Climate Change Rights: Trends and Developments in the Asia-Pacific Region

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Outline

• Overview of environment and human rights
• Constitutions and human rights
• Climate change rights: institutional developments
• Overview of developments in the Asia Pacific
• Climate change and displacement: inadequacy of international legal framework
• The role of judges

• This paper is based on a chapter distributed to participants, entitled “Climate Change and Human Rights in the Asia-Pacific: A Fragmented Approach”
Human rights and environmental issues

The various links between human rights and environmental issues are most abundantly clear when examining the effects of climate change on people’s basic human rights, including the right to life, livelihood, family, privacy, and the right to food and water security.
UN Special Rapporteur on Right to Environment

In 2013, the Special Rapporteur reported on a mapping exercise which examined the text of human rights treaties, statements by human rights treaty bodies, decisions of regional human rights tribunals, resolutions of the Human Rights Council, statements by states, and a range of other sources.

He stated:

“..it is now beyond argument that human rights law includes obligations relating to the environment.”
Constitutionalizing environmental rights

- Over 140 countries have incorporated some form of recognition of environmental rights in their national constitutions, some in recent years, including in the Asia-Pacific.

- These range from an explicitly stated right to a clean and healthy environment (or similar language) to the use of a ‘right to life’ provision as a basis for achieving the same environmental outcome.
Types of rights

• Robust formulations of environmental rights in The Philippines, South Korea, Indonesia, Nepal, The Maldives, Mongolia, Timor Leste, and Fiji.

• The robust approach is characterized by a direct recognition of a right, sometimes with a corresponding duty on the part of citizens to protect the environment.
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<thead>
<tr>
<th>Jurisdiction</th>
<th>Constitutional provision</th>
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<tr>
<td>Constitution of the Republic of The Philippines</td>
<td>Article 16: The State shall protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature.</td>
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<td>Constitution of the Republic of Korea 1987 (South Korea)</td>
<td>Article 35: (1) All citizens have the right to a healthy and pleasant environment. The State and all citizens shall endeavour to protect the environment. (2) The substance of the environmental right is determined by law.</td>
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<td>Constitution of the Republic of Indonesia 1945 and 2002</td>
<td>Article 28H(1) Each person has a right to a life of well-being in body and mind, to a place to dwell, to enjoy a good and healthy environment, and to receive medical care. Article 28F Every person shall have the right to communicate and to obtain information for the purpose of the development of his/her self and social environment, and shall have the right to seek, obtain, possess, store, process and convey information by employing all available types of channels.</td>
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<td>Constitution of the Republic of Fiji</td>
<td>Environmental rights Article 40 (1) Every person has the right to a clean and healthy environment, which includes the right to have the natural world protected for the benefit of present and future generations through legislative and other measures. (2) To the extent that it is necessary, a law or an administrative action taken under a law may limit, or may authorise the limitation of, the rights set out in this section.</td>
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Use of Constitutional Provisions on the ‘Right to Life’ in the Courts

• In various jurisdictions, where a specific environmental right is not embedded in their constitutions, other constitutional provisions which do not relate specifically to the environment but to the area of human rights, such as the right to life, have been used as a basis for legal actions to achieve environmental outcomes.

• The best-known instances are found in South Asia, where the right to life is used in the courts of Bangladesh, India, and Pakistan.
Recognition of Links between Climate Change and Human Rights

Concluding statement by United Nations Special Rapporteurs on Human Rights 5 June 2015:

• “Climate change is one of the greatest human rights challenges of our generation, and it is our generation that must meet it.

• Indeed, the heads of governments and their climate negotiators represent the very last generation that can prevent catastrophic environmental harm to a vast array of human rights.

• We will continue to support them and all those working to protect human rights from this grave threat.”
What are climate change rights?

Many coincide with broader environmental rights:
1. Right to life
2. Right to adequate food
3. Right to water
4. Right to highest standards of health
5. Right to adequate housing
6. Right to self-determination
7. Right to cultural identity
8. Other rights: property, freedom of residence, freedom of movement
Asia-Pacific regional groupings concerning environmental management, including climate change

South Asian Association for Regional Cooperation (SAARC)

Northeast Asia Subregional Programme for Environmental Cooperation

– Association of South East Asian Nations (ASEAN); Senior Official on the Environment

Secretariat of Pacific Regional Environment Program (SPREP)
Indications of trends

While a coherent regional approach to climate change and human rights has yet to emerge in the Asia-Pacific region, some human rights soft law declarations and informal statements over the past 25 years have included provisions relevant to climate change, and give some indication of regional trends in thinking on these issues.
The boundaries and names shown on this map do not imply official endorsement or acceptance by the United Nations.
The dotted line represents approximately the line of Control in Jammu and Kashmir agreed upon by India and Pakistan. The final status of Jammu and Kashmir has not been agreed upon by the parties.
South Asia Cooperative Environment Programme (SACEP)

- Afghanistan
- Bangladesh
- Bhutan
- India
- Maldives
- Nepal
- Pakistan
- Sri Lanka

Area 4,29,16,000 sq km
More than 1.5 billion people
> One fifth of world population
• 2007 Malé Declaration on the Human Dimension of Global Climate Change: In the South Asian region, the clearly recognized the links between human rights and the effects of climate change, with preambular paragraphs stating: ‘Concerned that climate change has clear and immediate implications for the full enjoyment of human rights’ and ‘Noting that the fundamental right to an environment capable of supporting human society and the full enjoyment of human rights is recognized, in varying formulations, in the constitutions of over one hundred states and directly or indirectly in several international instruments.’
• It called on the United Nations to treat this as a matter of urgency.
South Asian Association for Regional Cooperation

- A recent summit meeting of the SAARC Council issued the Kathmandu Declaration, in which the national leaders, inter alia, directed the relevant bodies/mechanisms to implement
  - the SAARC Agreement on Rapid Response to Natural Disasters
  - the SAARC Convention on Cooperation on Environment
  - The Thimphu Statement on Climate Change, including taking into account the continuing threats posed by climate change to some SAARC Member States.’
Vulnerability in the Maldives
Case study

Even though the Maldives contributes less than 0.01% to global emission of GHGs, the Maldives is in fact one of the most vulnerable countries to climate change and sea level rise.

Seven main areas of vulnerability:
1. land loss and beach erosion
2. infrastructure damage
3. damage to coral reefs
4. impact on the economy
5. food security
6. water resources
7. human health.
President Nasheed chairing the meeting of the Maldives Cabinet
The government of the Maldives has held a cabinet meeting underwater to highlight the threat of global warming before Copenhagen Climate Change COP 2009.

President Mohamed Nasheed and his cabinet signed a document calling for global cuts in carbon emissions.

Ministers spent half an hour on the sea bed, communicating with white boards and hand signals. The president said the UN climate change conference in Copenhagen this December cannot be allowed to fail.

At a later press conference while still in the water, President Nasheed was asked what would happen if the summit fails. "We are going to die," he replied.

The Maldives stand an average of 2.1 metres (7ft) above sea level, and the government says they face being wiped out if oceans rise.

"We're now actually trying to send our message, let the world know what is happening, and what will happen to the Maldives if climate change is not checked," President Nasheed said.

"If the Maldives cannot be saved today we do not feel that there is much of a chance for the rest of the world," he added.
Northeast Asian region

1 China
2 Mongolia
3 Japan
4 North Korea
5 South Korea
6 Russian Federation
Northeast Asia Sub-Regional Programme on Environmental Cooperation

Notwithstanding the fact that the six countries host about one quarter of the world’s population and are responsible for around one third of global carbon emissions, there is no specific NEASPEC programme focused on any aspect of mitigation of or adaptation to climate change, although there have been tentative steps in this direction with the discussion of carbon footprint labelling and low-carbon cities under an eco-efficiency partnership initiative.
Southeast Asian Region

1 Indonesia
2 Malaysia
3 Singapore
4 Philippines
5 Brunei
6 Thailand
7 Vietnam
8 Cambodia
9 Laos
10 Myanmar
11 Timor Leste
Relevant declarations and agreements

Haze Agreement 2002 to address transboundary air pollution – relevant to climate change and human rights

2007 ASEAN Declaration on Sustainability, which devotes a number of paragraphs to climate change and its mitigation

Also ‘ASEAN Cooperation on Climate Change’

Singapore Declaration on Climate Change, Energy and the Environment
Singapore Declaration on Climate Change, Energy and the Environment

- Recognises the impact of climate change on socio-economic development, health, and the environment, and envisages mitigation and adaptation measures, for example, enhancing access to safe drinking water, particularly in developing countries.

- Emphasizes the need to enhance adaptive capacities and for the international community to urgently act to address the growth of global GHG emissions,

- Declaration does not directly mention the issue of human rights, this is nevertheless implied in the reference to vulnerability to climate change in the region and the need to implement appropriate mitigation and adaptation measures to minimize the impact of climate change.
28. Every person has the right to an adequate standard of living for himself or herself and his or her family including:

a. The right to adequate and affordable food, freedom from hunger and access to safe and nutritious food;
b. The right to clothing;
c. The right to adequate and affordable housing;
d. The right to medical care and necessary social services;
e. The right to safe drinking water and sanitation;
f. The right to a safe, clean and sustainable environment.
Pacific Island Region: 14 independent countries and several dependencies (US and France)
Pacific Island Region

Climate change is already disproportionately affecting the islands of the Pacific. Although islanders have done little to contribute to the cause – less than 0.03% of current global GHG emissions – they are among the first to be affected.

Most islands are experiencing climate change impacts on communities, infrastructure, water supply, coastal and forest ecosystems, fisheries, agriculture, and human health. The consequences of sea level rise, sea temperature increases, ocean acidification, altered rainfall patterns, and overall temperature rise will be increasingly felt. SPREP has been designated by Pacific heads of government as the lead agency to coordinate the region’s response to this challenge.

SPREP established the Pacific Adaptation to Climate Change (PACC)
Program. PACC is a partnership between 14 Pacific Island countries, and includes regional and national agencies and communities aimed at making island communities more resilient to the effects of climate change.

‘Working to enhance adaptive capacity on the ground’ and is ‘driving the mainstreaming of climate risks into national development planning and activities.’
The territorial integrity of several island states in the South Pacific is threatened by climate change. In some cases their very existence might be in jeopardy, which makes the rising sea and the more frequent and intense cyclones not only an environmental but even more a security concern. Any adaptation and mitigation measures will only have a limited impact due to small landmass and low elevation of most of those island states.
Case study: climate change, displacement and human rights

One of the most acute and demonstrable effects of climate change on human rights in the Asia-Pacific region is involuntary displacement, both internal and transboundary.

No international organization charged with official responsibility for the issue.
Environmental refugees: forced migration

- Human-induced land degradation, as well as the effects of climate change, or more often a combination of the two, have forced large numbers of people to move from their traditionally occupied land to other land within the country (internally displaced persons), or to cross borders in order to resettle in other countries (transboundary migration).

- Such people are often referred to as “environmental refugees” or “survival migrants”.
Pacific Islands: climate change displacement

In the Pacific, displaced people are at risk of being deprived of both land and traditional livelihoods and they will face special challenges in meeting basic needs.

Displacement is likely to increase the risk of conflicts over land and resources, political instability, and, in particular instances, discrimination and perhaps violence, where old and new communities fail to integrate adequately.
Carteret Islanders: World’s first climate refugees

• Carteret community being displaced by the rising sea
• Around 2,500 people; a culturally unique Halia speaking community.
• 86 kilometers northeast of Bougainville and belongs to Papua New Guinea.
• Several low lying islands with a maximum elevation of only 1.5 meters, which makes them highly vulnerable to floods.
• Constantly rising sea level. Further stress on the shoreline has been caused by an increased number of tidal waves and storm surges
• Gardens and crops destroyed, damaging houses, and finally making the islands uninhabitable by polluting the fresh water supplies with salt water. The islands are virtually uninhabitable.
Carteret islands, Papua New Guinea

AN UNCERTAIN FUTURE

The homes of many Pacific islanders are threatened by increased storm surges, rising sea levels and sinking atolls, creating a growing number of environmental refugees. Here, researcher Taloi Havini highlights the plight of one such group, the Carteret Islanders.

Throughout much of the Pacific, the tribal possession of land underpins the traditions and beliefs that define the Custom or Kastom of each culture. But when ownership of land is threatened or people lose their land, what then becomes of these cultures?

Several Pacific communities in tropical and sub-tropical regions are set to lose their low-lying islands. Increased coastal erosion – caused by changes in climate, weather patterns and unpredictable seasons – are greatly affecting the daily lives of these communities who live by their traditional Kastoms.

This situation now faces the people of the Tulun or Carteret Islands, located 120 kilometres north-east of Bougainville. The Carteret Islanders urgently need to relocate their population of over two thousand to the Bougainville ‘mainland’ and are reportedly the world’s first environmental refugees. Their circular atoll, with a total land area of 0.6 square kilometres, has a maximum land height of just 1.2 metres above sea level.

Over the last ten years, people have witnessed the loss of sixty per cent of their land, and the islands are expected to disappear completely by 2015. Further to the east, the islands of Kiribati and Tuvalu are similarly endangered.
Most important loss felt by inhabitants is losing of their cultural heritage
Carteret Island Atoll
The inadequacy of traditional human rights law in the face of climate-induced displacement

New Zealand court cases involving questions of illustrate some of the complex questions faced by communities and decision-makers.

*Ioane Teitiota v Chief Executive of Ministry of Business, Innovation and Employment*

The applicant was a national of the Pacific atoll State of Kiribati, who had come to New Zealand with his wife on a temporary permit in 2007 and remained there after their permits expired in 2010.
Kiribati: population <200,000
Mr Teitiotota applied for refugee and/or protected person status, but his application was declined.

Mr Teitiotota then appealed this decision to the Immigration and Protection Tribunal. The primary basis for his application was the effect of climate change:

“The appellant claims an entitlement to be recognized as a refugee on the basis of changes to his environment in Kiribati caused by sea-level-rise associated with climate change. The issue for determination is whether the appellant is able to bring himself within the Refugee Convention or New Zealand’s protected person jurisdiction on this basis. The Immigration Act refers to the definition of ‘refugee’ under the 1951 United Nations Convention Relating to the Status of Refugees.”
Definition of refugee under 1951 Refugee Convention

• “… any person who … owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion,

• is outside the country of his [her] nationality and is unable, or, owing to such fear,

• is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”
With regard to the status of Mr Teitiota as a ‘refugee’, Tribunal stated:
‘underlying environmental events and processes favour no civil or political status’ under s 129 of the New Zealand Immigration Act 2009 interpreted in light of the Refugee Convention. Furthermore, the Tribunal denied that the applicant was ‘in danger of being subjected to cruel treatment’ under s 131 of the Act.

After rejection of the application in the first instance, Mr Teitiota applied for leave to appeal to the New Zealand High Court. The essence of the application was again whether the word ‘refugee’ under the New Zealand Immigration Act included those who are refugees because of climate change and its effects.

The Court rejected the appeal

The attempt to expand dramatically the scope of the Refugee Convention was ‘impermissible’

The High Court said: The appellant raised an argument that the international community itself was tantamount to the ‘persecutor’ for the purposes of the Refugee Convention. It completely reverses the traditional refugee paradigm.

Traditionally a refuge is fleeing from his own government or a non-state actor from whom the government is unwilling or unable to protect him.
Appeal Court also stated:

“No-one should read this judgment as downplaying the importance of climate change. It is a major and growing concern for the international community.

The point this judgment makes is that climate change and its effect on countries like Kiribati is not appropriately addressed under the Refugee Convention.”

Accordingly, the findings of the New Zealand Immigration and Protection Tribunal were confirmed and leave to appeal was again dismissed.
Latest institutional developments with relevance for judges

• Oslo Principles on Climate Change Obligations 2015
• Charter of the Global Judicial Institute for the Environment 2016
• World Declaration on the Environmental Rule of Law 2016
Oslo Principles on Climate Change Obligations 2015

• International law entails obligations to act cooperatively to protect and advance fundamental human rights, including in the context of climate change and its effects on people’s ability to exercise such rights.

• **Threatened human rights** include, but are not limited to the right to
  • Life
  • Health
  • Water
  • Food
  • A clean environment
  • Other social, economic and cultural rights
  • The rights of children, women, minorities and indigenous peoples.
Draft
World Declaration on the Environmental Rule of Law
Outcome Document of the 1st IUCN World Environmental Law Congress

I. Preamble

With the goal of building the environmental rule of law as the legal foundation for environmental justice by extending the procedural and substantive principles and protections enshrined in the rule of law to the environmental arena at national, regional and international levels,

Emphasising that humanity exists within nature and that all life depends on the integrity of the biosphere and the interdependence of ecological systems,

Deeply concerned by the anthropogenic stresses on Earth now causing unprecedented transgression of planetary boundaries manifested by climate change, loss of biodiversity, depletion of natural resources, and other environmental degradation, also contributing to insecurity and conflict,
### Principles for Promoting and Achieving Environmental Justice Through the Environmental Rule of Law

All relevant to climate change rights

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<td>Ecological Sustainability and Resilience</td>
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<td>Principle 7</td>
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<td>Participation of Minority and Vulnerable Groups</td>
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<td>Principle 12</td>
<td>Progression</td>
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</table>
Preamble

Recognizing the compelling need for the elaboration, implementation, compliance and enforcement of effective laws in responding to environmental crises, such as biodiversity loss and climate change, and in restoring and maintaining the ecosystems that support the community of life on Earth;

Affirming the critical role of judges in promoting the environmental rule of law, human rights, and climate justice, and the importance of judicial independence and integrity in fulfilling this imperative;
Conclusions

• Legal responses to climate change and human rights in the Asia-Pacific remains largely fragmented

• There are indications that regional responses are becoming more coherent

• National courts and judges can play a larger role in addressing climate change rights, in the absence of robust governmental responses in terms of legislation and its implementation