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The Environment and Human Rights

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14.1 Introduction to Human Rights and the Environment

Environment Movement

A political movement that emerged during the 1970s aimed at protecting ecosystems from destructive human practices. The movement is now global, and takes the form of political 'Green' parties, environmental NGOs, and protest movements.

Concern for the environment is a relatively new phenomenon. Although it can be traced back to the late 1800s, it was only during the 1960s and 1970s that the **environment movement** became a worldwide phenomenon. Human beings depend on the environment for survival, but it was not till recently that people realized their treatment of the environment, and their pollution, could have a permanent and devastating impact. In the 1960s and 1970s when high profile environmental disasters like the **Minamata mercury poisoning** tragedy in Japan and the **Cuyahoga river fire of 1969** in the United States made people, particularly from industrialized nations, realize the harm caused by environmental degradation. Other developments such as the anti-whaling movement and books like Rachel Carson's *Silent Spring* (1962) which highlighted the dangers of pesticides, also helped to bring the environment into public consciousness. In the decades following, these concerns began to be linked to human rights.

The interaction between human rights and the environment works both ways: a clean environment is a human right and the well-being and protection of the environment depends on the protection of human rights. In other words, human rights are necessary to assert environmental rights. The rights to health, food, and water sanitation depend on a safe, clean, healthy and sustainable environment. The connection between the environment, cultural rights and heritage may be even stronger for groups who have a cultural connection to the land and nature. As this chapter details, the idea that a clean environment is a human right is still open to debate, but it has already been firmly established that how environments are treated will have a significant impact on a State's human rights. This chapter outlines the various efforts to understand the relationship between the environment and human rights, before looking at the experience of indigenous groups and the problem of climate change.

FOCUS ON

Major Environmental Disasters of the 1960s

Minamata mercury poisoning

In 1922, Cisso Corporation started manufacturing chemicals for plastic production from their factory in Minamata Bay. During the post-World War II production boom, signs appeared that Cisso's waste water was contaminating the fish and shellfish of Minamata Bay. Dead fish were found floating in the bay, cats and dogs mysteriously died, and an increasing number of children born with deformities. Though complaints were made to Cisso in the late 1950s, and compensation was paid to some victims, the pollution continued until a 1968 court case finally put an end to disposing waste water in the bay. In total, there were over 2,000 victims, with compensation being paid to around 10,000 people.

Cuyahoga river fire of 1969

With a history of fires, the Cuyahoga River was once the most polluted river in the US. One fire in 1959 caused five deaths. The 1969 fire coincided with a society that had become more environmentally aware. The 1969 fire prompted US Congress to pass the National Environment Protection Act in 1970 which led to the creation of the



Environmental Protection Agency. This agency's first policy was to enact a mandate that all rivers in the US be clean enough to allow swimming. Since then, the Cuyahoga River has received billions of dollars in clean up funds and is now home to about sixty species of fish. It has not seen a fire since 1969.

Southeast Asia has a rich history of individuals and communities standing up to environmental degradation as a result of development. The civil society groups that emerged in the 1970s can be separated into two broad groups: those concerned with issues of land and livelihood (mostly consisting of indigenous or poor communities), and middle class groups concerned with quality of life, urban pollution, and environmental protection. In the 1980s, a global social movement took shape around the call for environmental justice in response to some infamous environmental disasters such as the one at **Bhopal**, where a factory leak of poisonous gas killed over 5,200 people. Caused by Union Carbide, the company escaped conviction in part because of its transnational status. Concern also grew over the threat of nuclear energy in response to the **Three Mile Island** and **Chernobyl** incidents. Finally, the **Exxon Valdez oil spill**—at the time, the largest oil spill with the greatest environmental impact—also caused much anger in the community because people felt the corporation had not done enough to avoid environmental destruction.

FOCUS ON

Major Environmental Disasters of the 1980s

Three Mile Island and the Chernobyl disaster

In 1979, a nuclear plant at Three Mile Island in Pennsylvania, US, experienced a partial reactor meltdown resulting in a small amount of radioactive contamination. Studies later showed this accident did not have a major adverse effect on people's health or the surrounding environment, but it did make people aware of the potential threat from nuclear energy. Seven years later, the meltdown of Chernobyl's nuclear reactor in the Soviet Union (now in the Ukraine) had a more disastrous effect, causing a fallout reaching all the way to Norway that affected thousands of people.

Bhopal

In 1984, in Bhopal, India, gas leaked from a plant owned by Union Carbide resulting in 5,200 deaths and causing thousands more to suffer permanent or partial disabilities. In 1989, settlements were reached and approved by the Supreme Court of India and again upheld in 1991 and 2007, although many victims' families never saw any form of compensation. The government closed the site and all operations, preventing a clean-up until after 1994.

Exon Valdez oil spill

In 1989, the oil tanker, Exxon Valdez, struck a reef as it entered Alaska's Prince William Sound, tearing open its hull and pouring around 20 million gallons of oil into the remote and biodiverse area. The resulting slick damaged more than 1,000 miles of coastline and killed an untold number of animals. Exxon paid billions in clean-up costs and legal court cases. Despite this, pollution can still be seen to this day.



Today, environmental rights are a widespread concern in Southeast Asia because of the impact businesses, agriculture, and development has on the environment. People in Southeast Asia are more aware of the importance of a clean environment, are more likely than ever to oppose developments thought to be dangerous to the environment. For example, people living in cities complain about pollution and air quality. The cross boundary problems like the haze caused by widespread forest burning in Indonesia have forced States to respond through regulation and treaties. Further, indigenous groups now protest when developments encroach upon their customary lands and way of life.

Resource Extraction

The process of taking resources out of the environment, applying particularly to resource extraction industries such as mining and logging.

One particular concern is that the benefits and burdens of changes to the environment are not equally distributed. Called **environmental racism**, this is where the extraction and destruction of the environment disproportionately affects certain ethnic, racial, or economic groups to the benefit of wealthier segments of the population. A simple example of this can be seen in cases of **resource extraction** where land is damaged around poor and marginalized areas to provide products and services for the middle and upper classes, the result of which is an inequitable distribution of burden and benefits. On a larger scale, environmental discrimination can occur between countries, when rich countries avoid pollution in their own territories by building factories in poorer countries. Fortunately, there is a growing awareness around environmental justice and the human right to enjoy a safe, clean, healthy, and sustainable environment.

Environmental Racism

The practice of placing polluting industries next to poor and disadvantaged communities. Sometimes called environmental discrimination, the term is not widely used.

DISCUSSION AND DEBATE

What are the environmental concerns of your country?

How many of the following problems exist in your country or community?

- air pollution
- over-logging of forests
- dirty or contaminated water
- industrial pollution, pollution from factories
- noise pollution from traffic
- contaminated food
- unclean water for drinking or washing
- destruction of natural forests
- agricultural pollution
- destruction of marine environments such as coral reefs and beaches

Do further research to find out the impacts of these concerns. Also, consider who created the problem, and how can they be solved?



Around the world, there is a history of environment rights defenders being targeted, attacked, and killed. The NGO Global Witness details at least 185 environmental activists killed in 2015, with Southeast Asia being one of the worst regions. For example, 33 activists were killed in the Philippines, the second worst country (after Brazil), with deaths also occurring in Indonesia, Myanmar, Cambodia, and Thailand. Environmental activists face threats because they oppose the interests of powerful businesses and challenge the development agenda of governments. In many cases, activists may be villagers who have been forced into become activists because their family and communities are directly threatened by environmental damage. In Southeast Asia and elsewhere, governments have done little to protect these people. Despite the influence of powerful forces and their under-protection, environmental rights defenders and their organizations have continued to protest for their human rights.

FOCUS ON

Extrajudicial Killing of Environmental Activists in Southeast Asia

Hundreds of environmental activists have been killed in the past decades in Southeast Asia. Most of the cases are unsolved, with people yet to face justice for these crimes.

Cambodia: Chut Wutty was an anti-logging campaigner and critic of the military's alleged role in illegal logging in protected forests. He was shot dead while showing journalists a protected forest known for illegal logging.

Philippines: Gloria Capitan was an environmental activist opposed to coal stockpile facilities in Bataan province. She was shot and killed by two unidentified men on a motorcycle who were waiting for her near the entrance to her family's business.

Philippines: Michelle Campos was a member of the indigenous Lumad people from the southern Philippines. Her father and grandfather, who were prominent campaigners for the protection of ancestral lands, were publicly executed by a paramilitary group in front of their village.

Thailand: Taksamol Aobaom was a lawyer campaigning against the mistreatment of an ethnic Karen community by National Park officials. He was shot dead on a main highway in 2011.

Thailand: Boonsom Nimnoi was a member of the Amphur Baan Laem Ocean Conservation Group and leader of a campaign against a petrochemical plant. He was shot dead on a road close to his home in 2002.

Indonesia: Indra Pelani was a 22 year old member of a network of people monitoring illegal activities in the forestry and agriculture sector. He was attacked, beaten, and killed while travelling to the Jambi branch of Friends of the Earth Indonesia in 2015.



14.2 Environmental Standards

Until the 1960s and 1970s, the laws that regarding the environment were less concerned with protecting the environment than protecting those seeking to exploit it. Over the years, such thinking slowly changed leading eventually to the development of jurisprudence on environmental protection. The long history of international laws date from the mid-1800s when treaties managing rivers in Europe were introduced to limit what countries could put in and take out of rivers that flowed between countries. Similar laws exist for the Mekong River, the largest river system in Southeast Asia flowing through six countries.

At the national level, environmental laws were first passed in the late 1800s to establish national parks, firstly in the United States. Similar laws appeared in European countries, Australia, and New Zealand. Other national laws include those managing pollution, for example, the Clean Air Acts (of which the US has one of the strongest and most well-known). Significantly, most countries now have air pollution laws. In Southeast Asia, seven of the eleven countries have air pollution acts, with only Myanmar, Laos, Timor Leste, and Cambodia yet to introduce them. Similarly, laws on water pollution, waste management, the handling of dangerous chemicals, and the protection of wildlife, forest, and other biodiverse areas have also been passed. Although enacted decades after the national laws, many of these provisions can also be found at the international level. Additional international laws include those covering clean air, the dumping of waste in the ocean, and the protection of endangered species. While these laws can protect environmental standards, they do not address the human rights consequences of damage to the environment.

The first major step towards the claim that a clean environment is a human right was introduced in the Stockholm Declaration (1972), at the very first United Nations conference dealing with the environment, called the UN Conference on the Human Environment. Principle 1 of the Declaration reads:

Humans' have the fundamental right to freedom, equality and adequate conditions of life, in an environment that permits a life of dignity and wellbeing, and he [or she] bears a solemn responsibility to protect and improve the environment for present and future generations.

('Here, the original term 'man' has been replaced)

Although not explicitly recognizing a clean environment as a human right, but rather, as necessary for those rights to be met, the Declaration clearly demonstrates their interdependence. In the decades that followed, both people and States began to recognize a clean environment as their right. The Declaration also accepted a responsibility to protect and improve the environment, not just in the present but also for future generations. This gives rise to the possibility of inter-generational rights, that is to say, people who are yet to be born may have rights against current inhabitants of the planet. Other outcomes of the World Conference include the establishment of the UN Environment Program (UNEP), and the Convention on the Laws of the Sea (UNCLOS). The right to a clean and healthy environment was novel and progressive with potentially far-reaching legal implications. Although the Stockholm Declaration is soft law (that is, a statement with no binding legal force), it is a statement of principles agreed to by its signatories.

The human right to a clean environment did not receive widespread support in the immediate aftermath of the Stockholm Conference. International lawyers felt

the concept was too vague and unenforceable, for example, how to define a 'clean environment'? Does it refer to how clean the air is? Or is it about trees, parks, and animals? Is its intention to restrict pollution to only some areas of the country? Environmentalists also criticized the concept as being too 'human centric,' meaning that protection extended only to humans, not to the environment itself, so the environment is only preserved because humans want it preserved.

In addition, the idea of a human right to a clean environment was also seen as not going far enough because it works within a legal system whose main priority is to ensure developments proceed with as little impact on the environment as possible. Some believe a complete change of practice giving the environment precedence in all endeavours is required before environmental protection can occur. Although the human right to a clean environment is still debated, it has received acceptance in some national and international law.

FOCUS ON

Elements of a Right to a Clean Environment

There is no precise definition to a clean environment, but the elements may include:

Freedom from pollution, which can include:

- pollution in drinking water
- pollution in the air
- freedom from garbage and waste
- freedom from poisons such as insecticides and herbicides

The right to a healthy environment, which can include:

- not getting sick from unclean water, air, or food
- laws banning the use of poisons
- prohibiting factories from polluting

The right to access a clean or a natural environment, which can include:

- the right to parks and playgrounds
- the right to national parks or other natural areas
- the right to access clean public beaches

The right to a sustainable environment, which can include:

- the right to save forests, wetlands, or other areas from destruction
- the right to ensure lands, forests, and rivers remain productive by preventing over-logging, over-fishing, or over-fertilizing



14.2.1 Substantive Right to a Clean Environment

For the right to a clean environment to work, or to be enforceable, two separate but interrelated functions must be present: there must be a law and a mechanism to enforce it. In other words, not only must individuals have the right, it must also be codified into law. A law without legislation to back it up is merely an ideal. Likewise, a right in law but without procedures to enforce it, loses its usefulness. Procedures such as tribunals, court systems, or mediation must be in place to ensure individuals can exercise and realize their rights. To summarise, substantive rights refer to the existence of the right itself, while procedural rights cover the ability to use courts or equivalent mechanisms.

The substantive right to a clean environment exists in different laws, both international and domestic. In international law, apart from soft law documents, such as the Stockholm and Rio Declarations, other treaties provide elements of a human right to a clean environment. The ICESCR made an indirect statement on the issue when it stated:

The State Parties to the present Covenant recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. (Art 12.1)

The steps to be taken by the State parties to the present Covenant to achieve the full realisation of this right shall include those necessary for the improvement of all aspects of environmental and industrial hygiene. (Art 12.2b)

Significantly, the ICESCR did not mention a specific right to a clean environment, but that a clean environment might be necessary to obtain the right to health. It limits State duties to those affecting the right to health, meaning a violation only occur if someone falls sick because of the environment. It does *not* give rights to live in or enjoy a clean environment. Elements of a State's duty towards a clean environment include providing clean drinking water, sanitation, and freedom from pollution as detailed in General Comment 14 to the ICESCR. This right does not extend to a sustainable environment, or preserving and protecting the environment. Other international documents include the *Rio Declaration on Environment and Development* (1992) which discussed the relationship between a clean environment and human rights. As a declaration it is non-binding and does not explicitly recognize a human right to a clean environment. On the other hand, the right to a clean environment does exist at the regional level. For example, the 1981 *African Charter on Human and Peoples' Rights* was more specific when it stated:

All peoples shall have the right to a general satisfactory environment favourable to their development. (Art 24)

Unfortunately, because the African Charter only mentions 'peoples' rights,' it is unclear whether it establishes an individual human right to a clean environment. In Europe, the equivalent document is the Aarhus Convention (detailed below). In Southeast Asia, the *ASEAN Human Rights Declaration* states:

Every person has the right to an adequate standard of living ... including: ... [t]he right to a safe, clean and sustainable environment. (Art 28)

Although the Declaration clearly mentions the right to a clean environment, it is not legally binding but when combined with other constitutional rights, it does form part of a substantive right to a clean environment in Southeast Asia.

The situation is very different at the national level. From the 1980s onwards, a human right to a clean environment was established in many States. Over ninety countries worldwide have accepted this principle. Some established the idea through a broad interpretation of their constitutions. In the Indian case of *Rural Litigation and Entitlement Kendra Dehradun and others v State of UP and others* (1985), the Supreme Court held that Art 21 of their Constitution which reads “No person shall be deprived of his life or personal liberty save in accordance with the law” ought to be given a broad interpretation. They decided that Art 21, commonly referred to as “the right to life,” includes a right to a clean environment, arguing that the concept goes further than the right to merely exist and includes a certain quality of life which necessitates a clean environment.

Similar decisions have also occurred in Southeast Asia. In *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Another*, a 1996 ruling about the wrongful dismissal of a school teacher, a Malaysian court held that the right to life includes a right to a clean environment. Other countries have incorporated the right directly into their constitutions. One Southeast Asian example is the 1987 Constitution of the Republic of the Philippines, Section 16, Art II which reads:

The State shall protect and advance the right of the people to a balanced and healthful ecology in accordance with the rhythm and harmony of nature.

The Philippine Supreme Court has interpreted this very broadly. In the case of *Minors Oposa v Factoran* (1993), it was argued that children (as represented by their parents) would be denied a healthy environment if forests were destroyed as a result of timber licenses issued by the government. The court went as far as to hold the right was so fundamental, that even if the Constitution had not recorded it officially, it would still have authority. In other words, in the Philippines, the right to a clean environment is considered an inalienable human right which does not require legislative confirmation to have the weight of law.

CASE STUDY

Minors Oposa v Factoran (1993), Supreme Court of the Philippines

A group of children (some of whom were the children of environmental activist, Antonio Oposa) brought a class action lawsuit to stop the destruction of rain forests, cancel existing Timber Licensing Agreements, and prevent the acceptance of new ones. The case was based on a reading of the 1987 Constitution of the Philippines (Section 16), which recognises the right of people to a “balanced and healthful ecology” and the right to “self-preservation and self-perpetuation.” The concept of “intergenerational equity” was used to argue that natural resources belong to children as well as adults, and by taking all a country’s resources, adults were stealing from their children and from future generations.



The Supreme Court ruled in favour of the children, finding:

- the right to a clean environment and to provide for future generations is fundamental
- there is an intergenerational responsibility to maintain a clean environment

Around the world, most countries recognize the right to a clean environment as a human right, and even though no international laws emphatically say this, soft laws like the *Stockholm Declaration* and hard laws like the *African Charter* and the ICESCR show that the principle is gaining acceptance. But it is at the national level, through constitutional interpretation, specific provisions, or court cases on the environment, that most developments have been made.

14.3 Procedural Right to a Clean Environment

The procedural right to clean environment is summarised in a number of international documents. First, this right is fully elaborated in the **Aarhus Convention**, a legally binding treaty for States in Europe and Central Asia. Also included is the work of the UN's Special Rapporteur on a clean environment (developed in the next section). An early elaboration can be found in Principle 10 of the *Rio Declaration* (1992), which reads:

Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.

When breaking down this principle, it can be seen that a procedural right to a clean environment consists of three main elements: (1) a right to environmental information; (2) a right to participate in environmental decision-making; and (3) access to courts or other forms of administrative mechanisms in the event of a dispute.

FOCUS ON

The Aarhus Convention (1998)

This European-based convention is part of the 'Environment for Europe' process. It codifies procedural rights to a clean environment including obligations to enforce a system of governance where citizens have rights to access information, participate in decision-making, and access justice. The Convention has 46 members from Europe and Central Asia and is seen as the best model for procedural rights. It is hoped it can become a regional treaty for Southeast Asia or a guide for domestic legislators.



14.3.1 Right to Environmental Information

Without information, it may be almost impossible to create a coherent and strong argument against a proposal or project which may harm the environment. Without these laws, a situation can occur where people could wake up to find a large construction site next to their house. When attempting to find out what is being built, they may be denied information. If parents, they may be worried about the dangers of pollution or increased traffic on their children. If farmers, they may worry about the impact on their farmland. If business owners, they may be concerned about the impact on their business. Whatever the worry, if denied information, there is no way for any of these groups to prepare for the consequences of the construction. Of course, the consequences may be few, but this is still information that should be revealed. Clearly, access to information should be a requirement to ensure people know about, and can prepare for, impacts on their local environment. Further, information will also enable them to protest or suggest modifications to the construction to reduce its impact on local communities. Such a requirement demonstrates the need for freedom of information laws to make this right readily enforceable.

For example, Indonesia has had a freedom of information law since April 2008. In Thailand, access to information was first guaranteed in Section 48 of the 1997 Constitution which states:

A person shall have the right to get access to public information in possession of a State agency, State enterprise or local government organisation, unless the disclosure of such information shall affect the security of the State, public safety or interests of other persons which shall be protected as provided by law.

This constitutional provision is given legislative force through the Thai Official Information Act of 1997. In Malaysia, the states of Penang and Selangor have freedom of information laws but there is no national law. In countries like Singapore, no such law exists at all. A right to information would allow communities to find out about proposed developments and their impact, so, for example, States planning to build a freeway or a new power station would have to inform residents of the exact location and duration of the construction.

Although these laws are a good starting point, there must be caution on their implementation. Being relatively new, the mechanisms for obtaining information from government agencies may not be prompt or accurate. Loopholes allowing unreasonable withholding of information should also be removed. This is particularly true of countries like Malaysia where freedom of information laws in certain States may be impeded by the *Official Secrets Act* (1972) which allows government agencies wide discretion to declare information secret. In fact, the Act has such wide ranging powers that any document may be declared secret, making access difficult and subject to strict liability.

Environmental Planning Regulations

Used to determine what building and developments can occur in certain areas. Common regulations include limiting the number of factories in residential areas and regulating the height and size of buildings.

14.3.2 Right to Participate in Environmental Decision-Making

There are several ways the public can participate in environmental decision-making. Two of the more common methods are through **environmental planning regulations** (sometimes called town and country planning regulations) and **Environmental Impact Assessment** (EIA) regulations, both of which should include public participation. Town and country planning should allow public participation during the drafting of long term plans for a town or city. Provisions should also allow the public to voice their concerns or opposition to more specific planning decisions, especially when their immediate environment is impacted. This would include, for example, opposition to the building of a chemical plant near a housing area.

An EIA is a study, ideally done by a party neutral to the construction, which assesses the environmental impacts of a development. The report should detail how the air, water, and land will be affected. Sometimes, this will also include social as well as livelihood impacts. There is no single standard for EIAs and they can differ greatly between countries. Certain projects, like those which may cause a substantial amount of pollution or larger projects, may require EIAs by law before approval is given. In addition, the EIA should include environmental effects, as well as all mitigating measures taken to lessen that effect, during both building and operation stages. Further, an EIA system should include a public participation mechanism. The EIA in itself cannot guarantee the safety of the environment. In some cases, a company may withhold details of the construction to the assessor, leading to an inaccurate final report, or employ a specific assessor to ensure the impact and environmental damage of a development is not reported. For both systems to work, effective monitoring mechanisms must be in place because without them the law is useless.

Central to human rights, public participation is the most important aspect of environmental planning and the EIA. But to be effective, participation must also be meaningful, which can be seen when input is taken seriously and could influence the final decision-making process. In other words, the right to be heard does not simply entail having those views listened to by the relevant authorities. They must also be seriously considered. In order for this to happen, the entire process must be transparent with the final decision being taken in such a way as to clearly demonstrate how those views were considered. For example, a final report should have a section dedicated to the consideration of public opinion including the reasons why these opinions were accepted or rejected. Participation is only inclusive if it ensures all groups have access to it. As an example, a group frequently left out of participation is women. Women's rights are often violated as a result of environmental damage. This was acknowledged in CEDAW which recognizes in Art 14 that rural women face significant discrimination, and given their role in, for example, agricultural work, they can be significantly harmed by degrading environments. Other work commonly done by women (including the collection of water and the planting and harvesting of crops) will also be affected by environmental damage such as pollution.

Another aspect of participation concerns ensuring the public has sufficient time to do the necessary research to make well-informed and thorough recommendations. Finally, the process must be accessible, meaning the public must have access to relevant documentation which should be presented in a manner understandable to the community. Although extremely technical, efforts must be made to ensure EIA reports are appropriately presented.

States may attempt to limit, or even falsify, participation in a variety of ways. Examples include allowing smaller pro-development groups to participate knowing they will

Environmental Impact Assessment

A report which estimates the amount and type of impact a development will have on the local environment. For example, it can estimate if pollution from a factory will destroy nearby forests, or suggest ways for a development to minimize its impact.

support the project, while preventing dissenters from being heard. Other cases are when States hold public meetings while setting up road blocks to prevent access to the meeting. Similarly, States may delay participation to the point where it becomes meaningless because the development has already started. In worst case scenarios, the public is simply excluded from the entire process.



DISCUSSION AND DEBATE

Meaningful Participation

A government wishes to establish a national park in a rain forest known for its wild species of birds and animals. Many surrounding villages support the development because they believe it will benefit the economy through increased tourism, but hill tribes living alongside or inside the forest, fear they will lose their land and livelihoods because hunting will be prohibited in the park. The first public meeting organized by the government ended with the indigenous and village groups arguing and not finding a resolution. Following this, the government decides it has met its obligation for public participation and begins to evict the hill tribes from the forest to build park facilities.

Questions:

- Has the government met its obligation for participation?
- If the villagers outnumber the hill tribes by at least five to one, is it fair and democratic that the villagers' views be the view accepted in the report?
- Are there alternative solutions to this dispute?

14.3.3 Access to the Court System

Another concern is the procedural right of access to remedy in cases of potential environmental harm or for dispute resolution. The main problem here is that to have the right to appear in court, or to use the legal term, *locus standi*, a person will usually have to prove they have been directly affected by the act through damage to themselves or their property, or through an economic loss. In environmental cases this damage or economic loss may not be obvious because it may not yet have occurred given that deforestation or if pollution may only have long term effects. In such cases, a broad interpretation of *locus standi* is vital. Countries like New Zealand and Holland have laws outlining the scope of groups or individuals who can appear in court to challenge environmental decisions. Other countries like India, have broadened the concept of *locus standi* to allow anyone to bring a case to court, even if they have not been directly affected as long as there is sufficient public interest in the matter. This is called Public Interest Litigation, a type of legal case that does not exist in Southeast Asia. In this way, a socially conscience lawyer can bring a case to court for the public good. For example, the Indian lawyer, MC Mehta, took on many environmental cases in the 1980s in the public interest to protect: the Ganges River from pollution; historic monuments like the Taj Mahal from air pollution caused by iron and glass factories; and to protest the use of leaded petrol, which led to the introduction of unleaded petrol in India.

Locus Standi

Locus standi in Latin means a place to stand and its legal meaning refers to the right to bring a case to court. For most courts, this means a person must have experienced negative consequences because of someone else's actions, entitling them to some form of redress.

In most Southeast Asian countries, the laws of locus standi are ambiguous or weak. Generally speaking, a person must prove he or she has an interest in the matter beyond that of the average person. This may include an environmental NGO with a special interest in wildlife or pollution in some jurisdictions. The previously mentioned *Minors Opasa v Factoran* case in the Philippines saw the Supreme Court extending locus standi to future generations. In this case, the citizens argued that deforestation would impact the right of future generations to the forest and that future generations have *locus standi* as they would be directly affected by these decisions. The court held that they did have an interest because a clean environment was a human right and deforestation an environmental issue. The court said:

The subject matter of the complaint is of common and general interest not just to several, but to all citizens of the Philippines. Consequently, since the parties are so numerous, it becomes impracticable, if not totally impossible, to bring all of them before the court. [...] The plaintiffs' personality to sue (*locus standi*) on behalf of the succeeding generations can only be based on the concept of intergenerational responsibility insofar as the right to a balanced and healthful ecology is concerned.

Unfortunately, this progressive approach to *locus standi* has not been embraced throughout Southeast Asia. Malaysia, for example, has extremely restrictive rules on locus standi. In short, unless one can show a direct relationship to the issue at hand, either through personal damage or monetary loss, the court may refuse to hear the complaint. Restricting access to courts has led some groups to find alternative methods of complaint such as public demonstrations. Some famous protests which have gained worldwide attention include those opposing the **Letpadaung copper mine** in Myanmar and the **Pak Mun dam** in Thailand.

CASE STUDIES

Environmental Protests in Southeast Asia

Letpadaung copper mine, Myanmar

Open since 1996, the copper mine had already displaced around 26 villages and up to 2,500 people, though this number is disputed by villagers, the mine owner, and the Government. Many villagers claimed they were not adequately compensated and their land was polluted from the mine. Although protests had been going on for many years, they were harshly put down by State officials in 2012, resulting in 100 people being hospitalized. More recently, a protestor was shot and killed in 2014. The protests did cause the Government to initiate a parliamentary investigation but this found in favour of the mine.

Pak Mun dam, Thailand

Completed in 1994, fears concerning the environmental impact of the dam on the river, fish, and wildlife came true. Over 20,000 people claimed to have been affected, not only by adverse effects on the fisheries, but also by insufficient compensation. Further, the dam never produced the electricity it had originally been planned for. Ongoing protests at the dam site and in Bangkok culminated in 1999 when more than 5,000 villagers occupied the dam site, setting up the 'Long-lasting Mun River Village No 1.' Relocation compensation has since been paid to many but the Government still faces pressure to open the dam gates, allowing the river to flow and fish stocks to be restored.



Both substantive and procedural rights are key to understanding how the right to a clean environment is put into practice. Similar to the previous chapter on business, legal frameworks on the environment and human rights have come a long way, but there is still some way to go. While formal protections slowly evolve, environmental rights defenders continue to search for new ways to protect the environment and the human rights that depend on it.

14.4 Right to a Safe, Clean, Healthy, and Sustainable Environment

The right to a clean environment is further developed by John Knox, the UN's Special Rapporteur on human rights and the environment, when he outlined the obligations of the State to ensure a safe, clean, healthy and sustainable environment (or the human right to a SCHS environment) by reviewing existing human rights obligations, and highlighting issues in need of greater attention. He acknowledged that this relationship was firmly established because there is overwhelming evidence that human rights are threatened by environmental harm. Moreover, because all UN bodies and all States recognized that environmental harm violate human rights in a variety of ways, States have duties to respond. While the Special Rapporteur's framework maintained the core elements of substantive and procedural obligations, they were further developed.

FOCUS ON

State Obligations Relating to Environmental Harm

Developed by the Special Rapporteur on human rights and the environment, these obligations are:

Substantive Obligations

States should have laws against environmental harm that may interfere with the enjoyment of human rights. Examples of these laws are standards for air and water quality, and anti-pollution measures.

Procedural Obligations

States have obligations to:

- (a) make assessments of environmental impacts and make environmental information public;
- (b) ensure public participation in environmental decision-making on the basis of freedom of expression and association;
- (c) ensure there are remedies for people whose rights have been interfered with by environmental harm.

Additional Obligations

- Obligation to Facilitate Public Participation in Environmental Decision-Making
- Obligation to Make Environmental Information Public



- [Obligation to Protect Rights of Expression and Association](#)
- [Obligation to Provide Access to Legal Remedies](#)
- [Obligations Relating to Non-State Actors](#)
- [Obligations Relating to Those in Vulnerable Situations](#)
- [Obligations Relating to Trans-boundary Environmental Harm](#)

Substantive obligations, as developed under Knox's work, protect individuals from environmental harm interfering with the enjoyment of human rights. States can fulfil this obligation by ensuring a reasonable balance between protecting the environment and the realization of other rights. In addition to ensuring individuals are able to assert their human rights to protect their environment, States also have an obligation to ensure the protection of human rights relative to projects that impact the environment. Knox explained this by stating in a meeting of signatory countries to the Rio Declaration in 2014:

The substantive obligation to protect human rights from environmental harm does not require the cessation of all activities that may cause any environmental degradation. States have discretion to strike a balance between environmental protection and other issues of societal importance, such as economic development and the rights of others. But the balance cannot be unreasonable, or result in unjustified, foreseeable infringements of human rights.

Specifically, States have an obligation to adopt a legal framework that protects against such environmental harm. This obligation includes a duty to protect against such harm when it is caused by corporations and other non-State actors, as well as by State agencies.

There are two important points here. First, while recognizing that development is both necessary and the cause of environmental damage, such damage should be limited when it results in the violation of rights. Second, the obligations extend to private actors and corporations, though it is the State, and not the private sector, which is obliged to monitor and limit the impact of corporations.

Regarding procedural obligations, States must ensure awareness, participation, and access to legal procedures which includes environmental impact studies, public participation processes, and mechanisms for individuals and communities to seek remedy should they experience environmental harm. Procedural rights to SCHS are interdependent with civil and political rights, in particular, freedom of expression (Art 19) and the right to a remedy (Art 2.3). In the field of environmental protection, these procedural aspects are already well-established in principle and practice.

Lastly, because additional obligations in a number of areas are often overlooked, people's rights may not be fully protected. First is the obligation to protect against violations by private actors as covered by the Guiding Principles and other mechanisms ensuring business accountability (mentioned in Chapter 13 on Business). Second are transboundary obligations which can arise when pollution crosses borders, impacting people in neighbouring countries. Examples of this include the [Southeast Asian haze](#) and the impact of dams. In both these cases, one country's action negatively impact people from neighbouring countries. For example, children in Malaysia and

Singapore could not attend school and fell ill because of the Southeast Asian haze. Knox argues it is when impacted countries are unable to protect people's rights that State obligations should be extended to cover cross boundary pollution through transboundary, or extra-territorial obligations.



CASE STUDY

The Southeast Asian Haze

Caused by the burning off of agricultural land, this occurs every year around August to September. The fires are often started illegally as a cheap way to clean land before sowing another crop. Although palm oil plantations and timber reserves are generally blamed for the fires, recent research now points to other causes as well, including businesses clearing land by fire, conflict over land titles (especially of forests), and ineffective firefighting by the Indonesian government. Much of the haze comes from Indonesia, but Malaysia is also a contributor. Affected countries include Malaysia, Singapore, Brunei DES, and Indonesia, and sometimes southern Thailand and the Philippines. Despite being in existence for over a decade, the *ASEAN Agreement on Transboundary Haze Pollution* (2002) has not yet reduced the size of the haze.

To conclude, States also have a final obligation to groups with particular vulnerabilities or who may suffer disproportionately from environmental destruction. This includes large groups such as women, children, the poor, and indigenous peoples. Women are particularly impacted because in many poorer regions, they do a significant amount of the agricultural and household labour which can be made more difficult by environmental problems. Children are more vulnerable to pollution, as demonstrated by the previous examples of Minamata and Chernobyl where pollution led to deformities in newborns, or the Southeast Asian haze which caused respiratory illnesses.

14.4.1 Indigenous Groups and the Environment

In many Southeast Asian countries, indigenous people face disproportionate violations from development and environmental degradation. These can be caused by large projects such as dams (for example, the Salween dam in Myanmar and the **Son La dam** in Vietnam), deforestation, mining, encroachment by farmers, and forced displacement because of changes to land regulations. Indigenous groups often do not have the same level of wealth or political power as the businesses they are in dispute with, making them vulnerable to exploitation in a number of ways. Their ownership of land may be traditional and not clearly stated in law. In other cases, groups migrating between plots of land in different regions, may return to find someone else in possession of their land. Further, substantially degraded environments can lead to a complete loss of livelihood from hunting, gathering, and cultivating. Land holds more significance than mere property ownership to indigenous groups, as they may have a strong cultural connection to the land so damage to the environment also affects their culture and heritage. For these reasons, special measures are required to protect indigenous groups.



FOCUS ON Son La Dam, Viet Nam

The building of the Son La dam displaced over 90,000 people, one of the largest displacements of indigenous people in Southeast Asia. While many faced no long term ill-effects, others who lost access to arable land were stripped of their livelihoods. Compensation and housing in some cases was either insufficient or unsuitable, putting stress on communities. Indeed, unable to survive the displacement, many communities simply disappeared.

14.4.2 United Nations Declaration on the Rights of Indigenous Peoples 2007 (UNDRIP)

One standard outlining indigenous people's rights can be found in the UNDRIP. Although only a declaration, or soft law, it has been signed by 144 countries, including all Southeast Asian States. Two articles are relevant to the issue of indigenous peoples and their rights to land. First:

Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and where possible, with the option of return. (Art 10)

The process to acquire free, prior, and informed consent to developments has become important in development. The forced removal of people, the most common way to move indigenous groups blocking developments, should be replaced with a process of gaining consent. This process includes the following elements:

- Free: free of force, corrupt practices, and interference or pressure from outside the community
- Prior: consent must be achieved in a suitable time frame before decision-making
- Informed: all information must be made available to the community in a manner that can be clearly understood
- Consent: following their own decision-making processes, the community must agree

UNDRIP also covers the right to traditional land ownership:

Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use. [...] States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples.

UNDRIP not only establishes the right of indigenous peoples to their land, but also a corresponding responsibility on the part of governments to respect those rights. Whether these will be practiced at the national level differ from State to State. Not all States in Southeast Asia recognize traditional ownership of land, for example, while Malaysia and Cambodia do, Thailand does not. And simply because a State recognizes

a group as indigenous, does not mean their land ownership will be recognized as well. While UNDRIP usefully established standards to better protect indigenous rights, indigenous groups in the region continue to be displaced from their land and regularly face violations created by environmental degradation.

14.5 Climate Change and Human Rights

The final section will discuss the relationship between climate change and human rights. Climate change has both long term effects and immediate consequences on people's livelihoods. While the most damaging impacts have yet to occur in terms of rising sea levels, the region is beginning to see extreme weather conditions, and temperature changes. Eventually this can lead to more frequent droughts, water shortages, floods, storms and heat waves. All of these will affect the lives of millions through changes in food production, and humanitarian disasters. In Southeast Asia, one of the greatest concerns is the damage done to river deltas as a result of rising sea levels. For example, the river deltas in Vietnam, Thailand, Myanmar, and in neighbouring Bangladesh are some of the most agriculturally productive and populous areas in the region. Rising sea levels could lead to tens of millions of people being forced to leave their homes, turning them into **environmental refugees**. Further, because these areas produce large amounts of food. For example the Mekong Delta in Vietnam produces half the country's rice crop, shortages in these regions could lead to human rights violations on a massive scale.

Other areas of concern include more extreme weather events, such as stronger typhoons hitting the Philippines, Vietnam, and Myanmar; harsher winters in northern Myanmar, and Vietnam; and droughts. The Maldives and Tuvalu are two countries in the Asia-Pacific that face extinction as rising water level projections place the entire island State under water. All of which goes to show that climate change can alter the realization of human rights.

Despite small pockets of denial, the consensus is that human-made greenhouse gas emissions are a primary cause of climate change. Backed up by the science of the Intergovernmental Panel on Climate Change (IPCC), the worst of these concerns may be avoided if States cooperate. As regards human rights, two relevant actions are required: (1) the prevention of violations to people due to climate change should be a government priority; and (2) countries, industries, and groups most responsible for climate change should be held accountable for their actions. However, States are yet to fully embrace this. Two important gaps are the 'emissions gap,' that is, the difference between what States need to do to reduce emissions and what they have promised. Unfortunately, States are not reducing emissions enough to hold off climate change. The 'financial gap' refers to the difference between the costs brought on by climate change, and the capacity or willingness of States to pay that money. People living in poorer countries will not have the financial or technological protection of those living in rich countries. Since 2006, this growing awareness has led to much action in the UN resulting in a resolution from the Human Rights Council, and more recently, reports from the Special Rapporteur on the environment, and the United Nations Environment Program (UNEP). The original UN Framework Convention on Climate Change (UNFCCC) of 1992 made no reference to human rights, most likely because the impact on human rights had not yet been fully realised. More recently, States party to the UNFCCC have acknowledged human rights implications noting that States should respect human rights in their response to climate change.

Environmental Refugee

A person forced to flee their home because of environmental changes. Currently, there is neither legal recognition nor protection for these people.

Further, the IPCC and the Office of the High Commission for Human Rights (OHCHR) are developing a rights-based response to climate change (detailed in Chapter 12 on Development). The OHCHR justifies this approach by linking it to environmental discrimination:

Negative impacts of climate change are disproportionately borne by persons and communities already in disadvantageous situations owing to geography, poverty, gender, age, disability, cultural or ethnic background, among others, that have historically contributed the least to greenhouse gas emissions.

The human rights based-approach ensures that States responding to climate change do not violate human rights. It is argued that many plans to mitigate climate change do not fully assess the impact on human rights. For example, closing coal-fired plants or reducing traffic on roads are obvious responses to climate change, yet the impact on people's livelihoods or other rights has not been fully examined. It is these questions that a rights-based response should answer.

Currently, UN bodies are working to incorporate human rights into existing development and climate change documents such as the UNFCCC and the 2030 Agenda for Sustainable Development. In February 2015, eighteen parties to the UNFCCC announced the *Geneva Pledge for Human Rights in Climate Action*, a voluntary commitment to:

Facilitate the exchange of good practices and knowledge between their human rights and climate change experts at a national level with a view to strengthen their capacities to deliver responses to climate change that are good for people and for the planet.

The 2030 Agenda for Sustainable Development has two aims. First, to ensure that States and non-state actors be accountable for their contribution to climate change impacting human rights, and that actors should use human rights as a framework through which to address climate change.

Although a good start, the process of turning pledges and declarations into a legally binding treaty on climate change has been challenging. In the recent 21st Conference of Parties to the UNFCCC (more commonly known as COP 21) in November 2015, there was much debate about the inclusion of human rights. It finally appeared in the preamble which states:

Climate change is a common concern of humankind, Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity.

While some see this as a victory because human rights were finally mentioned, others doubt whether it is legally binding due to its position in the preamble. Further, the wording does not specifically detail the duties and obligations of States. Apart from respecting and promoting human rights, the protection of these rights is not mentioned.



DISCUSSION AND DEBATE

Human Rights Impact of Climate Change

What are going to be the human rights implications of climate change to your country?

1. Look into the consequences of the following climate change implications:

- rising sea levels
- more storms or typhoons
- more droughts
- changes to agricultural production
- diseases such as malaria migrating to new areas
- hotter temperatures and heat waves

2. What can be done to reduce the impact of climate change? Consider the changes that need to occur to reduce the emission of greenhouse gases. Consider the following:

- what can individuals do to change their behaviour?
- what can families do?
- what can communities, villages, and suburbs do?
- what can cities do?
- what should a national government do?

14.6 Conclusion

This chapter has described the links between human rights and the environment. A clean environment is integral to human rights but much still needs to be done to ensure a clean and healthy environment is recognised as a human right. At this time, while many States recognize the human right to a clean environment, it has yet to become an established principle in international law. It is hoped a strong response to the current concerns surrounding climate change will encourage more international bodies to see human rights as a means to monitor and protect people's rights resulting in a wider recognition of the right to a clean environment.

A. Chapter Summary and Key Points

Introduction

Concern for the environment can be traced back to the late 1800s, but it was during the 1960s and 1970s that it became a worldwide phenomenon. High profile environmental disasters made people realize the impact of environmental degradation. Human rights were soon after linked to the environment. The interaction between human rights and the environment works both ways: a clean environment is a human right and the well-being and protection of the environment depends on the protection of human rights. Southeast Asia has a history of environmental activists on issues such as protecting nature and pollution. Pollution is now international with cross boundary haze caused by forest fires in Indonesia. The transboundary haze led to international agreements on the environment in the region. Environmental activism is dangerous with many being attacked and killed.

Environmental Standards

Till the 1960s and 1970s laws regarding the environment were more concerned with the exploitation of the environment. There were national parks laws, and laws on river uses, but during the 1970s many international laws on water pollution, dangerous chemicals, and protection of endangered species were introduced. The first claim that a clean environment is a human right, was in the Stockholm Declaration (1972). The human right to a clean environment did not receive widespread support because some saw it as too vague and unenforceable.

A Substantive Right to a Clean Environment

The right to a clean environment has two separate but interrelated objectives: there must be a law (or substantive rights) and a mechanism to enforce it (procedural rights). Substantive rights exist in both international and domestic laws such as ICCPR, ICESCR, and at the regional level in the ASEAN *Human Rights Declaration*. More substantive rights can be found at the national level in Southeast Asia with rights in the national constitutions of the Philippines, Malaysia, and Thailand.

The Procedural Right to a Clean Environment

The procedural right consists of a right to environmental information, a right to participate in environmental decision making, and access to the courts or other forms of administrative mechanisms in the event of a dispute. Information is needed so people know, and can prepare for, impacts on their local environment. These can be freedom of information laws. Participation can come through Environmental Impact Assessments and participation in town planning. Participation from the public should influence the final decision making. The report on a project should consider public opinion and responses to them. Access to a remedy for dispute resolution or compensation and access to the courts is part of this right, though it can be limited by *locus standi*.

The right to a Safe, Clean, Healthy and Sustainable environment.

Another model from the UN's Special Rapporteur on Human Rights and the Environment details obligations of the State to ensure a safe, clean, healthy and sustainable environment. This includes obligations to protect individuals from environmental harm, ensure awareness, participation and access to legal procedures, obligation to protect against violations by private actors, and to take account of groups who may have particular vulnerabilities or suffer disproportionately from environmental destruction such as women, children, the poor, and Indigenous groups.

Indigenous groups and the environment

Indigenous people face many violations from degradation of the environment through large projects such as dams, deforestation, and mining. There are special measures to protect the indigenous because their ownership of the land is traditional, and in the law they are vulnerable to encroachment by farmers and forced displacement. UNDRIP states indigenous peoples shall not be forcibly removed or relocated from their lands and movement can only be done with free, prior and informed consent.

Climate Change and Human Rights

The changes to climate have long term effects like sea level rise and immediate consequences such as extreme weather conditions. Food prices and availability will be affected through a drought, floods and storms. The result could lead to tens of millions of environmental refugees. The negative impact of climate change will face disadvantaged communities. The worst of these concerns may be avoided if States cooperate though reducing greenhouse gases, but this is yet to be realized. Many plans to mitigate climate change do not fully assess the impact on human rights. While human rights are mentioned in the more recent climate change documents there is no specific details on duties and obligations of States.

B. Typical exam or essay questions

- When did people in your country become interested in environmental protection?
- How does the protection of human rights impact the protection of the environment?
- What are the dimensions of the human rights to a safe, clean, healthy, sustainable environment, and how is each dimension measured?
- How could a human rights based-approach to climate change address responses to environmental refugees or increased disasters?
- Why may a substantive right to a clean environment not translate to a procedural right to a clean environment?
- Examine a protest by an environmental group in your country. This could be a protest about a dam or a development. What do the protestors say and how does the government respond? How can the benefits of the development compare to the environmental impact?
- What will be the major impacts of climate change in your country? Are there any preparations for this?
- What are the challenges in your country for a group of people to bring a court case based on environmental degradation?
- Is there any relationship between the waste produced by students and universities, for example over use of plastic bags and paper, and the human right to a clean environment?

C. Further Reading

Authors on human rights and the environment include:

- James Crawford
- Robert Hitchcock
- Ann Marie Clark
- David Boyd
- John Knox
- Jennifer Clapp
- Rachel Carson

Organizations which have programs and research on human rights and the environment include:

- The Special Rapporteur on human rights and the environment
- United Nations Environment Program (UNEP)
- Stockholm Environment Institute (SEI)
- Greenpeace
- Centre for International Environmental Law (CIEL)
- Centre for International Sustainable Development Law at Yale University
- World Bank reports on development and climate change

Additional resources on human rights and climate change include:

- At the UN there are various programs found at the OHCHR, Human Rights Council, and UNEP.
- Working Group on human rights and climate change has its own website at climatechange.org.
- Reports are available from the UNFCCC, which has a climate change newsroom and a facebook page, and COP 21, which has its own website.

Resources on indigenous groups and human rights include:

- James Ananya
- Paul Keal
- UNEP has a program on Indigenous rights
- OHCHR has a report on *Climate change and indigenous peoples*
- UNESCO has research on indigenous rights, and some on the environment and indigenous groups
- ILO, through its Resolution 169, covers indigenous rights.
- Asian Indigenous People's Pact (AIPP) has an environment program.

- In Thailand there is: Indigenous Peoples' Foundation for Education and Environment (IPF), Inter Mountain Peoples Education and Culture in Thailand Association (IMPECT)
- In Indonesia there is: Alliance of Indigenous Peoples of the Archipelago (AMAN)
- Other indigenous groups include Forest Peoples Program, Assembly of First Nations, and Survival International.