

**3<sup>rd</sup> ASIAN JUDGES SYMPOSIUM ON LAW, POLICY  
AND CLIMATE CHANGE  
26<sup>TH</sup> - 27<sup>TH</sup> SEPTEMBER 2016  
ASIAN DEVELOPMENT BANK, MANILA, PHILIPPINES**

**DAY 2**

**TOPIC:**

**ADDRESSING CLIMATE CHANGE - EVOLVING LEGAL  
JURISPRUDENCE IN ASEAN REGION AND ITS CHALLENGES**

**Speaker: Mr. Justice Richard Malanjum, Chief Judge of the High Court of Sabah and Sarawak, Malaysia and Justice of the Federal Court of Malaysia**

**Introduction**

Today, climate change is no longer a mere fiction. While there were earlier declarations and treaties related to the environment,<sup>1</sup> climate change was still then a controversial and debatable topic with both sides coming up with strong legal arguments. However, it is the United Nations Framework Convention on Climate Change (UNFCCC) 1992 that clearly demonstrated, despite it being based on the principle of reciprocity between states, the acceptance by the world community of its responsibility in addressing climate

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<sup>1</sup> For instance, the Declaration of the United Nations Conference on the Human Environment from 1972, also known as the Stockholm Conference

change. Hence, as a follow up to UNFCCC, the Kyoto Protocol was adopted in 1997 as an implementation tool to further the efforts of the world community. This Protocol contains rules and procedures on how to curb the amount of greenhouse gas emissions (GHG). Since then the world community and individual nations have been addressing climate change issues with the Paris Agreement on Climate Change 2015 being the latest document on the subject.

There are of course skeptics who still argue that climate change is inevitable. Their view is to let the Earth take its own course. After all Earth for the last 4.5 billion years had experienced tropical climates and ice ages many times over. Indeed the last ice age ended only about 11,000 years ago.<sup>2</sup>

### **Climate Change And Us**

While the skeptics may have their points, it has also been acknowledged that human activities are accelerating the climate change phenomenon.<sup>3</sup> It is these human (anthropogenic) activities that the world community and individual nations are attempting to regulate otherwise the Earth's lower atmosphere temperature could increase to more than 4° Celsius by the end of 21<sup>st</sup> Century<sup>4</sup>.

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<sup>2</sup> <http://www.metoffice.gov.uk/climate-guide/climate-change>

<sup>3</sup> The Intergovernmental Panel on Climate Change (IPCC) reported in 2014 that scientists were more than 95% certain that global warming is mostly being caused by human (anthropogenic) activities, mainly increasing concentrations of greenhouse gases such as carbon dioxide (CO<sub>2</sub>).

<sup>4</sup> <http://www.un.org/climatechange/blog/2015/03/will-weather-like-2050/>

If that happens, the sea level would rise and island nations and coastal cities would mostly likely be inundated.

Based on the study in 2009 conducted by the Asian Development Bank, Indonesia by 2100 can expect temperature increase between 2.1°C to 3.4°C, the Philippines between 1.2° C and 3.9° C by 2080, Singapore between 1.7° C and 4.4° C while Thailand and Vietnam between 2.0° C and 4.0° C by 2100 respectively. And in the worse case scenario with a temperature increase by 4.0° C the sea level could increase up to 59cm.<sup>5</sup> If such event were to happen ASEAN cities like Bangkok, Thailand and Jakarta, Indonesia would likely be partly submerged.<sup>6</sup>

In fact the “Climate Change Vulnerability Mapping for South East Asia” conducted with the assistance of international organizations identified all regions of the Philippines, the Mekong Delta region of Vietnam and the Bangkok region, all of Cambodia, North and East Lao PDR, west and south Sumatra, western and eastern Java would be adversely exposed to sea level rise.<sup>7</sup>

And according to the report “Climate Change 2014: Impacts, Adaptation and Vulnerability”, as a result of global warming, people in Asia would experience "heat stress, extreme precipitation, inland and coastal flooding as well as drought and water scarcity, pose risks in urban areas with risks amplified for those lacking essential

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<sup>5</sup> Asian Development Bank, The Economics of Climate Change

<sup>6</sup> <http://environment.asean.org/asean-working-group-on-climate-change/> & [https://www.ipcc.ch/publications\\_and\\_data/ar4/wg2/en/ch10s10-4-3.html](https://www.ipcc.ch/publications_and_data/ar4/wg2/en/ch10s10-4-3.html)

<sup>7</sup> Moving forward in the climate change policies and practices – Wan Portia Hamzah – Post-2020 Climate Change Regime Formation - Routledge

infrastructure and services or living in exposed areas”<sup>8</sup>. Heat stress, for example, could decrease productivity as it has significant impact especially on the outdoor workers. Worst hit will be Singapore and Malaysia, which could experience decrease in productivity by up to 25%. Expected decrease in productivity will vary across the region, with Indonesia predicted at 21%, Cambodia and the Philippines at 16% and Thailand and Vietnam at 12%<sup>9</sup>.

Vector-borne diseases such as Zika, dengue and malaria will also likely to flourish as a result of global warming.

Three other factors how climate change exposes human to vector-borne diseases<sup>10</sup>:

- i) **Rising global temperatures** can lengthen the season and increase the geographic range of disease-carrying insects. As temperatures warm up, mosquitoes and other warm-weather vectors can move into higher altitudes and new regions farther from the Equator. For instance, in some regions in the United States, warming is lengthening the season for Zika-carrying mosquitoes;
- ii) **Increased rainfall, flooding and humidity** creates more viable areas for vector breeding and allows breeding to

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<sup>8</sup> [http://ipcc-wg2.gov/AR5/images/uploads/WGIIAR5-PartA\\_FINAL.pdf](http://ipcc-wg2.gov/AR5/images/uploads/WGIIAR5-PartA_FINAL.pdf)

<sup>9</sup> <http://www.todayonline.com/world/asia/global-warming-increase-heat-decrease-productivity-south-east-asia-report>

<sup>10</sup> <http://climatenexus.org/learn/public-health-impacts/climate-change-and-vector-borne-diseases>

occur more quickly as eggs hatch faster in hotter climates. For example, officials braced for an increase in risk for Zika and West Nile virus infections after the massive flooding event in Louisiana in August 2016 which increased the breeding habitats for Aedes mosquitoes;

- iii) **Human migration** exposes people to viruses to which they are not immune. As populations migrate in response to climate change they bring diseases to new regions and urban areas. Infectious diseases spread more quickly in overcrowded urban areas.

### **Causes Of Climate Change**

In addressing climate change from the legal perspective it is necessary to determine its cause or causes. Some of the causes may be beyond human control. They may be governed by the laws of Nature in which case there is no issue of evolving legal jurisprudence. But as stated earlier human activities do have a major role either in triggering or accelerating climate change. The major cause in the rise of global temperature is human-caused greenhouse gas (GHG) emissions by the burning of fossil fuels and deforestation<sup>11</sup>. In this sphere legal jurisprudence can evolve as measures are taken to check, control and mitigate the effects on climate by those human activities.

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<sup>11</sup> <http://www.conservation.org/what/pages/climate.aspx> - Deforestation accounts for about 11% of global greenhouse gas emissions caused by human

It has also been scientifically established that there is a causal link between rapid industrialization and deforestation and the rise in Earth's temperature for the past 70 years. This is indicated when the 2011 Durban Conference of Parties (COP17) concluded a set of agreements including the “Durban Platform for Enhanced Action” that sets the agreed target limit of carbon emission by 2020 to not more than 2° C above the pre-industrial levels. It is generally accepted that life can still be sustained without irreversible damage at that level of temperature increase.<sup>12</sup>

Basically there are two main identifiable culprit groups of human-related activities that are responsible for global temperature increase, namely, the unchecked emission by fossil-fueled energy generating stations, automobiles and factories on the one hand while on the other hand it is the unmitigated deforestation.

While ASEAN Member States are not as industrialized as the developed nations they have a fair share in the blame on climate change. Based on the 2013 report the region contributed about 4%

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<sup>12</sup> Note 7

in GHG emission.<sup>13</sup> The blessing of green tropical forests with abundant biodiversity of the region has triggered the human greed for hard wood and agricultural produce. Indeed Southeast Asia region is losing at about 1.2% of its remaining forest area each year with Cambodia, Indonesia and the Philippines reporting annual losses of up to 2% over the last five years<sup>14</sup>. Malaysia has lost an estimated 14.4% (4.5 million ha) of its forests and tree cover from 2000-2012<sup>15</sup>. The culprits are the logging, legal and illegal and land clearing, including the practice of open burning on large scale for the planting of oil palm and other crops. And during the dry seasons uncontrollable wild fires, especially in the peatland areas, would degrade vast areas. Loggings cause the loss of the forests while the open burning for oil palm and other crops and wild fires cause the loss of forests and biodiversity as well.

It is therefore not surprising that most, if not all, of ASEAN Member States have been addressing climate change not only on GHG emissions but also through the prism of deforestation and the methods employed.

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<sup>13</sup> IEA's Report on Southeast Asia Energy Outlook 2015 – page 35. Although ASEAN's share of global emission is rather small, but it almost doubles by 2040

<sup>14</sup> <http://www.unep.org/vitalforest/Report/VFG-15-The-forests-of-southeast-asia.pdf>

<sup>15</sup> Carol Yong, SACCESS and JKOASM, "Deforestation Drivers and Human Rights in Malaysia – A National Overview and two-sub regional Case Studies" 2014

## **Evolving Legal Jurisprudence**

At the outset it should be appreciated that the 10 Member States of ASEAN are still categorized as developing countries with the exception of Singapore and are quite diverse in terms of political, administration and legal and judicial systems. On judicial system some adopted the common law system while the others took the civil law system. As such one should not hope to find from the ASEAN region a robust judicial activism in addressing climate change unlike in some developed nations. Further, climate change litigations that involved attempting to advance policy and seem to be gaining traction in the United States of America are yet to be conceived or at best only at a gestation stage in the ASEAN region. However, the European and Australian approach in climate change litigations, that is, focused almost exclusively on enforcing existing domestic environmental legislations, including by challenging governmental failures at enforcement, is not too alien to the judiciaries of ASEAN Member States.<sup>16</sup>

Notwithstanding, legal responses to climate change in the ASEAN region are evolving. Being very much aware on the challenges posed by climate change, ASEAN Member States are not only increasingly involved at the international level in addressing climate change but they are also formulating laws in order to implement their international obligations, domestic key policies and set goals to meet the impact of climate change<sup>17</sup>. In other words,

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<sup>16</sup> Example - *Oposa v Factoran*, GR No 101083 (SC, 30 July 1993) (Phil).

<sup>17</sup> Stockholm Environment Institute "Climate Change adaptation readiness in the ASEAN countries" Discussion Brief

the focus is also on enhancing adaptation to the impacts of climate change.

It should be noted as well that when one speaks of legal jurisprudence in addressing climate change it should not be focused only on the judiciary. The roles of the Legislature and Executive branches of government are equally important. This is because key policies and legislations are the essential framework to achieve the goals in addressing climate change. With clear policies and legislations, the judiciary will be able to play an important role in interpreting and enforcing those laws so as to ensure that the rationale of those laws are realized effectively.

The primary approach currently adopted in addressing climate change in the ASEAN region is very much based on legislative-executive actions. International, regional and at times bilateral agreements, conventions, protocols, declarations and treaties have been either signed and ratified or signed or noted by ASEAN Member States. And in fact the ASEAN Vision of 2020 calls for “a clean and green ASEAN” with fully established mechanisms to ensure protection of the environment, sustainability of natural resources and high quality of life of people in the region. The follow up of such Vision is verified by the many Declarations and Statements made by the Member States, namely:

- ASEAN Declaration on Environmental Sustainability (13<sup>th</sup> ASEAN Summit in 2007);

- ASEAN Declaration on COP13 to the UNFCCC and CMP-3 to the Kyoto Protocol (13<sup>th</sup> ASEAN Summit in 2007);
- Singapore Declaration on Climate Change, Energy and the Environment (3<sup>rd</sup> EAS Summit in 2007);
- Joint Ministerial Statement of the 1<sup>st</sup> EAS Energy Ministers Meeting in 2007;
- Ministerial Statement of the Inaugural EAS Environment Ministers Meeting (2008);
- ASEAN Joint Statement on Climate Change to COP-15 to the UNFCCC and CMP-5 to the Kyoto Protocol (15<sup>th</sup> ASEAN Summit in 2009);
- ASEAN Joint Statement on Climate Change 2014;
- ASEAN Agreement on Trans-boundary Haze Pollution.

At the domestic level ASEAN Member States have enacted various legislations and regulations intended directly or indirectly to tackle climate change.

## **SINGAPORE**

In order to tackle the haze crisis in Southeast Asia, Singapore has made a bold move with its Trans-boundary Haze Pollution Act

2014 (the Act). This is an extra-territorial action because the Act also claims jurisdiction over non-Singapore entities operating outside Singapore, i.e. companies or individuals with little or no link to Singapore. Examples of potential accused parties or defendants would include Indonesian or Malaysian companies operating in Indonesia. The bases for Singapore's jurisdiction or the claimed "nexus" in such cases would have to reside in the "passive personality" principle, the "protective" principle, and/or the "effects doctrine", given that the harm of haze pollution is felt in Singapore by Singapore citizens. Hence, for example a company on the ground in Indonesia is burning the land and if there is evidence to link it to any of the Singapore-based companies, Singapore can take action against the latter based on the Act 'if they "participate in the management or operational affairs" of the company on the ground. But the problem is securing the evidence. It would be very much dependent on the cooperation of Indonesia. So far there has been no reported prosecution although there are investigations ongoing against several firms.<sup>18</sup> Perhaps Singapore may also consider applying the precautionary principle as a response to the 'problem of proof'?<sup>19</sup>

The Act was inspired by a piece of legislation in the United States of America known as the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), also known as "Superfund". CERCLA is a U.S. federal law that authorizes federal natural resource agencies, states and private individuals to

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<sup>18</sup> The "Haze" Crisis in Southeast Asia: Assessing Singapore's Trans-boundary Haze Pollution Act 2014 by Alan Khee-Jin Tan

<sup>19</sup> Gray v Minister for Planning, Dir-General of the Dep't of Planning & Centennial Hunter Pty Ltd, [2006] NSWLEC 720

recover natural resource damages caused by releases of hazardous substances. CERCLA also establishes a clean up authority that is tasked with the powers to direct the cleaning up of sites contaminated with hazardous substances. In 2006, in the case of *Pakootas v. Teck Cominco Metals Ltd*, the Ninth Circuit Court of Appeals in the U.S. ruled that a CERCLA case could proceed against a Canadian lead-zinc smelter that discharged hazardous untreated effluents into the Canadian part of the Columbia River that carried the effluents southwards into the U.S. state of Washington. The *Pakootas* case was significant in that it was the first to establish that a U.S. court had jurisdiction over a foreign entity for operations conducted abroad that would have been permitted in its own country (Canada) but which violated U.S. law. In January 2008, the U.S. Supreme Court denied certiorari (i.e. declined to hear the case on appeal) and allowed the Ninth Circuit ruling to stand. CERCLA is a remedial statute that aims to address contamination occurring in the U.S. alone. It was never meant to regulate the activities at the source in a foreign country like Canada, something that was wholly within the province of Canadian law. Hence, what was at issue was the smelter's failure to prevent and address the harm occurring in the U.S. – in short, to clean up the mess in the U.S. that it had created. On this point, the District Court had supported the extra territorial application of CERCLA. However, the Ninth Circuit clarified that the release of hazardous substances complained of had occurred within the U.S. and therefore involved a domestic as opposed to extraterritorial application of CERCLA. The *Pakootas* case was eventually resolved when the U.S. government and the smelter entered into a settlement agreement pursuant to which the smelter's U.S.

subsidiary agreed to fund and perform the requisite remedial feasibility studies.

Anyway, Dr. Vivian Balakrishnan, Singapore's minister responsible for the environment has reiterated that the Act is "no silver bullet". He further added that there would be challenges faced. Certainly he is being very frank and realistic in order to manage public expectations of immediate or even short-term relief.<sup>20</sup>

Therefore, only time will tell whether the Act is a silver lining or silver bullet to the haze problem that threatens to engulf Singapore and Malaysia annually.

Be that as it may, the Act proves that human society is quite reactive, in that it only acts swiftly when immediate or imminent harms are felt. In the case of Singapore the trigger is the annual haze problem that invariably contributes to climate change.

## **INDONESIA**

Indonesia has laws governing the issues of open burning and deforestation. They are as follows:

### **a. Forestry Law No. 41 Of 1999, Article 50**

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<sup>20</sup> Article by Dr. Raman Letchumanan - Singapore's Transboundary Haze Pollution Act: Silver Bullet or Silver Lining - <https://www.rsis.edu.sg/rsis-publication/nts/co15021-singapores-transboundary-haze-pollution-act-silver-bullet-or-silver-lining/#.V7rTNaLI8To>

- i. Intentional setting off of fires - 15 years' imprisonment and fine of 5 billion Rupiah;
- ii. Negligent setting off of fires - 5 years' imprisonment and fine of 1.5 billion Rupiah.

**b. Law for Protection and Management of the Environment (Law No. 32 of 2009)**

- i. Minimum punishment of 3 years' imprisonment and fine of 3 billion Rupiah
- ii. Maximum punishment of 10 years' imprisonment and fine of 10 billion Rupiah

However, from the above, the challenge is that the laws lead to confusion for prosecutors as the various punishments prescribed for forest and land fires have not been properly reconciled. It is unclear which Law is the overriding provision – the prosecutors have been charging different perpetrators under both Laws but mostly the Forestry Law<sup>21</sup>.

From the judicial aspect the Indonesian courts have recognized strict liability for actions that cause a 'serious threat to the environment'.<sup>22</sup> Further, in recognizing the rights of the Indigenous communities over their customary lands, the Indonesian Supreme

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<sup>21</sup> Note 17 at page 12

<sup>22</sup> Current Legal Challenges in Climate Change Justice - Achieving Justice and Human Rights in an Era of Climate Disruption [www.ibanet.org/Presidential Task Force Climate Change Justice and Human Rights](http://www.ibanet.org/Presidential_Task_Force_Climate_Change_Justice_and_Human_Rights)

Court had thus indirectly given effect in protecting and preserving the forests.<sup>23</sup>

Some other interesting cases decided by the Indonesian courts are the decision of the Bandung District Court, Dec. No. 49/Pdt.G/2003/PN.BDG (4 Sept. 2003), upheld on appeal, Supreme Court, Dec. No. 1794 K/Pdt/2004 (22 Jan. 2007) (known as the “Mandalawangi Landslide Case”) where the court not only relied on the precautionary principle<sup>24</sup> but also ruled that even though the precautionary principle was not part of Indonesia’s legislation, it was *jus cogens*, that is, it is a fundamental principle of international law and an accepted norm from which no derogation is permitted.

The decision marked for the first time the Indonesian courts had applied the “precautionary principle” to establish causation between the company’s activities and the landslide. The application of this principle was considered as judicial activism since it was not expressly stated in the relevant environmental legislation but only recognized in various international declarations that Indonesia’s legislature had ratified.

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<sup>23</sup> The case of Aman and two others – Putusan Nomor 35/PUU-X/2012

<sup>24</sup> Principle 15 Rio Declaration: ‘In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation’. ‘Principle 15 codified for the first time at the global level the precautionary approach, which indicates that lack of scientific certainty is no reason to postpone action to avoid potentially serious or irreversible harm to the environment. Central to principle 15 is the element of anticipation, reflecting a requirement that effective environmental measures need to be based upon actions which take a long-term approach and which might anticipate changes on the basis of scientific knowledge’. - [www.gdrc.org/u-gov/precaution-7.html](http://www.gdrc.org/u-gov/precaution-7.html)

Briefly the facts of the case are that on 28<sup>th</sup> January 2003 heavy rain poured on Mount Mandalawangi in Garut, West Java. After several hours of heavy rain and at about 10 pm landslide and flood flowed from the mountain thus destroying some villages below, claiming 15 human lives and forcing the villagers to leave their homes and properties. For some years after the disaster the villagers sought for compensation from the Government (i.e. the President, the Minister of Forestry, the Governor of West Java, and the Regent of Garut) and PT. Perhutani, a state-owned forestry company responsible in the area of Mount Mandalawangi. It was the Plaintiff's case that the Government had failed to monitor the activities of the company in managing the forest and had converted the protective forest into production forest. As a result of such poor management there was a landslide after extreme rainfall. The court found conflicting expert witnesses on the question of whether the landslide was due to extreme rainfall or due to Perhutani's inappropriate management of the resource under its control. This, according to the court, amounted to scientific uncertainty concerning the exact cause of the landslide. To resolve the problem the court relied on the precautionary principle adopted in Principle 15 of Rio Declaration. The court stated that although this principle was not included in the Indonesian environmental legislation the court could still rely on it as necessary to guide its decision. The court found that by invoking the precautionary principle the liability rule has shifted from the negligence rule to one of strict liability.<sup>25</sup> The ruling

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<sup>25</sup> 'When an activity threatens harm to human health or the environment, precautionary measures must be taken'. 'Under the Precautionary Principle it

implied that the reliance on the precautionary principle allowed the court to reject the natural disaster defense submitted by the company.

Another case decided by the Indonesian court was the bush fire case, (State v Pt. Adei Plantation/Bangkinang Forest Fires Case (2001)).

The case was the first when the panel of judges applied the principle of corporate liability. The Bangkinang District Court ruled that officers of the company were guilty of intentionally committing acts resulting in pollution and environmental degradation. The High Court and Supreme Court of Indonesia upheld the decision.

## **MALAYSIA**

Article 5(1) of the Malaysian Federal Constitution which reads “*No person shall be deprived of his life or personal liberty save in accordance with law*” has been given fresh interpretation by the Malaysian Court of Appeal in the case of Tan Teck Seng v Suruhanjaya Perkhidmatan Pendidikan [1996] 1 MLJ 261. The Court opined on the expression “life” therein as thus:

*“The expression “life” incorporates all those facets that are integral part of life itself and those matters which go to form*

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is the responsibility of the proponent of an action to establish that a proposed activity will not result in harm’ -  
[precautionarygroup.org/precautionaryprinciple.html](http://precautionarygroup.org/precautionaryprinciple.html)

*the quality of life... it includes the right to live in a reasonably healthy and pollution free environment.”*

In so doing as it did the Court has recognized that it is a constitutional right of a person to have healthy and clean air. Thus, any person that infringes such right by carrying out open burning or allowing excessive smoke emission of his automobile which both activities could contribute to climate change, can be made liable.

Although the Court of Appeal in the case of Ketua Pengarah Jabatan Alam Sekitar & Anor v Kajing Tubek & Ors & Other Appeals<sup>26</sup> (commonly known as the Bakun Dam case) declared that the Environmental Quality Act 1974 did not apply to the State of Sarawak due to the doctrine of federalism in relation to the need for Environmental Impact Assessment (EIA) before the construction of the dam could begin, the case nevertheless highlighted the importance of EIA. As such the forests should not be simply cleared.

As in Indonesia the Malaysian Federal Court, the apex court, has also recognized claims on native customary rights land.<sup>27</sup> The effect of such recognition is that vast areas of forests are preserved where the native communities can forage for their daily needs. Thus, in turn deforestation is being checked.

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<sup>26</sup> [1997] 4 CLJ 253

<sup>27</sup> Superintendent of Land & Surveys Miri Division & Anor v Madeli Bin Salleh (suing as Administrator of the Estate of the Deceased, Salleh Bin Kilong) [2008] 2 MLJ 677

There are also domestic legislations enacted in Malaysia that address climate change directly or indirectly. Some of them are these:

- a. Renewable Energy Act 2011 (Act 725) that provides for the establishment and implementation of a special tariff system to catalyze generation of renewable energy. The clean Energy Cash-back schemes are introduced via this piece of legislations. This approach could help reduce dependency on fossil-fueled generating stations for energy.
- b. Forest and Land Use such as Forestry Act 1984 and Peat Soil Management to prevent forest fires – these laws help in controlling open fire and forest fires thus mitigate deforestation.

Moves to regulate backyard open burning with a compound penalty is also being finalized while plantation operators that practice slash - and – burn could be made to pay compound fee up to RM500, 000.00.<sup>28</sup>

The Courts in Malaysia have also been sensitized on the importance of protecting the environment including the impacts of climate change. Emphasis has been made to all judges and judicial officers on the importance of imposing deterrent sentences on offenders in order to send a clear message to the public. In fact

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<sup>28</sup> <http://www.theborneopost.com/2016/08/31/wan-junaidi-indonesia-has-measures-to-tackle-trans-boundary-haze/>

Judges and judicial officers have been invited to visit the many national parks and forest reserves to appreciate the forests and their beauties. The purpose is to create awareness especially those who have been living in the cities throughout their lives. Not surprising that after those visits many have shifted their perceptions on the roles and importance of the trees and forests to our Earth. Such shift can be gleaned from the serious attention they are now giving to environmental cases including meaningful and deterrent sentences imposed upon those convicted for illegal logging and opening burning. Further, the setting up of the Malaysian Environmental Court not only to deal with criminal offences but also civil matters related to the environment is another proactive step taken by the Malaysian Judiciary in protecting the environment including addressing climate change. Just a few years ago environmental cases were given a very casual attention almost at par with traffic offences and considered as mere technical offences. It is no longer true today. This is largely due to the result of active participation by the Malaysian Judiciary in the ASEAN Chief Justices' Roundtable on Environment spearheaded by ADB.

Recently on 8<sup>th</sup> September 2016, in Sandakan, Sabah, Malaysia, a foreigner was sentenced to two years imprisonment for illegal logging and unlawful possession of Gaharu wood<sup>29</sup>. If the case were heard a few years ago the offender might have been only sentenced to a minimum fine of a few hundred ringgit.

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<sup>29</sup> <http://www.newsabahtimes.com.my/nstweb/fullstory/9404>

Due to the active role played by the Malaysian Judiciary in environmental matters it is interesting to note that the other government agencies dealing with environment are also now taking active roles. They have taken steps to review all the existing legislations and have sent their officers to be trained as capable investigating officers and prosecuting officers. Indeed there has been a domino effect upon the other government agencies after the Judiciary has been sensitized on the need to protect the environment especially the forests.

## **PHILIPPINES**

Philippines, a signatory to the Paris Agreement has promised to reduce its carbon emissions by 70% by 2030 with assistance from the international community. But the initial stand of the present Administration of the Philippines was one of dismissal of the Agreement. The rationale was that the country should go for industrialization in order to create jobs opportunities for her citizens. However recent development seemed to show that the rigid stand has softened. In a news report dated 22<sup>nd</sup> July 2016, the President was reported to have said that he has “misgivings” about the international climate pact. However, he is ready to talk if the Agreement takes into consideration his plans for the country's economy.<sup>30</sup>

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<sup>30</sup> <http://www.rappler.com/nation/140606-duterte-paris-climate-change-agreement>

In spite of the apparent misgiving expressed by the current Administration it must not be overlooked that the Philippines is one of the pioneers when it comes to climate change adaptation<sup>31</sup>. The country has implemented significant policies to adapt the issues on climate change. One may say that an effective adaption framework has to be put into place in the case of the Philippines. She is highly susceptible to hydro-meteorological hazards and other natural destructive phenomena such as typhoons and flooding. Such unfortunate circumstances are aggravated by the high percentage of poverty.

The framework is provided by the Climate Change Act 2009, the National Framework Strategy on Climate Change (2010 - 2022) and the National Strategy Change Action Plan (2011 - 2022).

Accordingly, the legislations that have bearing on climate change are as follows:

**a. Climate**

i. Climate Change Act of 2009

1. Section 2: *Declaration of Policy* - “It is the policy of the State to afford full protection and the advancement of the right of the people to

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<sup>31</sup> Stockholm Environment Institute, “Climate Change Adaptation Readiness in the ASEAN Countries” – Philippines and Vietnam are the adaptation pioneers in ASEAN.

a healthful ecology in accord with the rhythm and harmony of nature.”

2. Section 4: *Creation of the Climate Change Commission*

3. Section 8: *Climate Change Office*

4. Section 10: *Panel of Technical Experts*

5. Section 13: *National Climate Change Action Plan* - “The Commission shall formulate a National Climate Change Action Plan...”

**b. Energy**

i. Renewable Energy Act (2008)

1. Section 2: *Declaration of Policies*

a. Accelerate exploration and development of renewable energy resources and increase utilization of renewable energy

2. Section 4: *Renewable Portfolio Standards*

a. Fraction of electric power must be supplied from eligible Renewable Energy (RE) Resources

3. Section 5: *Feed-in Tariff System*

4. Section 10: *Renewable Energy Market*

5. Rule 5: *General Incentives and Privileges for Renewable Energy Development*

**c. Philippines Clean Air Act of 1999**

i. Section 3: *Declaration of Policies*

1. Holistic national program of air pollution management

ii. Section 4: *Recognition of Rights*

1. The right to breathe clean air

2. Right to utilize and enjoy all natural resources

iii. Chapter 6: Fines and Penalties

1. Section 45 – 48

**d. Sustainable Management of Forest Act (2011)**

i. Executive Order No. 23

1. Creation of anti-illegal logging task force

Meanwhile, the Philippines Judiciary has not been just idling. The Philippines Supreme Court case of Oposa et al. v. Fulgencio S. Factoran, Jr. et al., Supreme Court of the Philippines, G.R. No. 101083, 30<sup>th</sup> July 1993 had effectively imported the principle of intergenerational equity into its procedural doctrine, an essential principle for effective climate change governance.

## **THAILAND**

The Kingdom of Thailand has also been active in addressing climate change especially through legislations and other administrative actions. Some of them are these:

### **a) On Climate Change**

- The establishment of a Greenhouse Gas Management Organization (TGO) B.E. 2550 (2007): The TGO functions as the Designated National Authority for CDM projects in Thailand

### **b) On Energy**

- The introduction of the Energy Conservation Promotion Act of 1992

### **c) On Forest And Land Use**

- The National Park Act (1961)
- The National Forest Reserve Act 1964
- The Forest Act (1941)

## **THE SOCIALIST REPUBLIC OF VIETNAM**

The Vietnam Administration has also introduced legislations intended to address climate change. They are as follows:

### **a. The Law On Climate Change**

- The Decision No. 158/2008/QD-TTg Approving the National Target Program on Response to Climate Change (2008) to set out the master plan for sustainable economic development.

### **b. On Air Protection**

- The Joint Circular No. 47/2011 Providing the Management of the Import, Export of Ozone Layer-Depleting Substances According to the Montreal Protocol on Substances that Deplete the Ozone Layer (2011).

### **c. On Energy**

- The No. 50/2010/QH12 Law on Economical and Efficient use of Energy (2010) to promote policies that encourages organizations and households to use energy sustainably.
- The Decision No. 1855/QD-TTg Approving Vietnam's National Energy Development Strategy up to 2020, with a Vision Toward 2050 (2007) to promote the expansion of nuclear energy generation and consumption to between 15 and 20% of the national energy mix.
- The Decision No. 177/2007/QD-TTg Approving the Scheme on Development of Biofuels up to 2015, with a vision to 2025 (2007) to promote and induce industry level production of bio fuels.
- The No. 79/2006/QD-TTg Decision Approving the National Strategic Program on Energy Saving and Effective Use (2006) to encourage and require household level energy savings through efficient usage.
- The Decision No. 265/QD-TTg Approving the Scheme on Building Research and Development and Technical Assistance Capacity for Atomic Energy Development and Utilization and Safety and Security Assurance (2010).

- The Decision No. 37/2011/QD-TTg Providing the Mechanism to Support the Development of Wind Power Projects in Viet Nam (2011) to outline the plan for wind development and provide economic incentives for expansion.
- The Decision No. 957/QD-TTg Approving the Master Plan on Peaceful Development and Utilization of Atomic Energy Through 2020 (2010).

#### **d. On Forests And Land Use**

- The Decision No. 799/QD-TTg on Prime Minister Approval of Vietnam's REDD+ National Action Plan (2012) to participate in the United Nation's REDD program which seeks to reduce greenhouse gas emissions by mitigating deforestation and degradation.
- The No. 117/2010/ND-CP Decree on Organization and Management of the Special-Use Forest System (2010) to designate certain forests as "special-use" protected areas for conservation, research, or historical significance.
- The Decision No. 2730/QD-BNN-KHCN Promulgation of the Climate Adaptation Framework Action (2010) to promote agricultural development and adaptation strategies accounting for the threat of climate change.

#### **e. On Environmental Impact Assessment**

- The Circular No. 04/2012 Stipulating Criteria for Identification of Establishments Causing Environmental Pollution or Serious Environmental Pollution (2012) to outlines the broad assessment standards for a wide variety of environmental issues.
- The Law on Environmental Protection (2005) to outline environmental standards and waste standards.

### **THE KINGDOM OF CAMBODIA**

Cambodia has also introduced several measures to address climate change but mostly if not all in the form of legislations and statements of policies.

Cambodia is consistently ranked among the top ten countries most vulnerable to climate change and among the three most vulnerable in Asia. This is due in large part to a relatively low adaptive capacity. Efforts made in recent years have allowed Cambodia to develop a comprehensive plan for the climate change response (Cambodia Climate Change Strategic Plan 2014-23), as well as the corresponding key sector plans. Key governmental and non-governmental institutions have also had the opportunity to manage their first climate change projects on a pilot basis.

**a. The Cambodia Climate Change Strategic Plan 2014 – 2023 (CCCSP)**

The first comprehensive national policy document responding to the climate change issue that Cambodia could be facing. The CCCSP reflected the political will, the firm commitment and readiness for reducing climate change impacts on national development and contributing with the international community to global efforts for mitigating GHG emissions under the UNFCCC.

**b. The Law on Forestry (2002)**

This legislation defines the framework for management, harvesting, use, development and conservation of the forests in the Kingdom of Cambodia. The objective of this legislation is to ensure the sustainable management of these forests for their social, economic and environmental benefits, including conservation of biological diversity and cultural heritage.

## **MYANMAR**

Although Myanmar only submitted its initial communication to UNFCCC in December 2012 there were already legislations promoting the adaptation to climate change, namely:

**a. Forest Law Act (1992)**

b. Protected Area and Forest Policy Statement (1995)

Myanmar has also drawn up her latest action plan in the form of Myanmar Climate Change Strategy and Action Plan (MCCSA) 2016 – 2030

There are 6 priority action areas under MCCSA, namely:

- a. Integrating climate change into development policies and plans;
- b. Establishing institutional arrangements to plan and implement responses to climate change;
- c. Establishing financial mechanisms to mobilize and allocate resources for investment in climate smart initiatives;
- d. Increasing access to technology;
- e. Building awareness and capacity to respond to climate change;
- f. Promoting multi-stakeholder partnership to support investment in climate smart initiatives.

**BRUNEI**

The Sultanate of Brunei has a legislation to protect her forest, namely the Forest Act (Chapter 46).

Brunei is also developing or has developed a Nationally Appropriate Mitigation Action Plan but ‘there is no policy document on adaptation.’<sup>32</sup>

## **LAOS**

Laos is the first ASEAN Member State to ratify the Paris Agreement<sup>33</sup>.

Meanwhile there are also legislations and policies declared to address climate change. They are as follows:

### **a. On Air Protection**

- The Ministerial Decision No. 7858/MONRE on the Ozone Depleting Substances Management (2012) – decision that regulates import, export, transit, distribution, and utilization of Ozone Depleting Substances;

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<sup>32</sup> Governance on adaptation to climate change in the ASEAN Region –Koh Kheng Liang and Lovleen Bhullar – International Environmental Law Research Centre – 1 Carbon and Climate Law Review (2011) p.82-90

<sup>33</sup> <http://www.diplomatie.gouv.fr/en/french-foreign-policy/climate/events/article/climate-paris-agreement-ratification-by-laos-07-09-16> & <http://climateanalytics.org/hot-topics/ratification-tracker.html>

- The Regulation No. 2358/STEA-PMO on Control of Imports, exports and Consumption of Ozone Depleting Substances (2004) – earlier regulation on Ozone Depleting Substances.

#### **b. On Energy**

- The Law on Electricity (1997) – establishing rules and regulations for the electricity industry, including government investment in hydropower and regulation of the import/export of energy resources;
- The Law on Minerals (2011) – revises the original Law of Minerals and includes principles and regulatory measures for mineral mining operations, with respect for environmental sustainability;
- The Decree No. 90/PM on Export of Mining Products (2008) – regulating the export of Mining Products;
- The Regulation No. 1116/MEM on Sending Mining Samples for Testing (2010) – regulating the testing of mining sample with the goal of coordinating management of local and international testing;
- The Decision No. 0352/MEM on Import and Export Licensing Procedures of Minerals and Mineral Products (2012);

- The Decision No. 0481/ME on selling and buying Mines [Ores] and Mining Products (2012).

### **c. On Forests And Land Use**

- Land Law (2003) – framework legislation that provides for the management of various types of land, including forestry and agricultural land;
- Law on Urban Plans (1999) - determines principles, regulations and measures regarding the management, land use, construction and building of structures at national and local levels to ensure conformity with policies and laws, aimed at urban development to meet the direction of the national socioeconomic development plan;
- Forest Law (2007) – creating categories of forests (protection, production, and conservation) and promoting sustainable management, preservation, development, and utilization of forest resources;
- Regulation on the approval procedure for proposed Clean Development Mechanism (CDM) (2007) – regulatory document approving the Clean Development Mechanism as part of the REDD Programme on deforestation;

- Council of Ministers Decree No. 117/CCM on the Management and Use of Forests and Forested Land (1989) – Early forest conservation Decree allowing for privatization of certain forested lands provided that owners “preserve, manage, maintain, rehabilitate forests”.

### **The Challenges**

There are numerous challenges in the evolution of common legal jurisprudence on climate change within the ASEAN family. Some have been briefly mentioned above such as the diverse legal and judicial systems. But this has not prevented any of the Member State to nurture the evolution of its own legal jurisprudence as seen above.

Anyway, one observation that may be made after examining the approaches taken by each of the ASEAN Member States in addressing climate change is that while there have been many declarations and joint statements made exalting cooperation among Member States there seems to be still the lingering absence of real collective response as a group.

In fact there were times when conflicts seemed imminent between Member States on the appropriate responses to adopt when confronted with environmental issues. Quite recently the Malaysian Minister of Natural Resources and Environment commented that Malaysia's effort to fight haze would become more difficult if

‘Indonesia does not fully enforce the ban on open burning in the country’. He said that the Indonesian government is still allowing open burning in areas less than two hectares. His hope is that the ‘Indonesian authorities will review the law and if possible abolish it for the benefit of the regional countries’.<sup>34</sup>

But it is not a case of where Indonesia has not been doing anything to address the annual haze problem. She has implemented ‘The Sustainable Peatland Management project began in 2010 across five different pilot sites in the archipelago after it was proposed by the Ministry of Agriculture and had its funding approved by the Indonesian Climate Change Trust Fund (ICCTF).’ Indeed Indonesia and environmentalists are very concerned on ‘the impact of one of the world’s most pressing environmental problems — Indonesia’s ticking carbon time bomb’.<sup>35</sup>

Now, in the event of any dispute between Member States on the appropriate response to be taken in addressing climate change or other environmental issues there is no institution to adjudicate amicably such dispute. As such perhaps the idea of an ‘ASEAN judiciary’ may be ripe for consideration. When that happens the opportunity for the evolution of uniformed legal jurisprudence in the ASEAN region should be promising.

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<sup>34</sup> <http://www.thestar.com.my/news/nation/2016/09/01/open-burning-ban-vital-to-fight-haze-says-wan-junaidi>

<sup>35</sup> <http://www.theborneopost.com/2013/10/02/how-an-indonesian-peatland-project-is-offering-a-new-way-to-curb-forest-fires/>

The ‘ASEAN Way’, premised on consensual decision-making is based on the principles of sovereignty and non-intervention, has also to a certain extent restricted ASEAN in implementing measures at the national level. And a fortiori a judiciary of one Member State could not be expected to have any jurisdiction in another Member State. Such problem has been anticipated by Singapore when enacting the Trans-Boundary Haze Pollution Act 2014.<sup>36</sup>

Indeed the ASEAN Way allows each Member State to act or declare a policy or change of policy on climate change that might be in contradistinction to the stand of the other Member States.<sup>37</sup> It should also be appreciated that all the Member States of ASEAN with the exception of Singapore are still developing. Economic growth is needed to provide job opportunities for their population. But of course it would be preferable if economic growth could be tailored in an environmentally sustainable form.

On an individual basis of ASEAN Member States there are also challenges in the development of legal jurisprudence on climate change. One challenge is on the issue of locus standi. Some have adopted a restrictive approach while some have taken a liberal

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<sup>36</sup> The “Haze” Crisis in Southeast Asia: Assessing Singapore’s Trans-boundary Haze Pollution Act 2014 by Alan Khee-Jin Tan.

<sup>37</sup> <https://www.theguardian.com/environment/2016/jul/19/philippines-wont-honour-un-paris-climate-deal-president-duterte>

approach. For instance, Malaysia is still quite on the former<sup>38</sup> while the Philippines and Thailand are on the latter.<sup>39</sup>

Environmental law is also still quite foreign to many judges and legal practitioners in the ASEAN region. Not all Law Schools in the region have made Environmental law a compulsory subject. As a result the creation of pools of lawyers conversant in environmental laws has been impeded. And added by the lack of interest or awareness among ordinary people it is not surprising that there is hardly any public interest litigation on climate change or related to it filed in courts. This has deprived the courts an opportunity to develop robust legal jurisprudence on climate change.

There is also a need for shift in mind-set by both the governing authorities and the governed in addressing climate change.

Presently too much reliance has been placed on the governing authorities to decide on climate change without the participation and contribution from those who are in fact affected or would be affected by its impacts. Such reliance has created a situation in which laws intended to address climate change are legislated leaving the courts merely to interpret them. As stated above some judges might adopt a plain and literal interpretation of a piece of

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<sup>38</sup> Ketua Pengarah Jabatan Alam Sekitar & Anor v Kajing Tubek & Ors & Other Appeals – Note 24

<sup>39</sup> Resident Marine Mammals of the Protected Seascape Tanon Strait, et al. v. Secretary Angelo Reyes, et al., G.R. No. 180771, 24 April 2012; Rules of Procedure for Environmental Cases in the Philippines; Judge Pairoj Minden, president, Chamber of the Central Administrative Court, and spokesperson, Thailand Administrative Court – 2nd Chief Justices' Roundtable on Environment

legislation thereby defeating the very purpose in enacting the law and at the same time stifled constructive judicial activism.

## **Conclusion**

Upon a quick perusal of the development of environmental jurisprudence in the ASEAN region for the last decade it can be safely said that it is evolving albeit at a slower pace when compared with that of the developed countries. But the important point is that it is evolving including those related to climate change.