

Council of Europe High-level conference

The right to a clean, healthy and sustainable environment in practice

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What are environmental rights?

1. Discussion of environmental rights whether within or separate to a human rights framework encompasses substantive rights, such as clear air, safe climate, healthy ecosystems and biodiversity, safe and sufficient water, healthy and sustainable food and support for indigenous communities. The recent United Nations General Assembly adoption on 28 July 2022 of the right to a clean, healthy and sustainable environment is likely to influence how the right will be described.¹
2. The focus of much recent domestic litigation seeking to enforce an environmental right, whether through a human right to life, or as a constitutional right to a clean, safe and sustainable environment, has been addressing climate change impacts. According to the Sabin Center for Climate Change global climate change litigation database based at Columbia University there have been 32 suits against governments (excluding the United States of America) relying on the 'right to a healthy environment.'² Suits were filed in domestic courts in the following regions:
 - a. two suits in Africa;
 - b. six suits in Asia;
 - c. sixteen suits in Central and South America.
 - d. five suits in Europe.

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¹ *The human right to a clean, healthy and sustainable environment*, GA Res A/RES/76/300, UN GAOR, 76th sess, Agenda item 74(b), UN Doc A/76/L/75 (26 July 2022, adopted 28 July 2022) <<https://digitallibrary.un.org/record/3982508?ln=en>>.

² 'Climate change litigation databases', *Sabin Center for Climate Change Law* (web page, accessed 26 April 2023) <<http://climatecasechart.com/non-us-case-category/right-to-a-healthy-environment/>>. Three suits were commenced in an international jurisdiction.

3. The means of achieving these substantive environmental rights in some contexts include undertaking adequate environment impact assessment and strategic environmental assessment.
4. Important procedural rights include ensuring access to justice such as the ability to take action in courts and tribunals, access to environmental information, right to public participation in decision-making, promoting free, prior and informed consent for indigenous and local communities, considering the circumstances of vulnerable groups such as women and children and indigenous communities, and supporting rights for environmental human rights defenders. These procedural rights are well defined in the 1998 Aarhus Convention³ and the Escazu Agreement⁴ which entered into force in 2021 in Latin America and the Caribbean.
5. Courts and therefore judges have important roles in achieving the implementation of these substantive and procedural rights. For example, a key procedural right in relation to access to justice is access to courts to obtain remedies for breaches of rights. The ability of citizens/civil society to access courts will depend on numerous factors, including rules of court and legislation in relation to standing to sue.

Complexity of diverse jurisdictions and legal systems

6. Domestic courts in many jurisdictions are considering environmental rights. My consideration of the practical implementation of the right to a clean, healthy and sustainable environment will focus on the Asia-Pacific region and the role of domestic courts. Superior courts in the South Asian jurisdictions of India, Pakistan, Nepal and Bangladesh have lead the way in cases recognising and giving effect to environmental and related rights, and courts in these jurisdictions have imposed innovative remedies. Within the wider Asian region, I will focus on East and Southeast Asia and Oceania given my esteemed fellow panellist from South Asia Justice Malik from the Supreme Court of Pakistan

³ *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*, United Nations Economic Commission for Europe, opened for signature 25 June 1998, 2161 UNTS 447 (entered into force 30 October 2001).

⁴ *Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean*, opened for signature 27 September 2018, 3397 UNTS (entered into force 22 April 2021).

who has far greater familiarity with that region. The important caselaw in Latin America will also no doubt be referred to by my esteemed fellow panellist Judge Lorenzetti of the Supreme Court of Argentina.

Asia-Pacific region diversity

7. The Asia-Pacific region includes a great variety of nations with diverse cultures, religions, economies, histories, and, not least, legal systems.
8. In the Pacific region the Pacific Community (SPC) was founded in 1947 with 22 nations in addition to founders Australia, France, New Zealand, the United Kingdom and the USA.⁵ The Secretariat of the Pacific Regional Environment Programme (SPREP) is a partner agency of SPC. The Pacific Forum (a regional organisation facilitating dialogue between its 18 members) recently released its 51st Leaders Communique which reaffirmed the urgency of action on climate change to limit global warming to 1.5 degrees celsius.⁶

ASEAN and human/environmental rights

9. The Association of Southeast Asian Nations (ASEAN) countries has 10 member states in Southeast Asia.⁷ The ASEAN Intergovernmental Commission on Human Rights (AICHR) was established 2009. The ASEAN Human Rights Declaration was made in 2012.⁸ Article 28F identifies the right to a clean, safe and healthy environment. The Commission has been working on a possible human rights framework agreement for the ASEAN region since 2014. It also has a working group developing the ASEAN framework on environmental rights.

⁵ The 22 nations are American Samoa, Cook Islands, Federated States of Micronesia, Fiji, French Polynesia, Guam, Kiribati, Marshall Islands, Nauru, New Caledonia, Niue, Northern Mariana Islands, Palau, Papua New Guinea, Pitcairn Islands, Samoa, Solomon Islands, Tokelau, Tonga, Tuvalu, Vanuatu and Wallis and Futuna. 'Members', *Pacific Community* (webpage, accessed 26 April 2023) <<https://www.spc.int/our-members/>>.

⁶ Pita Ligaiula, '51st Pacific Islands Forum Leaders Communique 2022', *PINA* (webpage, 18 July 2022) <<https://pina.com.fj/2022/07/18/51st-pacific-islands-forum-leaders-communique-2022/>>>.

⁷ The 10 member states are Brunei Darussalam, Cambodia, Indonesia, Lao PDR, Malaysia, Myanmar, Philippines, Singapore, Thailand and Vietnam. 'ASEAN Member States', *Association of Southeast Asian Nations* (webpage, accessed 26 April 2023) <<https://asean.org/member-states/>>.

⁸ 'ASEAN Human Rights Declaration', *Association of Southeast Asian Nations* (19 November 2012) <<https://asean.org/asean-human-rights-declaration/>>.

Environmental constitutionalism in the Asia-Pacific

10. The large number of national constitutions which include an environmental right or environmental focused human right has expanded substantially since the 1970s.⁹ In several jurisdictions such rights are enforceable and have been used by civil society before diverse courts. In more than 100 states the right to a healthy environment has gained constitutional recognition and protection.¹⁰ A large number of countries in the Asia-Pacific region include an environmental right in their constitution and that has enabled several cases to be brought in reliance on those rights.

Caselaw in Asia-Pacific region

Philippines

11. The Philippines legal system is predominantly a mix of civil law and common law systems, as well as indigenous customary law and a distinct Muslim legal system for the Muslim minority.¹¹ The Philippines Constitution states that ‘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.’¹²
12. *Oposa v Factoran* (1993) is a well-known case in the region.¹³ A group of children challenged timber licence agreements on the basis that deforestation was causing environmental damage to themselves as well as future generations. Their right to do so was recognised by the Supreme Court of the Philippines in its landmark judgment on a motion to dismiss, which upheld the standing of the children. The Supreme Court found that their complaint demonstrated prima facie the violation of the right to a

⁹ United Nations Environment Programme, *Environmental Rule of Law* (First Global Report, January 2019) 156, 159 <<https://www.unep.org/resources/assessment/environmental-rule-law-first-global-report>>.

¹⁰ John H. Knox, *Human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, UN GAOR, 73rd sess, Agenda Item 74(b), UN Doc A/73/188 (19 July 2018).

¹¹ ‘Philippines’, *Council of ASEAN Chief Justices* (webpage, accessed 26 April 2023) <<https://caci-ajp.org/philippines/>>.

¹² *Constitution of the Republic of the Philippines* 1987 Art II s 16.
<<https://www.officialgazette.gov.ph/constitutions/1987-constitution/>>.

¹³ *Oposa v Factoran* (1993) G.R. No. 101083, 224 S.C.R.A 792 (Supreme Court of Philippines)
<<http://hrlibrary.umn.edu/research/Philippines/Oposa%20v%20Factoran,%20GR%20No.%20101083,%20July%2030,%201993,%20on%20the%20State's%20Responsibility%20To%20Protect%20the%20Right%20To%20Live%20in%20a%20Healthy%20Environment.pdf>>.

balanced and healthy ecology. The case was remanded back to the trial court for further determination.¹⁴

13. In *Metropolitan Manila Bay Development Authority v Concerned Residents of Manila Bay* (2008),¹⁵ the Supreme Court of the Philippines again affirmed the constitutional right to a healthy environment in granting relief to the plaintiff who sued several government agencies seeking orders requiring the clean-up, rehabilitation and protection of Manila Bay. The Bay was heavily polluted. A writ of continuing mandamus was issued requiring clean up to be carried out and provision of progress reports to the court.

Indonesia

14. Indonesia's legal system is a mix of civil law, customary law and sharia law.¹⁶ The Indonesian Constitution provides that every person shall have the right to enjoy a good and healthy environment.¹⁷
15. In *Indonesian Youths and Ors v Indonesia*,¹⁸ the plaintiffs filed a complaint against the Indonesian government on 14 July 2022 in the Indonesian National Human Rights Commission concerning climate change impacts on youth and affected groups facing life-threatening hazards, reduced physical and mental well-being, increased health risks, food and water insecurity and disruption. Rights include the right to life, the right to a good and healthy environment inter alia. The violation of human rights guaranteed in the Indonesian Constitution is occurring by the Indonesian Government not taking the necessary mitigation and adaptation measures to prevent temperature rises above 1.5 degrees celsius.

¹⁴ Ma Soccoro Z Manguiat, Vincente Paolo B Yu III, 'Maximising the value of *Oposa v Factoran*' (2003) 15(3) *Georgetown International Environmental Law Review* 487, 488.

¹⁵ *Metropolitan Manila Development Authority v Concerned Residents of Manila Bay* (2008) G.R. 171947-48 (Supreme Court of Philippines) <<https://leap.unep.org/sites/default/files/court-case/COU-158533.pdf>>.

¹⁶ 'Indonesia', *Council of ASEAN Chief Justices* (webpage, accessed 26 April 2023) <<https://caci-ajp.org/indonesia/>>.

¹⁷ *Undang-Undang Dasar* [Constitution of the Republic of Indonesia] 1945 Art 28H(1).

¹⁸ Sabin Center for Climate Change Law, 'Indonesian Youth and Ors v Indonesia', *Climate Change Litigation Databases* (webpage, accessed 26 April 2023) <<http://climatecasechart.com/non-us-case/indonesian-youths-and-others-v-indonesia/>>.

16. In *Citizen Lawsuit re: Jakarta air pollution* decided in 2019, the District Court found that the President of Indonesia had failed to tackle air pollution in Jakarta and ordered monitoring stations and other measures to improve the city's air quality in a citizen lawsuit brought by 32 plaintiffs.¹⁹ The court held the defendants, which also included the Minister of Environment and Forestry, Minister of Home Affairs, Minister of Health and the Governor of Jakarta, in this case violated human rights by failing to take the necessary actions to fulfill the right to a good and healthy environment.²⁰ This decision was upheld by the Jakarta High Court in 2022 after the Central Government appealed the decision, affirming that a right to clean air is a human right protected by the Indonesian Constitution.

Thailand

17. Thailand is fundamentally a civil law system. Under the Constitution of Thailand, the Thai people have the right to manage, maintain and utilise, and the duty to support the conservation and protection of natural resources, the environment and biodiversity in a balanced and sustainable manner.²¹ The State shall, subject to the participation and benefit of the local community, 'conserve, protect, maintain and use or arrange for utilisation of natural resources, environment and biodiversity in a balanced and sustainable manner...'²² Nor will the State permit an undertaking that may severely affect natural resources and environment quality without an impact assessment on the community and public hearing of relevant stakeholders.²³

18. Fifty villagers, residents of Omkoi, filed a lawsuit in the Chiang Mai Administrative Court concerning the impacts of a coal mine on their environment and livelihoods. They sought revocation of mining concessions issued by a government agency because of the breach of various national laws and in light of international

¹⁹ *Citizen Lawsuit re: Jakarta air pollution* Decision No. 374/Pdt.G/LH/2019/PN Jkt.Pst (Central Jakarta District Court of Indonesia).

²⁰ Detania Sukarja and Barran Hamzah Nasution, 'Revisiting Legal and Ethical Challenges in Fulfilling Human Right to Clean Air in Indonesia' (2022) 13(5) *Jurnal HAM* 557, 574-575.

²¹ *Constitution of the Kingdom of Thailand 2017* ss 43.2, s 50.8

<https://www.constituteproject.org/constitution/Thailand_2017.pdf?lang=en>.

²² *Ibid* s 57.

²³ *Ibid* s 58.

obligations.²⁴ The court was asked to revoke the mining concessions because of impacts on the Karen way of life, health effects from mine emissions, loss of natural resources and environmental harm and loss of agricultural land. One issue raised by the plaintiffs was the lack of ability provided to them to participate in the environment impact assessment process considering the mine approval.

19. A temporary injunction suspending mining was issued pending a final hearing.²⁵ The judgment reaffirmed the right to live in a good environment and recognized the right to meaningful participation in the community. The court referred to the United Nations Human Rights Council resolution of 8 October 2021 and the United Nations General Assembly resolution of 28 July 2022 recognizing a clean, healthy and sustainable environment as a human right in the judgment.

South Korea

20. South Korea is located in East Asia. It is not a member state of the ASEAN. South Korea is a civil law legal system.²⁶
21. South Korea's Constitution includes a right to a healthy and pleasant environment, as well as a duty of citizens to endeavour to protect the environment.²⁷
22. The interesting case of *Do-Hyun Kim et al v South Korea* has been underway since 2020. The plaintiffs are youth climate activists who are asserting in the Constitutional Court of South Korea that the climate change law of South Korea (and a Presidential decree made under it setting the emissions reduction target) violates their constitutional rights including the right to life, right to live in a clean and healthy environment, the obligation to

²⁴ Sabin Center for Climate Change Law, 'Residents of Omkoi v. Expert Committee on EIA Consideration and the Office of Natural Resources and Environmental Policy and Planning', *Climate Change Litigation Databases* (webpage, accessed 26 April 2023) <<http://climatecasechart.com/non-us-case/fifty-representatives-of-the-residents-of-omkoi-v-expert-committee-on-eia-consideration-in-the-mining-and-extracting-industry-and-the-office-of-natural-resources-and-environmental-policy-and-planning/>>.

²⁵ Ibid.

²⁶ Subin Cho, 'A brief introduction to the Korean Judicial System and Court Hierarchy' (ALC Briefing Paper 13, 2021) Melbourne Law School, The University of Melbourne, 4 <https://law.unimelb.edu.au/_data/assets/pdf_file/0011/3899198/ALC-Briefing-Paper-13_Cho.pdf>.

²⁷ *Constitution of the Republic of Korea* Art 35(1) <<https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/67127/98324/F2042155478/KOR67127%20English.pdf>>.

prevent natural disasters and the obligation to protect health and safety.²⁸ The target of a 24% cut in emissions from 2017 by 2030 is argued to be too weak to keep global warming to under 2 degrees celsius.

23. A further novel case was commenced in the District Court of Seoul.²⁹ The claim relied on the constitutional right to a healthy and pleasant environment. In March 2022, a Korean national and three Tiwi Islanders filed a suit seeking an injunction against the Korea Trade Insurance Corporation and Korea Export Import Bank. Those organisations plan to provide credit for a Santos development seeking to exploit the Barossa Gas reserve near the Tiwi Islands off the coast of the Northern Territory in Australia. The plaintiffs, traditional owners of the Tiwi Islands, alleged inter alia that this project will cause environmental harm including by emissions of CO2 and that the development is incompatible with the Paris Agreement. The Court dismissed the case in May 2022.³⁰

Papua New Guinea

24. Papua New Guinea's legal system is a mix of common law and customary law.³¹ A national goal of the Constitution of Papua New Guinea is that its natural resources and environment be conserved and used for the collective benefit of all Papua New Guineans, and be replenished for the benefit of future generations.³² All governmental bodies have a duty to apply and give effect to the national goals.³³

²⁸ 'Constitutional Complaint', Complaint in *Do-Hyun Kim et al v South Korea*, 13 March 2023 <http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2020/20200313_NA_complaint-2.pdf>; Sabin Center for Climate Change Law, 'Do-Hyun Kim et al. v. South Korea', *Climate Change Litigation Databases* (webpage, accessed 26 April 2023) <<http://climatecasechart.com/non-us-case/kim-yujin-et-al-v-south-korea/>>

²⁹ Sabin Centre for Climate Change Law, 'Kang et al. v. KSURE and KEXIM', *Climate Change Litigation Databases* (webpage, accessed 26 April 2023) <<http://climatecasechart.com/non-us-case/kand-v-ksureandkexim/>>.

³⁰ Jane Bardon, 'Traditional owners vow to keep fighting Barossa gas field despite losing South Korean court battle', *Australian Broadcasting Commission News* (webpage, 25 May 2022) <<https://www.abc.net.au/news/2022-05-25/nt-santos-barossa-gas-tiwi-larrakia-lose-southkorea-court-figh/101097372>>.

³¹ 'Papua New Guinea Law', *The University of Melbourne* (webpage, accessed 26 April 2023) <<https://unimelb.libguides.com/c.php?g=926005&p=6688727>>.

³² *Constitution of the Independent State of Papua New Guinea* preamble <<https://www.parliament.gov.pg/images/misc/PNG-CONSTITUTION.pdf>>.

³³ *Ibid* Art 25.

25. In *Morua v China Harbour Engineering Co (PNG) Ltd*,³⁴ the National Court of Justice³⁵ recognised the standing of a group of landowners protesting about the activities of a company which caused substantial pollution and harm to their lands in the course of building a bridge.³⁶ In granting standing to sue to the landowners the judge looked at a range of sources including recognition of the right to a healthy environment internationally and in other jurisdictions in considering a section in the Papua New Guinea Constitution which allows action to be taken to enforce human rights in the Constitution. The court issued an interim injunction in part to ensure protection of the plaintiffs' constitutional rights.

Role of environmental human rights defenders in the Asia-Pacific Region

26. The United Nations Environment Programme has commissioned a report into the challenges and threats posed to human environmental rights defenders in the Asia-Pacific which was launched on 27 April 2023.³⁷

27. The Environmental Human Rights Defenders Working Paper identifies the many challenges and threats faced by people defending environmental human rights in the Asia-Pacific region and makes recommendations for how these can be addressed through implementing the rule of law. One area of concern is the use of courts to commence litigation which is designed to harass environmental human rights defenders.

³⁴ *Morua v China Harbour Co (PNG) Ltd* [2020] PGNC 16; N8188 (7 February 2020).

³⁵ The National Court of Justice is a superior court of record, has original jurisdiction as a trial court, and appellate jurisdiction to hear appeals from the District Courts. The Supreme Court of Justice (the highest court in Papua New Guinea) hears appeals from the National Court. 'Legal System of Papua New Guinea', *The University of Melbourne* (webpage, accessed 26 April 2023) <<https://unimelb.libguides.com/c.php?g=926005&p=6688730>>.

³⁶ Art 57 of the Papua New Guinea Constitution enables the enforcement of express rights in the National Court of Justice. A right to a healthy environment is not an express right. However, in *Morua v China Harbour Engineering Co (PNG) Ltd* the Court found that a right to a healthy environment underpins the right to life (express right enshrined in Art 35) and recognised the standing of the landowners.

³⁷ United Nations Environment Programme, *Environmental Rule of Law and Human Rights in Asia-Pacific: Supporting the Protection of Environmental Human Right Defenders* (Working Paper, February 2023); 'Environmental Rule of Law and Human Rights in Asia-Pacific Working Paper Launch', *United Nations Environment Programme* (webpage, 27 April 2023) <<https://www.unep.org/events/webinar/environmental-rule-law-and-human-rights-asia-pacific-working-paper-launch>>.

Expanding opportunities for litigation: human rights / environmental rights in Australia

28. Australia is a common law legal system albeit with extensive statutory schemes in the area of environmental protection. The Australian Constitution does not contain any human rights provisions.³⁸ While lacking comprehensive national human rights legislation, human rights acts or charters exist in three jurisdictions, the Australian Capital Territory and the states of Victoria and Queensland. None have an express environmental right. The rights protected by legislation have been called on in the environmental and indigenous cultural protection context.
29. In *Waratah Coal v Youth Verdict and the Bimblebox Alliance*, First Nations-led organisation Youth Verdict and the Bimblebox Alliance challenged two coal mining applications on human rights grounds under the *Human Rights Act 2019* (Qld). The right to life, cultural rights of First Nations people, rights of children, right to property, right to privacy and home and right to enjoy human rights equally were all relied on.³⁹ The Land Court of Queensland recommended that a mining lease and environmental authority for the proposed mine be refused because of human rights impacts inter alia. That decision is presently under appeal.

Observations about cases

30. My opening remarks about the important role of courts in considering substantive and procedural matters in giving effect to environment human rights is demonstrated in a number of the cases referred to above.
31. Issues such as climate change require domestic courts to consider environmental issues which arise within and beyond the jurisdiction of those courts. That has lead courts to refer to international and regional sources of policy and law, particularly in relation to climate change with the substantial work of the Intergovernmental Panel on Climate Change featuring in many judgments at the domestic level. This observation applies in

³⁸ *Commonwealth of Australian Constitution Act 1901* (Cth).

³⁹ *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors* (No 6) [2022] QLC 21; Environmental Defenders Office, *A Healthy Environment is a Human Right: Report on the Status of the Human Right to a Healthy Environment in Australia* (July 2022) 19.

relation to numerous cases considering environmental rights in the climate change context.

32. The relatively recent adoption by the United Nations General Assembly on 28 July 2022 of a clean, healthy and sustainable environment as a human right is likely to be influential in the future including in domestic litigation. As I mentioned earlier in the Thai case *Residents of Omkoi v Expert committee on EIA Consideration and the Office of Natural Resources and Environmental Policy and Planning* the Administrative Court referred to the United Nations General Assembly resolution in their consideration, as did the National Commission of Justice in the Papua New Guinea case of *Morua v China Harbour Engineering Co (PNG) Ltd*.

Conclusion

33. Environmental rights litigation is expanding in many regions of the globe, and is likely to continue to do so in the Asia-Pacific region, particularly given the challenges of climate change and the desire of civil society to respond. Domestic courts in diverse legal systems therefore play a crucial role in the recognition and implementation of such rights which will increasingly include the right to a clean, healthy and sustainable environment. Courts in the global south have been particularly willing to engage in that recognition according to a recent study published in the Oxford Yearbook of International Environmental Law.⁴⁰

⁴⁰ Pau de Vilchez and Annalisa Savaresi, 'The Right to a Healthy Environment and Climate Litigation: a Game Changer?' (2021) 32(1) *Yearbook of International Environmental Law* 3, 7.