

STRENGTHENING CAPACITY FOR ENVIRONMENTAL LAW IN THE ASIA-PACIFIC : DEVELOPING ENVIRONMENTAL LAW CHAMPIONS

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SESSION 10 – RIGHTS IN ENVIRONMENTAL LAW

LYE Lin Heng

Director, Asia-Pacific Centre for Environmental Law



COMPARING SUBSTANTIVE & PROCEDURAL RIGHTS

- **Learning Objectives** – to understand the difference between substantive and procedural rights
- **Methodology** – Presentation by trainer on:
 - human rights & the environment
 - environmental constitutionalism
 - Aarhus Convention & procedural rights
 - application in Asia-Pacific region (selected cases)
 - the emerging recognition of Rights for Nature



Substantive Rights

1972 Stockholm Conference - Declaration of the United Nations Conference on the Human Environment (Stockholm, 16 June 1972), which established a foundation for linking human rights and environmental protection in law.

Principle 1 :

“Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being”.



List of Substantive Human Rights

- • Nondiscrimination and equal protection of the law
- • Right to life
- • Prohibition of force and child labour
- • Freedom of movement and residence
- • Right to privacy and home life
- • Right to property
- • Freedom of religion
- • Right to an adequate standard of living (food, medicine, clothing, housing, water)
- • Cultural rights



List of Substantive Environmental Rights (continued)

- • Minority rights
- • Right to safe and healthy working conditions
- • Freedom of assembly and expression/opinion
- • Right to health
- • Right to privacy
- • Right to self-determination of peoples (controversial)
- • Right to a certain quality of environment (controversial; certain aspects of this right have a global consensus, such as safe drinking water, and nutritious food)



I. Right to life: General definitions

- **Article 3 - Universal Declaration of Human Rights**

Everyone has the right to life, liberty and security of person.

- **Article 6 - International Covenant on Civil and Political Rights**

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

- **European Convention on Human Rights and Fundamental Freedoms 1950 (as amended)**

Article 2 - Right to life

Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

- **Article 8 - Right to respect for private and family life**

Everyone has the right to respect for his private and family life, his home and his correspondence.



II. Right to Life – Constitutional provisions

- **Indian Constitution Article 21. Protection of life and personal liberty.**

“No person shall be deprived of his life or personal liberty except according to procedure established by law.”
- **Singapore Constitution Article 9 – Fundamental Liberties: Liberty of the person**

(1) No person shall be deprived of his life or personal liberty save in accordance with law.



Right to a healthy life?

Q – does the right to life mean the right to live a healthy life, free from pollution?

This should include the right of access to fresh water, clean air, healthy sources of food, freedom from toxic chemicals etc.

i.e. The right to Life means the right to have a clean and healthy environment

Depends on interpretation by courts?

Q - Should this right to a healthy environment be specifically stated in the Constitution?

If it is not stated, can we argue that this right is now recognised under international law?



Öneryildiz v Turkey (2004)

Case on European Convention on Human Rights and Fundamental Freedoms 1950 (as amended)

Methane explosion on dumpsite with a squatter colony.

32 persons killed including 9 relatives of petitioner.

Held by European Court of Human Rights :

Breach of article 2 on right to life. Duty of government to take positive steps to safeguard lives of its people. In the context of dangerous activities – this includes setting up proper procedures for the licensing, operation, security, and supervision of the operation of the rubbish dump.



López Ostra v Spain (rotten eggs case) 1994: European Court of Human Rights

- Leather industries in a Spanish town released hydrogen sulphide as part of leather tanning process, causing health problems.
- Petitioner claimed that the State's failure to take any measures against the smell, noise and contaminating smokes violated her rights to physical integrity (Article 3 of European Convention on Human Rights) and to respect for the home and private life (Article 8)
- Held by ECHR
 - (1) the State has violated art 8, as serious pollution can impact an individual's well-being and prevent him from enjoying his home in such a way that his or her private and family life is damaged.
 - (2) the State had failed to find an adequate balance between its interest to promote the city's economic development and the claimant's effective enjoyment of her rights

State ordered to pay compensation for damage caused and for judicial costs.



How are substantive environmental rights distinguished from procedural environmental rights?

Procedural rights are a vehicle for delivery of substantive rights:

1. Access to information in environmental matters
2. Participation in environmental decision making
3. Access to justice/judicial review environmental matters
4. Due process/fair hearing environmental matters
5. Substantive redress in court or other tribunals
6. Non-interference with international petitions (where applicable)



INDIAN Constitution

- **Article 21 – Indian Constitution**

No person shall be deprived of his life or personal liberty except according to procedure established by law.

- **Article 48A**

The State shall endeavor to protect and improve the environment and to safeguard the forests and wildlife of the country.

- **Article 51A**

It shall be the duty of every citizen of India to protect and improve the natural environment including forests, lakes, rivers and wildlife and to have compassion for all living creatures.

- **Procedurally**, these cases are usually brought before the Supreme Ct under Article 32, which grants citizens standing to sue directly in the Supreme Ct for violations of constitutional rights. Persons can file a Writ Petition or address a letter to the Chief Justice of India highlighting the question of public importance for invoking this jurisdiction.

“Public Interest Litigation” & “Epistolary justice”



Farooque v Govt of Bangladesh, 1996 (radioactive milk case)

Action to stop sale of alleged contaminated (radioactive) imported milk powder on the ground that it endangers or may endanger the life of the Petitioner and other people living in the country, violating the fundamental right of right to life under Articles 31 and 32 of the Constitution.

Supreme Court Held :

“No one has the right to endanger the life of the people, which includes their health, and normal longevity of an ordinary healthy person by marketing in the country any food item injurious to the health of the people. **We are therefore, of the view that the right to life under Article 31 and 32 of the Constitution not only means protection of life and limbs necessary for full enjoyment of life but also includes, amongst others, the protection of health and normal longevity of an ordinary human being.**”

<http://www.globalhealthrights.org/asia/dr-mohiuddin-farooque-v-government-of-bangladesh-radioactive-milk-case/>



Shela Zia & Ors. v WAPDA [1994] Pak. SC

- Supreme Court of Pakistan stopped the building of a power station near a residential area, applying the Precautionary Principle, as the electro-magnetic fields may be harmful to health.
- **Focussed on the constitutional right to life in Art. 9 of the Constitution** – Article 9, Constitution
“No person shall be deprived of life or liberty save in accordance with law.”
- **Held :** Although the word ‘life’ has not been defined in the Constitution, it should be given a wide meaning “to enable a man not only to sustain life but to enjoy it.”



The Philippines – unborn children have legal standing

- **Article II, Constitution**
- Section 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.
- Section 15 :
- The State shall protect and promote the right to health of the people and instill health consciousness among them.

Also in Philippines - Administrative Code 1987, Title XIV, Book IV and 1977 Presidential Decree PDNo. 1151 (Philippine Environmental Policy) & PD 1152 (Philippine Environment Code)



Oposa v Factoran (Secretary of DENR), [1993]

- Application by minors representing themselves **and unborn generations of Filipino children**, to order the government (DENR) to cancel all existing Timber Licence Agreements and stop issuing, renewing or approving new licence agreements.
- Argued that
 - (1) the granting of these licenses constitutes a misappropriation and/or impairment of the natural resource that govt holds in trust for the benefit of plaintiffs and succeeding generations
 - (2) That Plaintiffs have a clear and constitutional right to a balanced & healthful ecology and are entitled to protection by the State in its capacity as the *parens patriae (trustee)*.



Held by Supreme Court (Davide J)

- The right to a ‘balanced and healthful ecology in accordance with the rhythm, and harmony of nature’ (s. 16) unites with the right to health (s. 15). Even though it is found not under the Bill of Rights but under the Declaration of Principles & State Policies, it is not any less important.
- **Such a right relates to self preservation and can be said to even “predate all governments and constitutions. These basic rights need not be written into the constitution, for they are assumed to exist from the inception of humankind.**
- Discussed the broad principles in the Philippine Environment Code
- Agreed that the statements show a violation of their rights.
- “We find no difficulty in ruling that they can, for themselves, for others in their generation and for the succeeding generations, file a class suit.
 - **the right to a ‘balanced and healthful ecology is based on the concept of inter-generational responsibility**
 - **such a right considers the ‘rhythm and harmony of nature’**
 - **such rhythm and harmony must include the judicious disposition, utilization, management, renewal and conservation of the country’s natural resources.”**



PROCEDURAL RIGHTS

I. The Aarhus Convention

- The UN Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters was adopted on 25 June 1998 in the Danish city of Aarhus (Århus) as part of the "Environment for Europe" process. It entered into force on 30 October 2001.
- It provides for 3 rights :-
 - (1) "**access to environmental information**" - the right of everyone to receive environmental information that is held by public authorities. Applicants are entitled to obtain this information within one month of the request and without having to say why they require it. In addition, public authorities are obliged, under the Convention, to actively disseminate environmental information in their possession;



The Aarhus Convention (contd)

(2) The right to participate in environmental decision-making.

Arrangements are to be made by public authorities to enable the public affected and environmental non-governmental organisations to comment on, for example, proposals for projects affecting the environment, or plans and programmes relating to the environment, these comments to be taken into due account in decision-making, and information to be provided on the final decisions and the reasons for it ("**public participation in environmental decision-making**");

(3) Access to Justice - the right to review procedures to challenge public decisions that have been made without respecting the two aforementioned rights or environmental law in general.

- <http://ec.europa.eu/environment/aarhus/>



INDIA - Public Interest Litigation & Epistolary jurisdiction

- **Article 21 – Indian Constitution**

No person shall be deprived of his life or personal liberty except according to procedure established by law.

- **Article 48A**

The State shall endeavor to protect and improve the environment and to safeguard the forests and wildlife of the country.

- **Article 51A**

It shall be the duty of every citizen of India to protect and improve the natural environment including forests, lakes, rivers and wildlife and to have compassion for all living creatures.

- **Procedurally**, these cases are usually brought before the Supreme Court under Article 32, which grants citizens standing to sue directly in the Sup. Ct. for violations of constitutional rights.



Article 32, Indian Constitution

- Article 32 of the Constitution grants an extensive original jurisdiction to the Supreme Court in regard to enforcement of **Fundamental Rights**. It is empowered to issue directions, orders or writs, including writs in the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari* to enforce them.
- **“PUBLIC INTEREST LITIGATION”**
- Although the proceedings in the Supreme Court arise out of the judgments or orders made by the Subordinate Courts including the High Courts, but of late the Supreme Court has started entertaining matters in which interest of the public at large is involved and **the Court can be moved by any individual or group of persons either by filing a Writ Petition at the Filing Counter of the Court or by addressing a letter to Hon'ble the Chief Justice of India highlighting the question of public importance for invoking this jurisdiction. Such concept is popularly known as 'Public Interest Litigation' and several matters of public importance have become landmark cases. This concept is unique to the Supreme Court of India only and perhaps no other Court in the world has been exercising this extraordinary jurisdiction. A Writ Petition filed at the Filing Counter is dealt with like any other Writ Petition and processed as such. In case of a letter addressed to Hon'ble the Chief Justice of India the same is dealt with in accordance with the guidelines framed for the purpose.”**
- **http://supremecourtfindia.nic.in/new_s/juris.htm**



Features of Indian Supreme Court practice

- The Indian Supreme Court has acted on the basis of newspaper reports as well as on letters written by concerned citizens ('epistolary jurisdiction').
- Court enlists help of legal aid organisations and *amicus curiae*
- Appoints Commissions of Inquiry
- Monitors cases for years
- Monitors the results of its orders
- Has ordered various states to
 - pay compensation to petitioners for failing to protect fundamental rights
 - pay costs of petitioners
 - pay costs of Commissions of Inquiry established by the Court



Restrictions on the Indian Supreme Court

- Court cannot order the legislature to frame legislation
- Directive principles are not enforceable
- Court must itself operate within the Constitutional, legislative and policy framework
- Court depends on legislative and administrative support for the enforcement of its orders.



Philippines : Writ of Kalikasan (Nature) & Writ of Continuing Mandamus

- **April 2010- Philippines Rule of Procedure for Environmental Cases.**

Section 3 : The objectives of these Rules are:

- (a) To protect and advance the constitutional right of the people to a balanced and healthful ecology;
- (b) To provide a simplified, speedy and inexpensive procedure for the enforcement of environmental rights and duties recognized under the Constitution, existing laws, rules and regulations, and international agreements;
- (c) To introduce and adopt innovations and best practices ensuring the effective enforcement of remedies and redress for violation of environmental laws; and
- (d) To enable the courts to monitor and exact compliance with orders and judgments in environmental cases.



Writ of Kalikasan (Nature)

April 2010- Philippines Rules of Procedure for Environmental Cases.

Citizen suit. — Any Filipino citizen in representation of others, including minors or generations yet unborn, may file an action to enforce rights or obligations under environmental laws.

Upon the filing of a citizen suit, the court shall issue an order requiring all interested parties to appear and be heard within fifteen (15) days from notice.

This remedy is available to those whose constitutional right to a balanced and healthful ecology is violated, or threatened with violation by an unlawful act or omission of a public official or employee, or private individual or entity, **involving environmental damage of such magnitude as to prejudice the life, health or property of inhabitants in two or more cities or provinces.** Rule 7, Section 1.

- No docket fees need to be paid.



Rights of Nature

- Nature has been recognised to have rights in some jurisdictions
- Ecuador was first country to recognise this. 2008 Constitution Art 71 – “Nature or Pachamama, where life is reproduced and exists, has the right to exist, persist, maintain and regenerate its vital cycles...” and the people have legal authority to enforce these rights on behalf of ecosystems.
- 2010 – Rights of Mother Earth – Bolivia Constitution. Humans can bring actions on behalf of Mother Earth.
- New Zealand ‘s Whanganui River was given legal standing as a person 15 March 2017, under a river claims settlement with the Maoris people.
- 31 March 2017 - A court in the northern Indian state of Uttarakhand cited the NZ case and ordered that the Ganges and its main tributary, the Yamuna, be accorded the status of living human entities.



Ecological Law

- “The values and principles of ecological law are expressed in ecocentric jurisprudence (e.g. rights of nature, ‘Mother Earth’ rights, Earth jurisprudence, eco-feminism, ecological legal theory, ‘environmental law methodology’) and are also present in constitutional and international theory (e.g. ecological human rights, ‘eco-constitutional state’, ‘Pachamama’ constitutions, ecological sustainability and integrity, ecocide campaign, commons movement, global commons theory, eco-constitutionalism, global environmental constitutionalism). While different in their approaches and emphasis, they share a common ground and can be perceived as complimentary and mutually reinforcing.”
- See new Ecological Law & Governance Association (ELGA) and their Oslo Manifesto **“From Environmental Law to Ecological Law”** - website <https://www.elga.world>
- Launching 10-13 October in Siena, Italy.



Some questions:-

- Can the environment be safeguarded without constitutional protection?
- How important are substantive versus procedural rights?
- Critically examine the reasons for judicial activism in the Indian sub-continent. Does it have a sound basis in law?
- Is judicial activism necessary or desirable, in safeguarding the environment? What are the alternatives?
- Can the cases that you have studied be replicated elsewhere?
- Should all states recognize the rights of nature/Mother Earth ?

