabited or used without their free and informed consent, take steps to return these lands and territories" (OHCHR 2013: 20; OHCHR 2009b: Paragraph 36).

Last, General Comment 17 addresses the topic of traditional knowledge or scientific, literary, or artistic works of indigenous peoples by calling for each State Party to the ICESCR to "adopt measures to ensure the effective protection of the interests of indigenous peoples relating to their productions, which are often expressions of their cultural heritage or traditional knowledge" (OHCHR 2006: Paragraph 32). General Comment 17 notes that in "adopting measures to protect scientific, literary, and artistic productions of indigenous peoples" a State Party to the ICESCR "should take into account their preferences" (OHCHR 2013: 20-21; OHCHR 2006: Paragraph 32). Similar to the lands, territories, or resources, General Comment 17 asks each State Party to "respect the principle of free, prior, and informed consent of the indigenous authors concerned" and "…where appropriate, they should provide for the collective administration by indigenous peoples of the benefits derived from their productions" (OHCHR 2013: 20-21; OHCHR 2006: Paragraph 32). Hence, to the extent that an indigenous group constitutes an ethnic, religious, or linguistic minority, a State Party has a duty "to protect the moral and material interests of authors belonging to these minorities through special measures to preserve the distinctive character of minority cultures" (OHCHR 2006: Paragraph 33).

It should be noted that while it is possible to locate indigenous rights within the ICESCR, it is not so readily possible to exercise those rights. There is no formal complaints procedure within the main body of the ICESCR; rather, it is found in an Optional Protocol adopted in 2008 (Optional Protocol 2008). Under the 2008 Optional Protocol, the CESCR is able to receive complaints from individuals or groups of individuals and conduct inquiries regarding alleged violations of rights in the ICESCR (OHCHR 2018B; Optional Protocol 2008). The 2008 Optional Protocol, however, is a separate treaty open to State Parties to the ICESCR, and so the body of State Parties to the Optional Protocol is separate from the list of State Parties to the ICESCR (OHCHR 2013c). As of October 2018, there were 169 State Parties to the ICESCR (ICESCR 2018a) compared to twenty-four State Parties for the Optional Protocol containing the complaints procedure (ICESCR 2018b). Myanmar is a party to the ICESCR but is not a party to the Optional Protocol. (ICESCR 2018a; ICESCR 2018b).

As a result, while Myanmar indigenous rights claims can be made under the ICESCR, they cannot be exercised through the complaints procedure of the 2008 Optional Protocol and must instead be addressed within the domestic courts of Myanmar. As much as the Myanmar state may be obligated as a State Party to observe the strictures of the ICESCR, it is also granted by the ICESCR a measure of flexibility in terms of the principle of "progressive realization" (OHCHR 2000: 13). The notion of "progressive realization" recognizes that states—particularly underdeveloped ones such as Myanmar—may suffer from lack of capacity that impedes their ability to meet treaty expectations (OHCHR 2000: 13). To assist such states, the idea of "progressive realization" in the ICESCR only requires that a State Party "undertakes to take steps…to the maximum of its available resources, with a view to achieving progressively the full realization of rights" in the treaty (ICESCR 1966: Art. 2). As a result, claims to indigenous rights in Myanmar must articulate not only rights contained in the ICESCR but must also address potential arguments that the Myanmar state may have failed to support such rights but that it has taken the steps necessary to satisfy the requirements of the treaty.

4.2 UPR

Relative to the ICESCR, the HRC UPR mechanism offers a potentially more accessible recourse for Myanmar indigenous rights claims. The UPR is directed at promoting human rights among UN member states (UNGA 2007b; UNGA 2006). The UPR is a periodic process that evaluates the human rights record of each state once approximately every four years (OHCHR 2015). For each review, the UPR follows a four-step sequence: 1) the acceptance of reports providing information about a state's human rights record from UN bodies, UN member states, national human rights institutions (NHRIs), and non-governmental organizations (NGOs); 2) a Working Group meeting involving questions and answers about a state's human rights record before the representatives of 47 members of the HRC General Assembly; 3) the publication of an outcome report at the end of the Working Group meeting with recommendations on improving the reviewed state's human rights performance; and 4) the subsequent provision of capacity-building assistance, technical aid, and monitoring activities to help the reviewed state meet the outcome report's recommendations (OHCHR 2015).

In the UPR process, Myanmar indigenous rights claims can be advanced at several stages. First, they can be asserted during the initial reporting stage, in the sense that information regarding indigenous rights concerns can be submitted via receptive UN bodies, UN member states, NHRIs—in the case of Myanmar, the Myanmar National Human Rights Commission, or NGOs participating in the UPR. Second, they can be inserted into the discussion of the Working Group meeting, via representatives of one or more of the 47 member states in the meeting, such that they act as proxies for indigenous claims. Third, they can be included as part of the comments in the outcome report. Last, assuming that indigenous rights are referenced among the recommendations in the outcome report, they can be integrated into the activities to monitor the performance of a reviewed state in relation to the outcome report recommendations.

Some caution should be observed with respect to potential use of the UPR on behalf of Myanmar indigenous claims. First, it is a form of peer-review in that a state is reviewed by 47 other states in the HRC General Assembly. This means that there is no overarching global entity responsible for enforcement, and that the effectiveness of the UPR is a function of the commitment by participating states to the UPR and the UN system of human rights. Second, the outcome of the Working Group meeting is essentially a report that is less a prescription of judgement and sanctions and more a transcription of findings and recommendations. As a result, the end result of the UPR is not coercion but instead encouragement, with UN member states providing capacity-building and technical assistance to help improve a reviewed state's performance on human rights. In which case, the value of the UPR is dependent on the willingness of advocates for Myanmar indigenous rights to accept a human rights mechanism directed towards promotion of human rights leading towards an improved future for Myanmar rather than punishment to redress human rights violations in Myanmar's past.

5. Conclusion

The preceding sections assessed potential legal strategies at domestic, ASEAN region, and international levels for supporters of indigenous rights in Myanmar. The discussion identified the challenges posed by Myanmar and ASEAN region law and explored alternatives offered by international law. The analysis provided an overview of the major issues at each level, with the goal of clarifying the relative value of legal strategies between different levels. In doing so, the above sections inform the discourse over indigenous rights in Myanmar by addressing the issues related to various potential legal approaches. Apart from Myanmar, the discussion also serves to aid the study of indigenous rights efforts in other contexts in that the framework of analysis and its findings regarding different legal mechanisms are relevant to any case involving indigenous claims outside a state, whether for indigenous claims within the ASEAN law or within international law. The analysis, in short, demonstrates a way of better understanding the complexities of legal challenges and opportunities for advancing indigenous rights at multiple levels of action.

References

ASEAN Declaration of Human Rights (ADHR). (2012). Available at: https://asean.org/asean-human-rights-declaration/

ASEAN Intergovernmental Commission on Human Rights (AICHR). (2009). *Terms of Reference*. Available at: http://aichr.org/download/TOR-of-AICHR.pdf

Asia-Pacific Forum. (2015). Myanmar's NHRI Expands Education and Prison Monitoring Activities < http://www.asiapacificforum.net/news/myanmars-nhri-expands-education-and-prison-monitoring-activities/> accessed 10 September 2015.

Association of Southeast Asian Nations (ASEAN). (2018). *Overview*. Available at: https://asean.org/asean/about-asean/overview/

Bui, H. (2016). The ASEAN Human Rights System: A Critical Analysis. *Asian Journal of Comparative Law* 11(2016): 111-140.

Chesterman, S. (2016). Asia's Ambivalence about International Law and Institutions: Past, Present and Futures. *European Journal of International Law* 27(4): 945-978.

Declaration on the Rights of Indigenous Peoples (DRIP). (2007). Available at: http://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf

De Schutter, O. (2010). *International Human Rights Law*. Cambridge University Press.

Ethnic Rights Protection Law (ERPL). (2015). Available at: http://www.myanmar-law-library.org/law-library/laws-and-regulations/laws/myanmar-laws-1988-until-now/union-solidarity-and-development-party-laws-2012-2016/myanmar-laws-2015/pyidaungsu-hluttaw-law-no-8-2015-law-protecting-ethnic-rights-burmese.html

Food and Agriculture Organization (FAO). (2016). *Free Prior Informed Consent: An Indigenous Peoples' Right and Good Practice for Local Communities*. Available at: http://www.fao.org/3/a-i6190e.pdf

International Covenant on Economic, Social, and Cultural Rights (ICESCR). (2018a). *International Covenant on Economic, Social, and Cultural Rights, Map on Ratifications*. Available at: https://www.ohchr.org/Documents/HRBodies/CESCR/OHCHR_Map_ICESCR.pdf

International Covenant on Economic, Social, and Cultural Rights (ICESCR). (2018b). *Optional Protocol to the International Covenant on Economic, Social, and Cultural Rights, Map on Ratifications*. Available at: https://www.ohchr.org/Documents/HRBodies/CESCR/OHCHR_Map_CESCR-OP.pdf

International Covenant on Economic, Social, and Cultural Rights (ICESCR). (1966). Available at: https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx

International Work Group on Indigenous Affairs (IWGIA). (2018). Available at: https://www.iwgia.org/en/myanmar

Liljeblad, J. (2018). Beyond Transnational Advocacy: Lessons from Engagement of Myanmar Indigenous Peoples with the UN Human Rights Council Universal Periodic Review. *Vermont Law Review* 43(1): 1-34.

Morton, M. (2017). Indigenous Peoples World to Raise Their Status in a Reforming Myanmar. *ISEAS Yusof Ishak Institute Perspective* 33(2017): 1-10.

Myanmar Constitution. (2008). Available at: http://www.burmalibrary.org/docs5/Myanmar_Constitution-2008-en.pdf

Office of the High Commissioner for Human Rights (OHCHR). (2018a). *Ratification Status for Myanmar*. Available at: https://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=119&Lang=EN

Office of the High Commissioner for Human Rights (OHCHR). (2018b). *Human Rights Treaty Bodies – Individual Communications*. Available at: https://www.ohchr.org/EN/HRBodies/TBPetitions/Pages/IndividualCommunications.aspx#ICESCR

Office of the High Commissioner for Human Rights (OHCHR). (2015). *Basic Facts about the UPR*. Available at: http://www.ohchr.org/EN/HRBodies/UPR/Pages/BasicFacts.aspx

Office of the High Commissioner for Human Rights (OHCHR). (2013a). *Indigenous Peoples and the United Nations Human Rights System*. Available at: https://www.ohchr.org/Documents/Publications/fs9Rev.2.pdf

Office of the High Commissioner for Human Rights (OHCHR). (2013b). *Free, Prior, and Informed Consent of Indigenous Peoples*. Available at: https://www.ohchr.org/Documents/Issues/ipeoples/freepriorandinformedconsent.pdf

Office of the High Commissioner for Human Rights (OHCHR). (2013c). *Individual Complaint Procedures Under the United Nations Human Rights Treaties*. United Nations. Available at: https://www.ohchr.org/Documents/Publications/FactSheet7Rev.2.pdf

Office of the High Commissioner for Human Rights (OHCHR). (2009a). *General Comment 20: Non-Discrimination in Economic, Social, and Cultural Rights*. Available at: https://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?TreatyID=9&DocTypeID=11

Office of the High Commissioner for Human Rights (OHCHR). (2009b). *General Comment 21: Right of Everyone to Take Part in Cultural Life*. Available at: https://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?TreatyID=9&DocTypeID=11

Office of the High Commissioner for Human Rights (OHCHR). (2006). *General Comment 17: The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from Any Scientific, Literary, or Artistic Production of Which He or She Is the Author*. Available at: https://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?TreatyID=9&DocTypeID=11

Office of the High Commissioner for Human Rights (OHCHR). (2000). *Frequently Asked Questions on Economic, Social, and Cultural Rights: Fact Sheet No. 33*. Available at: https://www.ohchr.org/Documents/Publications/FactSheet33en.pdf

Office of the High Commissioner for Human Rights (OHCHR). (1992). *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious, and Linguistic Minorities*. Available at: https://www.ohchr.org/en/professionalinterest/pages/minorities.aspx

Optional Protocol to the International Covenant on Economic Social and Cultural Rights (Optional Protocol). (2008). Available at: https://www.ohchr.org/EN/ProfessionalInterest/Pages/OPCESCR.aspx

Promotion of Indigenous and Nature Together (POINT). (2018). Available at: http://www.point-myanmar.org/en_US/

Transparency International. (2015). *Myanmar*. Available at: https://www.transparency.org/country/#MMR

Treaty of Amity and Cooperation in Southeast Asia (TACSE). (1976). Available at: https://asean.org/treaty-amity-cooperation-southeast-asia-indonesia-24-february-1976/

United Nations (UN). (2018). *United Nations – Indigenous Peoples*. Available at: https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html

United Nations (UN). (1993). *Final Declaration of the Regional Meeting for Asia of the World Conference on Human Rights, UN Doc.A/CONF.157/PC/59*. United Nations.

United Nations General Assembly (UNGA). (2015a). Situation of Human Rights in Myanmar, UN Doc A/HRC/RES/28/23. Available at: http://ap.ohchr.org/documents/dpage_e.aspx?m=89

United Nations General Assembly (UNGA). (2015b). Report of the Special Rapporteur on the Situation of Human Rights in Myanmar, Yanghee Lee, UN Doc A/HRC/28/72. Available at: http://ap.ohchr.org/documents/dpage_e.aspx?m=89

United Nations General Assembly (UNGA). (2007a). General Assembly Adopts Declaration on Rights of Indigenous Peoples; 'Major Step Forward' Towards Human Rights for All, Says President, UN Doc GA/10612, Press Release September 13, 2007. Available at: http://www.un.org/press/en/2007/ga10612.doc.htm

United Nations General Assembly (UNGA). (2007b). *Institution-Building of the United Nations Human Rights Council, A/HRC/Res/5/1*. Available at: http://www.ohchr.org/EN/HRBodies/UPR/Pages/BackgroundDocuments.aspx

United Nations General Assembly (UNGA). (2006). *Human Rights Council, A/Res/60/251*. Available at: http://www.ohchr.org/EN/HRBodies/UPR/Pages/BackgroundDocuments.aspx

United Nations Office of the High Commissioner for Human Rights (UN OHCHR). (2015). *Basic Facts about the UPR*. Available at: http://www.ohchr.org/EN/HRBodies/UPR/Pages/BasicFacts.aspx

United Nations Office of the High Commissioner for Human Rights. (2013). *The United Nations Declaration on the Rights of Indigenous Peoples: A Manual for National Human Rights Institutions*. Office of the United Nations High Commissioner for Human Rights.

Universal Declaration of Human Rights (UDHR). (1948). Available at: http://www.un.org/en/universal-declaration-human-rights/

World Justice Project < http://worldjusticeproject.org/ > accessed 1 September 2015.

Yutaka, A.-T. (2002). *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR*. Intersentia: New York.

Zakaria, F. (1994). Culture is Destiny: A Conversation with Lee Kuan Yew. *Foreign Affairs* 73(2): 109-126.

Indigenous People in the Indian Context: Why the Concept has Limited Relevance in India and its Continued Use is Problematic

Ritwick Dutta*

The idea of indigenous people and the need to protect their identity and culture has been central element in human rights discourse. In recent decades, there has been increasing recognition of the need to articulate the rights of indigenous people and to confer on them special rights and privileges. There is, however, a serious concern about borrowing of the term 'indigenous' to societies (such as in India) where it is not possible to clearly distinguish as to who constitutes the term 'indigenous'. In such circumstances, the increasing use of the term 'indigenous' can have serious ramification in a society which is characterised by ethnic plurality. Specifically, it can deepen existing cleavage that exists and can play a divisive role in the society. The Paper looks at the implications of the use of the term 'indigenous people' in the Indian context and how the concept of indigenous could have serious legal implications in a culturally plural society.

The Concept

The term "Indigenous People" has been used in anthropology and sociology to describe groups called 'tribes'. Its use however is not restricted to anthropology and sociology. Outside the academic discipline the term was used for the first time in 1957 when the general conference of the International Labour Organisation (ILO) adopted a Convention concerning protection and integration of indigenous and other tribal and semi tribal population in independent countries. The Convention aims at facilitating government actions towards protecting and the Indigenous People.[1]

There have been, however, changes in the approach of the ILO in so far as indigenous people are concerned. It was realised that ILO Convention 107 was written from a perspective which saw indigenous communities as lower in the evolutionary scale than European societies. Post 1957, various international organisations felt that the approach should be one where the indigenous and tribal communities are able to retain their unique identity and culture and at the same time are able to participate effectively in affairs that concern their lives. It promoting progressive integration of these people into the respective national communities (Convention No. 107). The term "Indigenous People' further gained prominence in 1993 with the declaration of 1993 as the 'International Year of World's Indigenous People. However, it was felt that that there was a need to remove the "assimilationist orientation" in the earlier standards. Accordingly, ILO Convention 169 was adopted in 1989. However, before that first contemporary attempt to present a definition for indigenous peoples at the UN level was made the Jose Martinez Cobo. In his study titled 'Study of the Problem of Discrimination against indigenous Populations', Cobo included the following cautious definition for the purpose of international action:

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[1] The UN General Assembly had proclaimed 1993 the **International Year** of the World's **Indigenous People**, and the same **year**, the Assembly proclaimed the **International** Decade of the World's **Indigenous People**, starting on 10 December 1994 (resolution 48/163)

> "Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems"[2]

Jose Martinez Cobo[3] proposed the following explanation: indigenous populations are composed of the existing descendants of the peoples who inhabited the present territory of a country, wholly or partially, at the time when persons of different culture or ethnic origin arrived there from other parts of the world, overcame them and, by conquest, settlement or other means, reduced them to a non-dominant or colonized status. Second, the occupation of ancestral lands is often at least a part of this process. Third, the aforesaid basic criteria should be related to cultural characteristics. According to the working definition indigenous peoples should possess distinctive cultural characteristics that distinguish them from the prevailing society in which they live—religion, language, living under a tribal system, membership of an indigenous community, dress, means of livelihood, lifestyle and so forth. Fourth, the criterion also referred to 'non-dominance', which alludes to the sense that indigenous peoples should constitute a non-dominant part of the population of the countries in which they live.[4]

In addition to the above, Erica Daes, who served as between 1984 to 2001, the Special Rapporteur for the Working Group on Indigenous People (WGIP) 1984-2001 felt that two other criteria must be taken into consideration, in connection with the analysis of the term 'indigenous peoples': self-identification and group consciousness. According to Deas, "[I]t may be noted that indigenous peoples themselves have defined and determined whether they are indigenous or not and how their membership is attributed. In certain countries, in the past, indigenous peoples felt shame or fear to identify themselves as indigenous. Of late there has been a reversal of this trend and members of indigenous nations or communities are proud to be recognized as such. At the international level, a sense of common vision and experience appears to prevail among many hundreds of indigenous peoples from all regions of the world.[5]

The ILO Convention 169 applies both to Tribal as well as Indigenous People. Both, however are separately defined. In the Convention, "Tribal Peoples' are defined as follows:

> "peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations" (Article 1 of the Convention).

[2] hrlibrary.umn.edu/edumat/hreduseries/TB7/Chapter%202%20P7-P14.pdf
[3] One of the most cited descriptions of the concept of the **indigenous** was given by Jose R. **Martinez Cobo**, the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, in his famous Study on the Problem of Discrimination against **Indigenous** Populations.
[4] Daes, E.-I., (2008). An overview of the history of indigenous peoples: self-determination and the United Nations. Cambridge Review of International Affairs,, 21(1), 7-26.
[5] *Ibid.*

The above definition places primacy on the fact that there has to be conditions which distinguish the people who are tribal from other section of the national community. One of the important factor to be taken into consideration is the fact that the community to be considered as a 'tribal' must be wholly or partially governed by their own customs, traditions and special laws.

With respect to Indigenous people, the Convention defines it has follows:

> "peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institution" (Article 1 of the Convention)

Thus, there are thus three aspects which are central to the conceptualisation of the indigenous people. First, the indigenous people are those who lived in the country to which they belong before colonisation or conquest from outside the country or the geographic region. Secondly, they have become marginalised as an aftermath of conquest and colonisation by the people from the outside the region. Though, this aspect is not specifically mentioned, it can be inferred from the definition. Thirdly, such people govern their life more in terms of their own social, economic and the cultural institution than the laws applicable to the general population of the country. What is important here is that the notion of indigenous people, despite sharing attributes in common with the people described as tribal or semi tribal population, is seen as different from the latter in the sense that indigenous are invariably seen as victims from outside the region; hence the outsider is easily identifiable.

2. The Indian Context

In India the term 'adivasi' is commonly used to refer to tribal people and this is extensively used by civil society, activists and others to refer to so called 'indigenous' and tribal people[6]. There are other terms such as 'aboriginals' which is used very rarely or even 'autochthonous' whose use is even rarer. The term 'adivasi' is however not accepted by all Anthropologist's such as G.S Ghurye who used to refer to tribes as 'backward Hindus' had reservation about the use of the term 'adivasi' and referred to them as the 'aborigines'. He writes:

> "when the history of internal movement of people is not know, it is utterly unscientific to regard some tribe or the other as the original owner of the soil. It is possible to contend that even if the tribes are not aborigines of the exact area they occupy, they are the autochthonous of India and to that extent they may be called the aborigines".[7]

While at one time it was essentially international groups including international financial institutions which were extensively using the term 'indigenous people", over the last decade and a half, civil society groups as well people's movements are extensively using the term "indigenous'. In fact that term finds its greatest expression in environmental movements. The movement against big dams in India's North East as well as those against mining in central and eastern India is

[6] The term 'Adivasi' is largely limited to the Central India. The other less common term used is "Vanvasi" meaning forest dwellers.
[7] Ghurye, G. (1963). *The Scheduled Tribe.* Bombay: Popular Prakshan.

essentially seen as an assault on the rights of the "indigenous' people of India. Recently, when the Supreme Court ordered the eviction of forest dwellers who were allegedly illegally residing in forest land, the human rights and environmental groups called it as an assault on the indigenous people of India.[8] However, given the fact that the word 'indigenous' has a specific connotation in International law, it needs to be examined as to what extent the concept of 'indigenous people' is relevant in the Indian context.

The term "indigenous people' is loosely applied in the Indian context and used interchangeably with tribal people. In many of the writings, the whole tribal population is viewed as indigenous to India. Writing in a prominent environmental magazine - Down to Earth, a group of writers and activists working closely on tribal issue observed:

> India is home to about 700 tribal groups with a population of 104 million, as per 2011 census. These indigenous people constitute the second largest tribal population in the world after Africa. As industries encroached upon their lands, many communities were displaced and some continued to wage a struggle to either protect their homes or demand a fair compensation.[9]

Even in international news coverage on Indian tribes, there is a tendency to view the entire tribal population as indigenous to India. In the wake of recent Supreme Court order on eviction of forest dwellers, the Guardian wrote:

> "Millions of Indians face eviction after the country's supreme court ruled that indigenous people illegally living on forest land should move".[10]

In a Report titled "India and the Rights of Indigenous People" published by Asia Indigenous People's Pact, Bijoy, Gopalakrishan and Khanna writes:

> "India is home to the largest population of indigenous peoples of any country in the world. Roughly a quarter of the world's indigenous population – around 80 million people – are scattered across India, their numbers a staggering diversity of ethnicities, cultures and socioeconomic situations. They range from some of the last uncontacted indigenous communities in the world, like the Sentinelese of the Andamans, to some of the largest, such as the Gonds and Santhals of central India. They include not only communities who live under conditions of extreme destitution, but also communities with social indicators well above the national average. But across circumstances and areas, like other indigenous communities around the world, India's indigenous peoples do share one characteristic – social, political and economic marginalisation".[11]

[8] https://www.theguardian.com/world/2019/feb/22/millions-of-forest-dwelling-indigenous-people-in-india-to-be-evicted

[9] Bahuguna, K. et al. (2016, August 10). Indigenous people in India and the web of indifference. *Down to Earth*.

[10] Dhillon, A. (2019). Millions of forest-dwelling indigenous people in India to be evicted. *The Guardian Weekly*, 22 February.

[11] Bijoy, C., Gopalakrishnan, S. & Khanna, S. (2010). India and the Rights of Indigenous Peoples: Constitutional, Legislative and Administrative Provisions Concerning Indigenous and Tribal Peoples in India and their Relation to International Law on Indigenous Peoples. Thailand: Asia Indigenous Peoples Pact (AIPP) Foundation.

The Government of India has taken the stand that the concept of Indigenous people is not relevant in the Indian situation. As a result, India has not ratified the ILO Convention 169. In a special report in May 2012, India's National Commission for Scheduled Tribes informed ILO of the perspectives of various government agencies on the Convention. As per the report, the Ministries of External Affairs, Home Affairs and the Tribal Affairs objected to the need for ratification of the Convention, saying that the concept of 'indigenous peoples' is not relevant to India and that the Convention violates State ownership of sub-surface resources in existing laws of the country that provides fair compensation for lands and that there was no need for external cooperation or evaluation, including from the UN, for tribal development programmes in India.[12]

The tendency to treat the tribal people in India as 'indigenous' is not limited to only human rights activists, civil society actors and journalist. The Supreme Court of India in fact dealt with the issue of indigenous people at great length in the case of *Kailas versus State of Maharashtra*,[13] The judgment of the Supreme Court was hailed as a landmark judgment recognizing that there are indigenous people in India (8% of the Population) and that India is essentially a land of immigrants. The judgment was praised by tribal and human rights groups as a landmark decision which recognized the tribal people as the 'original' inhabitants of India as well as the fact that there has been grave injustice on the population.

Commenting on the significance of the Judgment, Survival International, an international campaign group that claims to work on tribal rights wrote:

> Two of India's Supreme Court judges have passed a ground breaking judgement recognising India's tribal people as the nation's 'original inhabitants' and strongly condemning their 'historic injustice'. Judges Gyan Sudha Misra and Markandey Katju were hearing an appeal case regarding the stripping, beating and parading naked of a Bhil tribal woman for having had a relationship with a man of 'higher' caste. The judges proclaimed that the sentences given to the men involved were too lenient and that the crime was 'shameful, shocking and outrageous' and 'totally unacceptable in modern India.'
>
> The judges praised the tribes of India who 'have managed to preserve many of their tribal customs despite many oppressions and atrocities from other communities'. They recognised explicitly that the country's tribal people, or adivasis, are 'descendants of the original inhabitants of India', unlike the remaining 92% of the population who are 'descendants of immigrants'. The official Indian government position has been that all its citizens are 'indigenous' not just the adivasis.[14]

Commenting on the Supreme Court judgment N. K Das, in the Journal of Adivasi and Indigenous studies writes:

> "The Indian government has not accepted the nomenclature indigenous people to classify the tribes of India. Despite India's defiance in global forums, India's apex Supreme Court has issued a pertinent verdict in 2011 in case of a woman of Bhil scheduled tribe,

[12] AIPP & ZIF (2017): *Joint Stakeholders' submission on The situation of the rights of indigenous peoples in India: For 3rd cycle of the Universal Period Review (UPR) of India*.

[13] SCC, SC, 1, p.793 (2011).

[14] Survival International (2011): *News: Survival International.* [Online] Available at: https://www.survivalinternational.org/news/6875 [Accessed 24 July 2019].

resolving to some extent the very controversy pertaining to indigeneity and especially the suitability of category of 'indigenous people'. The Supreme Court in its latest judgment on 5 January 2011 unequivocally asserted that Scheduled Tribes are 'indigenous people of India'. On 5 January 2011, it dismissed a criminal appeal, concluding its judgment with a call to address historical wrongs done to the nation's tribal peoples: 'It is time now', the Court noted, 'to undo the historical injustice' done to these people."[15]

The Supreme Court's judgment is binding on all authorities. However, given the fact that both anthropologists/ sociologists as well as the Government has serious reservation with respect to the use of the term 'indigenous' for tribal communities in India, it needs to be analysed as to what extent the judgment of the Supreme Court can be regarded as a correct statement of both law and fact.

The Judgment of the Supreme Court recognizing that tribal's were the original inhabitants of India was authored by Justice Markendey Katju. It is important to point out that the Court was never required to undertake an inquiry as to who the original inhabitants or indigenous people of India were and it was simply because of the intellectual curiosity of the judge that the issue was dealt in the judgment at length.[16] Neither the parties involved in the litigation viz., those convicted of the crime nor the State advanced any argument on the issue as to who the indigenous or original inhabitants of the country were. The Court did not seek the expert opinion of either sociologists or anthropologists. Rather, the entire finding of the Supreme Court on this important issue of indigenous people were based on the Judge's own research as evident in the Judgment. A plain reading of the judgment makes it clear that it lacks substance both in law and fact. It does not examine various dimensions and complexities involved in the concept of indigenous people. The Judgment is full of generalisations and unverified statements. In fact, in concluding that the tribal are the original inhabitants of India, the judge extensively relies on 'Google'. Some paragraphs from the judgments needs to be quoted to highlight the above fact:

25. In Google `The original inhabitants of India', it is mentioned:
"A number of earlier anthropologists held the view that the Dravidian peoples together were a distinct race. However, comprehensive genetic studies have proven that this is not the case.
The original inhabitants of India may be identified with the speakers of the Munda languages, which are unrelated to either Indo-Aryan or Dravidian languages"
26. Thus the generally accepted view now is that the original inhabitants of India were not the Dravidians but the pre-Dravidians Munda aborigines whose descendants presently live in parts of Chotanagpur (Jharkhand), Chattisgarh, Orissa, West Bengal, etc., the Todas of the Nilgiris in Tamil Nadu, the tribals in the Andaman Islands, the Adivasis in various parts of India (especially in the forests and hills) e.g. Gonds, Santhals, Bhils, etc.[17]

[15] Das, N. (2015): Indigeneity, Anthropology and the Indian Tribes: A Critique. *Journal of Adivasi and Indigenous Studies (JAIS)* , II(1), pp. 11-34.
[16] The case related to an Appeal filed by those who were convicted by the trial court for abusing a tribal women and sentenced to imprisonment. Even though the punishment was meagre given the gravity of the crime, the accused preferred an Appeal to the Supreme Court which was dismissed and the trial courts sentence was upheld.
[17] *Supra* note 13 at 12.

Thus, the Judge concludes based on "Google' as to who is "generally accepted" as the original inhabitants of India.

Even more flippant is the conclusion of the judge that India is largely a country of immigrants. The judge again cites no authoritative study to come to this conclusion. It is worth quoting some paragraphs from the Judgment:

"India is broadly a country of immigrants
20. While North America (USA and Canada) is a country of new immigrants, who came mainly from Europe over the last four or five centuries, India is a country of old immigrants in which people have been coming in over the last ten thousand years or so. Probably about 92% people living in India today are descendants of immigrants, who came mainly from the North-West, and to a lesser extent from the North-East. Since this is a point of great importance for the understanding of our country, it is necessary to go into it in some detail.
21. People migrate from uncomfortable areas to comfortable areas. This is natural because everyone wants to live in comfort. Before the coming of modern industry there were agricultural societies everywhere, and India was a paradise for these because agriculture requires level land, fertile soil, plenty of water for irrigation etc. which was in abundance in India. Why should anybody living in India migrate to, say, Afghanistan which has a harsh terrain, rocky and mountainous and covered with snow for several months in a year when one cannot grow any crop? Hence, almost all immigrations and invasions came from outside into India (except those Indians who were sent out during British rule as indentured labour, and the recent migration of a few million Indians to the developed countries for job opportunities). There is perhaps not a single instance of an invasion from India to outside India.[18]

Finally, the broad generalisation of the tribal community is evident in the following paragraphs from the judgment:

36. The injustice done to the tribal people of India is a shameful chapter in our country's history. The tribals were called `rakshas' (demons), `asuras', and what not. They were slaughtered in large numbers, and the survivors and their descendants were degraded, humiliated, and all kinds of atrocities inflicted on them for centuries. They were deprived of their lands, and pushed into forests and hills where they eke out a miserable existence of poverty, illiteracy, disease, etc. And now efforts are being made by some people to deprive them even of their forest and hill land where they are living, and the forest produce on which they survive.[19]

The Judge, finally makes a further generalisation about the behavioural traits of tribals in India:

39. Despite this horrible oppression on them, the tribals of India have generally (though not invariably) retained a higher level of ethics than the non-tribals in our country. They normally do not cheat, tell lies, and do other misdeeds which many non-tribals do. They are generally superior in character to the non-tribals. It is time now to undo the historical injustice to them.[20]

[18] *Ibid.* at 9.
[19] Ibid. at 16.
[20] Ibid. at 17.

Despite all the praise the Judgment of Justice Katju has received from those who articulate rights of tribal and indigenous people, the observations of Justice Katju can at best be termed as '*obiter dicta'*[21] and therefore has no value as a judicial precedent. The Supreme Court of India has dealt in a number of cases as to the binding value of a judgment. In *Union of India* v. *Dhanwanti Devi* (1996) a three-Judge Bench of Supreme Court has observed as follows:

> "*9*. … It is not everything said by a Judge while giving judgment that constitutes a precedent. The only thing in a Judge's decision binding a party is the principle upon which the case is decided and for this reason it is important to analyse a decision and isolate from it the *ratio decidendi*. According to the well-settled theory of precedents, every decision contains three basic postulates—(*i*) findings of material facts, direct and inferential. An inferential finding of facts is the inference which the Judge draws from the direct, or perceptible facts; (*ii*) statements of the principles of law applicable to the legal problems disclosed by the facts; and (*iii*) judgment based on the combined effect of the above. A decision is only an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in the judgment.[22]

In fact there the Supreme Court has held that "observations made by the court on a point not debated, is not binding'. In view of this settled legal position, one can conclude that the decision of the Supreme Court on who are the 'original' people of India should not be treated as a binding judicial precedent. Even otherwise, given the fact that most of the findings of the Court have been arrived by examining literature and in a casual manner, it would not even have a persuasive value.[23]

3. The Situation in Tribal Majority Areas – India's North East

In India civil society debates and discussions as well as judicial decisions have generally considered the tribal community in India as an exploited and marginalised section in the society. Further, they also subscribe to the view that 'tribal population' in India is the indigenous community in India contrary to both is evident from both empirical evidence as academic literature. The Supreme Court in *P Rami Reddy & Ors. Vs. State of Andhra Pradesh* (1988) disturbingly observed:

> "*19*. … The community cannot shut its eyes to the fact that the competition between the 'tribals' and the 'non-tribals' partakes of the character of a race between a handicapped one-legged person and an able-bodied two-legged person.[24]

There is no doubt that the level of social and economic development among tribals is lower in comparison to non tribals[25]. However, most discussion on tribes tend to focus on areas where

[21] A judge's expression of opinion uttered in court or in a written judgement, but not essential to the decision and therefore not legally binding as a precedent.
[22] Union of India Vs. Dhanwanti Devi (1996): SCC, SC, 6, 51-52.
[23] *Saiyada Mossarrat Vs. Hindustan Steel Ltd., & Ors.* (1988): SCC, SC, 1, p. 272.
[24] P. Rami Reddy & Ors. Vs. State of Andhra Pradesh & Ors. , 1988: 446.
[25] The Ministry of Tribal affairs, Government of India constituted a committee to investigate the socio-economic, health and educational status of tribes in India. The result was the 2014 "Report of the High Level Committee on

the tribal population are a minority and not in states or region where tribals form the majority. Thus in most of the North Eastern States in India[26], the tribals form. the dominant majority with Mizoram having 94.8%, tribal population, followed by Mizoram (94.4%), Nagaland (86.5%), Meghalaya (86.1%), and Arunachal Pradesh (68.8%). It is important to focus some attention on the nature of tribal –non tribal relation in areas where tribal are the dominant group.

A fairly frank, and at the same time, incisive analysis of the tribal situation in the North Eastern states of India has been done by H. Srikanth.[27] He makes a strong point on why the narrative of tribals being the "exploited" and the non-tribal being the "exploiter" does not hold true for much of India's North East.

> The experience of colonial rule in the north-east was quite different from what Native Indians or other natives experienced in the Americas and Oceania. Unlike in the US or Australia, the northeast, or for that matter India as a whole, did not witness large-scale migration and settlement of white people. To the British, India was a colony, not a second home.[28]

However, this not mean that there were no migration. Srikanth infact writes:

> Although white people did not flood the region, colonial rule did contribute to voluntary or forced migration of different communities from the rest of India to the north-east. It was not that all migrant communities were economically and culturally superior to the locals. The adivasis who were forcibly brought to work in tea and other plantations and Bengali Muslim peasants who were forced to migrate because of poverty were no exploiters in any sense. (Guha 1977; Schendel 2005; Sharma 2011; Karotemprel and Roy 1990). Further, the negative effects of large-scale immigration of people from other parts of British India to the north-eastern region were confined mostly to the plain areas. By and large, the hill communities retained their traditions and continued to exercise control over their land and resources.[29]

On the issue of cultural domination of tribal people by non tribals, Srikanth (2014) writes:

Socioeconomic, Health and Educational Status of Tribal Communities of India". The Committee came to some important findings:

> Generally, we may conclude, that the Scheduled Tribes in India suffer predominantly from: A) The diseases of underdevelopment (malnutrition, communicable diseases, maternal and child health problems), B) Diseases, particularly common in Scheduled Tribe population (Sickle cell disease, animal bites, accidents) and C) Diseases of modernity (hypertension, high consumption of alcohol and tobacco, stress) (MoTA, 2014: 205)

On economic and education also, the Report pains a grim picture of the tribal population in India.
[26] The North East India comprises of the states of Arunachal Pradesh, Assam, Manipur, Meghalaya, Mizoram, Nagaland and Tripura. They form part of the East Himalayan region which extends from Sikkim eastwards and embraces the Darjeeling Hills of West Bengal. The location of the region is strategically important as it has international borders with Bangladesh, Bhutan, China, Myanmar and Tibet. The area is characterised by rich bio-diversity, heavy precipitation and high seismicity. Total area of the region is about 2,55,168 Sq. Km.
[27] Srikanth, H. (2014): Who in North-east India Are Indigenous?. *Economic & Political Weekly,* XLIX(20), pp. 41-47.
[28] *Ibid.* at 43.
[29] *Ibid.*

> "Advocates of indigenous rights speak not only of the economic deprivation but also the cultural domination that indigenous peoples have had to suffer in colonial and postcolonial states. Here, the experience of north-east India differs considerably. Colonial rule in the region did not wipe out local languages. The native communities in the northeast did not experience the sense of alienation that native children experienced in residential schools in Canada and the US (Littlefield 2001; Miller 2003; Francis 1998: 51-87). Christian missionaries opened schools in remote villages. They learnt the local languages of the people and developed scripts for local dialects. Both preaching and teaching were done in local dialects."[30]

Nothing can illustrate this situation more than the "rat-hole" mining in the state of Meghalaya. The local tribal population comprises largely of the Khasi, Garo and Jaintia tribes. Meghalaya is included in the Sixth Schedule of the Indian Constitution which confers special rights and privileges to the tribal communities. Among the most important right, is the ownership over forest as well as sub-surface mineral. In addition, a wholly tribal elected body in the form of Autonomous District Councils (ADC) exercise powers over the various subject allocated to it which includes natural resources. Thus, a unique system of tribal self-rule (which is in a way visualised in the ILO Convention 169) is operational in the state of Meghalaya. Given the restriction on transfer of land to non tribals, the tribal community has legal control over the land and the resources. The Khasi, Jaintia and Garos 'claim' to be the indigenous people and have organised themselves into organisations to protect their identity.[31] Given this ideal situation, one would have expected sustainable and equitable use as well as distribution of resources. Unfortunately, as the experience in Meghalaya shows, community land, including forests, rivers and streams were mined in the most unscientific manner. The Autonomous District Councils which were completely under the tribal control became the focal point for exploitation of natural resources. Beginning with timber logging, it expanded to coal and limestone mining. The mining was done in the most unscientific manner, without any social and environmental safeguards. The most common method is the "rat hole' mining[32]. The owners of these "rat holes' are the tribal elite, while the workers were mostly non tribal labourers including child labourers from outside the state. Strangely, when it came to using the cheap non tribal labourers for mining and other ancillary activities, the issue of influx of 'outsiders' and the impact on local culture was never generally raised by the so called custodians of tribal identity and culture[33]. National level groups

[30] *Ibid.* at 44.

[31] One such association is the Federation of Khasi, Jaintia and Garo People which was formed in 1989 with the aim to unite the "indigenous" tribes of Meghalaya under one umbrella

[32] Rat Hole mining involves digging of very small tunnels, usually only 3-4 feet high, which workers (often children) enter and extract coal. Rat-hole mining is broadly of two types. - in side-cutting procedure, narrow tunnels are dug on the hill slopes and workers go inside until they find the coal seam. The coal seam in hills of Meghalaya is very thin, less than 2 m in most cases. In the other type of rat-hole mining, called box-cutting, a rectangular opening is made, varying from 10 to 100 sq m, and through that is dug a vertical pit, 100 to 400 feet deep. Once the coal seam is found, rat-hole-sized tunnels are dug horizontally through which workers can extract the coal.

[33] One of the controversial demands of the local tribal groups in Meghalaya is the introduction of Inner Line Permit (ILP). The system of ILP which is operational in the States of Arunachal Pradesh, Mizoram and Nagaland requires prior approval from the State Government before an Indian Citizen can enter the state. The reason for demanding ILP is to protect the tribal culture and way of life from 'outsiders'. However, the state of Meghalaya has seen massive cultural transformation over the last hundred years with very few people retaining their traditional cultural practices.

working on rights of tribal people and well as those working on mining impacted communities[34] as well as those articulating greater community control over natural resources have been largely silent when it came to 'rat hole' mining by tribal communities in Meghalaya. The reason could be that the situation in Meghalaya runs counter to the general narrative of tribal control as a panacea for all issue related to mismanagement of natural resources. Finally, it was as a result of the intervention of India's environmental Court – National Green Tribunal (NGT) in 2014 has led to the stoppage of rat hole mining in the state.

While national and international group working on rights of tribal communities have chosen to remain silent with respect to the situation in Meghalaya, some prominent citizens of Meghalaya brought out a comprehensive Citizens Report titled "Curse of Unregulated Coal Mining in Meghalaya". In Volume I under the head "Introduction" the Report states:

> "Meghalaya has a resource curse. Although, we have been endowed with abundant forests and minerals, these resources have not contributed to the good of our society, because they have been extracted without any regulation or concern for the larger common good. This unregulated, narrow, self-interest based use of natural resources has exacerbated socio-economic inequality, destroyed the environment, heightened criminality, and torn as under our egalitarian tribal social fabric. It also violates Section 39(b) of the Constitution which provides that the ownership and control of the material resources of the community should be so distributed so as to best subserve the common good and, therefore, the State cannot distribute the material resource of the community in any way it likes. The process of distribution must be guided by the constitutional principles including the doctrine of equality and larger public good. The National Green Tribunal's landmark order regarding Unregulated and illegal coal mining in our state therefore came as a wakeup call for Meghalaya society at large. This order has been criticised and appealed against by a small section of locals most of who are coal mine owners, transporters, politicians and administrators who have 'illegally' benefitted out of this unregulated mining and who want things to get back to business as usual."[35]

The coal mining in Meghalaya is an epitome of the situation that exists in other north eastern states where the tribals are the majority. Despite the dominance of the tribal community, national and international groups still consider the tribals not only as indigenous but also marginalised and exploited. The narrative, borrowed from tribal situation across the world and also from other parts of India, are made applicable in every geographical situation, irrespective of its relevance. In the neighbouring state of Assam, the situation has assumed even more serious

Most of the tribal population practice Christianity, the script of the tribal language is Roman and the attire is largely western.

[34] The Mines, Minerals and People (MMP) is one of the most vocal group at the national level raising environmental and social concerns around mining has also been conspicuously silent when it comes to rat hole mining and the role of tribal communities in

[35] Citizen's Report (2018). *Curse of Unregulated Coal Mining in Meghalaya: How Unregulated & Illegal Coal Mining in Meghalaya is Destroying Environment and Dispossessing Tribal People of their Land and Livelihood,* Meghalaya: s.n.

dimension where under the watchful eyes and directions of the Supreme Court[36], the state government is undertaking a detailed process of identifying who the real citizens of India are and who are the "foreigners". In a region marked by recurring flood, the nearly 32 million people are required to now prove through written records that they or their parents were in India prior to July 24, 1971.[37] If they are able to prove this, their names gets included in the National Register of Citizens (NRC). If they are unable to do so, they get branded as "foreigners' who have to be either land up in detention camps or sent to Bangladesh (provided Bangladesh accepts them as their citizens).[38] The main aim of the exercise is to ensure that the only those who originally and ethnically belong to Assam are allowed the rights and privileges as citizens. Though, it is projected that the NRC process aims protect the rights of the "indigenous" people of Assam, in reality it is a process to ensure the continued cultural hegemony of the Assamese speaking people in Assam as opposed to Bengali speaking and other communities which have lived in Assam for generations.

The NRC process has wide support from intellectuals, human rights activists and organisation and others. Some of its most vocal leaders include activists such as Akhil Gogoi whose organisation (Krishak Mukti Sangram Samiti) is affiliated to the National Alliance of People's Movement- a national network of social movement. Akhil Gogoi has openly supported the implementation of NRC and identification of 'foreigners' and has advocated violence against those who are foreigners. The views of activists such as Akhil Gogoi not only find wide support in the state, he is openly supported by most national level human rights groups. On September, 2017 Akhil Gogoi was arrested under the provisions of the National Security Act. News portal - The Wire reported the following about Akhil Gogoi' arrest:

> Opposing the Modi government's decission to grant citizenship to Hindu Bangladeshis residing in the state, non-implementation of the 1985 Assam Accord by the central government and dearth of constitutional safeguards to protect the rights of the indigenous people, Gogoi is reported to have said in the public rally that perhaps the time has come to take up AK 47s against the government instead of the *hengdang*, a traditional Assamese sword used by the Ahom army for defence.
> Though there was widespread protest by civil society groups against the arrest of Akhil

Gogoi, not a single national level human rights groups opposed his open support for violence and campaign to ensure that citizenship rights are not given to non Assamese speaking people. The groups see the NRC as a process to protect the "indigenous" people of Assam from being marginalised in their own home. Barring few exceptions, no effort is ever made by either by the media, rights based activists, commentators and others to understand the true meaning of

[36] The Supreme Court got involved in 2009 after an NGO, Assam Public Works, filed a writ petition for the deletion of illegal migrants' names from voter lists in Assam.
[37] In 1979, All Assam Students' Union (AASU) had launched an agitation during which it demanded that illegal immigrants from Bangladesh be identified and deported. The protest turned violent and finally, the Assam Accord was signed on August 15, 1985 in New Delhi. Assam Accord of 1985 that states all illegal foreigners who came to Assam after 1971 from Bangladesh irrespective of religion have to be deported. This accord also fixed March 24, 1971, as the cut-off date for deportation of all illegal immigrants irrespective of their religion.
[38] Those who are not able to prove their citizenship can prefer and Appeal before a Foreigners Tribunal. However as per Section 9 of the Foreigners Act, 1946 says that "the onus of proving that such person is not a foreigner or is not a foreigner of such particular class or description, as the case may be, shall, not withstanding anything contained in the Indian Evidence Act, 1872, lie upon such person".

the term "indigenous" and how this false narrative of the 'indigenous' has no relevance in the Indian context including the North East.

4. Autochthonous and not Indigenous

The concept of 'autochthonous' becomes relevant in the context of India's North East. In a paper titled "Indigeneity and autochthony: a couple of false twins?" Gaussett, Kenrick and Gibbs in 2011[39] makes a powerful case for making a distinction between 'indigenous' and 'autochthonous'. The first to refer to communities that are truly primitive, marginalised, and discriminated, and the second to denote those who have established superiority in the region, but are apprehensive of future domination by more powerful communities or groups of people. According to Gaussett, et al. "the term autochthonous is more often used with reference to agricultural or industrial populations, who are not necessarily marginal, but rather believe that their resources, culture or power are threatened by 'migrants'. Examples can be found either within national borders, as is the case when 'original' members of an area or town feel threatened by the migration of their neighbours and want to 'protect' themselves from a process of encroachment". On the other hand, according to Gausett, et al. "the term indigenous tends to be used for people who are already marginalised, while autochthonous is generally reserved for people who are dominant in a given area but fear future marginalisation.

The concept of autochthonous has great relevance in India's North East. As Srikanth (2014) observes:

> All the communities in the north-east have not become autochthonous, but in all the native communities, one can see a section that has the attributes of being autochthonous. This section of people, living mostly in urban areas and drawing incomes from nonagrarian sources, has lifestyles and values different from the rest of the population. They live in big bungalows, own costly vehicles, buy luxury items, spend lavishly on entertainment and travel, seek wealth and political power, and in their own interest establish contacts with politicians, businessmen, and other influential persons outside the north-eastern region. Although they regularly attend church and participate in meetings of traditional political institutions, they care little for communitarian values and customary laws that are so dear to indigenous peoples. Indigenous ideologies and movements lose their progressive content once such autochthonous elite develop and begin dominating the economy and politics of native communities.[40]

5. Conclusion

The concept of " Indigenous People" have been applied in the Indian situation by civil society groups, activists as well as by the judiciary without much thought about the true meaning and implications of the term. The term 'indigenous' and 'tribal' continue to be used either together or interchangeably. Importing a western concept and applying it blindly has unfortunately created deep fissures in the Indian society. Rather than highlighting the plight of the marginalised, the

[39] https://www.researchgate.net/publication/227760049_Indigeneity_and_autochthony_A_couple_of_false_twins
[40] Srikanth, H. (2014): Who in North-east India Are Indigenous?. *Economic & Political Weekly,* XLIX(20), pp. 41-47.

concept of 'indigenous' has led to division of the multicultural society on narrow grounds of ethnicity, language, religion and cultural identity. Civil society narrative fails to look beyond the tribal –non tribal and 'indigenous' and 'outsider' binaries. Despite compelling evidence that in a globalised world tribal institutions invariably come under the control of tribal elite who exploit both natural and human resources in the most exploitative manner, proponents of tribal and indigenous rights continue to advocate for more autonomy for tribal institutions, extension of Inner Line Permits and greater control over natural resources. The blind acceptance of the concept of indigenous people is bound to have serious consequences on peace and stability in India's North East. As more and more local communities mistakenly assert their 'indigenous' identity, violence and lawlessness will become the order of the day, with no significant gain for the community in term of their social and economic status. Rather than considering the communities as indigenous, one needs to consider them as autochthonous. There can be legal safeguards to protect the culture and identity of communities that are autochthonous. But such safeguards should be reasonable in no manner harm the interest of those who are at a more disadvantaged position in the society. Also importantly, any legal safeguards for communities which are autochthonous should in no manner lead to division of the society on grounds of religion, race, ethnicity and language. At the end one must not lose sight of the fact that the concept of 'indigenous' people is part of the human rights discourse. If by recognizing and applying the concept of indigenous people, the basic human rights of a large section of so called 'non-indigenous' people are adversely affected, it will indeed be a travesty of the idea of universal human rights.

References

AIPP & ZIF. (2017). *Joint Stakeholders' submission on The situation of the rights of indigenous peoples in India: For 3rd cycle of the Universal Period Review (UPR) of India*.

Bahuguna, K. et al. (2016). Indigenous people in India and the web of indifference. *Down to Earth* , 10 August.

Bijoy, C., Gopalakrishnan, S. & Khanna, S. (2010). *India and the Rights of Indigenous Peoples: Constitutional, Legislative and Administrative Provisions Concerning Indigenous and Tribal Peoples in India and their Relation to International Law on Indigenous Peoples*. , Thailand: Asia Indigenous Peoples Pact (AIPP) Foundation.

Citizen's Report. (2018). *Curse of Unregulated Coal Mining in Meghalaya: How Unregulated & Illegal Coal Mining in Meghalaya is Destroying Environment and Dispossessing Tribal People of their Land and Livelihood,* Meghalaya: s.n.

Daes, E.-I. (2008). An overview of the history of indigenous peoples: self-determination and the United Nations. *Cambridge Review of International Affairs,,* 21(1), pp. 7-26.

Das, N. (2015). Indigeneity, Anthropology and the Indian Tribes: A Critique. *Journal of Adivasi and Indigenous Studies (JAIS)* , II(1), pp. 11-34.

Dhillon, A. (2019). Millions of forest-dwelling indigenous people in India to be evicted. *The Guardian Weekly*, 22 February.

Gausset, Q., Kenrick, J. & Gibb, R. (2011). Indigeneity and autochthony: a couple of false twins. *Social Anthropology,* pp. 135-142.

Ghurye, G. (1963). *The Scheduled Tribe*. Bombay: Popular Prakshan.

Kailas & Others Vs. State of Maharashtra (2011): SCC, SC, 1, p.793.

Kingsbury, B. (1998). "Indigenous Peoples" in International Law: A Constructivist Approach to the Asian Controversy. *The American Journal of International Law,* 92(III), pp. 414-457.

MoTA. (2014). *Report of the High Level Committee on Socio-Economic Level Committee on Economic, Health and Educational Status of Tribal Communities of India* , New Delhi: Government of India.

P. Rami Reddy & Ors. Vs. State of Andhra Pradesh & Ors. (1988): SCC, SC, 3, p.433.

Saiyada Mossarrat Vs. Hindustan Steel Ltd., & Ors. (1988): SCC, SC, 1, p. 272.

Srikanth, H. (2014). Who in North-east India Are Indigenous?. *Economic & Political Weekly,* XLIX(20), pp. 41-47.

Survival International. (2011). *News: Survival International*. [Online] Available at: https://www.survivalinternational.org/news/6875 [Accessed 24 July 2019].

Union of India Vs. Dhanwanti Devi (1996): SCC, SC, 6, p.44.

The Philippine Judiciary as the Beacon Giving Light to Legislations on the Rights of Indigenous Peoples

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Of the three (3) branches of the Philippine government, it is the judiciary that interprets and construes vague provisions of law. The said function is rightfully covered in the judicial power vested to it by the Constitution which is that power which vested in one Supreme Court and in such lower courts as may be established by law. Judicial power includes the duty of the courts of justice to settle actual controversies involving rights which are legally demandable and enforceable, and to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the government. However, the duty of the courts to interpret and construe will only lie if there is an actual case or controversy and if there is ambiguity in the law. This study analysed how can the role of the Philippine judiciary on the rights of indigenous peoples (IPs) under international and local legislations be described. The study revealed that the rights of the IPs are well-provided for, both in the local and international legislations. The Philippine Supreme Court settled actual cases or controversies involving rights of the IPs wherein it has nullified agreement and provision of laws; invalidated government actions; struck down administrative rules; upheld and protected rights of IPs; and clarified functions and jurisdiction of government agency/s. Nonetheless, it can likewise be deduced from the selected jurisprudence that the Highest Court particularly emphasized that although recognition, respect and protection of the rights of indigenous peoples to preserve and develop their cultures, traditions and institutions are vital concerns of the State and constitute important public policies, when in the pursuit of the loftiest ends ordained by the Constitution, the Court finds that the law is clear and leaves no room for doubt, it shall decide according to the principles of right and justice as all people conceive them to be, and with due appreciation of the rights of all persons concerned. Indeed, the Philippine Supreme Court, as the final arbiter of all controversies, upholds and protects the rights of the IPs by interpreting vague provisions of both international and domestic legislations or by their application when there is no ambiguity.

Key terms: judicial power, legislation, ambiguity, indigenous people

Introduction

The 1987 Constitution[1] vested the Philippine Supreme Court and the statutory lower courts with judicial power. This power includes the duty of the courts of justice to settle actual controversies involving rights which are legally demandable and enforceable, and to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government. The Philippine Supreme Court is the only constitutional court and the lower courts are created through legislation. Thus, of the three branches of the government, it is the judiciary that interprets and construes vague provisions of law. Though it is not always that the courts are duty-bound to interpret and construe.[2]

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[1] Article 8. Section 1.

[2] Diaz, N. (2012). *Statutory Construction.* Rex Bookstore: Philippines.

If the law is clear and unambiguous, the courts shall apply the same. Hence, the process of interpretation and/or construction is only done if there is an actual case or controversy and if there is ambiguity in the law.

There is an actual case or controversy when a case is brought to court by party litigants to hear and settle their disputes. If there is no case or controversy, there is no way for the court to construe or interpret the law. On the other hand, there is ambiguity in the law if the same is susceptible of two or more interpretations. There is ambiguity when there is doubtfulness, doubleness of meaning, duplicity, indistinctiveness, or uncertainty of meaning of an expression used in a written instrument. The language used is wanting in clearness or definiteness, difficult to comprehend and distinguish, and of doubtful import. Ambiguity exists if reasonable persons can find different meaning in a statute, document, rule or law.[3]

By employing descriptive research which method only describes situation and does not make accurate predictions, and does not determine cause and effect but is just a statement of affairs as they are present with the researcher having no control over variable, the role of the Philippine judiciary on the rights of indigenous peoples under international and domestic legislation shall be described. Data were obtained from primary sources such as jurisprudence, laws and rules; and secondary source, like books.

1. International and Municipal Laws providing for the rights of IPs

A number of laws, both in the international and municipal planes, appropriately decreed for the rights of indigenous peoples. Below are some of them.

The UN Declaration of the Rights of Indigenous Peoples[4] mandates that indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture. It likewise prescribes states to provide effective mechanisms for prevention of, and redress for any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities; any action which has the aim or effect of dispossessing them of their lands, territories or resources; any form of forced population transfer which has the aim or effect of violating or undermining any of their rights; any form of forced assimilation or integration; and any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them.[5]

This Declaration also recognizes the right of indigenous peoples to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.[6] Nevertheless, under Article 46, Section 1 of the declaration, it was emphasized that nothing therein may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the UN or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent states.

[3] *Ibid.*
[4] This was adopted by the General Assembly on September 13, 2007.
[5] Article 8.
[6] Article 26, Section 1.

Article 27 of the International Covenant on Civil and Political Rights[7] provides that in those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

The 1987 Philippine Constitution[8]ordains that the State, subject to the provisions of this Constitution and national development policies and programs, shall protect the rights of indigenous cultural communities to their ancestral lands to ensure their economic, social, and cultural well-being. The Congress may provide for the applicability of customary laws governing property rights or relations in determining the ownership and extent of ancestral domain.[9]

The policy of the State to recognize, promote, and protect the rights of IPs to their ancestral lands and domains and ensure their cultural integrity or political unity of sovereign and independent States is well-embodied in the Indigenous People's Rights Act.[10]

The People's Small-Scale Mining Act[11] decrees that no ancestral land may be declared as a people's small- scale mining area without the prior consent of the cultural communities concerned. If ancestral lands are declared as people's small-scale mining areas, the members of the cultural communities therein shall be given priority in the awarding of small-scale mining contracts.[12] On the other hand, Republic Act No. 7492[13] emphasizes that no ancestral land shall be opened for mining operations without the prior consent of the indigenous cultural communities concerned.[14] In the event that the members of such indigenous cultural communities give their consent to mining operations within their ancestral land, royalties shall be paid to them by the parties to the mining contract.[15]

The National Integrated Protected Areas System Act of 1992[16] as amended by the Expanded National Integrated Protected Areas System Act of 2018 which was signed into law on June 22, 2018 by the President of the Republic[17] provides that ancestral domains and customary rights shall be accorded due recognition. As part of heritage preservation and pursuant to the need to conserve biologically significant areas, the territories and areas occupied and conserved for and by IPs and communities shall be recognized, respected, developed, and promoted. The ICCs and IPs concerned shall have the responsibility to govern, maintain, develop, protect, and conserve such areas, in accordance with their indigenous knowledge systems and practices and customary law, with full and effective assistance from the NCIP, DENR and other concerned government

[7] Adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966, entered into force on March 23, 1976 in accordance with Article 49.
[8] Was ratified by a nationwide plebiscite on February 2, 1987.
[9] Article 12, Section 5.
[10] Republic Act No. 8371 (1997).
[11] Republic Act No. 7076 (1991).
[12] Section 7.
[13] Republic Act No. 8749, Philippine Mining Act approved on March 3, 1999.
[14] Section 16.
[15] Section 17.
[16] Republic Act No. 7586 approved on June 1, 1992.
[17] Republic Act No. 11038.

agencies. A mechanism for coordination and complementation between the indigenous traditional leadership and governance structures and the NCIP, DENR, government agencies, concerned LGUs and civil society organizations shall be created.

2. Actual Cases and Controversies Involving the Rights of IPs settled by the Philippine Judiciary

Cases and controversies anchored on the rights of indigenous peoples and their claim for ancestral lands have reached the courts of justice invoking judicial wisdom for the settlement of each cause of action seeking final resolution. A discussion of a number of them is presented hereafter.

2.1 Carino vs Insular Government 41 Phil 935; 212 US 449, 53 L Ed. 594 (1909)

Mateo Carino, an Igorot, applied for registration in his name of an ancestral land measuring 146 hectares located in then municipality of Baguio, province of Benguet. The applicant established that he and his ancestors had lived on the land, had cultivated it, and had used it as far as they could remember. He also proved that they had all been recognized as owners, the land having been passed on by inheritance according to native custom. However, neither he nor his ancestors had any document of title from the Spanish crown. The government opposed the application for registration, invoking the theory of jura regalia.

The Court of Land Registration ruled in favour of the petitioner, from which judgment an appeal was taken to the court of first instance of Benguet, on behalf of the government of the Philippines and also on behalf of the United States, those governments having taken possession of the property for public and military purposes. The court of first instance dismissed the application which judgment was affirmed by the Supreme Court of the Philippines. The case was brought to the United States Supreme Court by writ of error.

On appeal, the United States Supreme Court held that the applicant was entitled to the registration of his native title to their ancestral land. The US Supreme Court held that in cases like that of Carino, it is proper and sufficient to say that when, as far back as testimony or memory goes, the land has been held by individuals under a claim of private ownership, it will be presumed to have been held in the same way from before the Spanish conquest, and never to have been public land.

This ruling institutionalized the recognition of the existence of native title to land, or ownership of land by Filipinos by virtue of possession under a claim of ownership since time immemorial and independent of any grant from the Spanish Crown, as an exception to the theory of jura regalia.

2.2 Alcantara vs Commission on the Settlement of Land Problems, et.al. GR No. 145838, July 20, 2001

This is a petition for review on certiorari assailing the decision of the Court of Appeals dismissing the petition for review on certiorari of the decision of the Commission on Settlement of Land Problems (COSLAP) which ordered the cancellation of Forest Land Grazing Lease Agreement No. 542 previously granted to petitioner Nicasio Alcantara.

Alcantara contended that the Court of Appeals erred in ruling that he had earlier recognized the jurisdiction of the COSLAP over the case. He stated further that the appellate court should have considered that the COSLAP does not possess the historical, genealogical and anthropological expertise to act on ancestral land claims, and that it is the National Commission on Indigenous Peoples (NCIP), under the Indigenous People's Rights Act of 1997 which has jurisdiction over such claims. Thus, the decision of COSLAP ordering the cancellation of FLGLA No. 542 and declaring the area being claimed by private respondent as ancestral land is void for having been issued by a body which does not have jurisdiction over said matters.

The private respondent Rolando Paglangan alleged among others, that the dispute between petitioner and the B'laan tribe antedated the creation of the NCIP, hence, filing of the petition for cancellation of the FLGLA with the COSLAP.

On the other hand, the intervenors who were representatives of the Heirs of Datu Abdul S. Pendatun, the Heirs of Sabal Mula and the Gawan Clan alleged that the parcels of land in dispute form part of their ancestral lands, and that they have been in open, continuous, exclusive and notorious possession under claim of ownership of the same.

The Supreme Court upheld the Court of Appeals' ruling that the land being claimed by private respondents belongs to the B'laan indigenous cultural community since they have been in possession of and have been occupying and cultivating the same since time immemorial, a fact which has not been disputed by petitioner.

The Court likewise sustained the Court of Appeals in finding that the Forest Land Grazing Lease Agreement no. 542 issued by the DENR to Alcantara violated Section 1 of PD No. 410 which states that all unappropriated agricultural lands forming part of the public domain are declared part of the ancestral lands of the indigenous cultural groups occupying the same, and these lands are further declared alienable and disposable, to be distributed exclusively among the members of the indigenous cultural group concerned.

2.3 Atitiw vs Zamora GR No. 143374, September 30, 2005

This is a petition for Prohibition, Mandamus and Declaratory Relief as taxpayers, officers and members of the various units of the Cordillera Administrative Region (CAR) seeking to declare paragraph 1 of the Special Provisions of Republic Act No. 8760 or the General Appropriations Act of 2000 directing that the appropriation for the CAR shall be spent to wind up its activities and pay the separation and retirement benefits of all affected officials and employees.

The Supreme Court declared that even assuming that the limitation on the CAR's budget had the effect of abolishing certain offices, the authority of Congress to do so cannot be denied and should be recognized because an office created by the legislature is wholly within the power of that body, and it may prescribe the mode of filling the office and the powers and duties of the incumbent, and if it sees fit, abolish the office.

The Court explained that considering the control and supervision exercised by the President over the CAR and the offices created under EO No. 220, and the indispensable participation of the line departments of the national government, the CAR may be considered more than anything else as a regional coordinating agency of the national government, similar to the regional development councils which the President may create under the Constitution.

The Supreme Court eloquently pronounced that there are fundamental prerogatives that have to be upheld, particularly the powers of Congress over the national purse and to legislate, both of which it exercises in representation of the sovereign people. Neither the good of regional autonomy nor the unique status of the Cordillera people cannot hinder the rule of law and the Constitution.

2.4 Heirs of Dicman vs Jose Carino and the Court of Appeals GR No. 146459 June 8, 2006

This is a petition for review on certiorari under Rule 45 of the Rules of Court questioning the Court of Appeals' decision which affirmed in toto the decision of the RTC Branch 7, Baguio City, La Trinidad, Benguet declaring Jose Carino, herein respondent then defendant as the lawful possessor and the party who has the better right over the land subject matter of that action for recovery of possession filed by the petitioner who sued as compulsory heirs of Ting-el Dicman; and the resolution denying the Motion for Reconsideration of the petitioner.

The Supreme Court did not sustain the argument of the petitioner that Proclamation No. 628 issued by then President Carlos P. Garcia on January 8, 1960 had the effect of "segregating" and "reserving" certain Igorot claims identified therein, including one purportedly belonging to the "Heirs of Dicman" and prohibiting any encumbrance or alienation of these claims for a period of 15 years from acquisition of patent. But by the time the Proclamation had been issued, all rights over the property in question had already been vested in private respondent.

The Court also found that for over 30 years reckoned from the "Deed of Conveyance of Part Rights and Interests in Agricultural Land" dated October 22, 1928 or 20 years reckoned from the Deed of Absolute Sale dated January 10, 1938, Ting-el Dicman or his successors-in interest and Sioco Carino or his estate neglected to take positive steps to assert their dominical claim over the property.

In denying the petition, the Supreme Court ruled that the recognition, respect, and protection of the rights of the indigenous peoples to preserve and develop their cultures, traditions, and institutions are vital concerns of the State and constitute important public policies, however, as the final arbiter of disputes and the last bulwark of the Rule of Law, the Court has always been

mindful of the highest edicts of social justice especially where doubts arise in the interpretation and application of the law.

Thus, when in the pursuit of the loftiest ends ordained by the Constitution, the Court finds that the law is clear and leaves no room for doubt, it shall decide according to the principles of right and justice as all people conceive them to be, and with due appreciation of the rights of all persons concerned.

2.5 Province of North Cotabato vs GRP Peace Panel on Ancestral Domain GR No. 183591 October 14, 2008

One of the substantive issues presented to court for adjudication is whether or not respondents violated constitutional and statutory provisions on public consultation and the right to information when they negotiated and later initialed the Memorandum of Agreement – Ancestral Domain (MOA-AD).

In ruling in the affirmative, the court held that the peoples' right to information on matters of public concern under Sec. 7, Article III of the Constitution is in *splendid symmetry* with the state policy of full public disclosure of all its transactions involving public interest under Sec. 28, Article II of the Constitution. The right to information guarantees the right of the people to demand information, while Section 28 recognizes the duty of officialdom to give information even if nobody demands. The complete and effective exercise of the right to information necessitates that its complementary provision on public disclosure derive the same self-executory nature, subject only to reasonable safeguards or limitations as may be provided by law. The contents of the MOA-AD is a matter of paramount public concern involving public interest in the highest order. In declaring that the right to information contemplates steps and negotiations leading to the consummation of the contract, jurisprudence finds no distinction as to the executory nature or commercial character of the agreement.

Further, an essential element of these twin freedoms is to keep a continuing dialogue or process of communication between the government and the people. Corollary to these twin rights is the design for feedback mechanisms. The right to public consultation was envisioned to be a species of these public rights. At least three pertinent laws animate these constitutional imperatives and justify the exercise of the peoples' right to be consulted on relevant matters relating to the peace agenda.

One, E.O. No. 3 itself is replete with mechanics for continuing consultations on both national and local levels and for a principal forum for consensus-building. In fact, it is the duty of the Presidential Adviser on the Peace Process to conduct regular dialogues to seek relevant information, comments, advice, and recommendations from peace partners and concerned sectors of society.

Two, Republic Act No. 7160 or the Local Government Code of 1991 requires all national offices to conduct consultations before any project or program critical to the environment and human ecology including those that may call for the eviction of a particular group of people residing in such locality, is implemented therein. The MOA-AD is one peculiar program that

unequivocally and unilaterally vests ownership of a vast territory to the Bangsamoro people, which could pervasively and drastically result to the diaspora or displacement of a great number of inhabitants from their total environment.

Three, Republic Act No. 8371 or the Indigenous Peoples Rights Act of 1997 provides for clear-cut procedure for the recognition and delineation of ancestral domain, which entails, among other things, the observance of the free and prior informed consent of the Indigenous Cultural Communities/Indigenous Peoples. *Notably, the statute does not grant the Executive Department or any government agency the power to delineate and recognize an ancestral domain claim by mere agreement or compromise*.

With respect to the second substantive issue of whether or not contents of the MOA-AD violated the Constitution and the laws, the court found that it did violate the constitution.

The court pronounced that MOA-AD cannot be reconciled with the present Constitution and laws. Not only its specific provisions but the very concept underlying them, namely, the associative relationship envisioned between the GRP and the BJE, are unconstitutional, for the concept presupposes that the associated entity is a state and implies that the same is on its way to independence.

It added that while there is a clause in the MOA-AD stating that the provisions thereof inconsistent with the present legal framework will not be effective until that framework is amended, the same does not cure its defect. The inclusion of provisions in the MOA-AD establishing an associative relationship between the BJE and the Central Government is, itself, a violation of the Memorandum of Instructions from The President dated March 1, 2001, addressed to the government peace panel. Moreover, as the clause is worded, it virtually guarantees that the necessary amendments to the Constitution and the laws will eventually be put in place. Neither the GRP Peace Panel nor the President herself is authorized to make such a guarantee. Upholding such an act would amount to authorizing a usurpation of the constituent powers vested only in Congress, a Constitutional Convention, or the people themselves through the process of initiative, for the only way that the Executive can ensure the outcome of the amendment process is through an undue influence or interference with that process.

The court further declared that while the MOA-AD would not amount to an international agreement or unilateral declaration binding on the Philippines under international law, respondents act of guaranteeing amendments is, by itself, already a constitutional violation that renders the MOA-AD fatally defective.

2.6 The City Government of Baguio City, et. al. vs Masweng, et.al. GR No. 180206 February 4, 2009

In their petition, private respondents claimed that the lands where their residential houses stand are their ancestral lands which they have been occupying and possessing openly and continuously since time immemorial; that their ownership thereof have been expressly recognized in Proclamation No. 15 dated April 27, 1922 and recommended by the Department of Environment and Natural Resources (DENR) for exclusion from the coverage of the Busol Forest Reserve. They, thus, contended that the demolition of their residential houses is a violation of their right of

possession and ownership of ancestral lands accorded by the Constitution and the law, perforce, must be restrained.

On the other hand, petitioners asserted that the NCIP has no jurisdiction to hear and decide main actions for injunction such as the one filed by private respondents. They claimed that the NCIP has the authority to issue temporary restraining orders and writs of preliminary injunction only as auxiliary remedies to cases pending before it. Further, they pointed out that the IPRA provides that Baguio City shall be governed by its Charter. Thus, private respondents cannot claim their alleged ancestral lands under the provisions of the IPRA. Petitioners also contended that private respondents are not entitled to the protection of an injunctive writ because they encroached upon the Busol Forest Reservation and built structures thereon without the requisite permit. They also emphasized that the Supreme Court, in Heirs of Gumangan v. Court of Appeals, had already declared that the Busol Forest Reservation is inalienable and possession thereof, no matter how long, cannot convert the same into private property. Even assuming that private respondents have a pending application for ancestral land claim, their right is at best contingent and cannot come under the protective mantle of injunction. Petitioners also claimed that the Busol Forest Reservation is exempt from ancestral claims as it is needed for public welfare. It is allegedly one of the few remaining forests in Baguio City and is the city's main watershed. Finally, petitioners contended that the demolition orders were issued pursuant to the police power of the local government.

The Supreme Court held that while the National Commission on Indigenous Peoples has the authority to issue TROs and writs of injunction, private respondents who erected illegal structures on a portion of Busol Watershed Reservation at Aurora Hill, Baguio City, were not entitled to the relief granted by the Commission. The declaration of the Busol Forest Reservation as inalienable precludes its conversion into private property as the courts have no jurisdictional competence to adjudicate forest lands. Proclamation No. 15 does not appear to be a definitive recognition of private respondents' ancestral land claim as it only identifies the Molintas and Gumangan families, the predecessors-in-interest of private respondents, as claimants of a portion of the Busol Forest Reservation but does not acknowledge vested rights over the same.

2.7 Agnes, et.al. vs Republic GR No. 156022 July 6, 2015

This is a Petition for Review on Certiorari essentially seeking the reversal of the April 24, 2002 Decision of the Court of Appeals in CA-G.R. CV No. 46222, entitled "Republic of the Philippines v. Agnes, et al.," which affirmed the February 23, 1994 Decision[3] of the Regional Trial Court (RTC) of Palawan, Branch 49, Fourth Judicial Region, Puerto Princesa City in Civil Case No. 2262, entitled "Republic of the Philippines v. Aurellano Agnes, et al." The RTC of Palawan decided against the petitioners' return to Calauit and thus held that national interest in the preservation of Calauit as Game Preserve and Sanctuary is the overriding factor which argues against the right of petitioners to return to Calauit. Assuming that the Resettlement Areas provided by Respondent-Republic did not measure up to the expectations of petitioners, the recourse was not to renege on their Agreements by returning to Calauit and contributing to the disturbance or destruction of the Preserve, but to demand that Respondent deliver the fair value of the properties they vacated. Respondent-Republic was found to be not entirely free from blame for what appears

to have been an unwise choice of Relocation Sites and should be given an opportunity to rectify the mistake.

During the pendency of the case, on March 25, 2008, pursuant to Republic Act No. 8371, entitled "The Indigenous Peoples' Rights Act of 1997," the Office of the President, through the National Commission on Indigenous Peoples (NCIP),[50] issued a Certificate of Ancestral Domain Title (CADT) No. R04-BUS-0308-062[51] over 3,683.2324 hectares of land in the Municipality of Busuanga, Province of Palawan, in favor of the Tagbanua Indigenous Cultural Community, which comprised the communities of Barangays Calauit and Quezon, Calauit Island, and Municipality of Busuanga.

Thus, the Supreme Court dismissed the petition for being moot and academic. According to the court, the issuance by the Office of the President of the CADT, an *ostensive* successor to the *Resettlement Agreements*, to the Tagbanua Indigenous Cultural Community (ICC), the resolution of the question on the propriety or impropriety of the latter contract and their effects on the continued stay of the settlers on Calauit appears to have been rendered moot and academic.

Under the CADT, the Tagbanua ICC is given authority "TO HAVE AND HOLD IN OWNERSHIP, *the x xx described ancestral domain as their private but community property, which belongs to all generations of the said Indigenous Cultural Community/Indigenous Peoples*"; and "TO DEVELOP, CONTROL, MANAGE *and* UTILIZE COLLECTIVELY *the said* ANCESTRAL DOMAIN *with all the rights, privileges and responsibilities appurtenant thereto, subject to the condition that the said ancestral domain shall* NOT be SOLD, DISPOSED, *nor* DESTROYED." Section 7 of Republic Act No. 8371 includes the rights of ownership, rights to develop lands and natural resources, right to stay in the territories; right in case of displacement, right to regulate entry of migrants, right to safe and clean air and water, right to claim parts of reservations and right to resolve conflict.

Of significant finding by the court was that the aforequoted provision provides that the right to ancestral domain carries with it the right to "stay in the territory and not to be removed therefrom." Moreover, the CADT was issued notwithstanding the existence of Presidential Proclamation No. 1578, which recognized the existence of private rights already extant at the time. Thus, although the issuance of the CADT in favor of the Tagbanua ICC to develop, control, manage, and utilize Calauit does not affect the propriety or impropriety of the execution of the *Resettlement Agreements per se*, the same, however, gainsays the avowed consequence of said contracts, that is, to remove and transfer the settlers from Calauit to the resettlement areas in Halsey and Burabod.

2.8 Begnaen vs Spouses Caligtan GR No. 189852 August 17, 2016

This is a petition for review on certiorari under Rule 45 assailing the Court of Appeals' decision which reversed and set aside the decision of the Regional Trial Court of Bontoc, Mountain Province and instead reinstated the resolution of the Municipal Circuit Trial Court of Bauko, Mountain Province. The case involved an ancestral land dispute between members of the Indigenous Cultural Community (ICC) particularly the Kankanaey Tribe of Mt. Province.

The basic issue brought to the Supreme Court for its resolution is whether the Court of Appeals in upholding the authority of the National Commission on Indigenous Peoples (NCIP) over the mentioned dispute, to the exclusion of regular courts, committed reversible error.

After Begnaen's complaint was dismissed by the Regional Hearing Office (RHO) of the NCIP, La Trinidad, Benguet on the basis of the respondents' argument that the case should have gone to the council of elders and not through the barangay lupon, as mandated by the Indigenous Peoples' Rights Act (IPRA), he filed a complaint for forcible entry with prayer for writ of preliminary mandatory injunction against respondents before the MCTC of Bauko, Mt. Province. Begnaen claimed that he was the owner of a 125 square-meter parcel of land located at Supang, Sabangan, Mt. Province. He also claimed that on two occasions, respondents - by using force, intimidation, stealth, and threat -entered a portion of the subject property, hurriedly put up a chicken-wire fence, and started building a shack thereon without Begnaen's knowledge and consent.

On the other hand, respondents averred that they owned the area in question as part of the land they had purchased from a certain Leona Vicente in 1959 pursuant to age-old customs and traditions. They introduced improvements evidencing their prior physical possession. Respondents further contended that when petitioner's father Alfonso Begnaen (Alfonso) was still alive, he had always respected their boundary wherein a "GIKAD" or old pine tree lumber was buried and recovered. The "GIKAD" established their boundary pursuant to age-old Igorot customs and traditions. To further mark their boundary, respondents also planted bushes and a mango tree, all of which Alfonso had likewise respected.

The MCTC dismissed the complaint in favor of respondents. However, this was without prejudice to the filing of a case before the RHO of the NCIP, which the MCTC recognized had primary, original, and exclusive jurisdiction over the matter pursuant to the IfjRA. The MCTC further reasoned that the fact that petitioner initially filed a complaint with the NCIP-RHO shows that he recognized the primary jurisdiction of the NCIP. Aggrieved, petitioner-appellant filed an appeal before Regional Trial Court Branch 35 of Bontoc, Mt. Province (RTC).

The RTC reversed and set aside the Resolution and Order of the MCTC, saying that it was the latter court that had jurisdiction over the case for forcible entry. The RTC reasoned that the provisions of the IPRA pertaining to jurisdiction do not espouse exclusivity and thus cannot divest the MCTC of its jurisdiction over forcible entry and unlawful detainer cases as provided by B.P. Big. 129. According to the RTC, IPRA must be read to harmonize with B.P. Big. 129. This ruling was reversed by the CA which set aside the RTC rulings and reinstated the Resolution of the MCTC. In upholding the jurisdiction of the NCIP over the present case, the CA ruled that the passage of the IPRA has divested regular courts of their jurisdiction when the parties involved are members of ICCs/IPs and the disputed property forms part of their ancestral land/domain. Petitioner filed a Motion for Reconsideration, but it was denied by the CA in its questioned Resolution. Hence, this petition.

In denying the petition for review and affirming the decision of the CA upholding the decision of the MCTC, the Supreme Court held that the NCIP is vested with jurisdiction over the parties who are members of the same Indigenous Cultural Community and the subject property

which is ancestral land. The court also declared void the NCIP Rule (Section 5, Rule III of NCIP Administrative Circular No. 1-03 dated April 9, 2003, known as The Rules on Pleadings, Practice, and Procedure before the NCIP) purporting to establish the jurisdiction of the NCIP-Regional Hearing Officer over claims and disputes involving rights of ICCs/IPs as original and exclusive, for expanding the law.

The court found the CA to have erred in reversing the RTC's findings on the jurisdiction of regular courts and declaring that the NCIP "has original and exclusive jurisdiction over the instant case to the exclusion of the regular courts." The appellate court was likewise in error in upholding the NCIP's primary jurisdiction over all claims and disputes involving rights of ICCs/IPs and all cases pertaining to the implementation, enforcement, and interpretation of R.A. 8371. It pronounced that the limited jurisdiction of the NCIP is concurrent with that of the regular trial courts in the exercise of the latter's general jurisdiction extending to all controversies brought before them within the legal bounds of rights and remedies.

On the other hand, it held that the MCTC's dismissal of petitioner-appellant's case for forcible entry against respondents-appellees to be warranted.

The Supreme Court clarified that the limited jurisdiction of the NCIP is concurrent with that of the regular trial courts in the exercise of the latter's general jurisdiction extending to all controversies brought before them within the legal bounds of rights and remedies.

2.9Unduran, et.al. vs Aberasturi, et.al. GR No. 181284, April 18, 2017

This is petitioners' Motion for Reconsideration and Supplemental Motion for Reconsideration of the Supreme Court's en banc Decision affirming the decision and subsequent resolution of the Court of Appeals.

In their Motion for Reconsideration, petitioners maintained that it is the National Commission on Indigenous Peoples (NCIP), not the regular courts, which have jurisdiction over disputes and controversies involving ancestral domain of the Indigenous Cultural Communities (ICCs) and Indigenous Peoples regardless of the parties involved.

Then Motion for Reconsideration and the Supplemental Motion for Reconsideration were denied. The Court held that under Section 66 of the Indigenous Peoples Rights Act (IPRA), the jurisdiction of the NCIP is limited to claims and disputes involving rights of IPs/ICCs where both parties belong to the same ICC/IP group, but if such claims and disputes arise between or among parties who do not belong to the same ICC/IP group, the proper regular courts shall have jurisdiction.

It was reiterated by the Court that the NCIP shall have jurisdiction over claims and disputes involving rights of ICCs/IPs only when they arise between or among parties belonging to the same ICC/IP group because of the qualifying provision under Section 66 of the IPRA that "no such dispute shall be brought to the NCIP unless the parties have exhausted all remedies provided under their customary laws." The Court pointed out further the two conditions set forth in the qualifying provision, i.e. exhaustion of all remedies provided under customary laws, and the Certification issued by the Council of Elders/Leaders who participated in the attempt to settle the dispute that

the same has not been resolved. According to the Court, these two conditions cannot be complied with if the parties to a case either 1) belong to different ICCs/IP groups which are recognized to have their own separate and distinct customary laws, or 2) if one of such parties was a non-ICC/IP member who is neither bound by customary laws or a Council of Elders/Leaders.

On the other hand, if the claims and disputes do not arise between or among parties belonging to the same ICC/IP group, the proper regular courts shall have jurisdiction. Note however that under Sections 52(h) and 53, in relation to Section 62 of the IPRA, as well as Section 54, the NCIP shall have primary jurisdiction over adverse claims and border disputes arising from the delineation of ancestral domains/lands, and cancellation of fraudulently-issued CADTs, regardless of whether the parties are non-ICCs/IPs, or members of different ICCs/IPs groups, as well as violations of ICCs/IPs rights under Section 72 of the IPRA where both parties belong to the same ICC/IP group.

2.10 Heirs of Tunged vs Sta Lucia Realty and Development, Inc. GR No. 231737 March 6, 2018

This is a Petition for Review on Certiorari under Rule 45 of the Rules of Court, where the petitioners questioned the Order of the Regional Trial Court of Baguio City, Branch V dismissing Environmental Case No. 8548-R and the subsequent order denying the Motion for Reconsideration.

The petitioners argued in their Motion for Reconsideration that NCIP has no jurisdiction over their complaint as its jurisdiction covers only claims and disputes involving rights of Indigenous Cultural Communities (ICCs) and IPs only. They pointed out that since the respondents are not ICC/IP members, it is the RTC and not the NCIP that has jurisdiction. It was also emphasized that they are not praying for the issuance of CALTs/CADTs in favour but merely for the recognition of rights under the IPRA to their ancestral land by virtue of their native title. This motion was denied by the RTC.

The Supreme Court in ruling that the outright dismissal of the case by the court of origin was not proper, reiterated its ruling in the case of Unduran, et.al. vs. Aberasturi[18]that the NCIP shall have jurisdiction over claims and disputes involving rights of ICCs/IPs only when they arise between or among parties belonging to the same ICC/IP, pursuant to Section 66 of the IPRA. This was the clear import of the qualifying provision that "no such dispute shall be brought to the NCIP unless the parties have exhausted all remedies provided under their customary laws."

Non-ICCs/IPs cannot be subjected to the special and limited jurisdiction of the NCIP even if the dispute involves rights of ICCs /IPs since the NCIP has no power and authority to decide on a controversy involving rights of non-ICCs/IPs which should be brought before the courts of general jurisdiction.

[18] G.R. No. 181284. April 18, 2017.

3. Analysis of Cases

The abovementioned cases challenged the courts for its interpretation in the ambiguity of the laws. Though each providing different scenarios and question different aspects of the law, the courts provided insight as to its stance on this matter. More importantly, it provided legal certainty for the indigenous people as compared to the US Supreme Court. Whereas the Philippines provided legal certainty in their decisions for the indigenous people, the US Supreme Court provided more lenience on the decisions.

The case of **Cariño vs The Insular Government,**[19] tested the **doctrine of presumptive grant.** In a land registration case elevated to it, the Philippine Supreme Court denied the appellant's argument due to their failure to produce any documentary evidence of the title, except a possessory information that produces effects only to mere possession. The Mortgage Law in 1901 stipulates that a grant is presumed exclusively from the immemorial use and occupation of the land. However, considering the existence in the Philippines of Spanish legislation for the Indies can evict requiring persons in possession of public lands to exhibit their titles or grants thereto for confirmation if found to be good, otherwise, or if the persons had no grants or titles at all, they were evicted from the land. Hence, the **doctrine of presumptive grant** cannot apply in this case. Meanwhile, when discussing the Spanish legislation, notable is the **doctrine of jura regalia** mandating that all lands and natural resources found within the territory of a State are owned by the State. In the Philippine court case Valenton vs Murciano[20], although the State has always recognized the right of the occupant to a deed, the State remained the absolute power until he proves a possession for a sufficient length of time.

Additionally, prior to obtaining his deed from proper administration officers, he must provide them with proof as they always insist for it. Juxtaposed, when brought to the **US Supreme Court** through a writ of error, this decision of the Philippine court was **reversed**. The US Supreme Court held that the acquisition of the Philippines was not for the purpose of acquiring the lands occupied by the inhabitants. It is ordained in the Organic Act of July 1, 1902 that property rights are administered for the benefit of the inhabitants, one who actually owned land for many years cannot be deprived of it for failure to comply with certain ceremonies prescribed either by the acts of the Philippine Commission or by Spanish law. It pronounced that **title by prescription** against the crown existed under Spanish law in force in the Philippine Islands prior to their acquisition by the United States, and one occupying land in the Province of Benguet for more than fifty years before the Treaty of Paris is entitled to the continued possession thereof.

The Supreme Court upheld legal certainty through their binding and conclusive decisions in cases of indigenous land. For example, in the case of Alcantara vs Commission on the Settlement of Land Problems, et.al. the case reaffirmed the credibility of the Court of Appeals when it earlier held that the petitioner is estopped from questioning the jurisdiction of the Commission on the Settlement of Land Problems. The court further sustained the appellate court when it strengthened the basis of the B'laan indigenous cultural community. Based on case records, the land area being claimed by private respondents belongs to the community since they have been in possession of, and have been occupying and cultivating the same since time immemorial. This was undisputed

[19] 212 US 449.
[20] 2 Official Gazette 434.

by the petitioner. Furthermore, the Highest Court similarly held the Forest Land Grazing Lease Agreement No. 542 issued to the petitioner violated Section 1 of Presidential Decree No. 410 otherwise known as Declaring Ancestral Lands Occupied and Cultivated by National Cultural Communities As Alienable and Disposable, and for Other Purposes. It provided that all unappropriated agricultural lands forming part of the public domain are declared part of the ancestral lands of the indigenous cultural groups occupying the same, and these lands are further declared alienable and disposable, to be distributed exclusively among the members of the indigenous cultural group concerned. Thus, the Supreme Court is in consonance to the rule that findings of fact of the Court of Appeals are binding and conclusive upon it as evidenced on record.

In maintaining the indigenous people's rights, the presumption of constitutionality serves necessary in enactments and accordingly facilitates Congress to make laws. In the case **Atitiw vs Zamora,** petitioners filed a petition for prohibition, mandamus, and declaratory relief to the Supreme Court, as taxpayers and officers and members of the various units of the Cordillera Administrative Region (CAR)**.** They sought to nullify paragraph 1 of the Special Provisions of Republic Act No. 8760 otherwise known as the General Appropriations Act of 2000. which provided that the appropriation for the CAR be spent to wind up its activities and pay the separation and retirement benefits of all affected officials and employees. The Supreme Court rejected the argument that the questioned provision is a prohibited rider in contravention of Section 25(2) of the 1987 Constitution. The Constitution forbids provision or enactment in the general appropriations bill which is unrelated specifically to some particular appropriation. Due regard for the **inherent and stated powers and prerogatives of Congress** as well as a staunch observance of the **principle of separation of powers** necessitates that the **presumption of constitutionality** be rendered to its enactments. In denying the petition, the Supreme Court gave prominent importance to the powers of Congress over the national purse and to make laws, more than the goal of regional autonomy nor the unique status of the Cordillera people which definitely cannot thwart the rule of law and the Constitution.

Similarly, the Constitution requires due process in order to prevent the unlawful taking of private property. As with the case of **Heirs of Dicman, et.al. vs. Carino, et.al.,**[21] the Supreme Court assailed the decision of the Court of Appeals which affirmed the decision of the Regional Trial Court, Baguio City, La Trinidad, Benguet that dismissed the complaint for recovery of possession of a parcel of land and declaring the private respondent the lawful possessor and as the party having the better right over the subject land; and the resolution denying their Motion for Reconsideration. In rejecting the argument of petitioners that an earlier presidential proclamation had, in effect "segregated" and "reserved" certain Igorot claims identified therein including one allegedly belonging to the "Heirs of Dicman", and prohibiting any encumbrance or alienation of these claims for a certain period from acquisition of patent, the Supreme Court found that when the proclamation was issued, all rights over the subject property had already been vested in private respondent. According to the Court of Last Resort, property rights may not be defeated or trampled upon by executive issuance alone without violating the **due process guarantees of the Constitution** and may turn out to be unlawful taking of private property to be redistributed for public use without just compensation.

[21] G.R. No. 146459. June 8, 2006.

Ancestral domain can only be delineated by observation and consent from Indigenous communities or people.[22] The Executive Department or any government agency, including the President of the Republic is not granted the power to delineate and recognize an ancestral domain claim by mere agreement or compromise. However, despite near-independent status, any action which would dismember or impair, totally or in part , the territorial integrity or political unity of sovereign and independent States. While the President of the Republic was pursuing the peace process, a consolidation of cases was brought to fore, and the Supreme Court made a thorough delineation of the presidents' powers and the confines of her discretion. The Memorandum of Agreement on the Ancestral Domain Aspect of the Government of the Republic of the Philippines-Moro Islamic Liberation Front Tripoli Agreement on Peace of 2001 was declared to be in violation of the law and the Constitution. The Indigenous Peoples' Rights Act (IPRA) requires, the free and prior informed consent of Indigenous Cultural Communities or Indigenous Peoples, in the recognition and delineation of ancestral domain. Hence, the recognition and delineation of ancestral domain can only be done by indigenous people and communities.

Protection of the indigenous communities extend to forest lands as courts cannot adjudicate such areas. Forest lands issues arose in several cases, but a court's lack of jurisdictional competence have outweighed attempts to control forest lands. One such case is the case of **The City Government of Baguio City, et.al. vs Masweng**, **et. al**.[23] The Supreme Court upheld the injunctive writ issued by the National Commission on Indigenous Peoples against their demolition orders. The Supreme Court **granted the petition, and reversed and set aside the decision of the Court of Appeals.** It was held that while the Commission has the authority to issue temporary restraining orders and writs of preliminary injunction, private respondents who constructed illegal structures on a portion of Busol Watershed Reservation at Aurora Hill, Baguio City, were not entitled to the relief granted by it. Subsequently, the Supreme Court also affirmed the ruling in Gumangan vs Court of Appeals[24] where the Busol Forest Reservation was declared as inalienable and as such its conversion into private property is prohibited. Hence, the long-standing doctrine that the courts do not possess jurisdictional competence to adjudicate forest lands have continually been upheld.

In a similar case, the Highest Court had to determine its ability to assume jurisdiction on the case. The Resettlement Agreements of the settlers from Calauit Island of the municipality of Busuanga, province of Palawan was the subject of two cases before the Petition of Review on Certiorari case entitled Agnes, et.al. vs Republic. The issue concerned the legality of the acts under the Certificate of Ancestral Domain Title No. R04-BUS-0308-062 over 3,683.2324 and the Resettlement Agreements. The Supreme Court held that the issuance of the certificate name contradicts the consequence of the mentioned agreements which is to remove and transfer settlers from Calauit Island of the Municipality of Busuanga, province of Palawan. Due to the certificate name covering the entire area subject to the Resettlement Agreements in favour of the Tagbanua Indigenous Cultural Community, its issuance of the Certificate of Ancestral Domain Title already removes judicial controversy as authority is given by virtue of Republic Act No. 8371 or the Indigenous Peoples' Rights Act of 1997. The Certificate of Ancestral Domain Title "refers to a title formally recognizing the rights of possession and ownership of Indigenous Cultural

[22] G.R. Nos. 183591, 183752, 183893, 183951 and 183962.
[23] G.R. No. 180206. February 4, 2009.
[24] G.R. Nos. 75672 and 75673. April 19, 1989. 172 SCRA 563.

Communities/Indigenous Peoples over their ancestral domains identified and delineated in accordance with the law." As a result the Highest Court refused to assume jurisdiction on this case as it was rendered moot by supervening events. Hence, The Petition of Review on Certiorari case entitled Agnes, et.al. vs Republic was rendered moot because a Certificate of Ancestral Domain Title already granted them rights to the land and thus the highest court refused to assume jurisdiction over the case.

While the previous cases depicted a court's jurisdiction over cases on land rights, the Supreme Court provided originality and exclusivity to National Commission on Indigenous People. In the case of **Begnaen vs Spouses Caligtan**[25] the Supreme Court **denied the petition and upheld the Decision of the Court of Appeals sustaining the Decision of the Municipal Circuit Trial Court dismissing the ejectment complaint and recognizing the primary, original and exclusive jurisdiction over the matter of the National Commission on Indigenous People-Regional Hearing Officer pursuant to the Indigenous Peoples' Rights Act.** This pronouncement of the first level court was prompted by its finding that the petitioner initially filed a complaint with the Regional Hearing Officer of the Commission at La Trinidad, Benguet and when the hearing officer dismissed the complaint for failure of the petitioner to bring the matter first to the council of elders and not through the *barangay lupon,* as ordained by the Indigenous Peoples' Rights Act, the petitioner brought the matter to the Municipal Circuit Trial Court. Thus, the National Commission on Indigenous People-Regional Hearing Officer became the first agency to take cognizance of the petitioner's complaint has jurisdiction over the parties who are members of the same Indigenous Cultural Community, and found that the subject property was an ancestral land. Furthermore, it likewise adjudged the petitioner to be guilty of forum shopping. The complaint filed by the petitioner before the first level court after the hearing officer of the Commission dismissed his complaint without prejudice, did not indicate the previous proceedings before the Commission which is clearly in violation of Section 5, Rule 7 of the Revised Rules of Court against forum shopping. Clearly, the denial of the petition was in consonance with the **rule against the resultant confusion of forum shopping where cunning litigants in their attempt to obtain a favourable decision, file cases simultaneously in several different fora**. Likewise, the Court, in this case, had the opportunity to **declare as void Section 5, Rule III of the National Commission on Indigenous People Administrative Circular No. 1-03 dated April 9, 2003, known as "The Rules on Pleadings, Practice, and Procedure Before the National Commission on Indigenous People for being beyond the provisions of the Indigenous Peoples' Rights Act of 1997** when it established that the jurisdiction of NCIP-Regional Hearing Officer is original and exclusive there being no qualification in the law as to whether such jurisdiction is original and/or exclusive.

However, despite the originality or exclusivity of the Commission, there is a distinction of the limited jurisdiction and primary jurisdiction of the Commission. A case on inheritance of ancestral land, a Petition for Review on Certiorari was brought towards the Regional Trial Court and was swiftly dismissed for lack of jurisdiction. The case was brought towards the Supreme Court declared that the RTC erred in its outright dismissal of the case. The petition was granted and the dismissal by RTC was nullified and reinstated the Environmental Case by pronouncing that Section 66 of the IPRA provides that the National Commission on Indigenous People (NCIP) shall have jurisdiction over claims and disputes involving rights of Indigenous Cultural

[25] G.R. No. 189852. August 17, 2016.

Communities/Indigenous Peoples only when they arise between or among parties belonging to the same ICC/IP. When the parties to such claims and disputes do not belong to the same ICC/IP, i.e., parties belonging to different ICC/IPs or where one of the parties is a non-ICC/ IP, the case shall fall under the jurisdiction of the proper Courts of Justice, instead of the NCIP. In the case Heirs of Tunged vs Sta Lucia Realty and Development, dated March 6, 2018, though most of the respondents belong to the same Talaandig Tribe, they do not all belong to the same ICC/IP and in the interest of fair play, the issue cannot be resolved by the NCIP despite the disputed land being on ancestral Talaandig Tribe land.

4. Conclusion

The Philippine Supreme Court and all lower courts have sustained the rights of IP's and the legal certainty of not only the indigenous people's rights, but also extending to their land, and in understanding the jurisdiction of courts and commissions. It acts as the situs of interpretation and construction of vague provision by seeking the real intention of the initial authors and upholding their initial values and intentions.

In the cases discussed, the courts of justice by virtue of its judicial power nullified agreement and provisions of laws, invalidated government actions, struck down administrative rules, upheld and protected rights, and clarified functions and jurisdiction of concerned government agency/ies. Ultimately, serving as the protector of the IP rights despite the many continual issues that arise over their rights. It is clear through the legal certainty provided, that IP rights piqued as a priority.

Meanwhile, the US Supreme Court had notably taken a more relaxed stance since its departure from a rigid adherence to the doctrine of jura regalia. It progressed towards a cautious but liberal acknowledgment of the concept of native title which adopted by then colonial Philippine Supreme Court. It should also be recognised for the courts function of resolving controversies presented to them for adjudication. Though in several instances, the courts' wisdom is invoked with appeal for the protection of the rights of IPs, a careful balance of the rights of all concerned seen under the lens of justice and fairness, and only on the basis of the facts and the laws, has always been maintained.

The ambiguity of provisions and laws concerning the rights of IPs, implores the Philippine judiciary to adjudge with favour only those who have proved the merit of their cause, with the required quantum of proof, viewed from the standpoint of impartiality and neutrality. The Court of Last Resort does not mind at all to restrain from working on a case involving a question of which its outcome has no actual interest or of which supervening events render the initial question moot. Thus, with the Philippines' judiciary's exemplary approach on the rights of IP, not only is legal certainty provided, but it serves as the beacon of light in the bigger picture.

References

Agnes, et.al. vs Republic GR No. 156022. July 6, 2015.

Alcantara vs Commission on the Settlement of Land Problems, et.al. GR No. 145838. July 20, 2001.

Atitiw vs Zamora GR No. 143374. September 30, 2005.

Begnaen vs Spouses Caligtan. GR No. 189852. August 17, 2016.

Carino vs Insular Government 41 Phil 935. 212 US 449, 53 L Ed. 594.1909.

Diaz, N. C. (2016). *Statutory Construction*. Rex Bookstore. Quezon City, Philippines.

Heirs of Dicman vs Jose Carino and the Court of Appeals. GR No. 146459. June 8, 2006.

Heirs of Tunged vs Sta Lucia Realty and Development, Inc. GR No. 231737. March 6, 2018.

Province of North Cotabato vs GRP Peace Panel on Ancestral Domain GR No. 183591. October 14, 2008.

Republic Act No. 7076. The People's Small-Scale Mining Act. June 27, 1991.

Republic Act No. 7492. The Philippine Mining Act. March 3, 1999.

Republic Act No. 7586 .The National Integrated Protected Areas System Act of 1992. June 1, 1992.

Republic Act No. 8371. The Indigenous People's Rights Act. October 29, 1997.

Republic Act No. 11038. Expanded National Integrated Protected Areas System Act of 2018. June 22, 2018.

The City Government of Baguio City, et. al. vs Masweng, et.al. GR No. 180206. February 4, 2009.

The 1987 Philippine Constitution

The UN Declaration of the Rights of Indigenous Peoples. September 13, 2007.

The International Covenant on Civil and Political Rights. March 23, 1976.

Unduran, et.al. vs Aberasturi, et.al. GR No. 181284. April 18, 2017.