



**Constructing ASEAN Environmental Governance:
Regional Cooperation, Environmental Rights, and the
Politics of Institutional Change
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1. Introduction

IN 1997, a ‘regional’ disaster hit Southeast Asia: the transboundary haze. Started with unresolved forest fires in Indonesia, which produced a regional-scale smoky haze, the Indonesian authority reacted by declaring a state of emergency and coordinate a national-level actions to resolve the problem, but was unable to prevent the haze from spreading to neighboring countries. This has also prompted the Association of Southeast Asian Nations (ASEAN), the ‘umbrella’ organisation for regional cooperation in Southeast Asia, to establish a more complex cooperation to deal with environmental issues. Even though the cooperation has been set up since the 1970s, the transboundary haze problem has made clear that ASEAN needs a deeper plan of action to resolve the environmental issues. ASEAN has since signed an ASEAN Agreement on Transboundary Haze Pollution (2002), produce an various statements and declarations, establish an greement on Transboundary Haze Pollution (AATHP) and its Conference of Parties, set up a center to conserve biodiversity (since 2004), and arrange some policy frameworks to manage the peatland (since 2014).

This development has also raised questions as to whether ASEAN’s approach to environmental issues corresponds to the broader idea of “environmental rights”. At the global level, the concept has been theoretically developed since the 1970s and was acknowledged in international sphere at the 1972 Stockholm Conference on the Human Environment (Shelton, 1991) and recent attempts have since been made to incorporate the question of environmental protection with the human rights standard, albeit with some limitations (Shelton and Anton, 2011). Yet, the discussion of environmental rights has not fully developed in the ASEAN legal, institutional, and policy frameworks.¹ Although ASEAN member states have incorporated international legal frameworks on Human Rights and the environment (albeit generally) in their national legislations, it is unclear whether ASEAN has also developed such approach on its framework of environmental cooperation.

This article addresses this puzzle by offering a preliminary analysis on the construction of ASEAN environmental governance. We investigate if and why the construction of ASEAN cooperations on environment, which was initially established already in 1977, conflicts with environmental rights; and what is the prospects for institutional change to accommodate environmental rights. We establish a deliberative framework of global governance to understand the way in which environmental rights, as an idea and norm, could be incorporated in the global governance through ‘deliberative practices’. We then apply this concept to assess the current normative and ideational construction of ASEAN environmental governance. Drawing upon a combination of constructivist and historical institutionalist analysis of regional governance, we collect 49 policy documents on ASEAN cooperations on environment. Furthermore, we identify the core ideas that underpin the frameworks of cooperations and governance (or what we shall call “metagovernance”) before and after the 1997 regional haze

¹. For further discussion on “Environmental rights” see Stone (1972) and Shelton (1991).



crisis, and furthermore assess the extent to which the framework accommodate environmental rights.

This review sheds light to two general observations on the state of ASEAN environmental governance. *First*, in line with previous studies that sees the tension between ‘rights’ and ‘sovereignty’ in ASEAN (see for example Elliott, 2012; Nguitragool, 2010; Aggarwal and Chow, 2011), we argue that the existing policy frameworks, both prior and after 1997, has not fully accomodated environmental rights. Whilst the idea of “Human Rights on the Environment” has slightly appeared in ASEAN, the persistence of “environmental sovereignty” in ASEAN environmental cooperation/governance prevent the institutionalisation of Environmental rights. *Secondly*, however, our analysis also suggests that despites of the tnsion between ‘sovereignty’ and ‘rights’, ASEAN experience shows the possibility of ‘institutional changes from within’, in which ASEAN technocratic and scientific bodies have emerged as a response of ASEAN haze crisis. We suggest that even though environmental sovereignty still persists, the way it respond the haze crisis shows complex institutionalisation by incorporating scientific and technoncratic approach to existing bodies or institutions, despite the persistence of sovereign state in the process. Institutional changes from within, from this perspective, is possible. In the current state, however, the prospect is constrained by the persistence of state-centric discourse in the formalisation of ASEAN environmental governance.

Drawing upon a deliberative framework, we attempt to propose some policy implications to furthermore incorporate environmental rights in the existing ASEAN environmental governance. We suggest that renovating institutions of ASEAN environmental governance could be done by ‘socialising’ the environmental rights as a foundational idea in the ASEAN institutions, furthering the deliberative outreach in ASEAN institutional framework, and acknowledging the multi-level structure of ASEAN environmental governance. Engaging ASEAN’s ‘technocratic’ and ‘scientific’ institutions through knowledge production and broader ‘everyday engagement’ within the institution is therefore necessary to embrace further reform in ASEAN environmental governance.

This argument will be set forth in four sections. The first section establish a theoretical framework to incorporate Environmental rights and ASEAN Environmental Governance through the idea of global democracy. The second section move to identify the structure and evolution of ASEAN environmental cooperation, which will be traced since the 1970s. The third section assess the current state of ASEAN cooperations on environment based on the framework of deliberative global governance and providing a critique to the dominating “environmental sovereignty” in the current ASEAN environmental governance. The final section conclude and propose some policy implications, which we shall call “institutional changes” to remedy these gaps in the future ASEAN environmental governance.

2. Environmental rights, Global Democracy, and Regional Governance: A Framework for Analysis

2.1. Defining “Environmental rights”: Contending Perspectives

There are three dominating approaches that attempt conceptually define “Environmental rights”. The first approach, drawing heavily upon international legal frameworks on Human Rights and the Environment, understand ‘environmental rights’ in terms of ‘Human Rights to



Healthy Environment’ and related Human Rights framework that has been internationally established in international legal system. This approach, to sum up, understands ‘environmental rights’ as an adaptation of international human rights standards, in responding the challenge of environmental deterioration. Shelton (1991), for example, argues that Human Rights and Environmental Protection are in fact complementary, in which the practice of environmental protection needs to consider a Human Rights based approach and Human Rights enforcement needs to incorporate environmental protection in its implementation. From a legal perspective, Lee (2000) traces the legal origins of the Rights to Healthy Environment to the existing domestic and international law, in order to theorises the legal foundation of environmental protection in international level.

The second approach acknowledges one significant flaw of the previous approach, namely the anthropocentric tendency. Eckersley (1999) paid some attention to legal approach that attempts to ‘represent the nature’ in global/national politics through an anthropocentric way, which in turn ‘silenced’ the nature at the expense of individual interests. Stone (1972) questions the anthropocentric conception of environmental law by locating the idea of environmental protection not only as the incorporation of the needs for environmental protection in the existing legal foundation, but move forward to acknowledge the rights of ‘non-Human’ to co-exist with the Human as an equal legal subject. From different theoretical perspective, Latour (2013) argues that the legal and scientific understanding of environmental deterioration has seduced the human being into a single standard. To resolve the problem, one to acknowledge the complex networked relationship between human and the surrounding environment, which implies the acknowledgement of multiple mode of existence in human society (Latour, 2013). The emergence of ‘New Materialist’ in International Relations theory also acknowledge some limitations of the legal and scientific approach for attempting to ‘fix the unfixable’ and for drawing heavily upon the Anthropocentric approach resolving environmental deterioration (Dalby, 2014; Burke et. al., 2016; Hamilton 2016a; 2016b).

The third approach considers a ‘middle ground’ for the environmental rights by proposing the incorporation of environmental issues in the broader practice of ‘earth system governance’. Drawing upon the works of Frank Biermann and his colleagues at the ‘Earth System Governance’, this approach acknowledges the devastating environmental deterioration over the 20th century but still consider the political and legal solution to resolve the problem, this approach understand environment as a part of a complex ‘earth system’ that needs to be governed sustainably by the human being (Biermann, 2007; Biermann and Gupta, 2011; Biermann et. al., 2014). They begin with the epoch of anthropocene, which identifies changes in geological and atmospherical environment in the last 1-2 century due to population boom, technological advancement, or wars and other political changes in world politics (Crutzen and Stoermer, 2000). However, rather than simply dependent upon the narrow international legal system or abandoning the legal-scientific approach due to its weaknesses, this approach attempts to resolve the problem by creating ‘earth system management’. Governing and managing earth system does require a proper acknowledgement of multiple actors in world politics, as well as the complex inter-actor relationship in world politics (Young, 2003; Biermann, 2014).²

Each approaches of course offers provide significant merit in understanding environmental rights, which we would not object. However, it is equally important to

² Whilst agreeing with Professor Oran Young’s arguments on crafting an effective ‘environmental governance’, we also propose that global environmental governance should also ‘democratic’ in the sense that it also embraces participation and acknowledging environmental rights.



acknowledge the strength and limitations of each approach in understanding environmental rights. The first approach proposes a strong legal basis to argue for the rights to healthy environment. However, as Weston and Bollier (2013) has rightfully notes, these legal-judicial form of human rights to environment, however robust in their particularised application, are essentially limited in their legal recognition and jurisdictional reach due to their reliance on “soft law”. Another critique also render this approach for narrowly ‘seducing’ environmental protection into a single standard whilst denying the environmental destruction led by human (Latour, 2010; Hamilton, 2016b; Burke et. al.; 2016). The second approach attempts to provide a useful critique on how the international law might be resolved by understanding the broader historical and genealogical origins of the environmental destruction and how Humans are attempting to solve the problem, but gives no political and legal solution to deal with the future environmental problems. Another attempt by Stone (1972) to acknowledge legal standing for non-Human Agency in the environmental protection has been useful in providing a constitutional basis for environmental protection, but its application is only limited to particular country in which civil society are strong and vibrant. The third approach, whilst offering a more politically viable solution to advocate environmental protection, has also been limited by the ‘weak’ nature of global governance institutions and the dominance of political power that neglect the environmental sustainability.

To remedy some limitations of the abovementioned approaches, we envisage a new theoretical framework to incorporate environmental rights in the global governance institution, which will be specifically discussed in the case of ASEAN. Following Stone (1972), we define ‘environmental rights’ in two aspects: *First*, a legal mechanism that acknowledges the rights to environment; and *Second*, the physical and socio-physical aspect of the environment that necessitates the acknowledgement of the nature as legal subject. Having acknowledged some limitations on the international legal system on environmental law (Shelton, 1991; Boyd, 2012), Environmental rights encompasses both ‘Human Rights to Healthy Environment’, which has been legally incorporated in international human rights standard, as well as broader aspects of ‘Rights to Environment’ as argued by Stone. Therefore, our understanding on Environmental rights considers not only the legal aspect of “Human Rights” and “Environmental Protection” from a constitutional perspective (Boyd, 2012) but also the environmental sustainability that requires a sociological and physical inquiry over the future of the earth. This necessitates a new approach of incorporating environmental protection in existing global governance institution.

2.2. Environmental rights, Global Democracy, and ASEAN: Towards a New Framework

We offer a more specific methodological framework by drawing upon the general idea of “global democracy” and ‘multi-level governance’ (Dryzek, 2000; Dryzek and Stevenson, 2014; Flinders and Bache, 2004). We shall begin by conceptualising “global democracy”. Whilst most of literatures on democracy seem to focus on the practice of democracy in domestic level, a number of literatures attempt to bring this idea to global governance institution. Cohen and Sabel (2004) argues that the practice of democracy emerges in what they called as “global administrative space”, in which global rule-making bodies or institutions emerged in global politics alongside transnational movement and organisations that operates outside the state.³ In this new landscape of ‘global governance’, whilst states remain an

³ Even though many scholars have argued that ‘democracy’ is not compatible with Asian regionalism because of what they perceived as “Asian value” rooted in Asian developmentalist regimes in the 1970s, we shall refute this claim. We conceptualise “democracy” not in terms of Western values that is incepted in the Asian context, but as a process of “deliberation” that has been practiced by ASEAN member states, either through “diplomatic



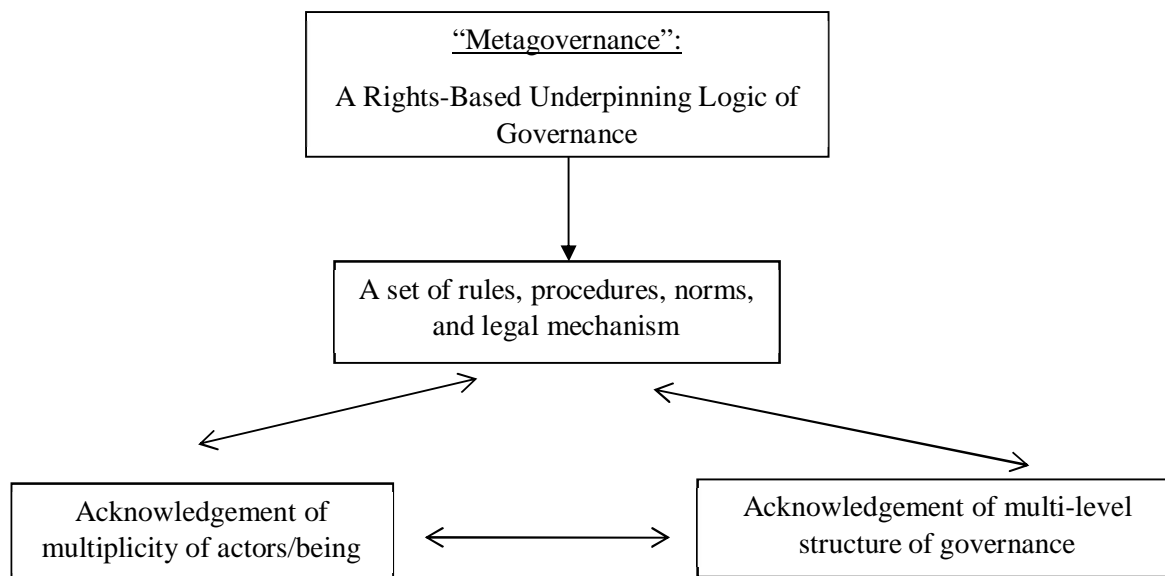
essential players, there are also an increasing demands from ‘non-state actors’ to participate (Nanz and Steffek, 2004). Therefore, democracy is necessary for global governance. Whilst the democratic practice is not necessarily similar to that of national level, Dryzek (2000) argues that democratic practice in global governance could be ‘deliberative’, in which the communicative action of increasingly plural actors in emerging extended space of global governance shape the practice of global democracy. Taking the case of global climate governance as a case study, Dryzek and Stevenson (2011) expands this argument further to analyse how communicative practice help to incorporate sustainability and democracy to the global climate governance institutions such as UNFCCC. The “earth system governance” approach also acknowledges the importance of communicative basis of global governance, which would enable the presence of legitimacy, allocation, and access in the increasingly complex earth system governance (Biermann, 2007; Biermann and Gupta, 2011).

This understanding of ‘democratic’ global governance leads to another question: in what way could we understand, and furthermore assess, the practice of *democracy* in contemporary global governance institution? What would this imply to our assessment on ‘environmental rights’ in ASEAN? In this research, we aim to extend the merits of ‘global democracy’ by applying this to understand the ideational and normative construction of ASEAN environmental governance, and furthermore links this to understand the extent to which it conflicts or inherent with the environmental rights. This move requires three types of investigation. *First*, an inquiry over the ideational and normative backbone of a particular governance, which drives the institutional foundation and the political practice that underpins a regional governance. This inquiry will enable us to show as to whether a particular idea is accommodated or conflicted in the regional institution. *Second*, once the ideational and normative backbone has been identified, it is important to explain the communicative and deliberative practices that has been staged at the regional governance. This process will enable us to understand how a ‘regional governance’ is constructed through inter-subjective practices that is embodied in the regional institution. *Third*, it is equally important to understand how the institutional process is ‘transmitted’ to the lower level of governance by taking into account the multi-level structure of governance. This will enable us to understand the ‘outreach’ of the ideational and normative framework to the broader structure of regional governance.

culture” or non-state actors’ participations in the region. Therefore, democracy is not perceived as a normative ideas that should be incorporated by ASEAN member states, but as a practice of deliberation that has been embedded in ASEAN’s institutional practices since its establishment, albeit with some limitations (that we shall assess in this article).



Figure 1. The Framework of Deliberative Global Governance



Drawing upon this methodological framework, this article will be focused on the first aspect of deliberative global governance, namely the “normative and ideational framework”. We shall go deeper to explain how the existing ASEAN environmental governance is constructed, both in ideational and institutional level.⁴ We primarily deal with the first aspect deliberative global governance as has been previously discussed, namely the ideational and normative backbone of a particular governance. In this article, we adopt a combination of ‘Constructivist Institutionalism’ framework, which puts an emphasis on the ideational construction of a global governance (Hay, 2008) with an Historical Institutionalism’ framework, which deals with temporal processes and events that influence the transformation of a particular social and political institutions (Fioretos, Falleti, and Sheingate, 2016). Constructivist Institutionalism is important to dissect the ‘ideational’ foundation of a particular regional governance, whilst Historical Institutionalism could examine whether or not it undergoes an ‘ideational shift’ in a particular historical timeframe. This combination will provide us a clear picture of how a particular environmental governance is constructed in the regional level.

Our approach identifies the location and evolution of environmental rights in four core components. *First*, a meta-governance, which refers to a particular ideational aspect that drives the whole governance process in ASEAN; *Second*, the institutional foundations, which refers to a set of rules, procedures, and legal mechanism that bind the practice of governance. *Third*, deliberative outreach, which refers to an acknowledgement of multiple actors in global politics and their location in the governance practice within regional institutions. *Fourth*, the multi-level structure of governance, which relates to an acknowledgement of multiple levels in which political authority are established in world politics, which requires further

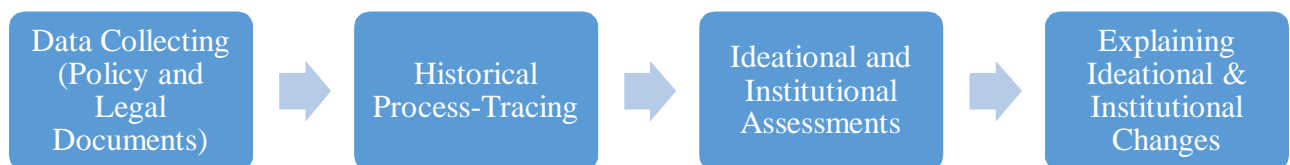
⁴ Given the limitation of space, This research will only focus on the first type of inquiry, which will locate the ideational and normative foundation of existing ASEAN environmental governance.



acknowledgement of multiple constitutional and legal basis of environmental governance in each level (Flinders and Bache, 2004; Hooghe and Marks, 2001). We aim to analyse how these aspects work in the existing environmental governance, particularly after the 1997 haze crisis. The event will be taken as a vantage point because, as this research will show, it represents some ‘paradigm shift’ of ASEAN environmental governance, which to some extent change the way ASEAN treat environmental issue in its institutional framework.

In order to explain how these aspects work, we shall provide a description of how ASEAN environmental governance is constructed in ASEAN. It requires a ‘process-tracing’ of the history of ASEAN environmental governance from the earliest phase of governance-making. We collect 49 policy documents on ASEAN cooperations on environment, identify the core ideas that underpin the frameworks of cooperations and governance (or what we shall call “metagovernance”) since 1977, when ASEAN firstly introduced environmental cooperation. Furthermore, we analyse the historical evolution of cooperation before and after the 1997 regional haze crisis, and assess the extent to which the framework accommodate environmental rights. This ‘historical’ description will provide the patterns of environmental governance in ASEAN. Moreover, we shall analyse the location of ‘environmental rights’ in this pattern and investigate as to whether the existing frameworks of cooperation conflict with the idea. Against this pattern, we shall therefore investigate (1) if and why the construction of ASEAN cooperations on environment has accommodated the idea of environmental rights; and (2) in what way we could embrace institutional change in the current ASEAN environmental governance. **Figure 2.** Develops the methodological framework in a coherent diagram.

Figure 2. The Methodological Framework



3. From “Cooperations” to “Governance”: The Persistence of Environmental Sovereignty in ASEAN

3.1. The First Phase of ASEAN Cooperations on Environment (1977-1997): Crafting Environmental Sovereignty

We begin by presenting the ASEAN cooperations on environment since the signing of ASEAN Treaty of Amity and Cooperation (1976) and its formalisation one year later (1977). The seed of environmental cooperation has been established through the 1st ASEAN Ministerial Meeting on Environment (AMME) in Manila (1981), which established the Manila Declaration on ASEAN Environment (1981). This is the first documented cooperation on environment in ASEAN, having been preceded by three preparatory meetings in Jakarta (1978), Penang (1979), Manila (1980) and Singapore (1981). The Meeting established ASEAN Environment Program (ASEP) to ensure the protection of the ASEAN environment and its sustainability for regional institution and its member states development. The Declaration was renewed in



Bangkok (1984), which continues the progress of established project on the subject of environmental protection and supportive governmental action. Since then, ASEAN Cooperations on Environment was crafted through diplomatic arrangements. ASEAN established cooperations on Heritage Parks and Reserves (1984) and Conservation of Nature and Natural Resources (1985), which was followed by the signing of Jakarta Declaration on Sustainable Development (1987) and several other Declarations on environment until the 1990s.

Since 1981, ASEAN cooperations on environment has been institutionally operated through ASEAN Ministerial Meeting on Environment (AMME), a regular forums attended by Environmental Ministers from each ASEAN Member states. This institutional backdrop posits the state as the major actor in crafting the cooperation, accompanied by a limited number of inter-governmental organisation or other global governance institutions (Elliott 2012, Uhlin 2016). Consequently, the construction of ASEAN cooperations on environment was very state-heavy and represents state's interests. For example, the Manila Declaration outlined six aspects of environmental cooperation that has been agreed by all ASEAN member states, including (1) environmental management including environmental impact Assessment; (2) Nature Conservation and Terrestrial Ecosystems; (3) Marine Environment; (4) Industry and Environment; (5) Environmental Education and Training; and (6) Environmental information (Manila Declaration 1981). It did not mention some critical environmental issues that was linked to development or extractive industries, which will be harmful to state-led development programs.

The emergence of “sustainable development” at the Rio Declaration on Environment and Development (1992) has also provided a significant impact in the ASEAN cooperations on environment. ASEAN embraced the idea of “sustainable development” for the first time in 1987, when ASEAN environmental ministers has agreed to “adopt the principle of sustainable development” as a part of ASEAN cooperations in the future (Jakarta Resolution, 1987). Three years later, ASEAN substantiate the principle in a specific guidelines on “environment and development”, which was considered as the most “pro-development” stance, given the emphasis on natural resource management besides the environmental protection (Kuala Lumpur Accord, 1990; Cotton, 1999). This stance was, however, gradually changed after 1992, which witnessed the rise of ‘sustainable development’ and the devastating haze crisis in the region.

Table 1. summarises the first phase of ASEAN environmental cooperation. From the data, it is clear that between 1981-1977, ASEAN environmental cooperation has been focused on three core issues: environment, development, and conservation. Except the Declaration on Heritage Parks and Reserves (1984) and the Agreement on the Conservation of Nature and Natural Resources (1985), the cooperation is built upon the centrality of the state in ‘managing’ the environment. The latest of the series, Jakarta Declaration (1997), that emerges in the wake of Asian haze crisis, clearly states that “ industrialization will continue to be a critical part of the ASEAN economy into the foreseeable future” and “a continued, long-term economic growth is essential to the prosperity of the ASEAN people and is fundamental to sustainable development” (see Jakarta Declaration, 1997). It constitutes the stance of ASEAN environmental cooperation: reducing environmental impacts to safeguard national economic development. Therefore, the construction of ASEAN environmental cooperation between 1981-1997 clearly shows the dominance of “environmental sovereignty”, in which state representative (diplomats) plays key role in crafting cooperation and ratify it in national level (Condon, 2006). This is inevitable since ASEAN has adopted non-interference as its main



principle in crafting regional cooperation, which locate the state as the main actor (ASEAN Treaty of Amity and Cooperation, 1976). In ASEAN, environmental sovereignty operates through the strong role of ASEAN Ministerial Meeting on Environment, who define the environmental problems that should be addressed regionally. It posits ASEAN cooperations on Environment merely as ‘diplomatic forum’, although there were several agreements that addresses environmental issues in the region.

Table 1. Pre-1997 ASEAN Framework of Cooperation

No	Document	Year
1.	Manila Declaration on the ASEAN Environment	1981
2.	Bangkok Declaration on the ASEAN Environment	1984
3.	ASEAN Declaration on Heritage Parks and Reserves	1984
4.	Agreement on the Conservation of Nature and Natural Resources	1985
5.	Jakarta Resolution on Sustainable Development	1987
6.	The Kuala Lumpur Accord on Environmental and Development	1990
7.	Resolution on Environment and Development	1992
8.	Resolution on Environment and Development	1994
9.	Jakarta Declaration on Environment and Development	1997

3.2. The Second Phase of ASEAN Cooperations on Environment (1997-2017): Combining Environmental Sovereignty with Technocratic-Scientific Measurement

The 1997 forest fires, which was followed by disastrous haze crisis in the region, marks a paradigm shift in ASEAN cooperations on environment. ASEAN member states have since agreed to craft a more complex form of cooperation and gradually develop a form of regional environmental governance. After a series of negotiation, ASEAN member states established an Agreement on Transboundary Haze Pollution (2002), which served as a more rigid framework of cooperations in tackling regional haze problem. This agreement has been followed by a set of institutional and policy framework that strengthen the implementation of this agreement, particularly (1) a set of institutional and scientific bodies in ASEAN Secretariato; and (2) the Conference of Parties that accompanies the Agreement. In addition to Transboundary Haze Pollution, the post-1997 environmental cooperation in ASEAN also established framework to tackle climate change, as well as further institutionalisation of ‘sustainable development which has been set out as development goals by the United Nations in 2015.

The institutionalisation of ASEAN Cooperations of Environment has been further set forth after the ASEAN Agreement on Transboundary Haze Pollution. The ASEAN Ministerial Meeting on Environment (AMME) has been accompanied by the Senior Official Meeting on



Environment (SOME), which was based at the ASEAN Secretariat. Further institutionalisation was accorded following the signing of AATHP. For example, the Agreement has established several key measurements to anticipate haze in the region, including Monitoring and assessment, Prevention, Preparedness, National and joint emergency response, Procedures for deployment of people, materials and equipment across borders, and technical cooperation & scientific research (AATHP, 2002). The agreement has also **established** ASEAN Coordinating Centre for Transboundary Haze Pollution Control at the ASEAN Secretariat to handle the regional haze crisis, as well as an ASEAN Specialised Meteorological Centre in Singapore. These institutions are overseen by a Conference of Parties, which consists of Environment-related ministers of ASEAN member states. The CoP hold meeting annually to discuss the progress of AATHP implementation. In the prevention level, the Agreement also established some key guidelines regarding peatland management system in the region.

However, the construction of ASEAN cooperations on environment after 1997 has also failed to escape from the trap of “environmental sovereignty”. For example, the ratification of AATHP has been varied in all ASEAN Member states due to state’s domestic politics. Whilst countries like Brunei Darussalam, Malaysia, and Singapore ratified the Agreement in 2003, it takes a decade for Indonesia to process the ratification. The progress of AATHP Implementation were therefore halted in some key parts in Indonesia and the Phillippines (who both ratify the Agreement in 2010). Environmental sovereignty also persists in the institutional structure of ASEAN environmental governance. Whilst the ASEAN Secretariat and the accompanying technocratic bodies that deal with haze issues are gaining prominence after the signing of AATHP, the direction of these technocratic bodies are still dependent upon the Conference of Parties (CoP), which consists of state ministerial representative that negotiate in a regular basis. It is also worth noting that the AATHP itself has also been guided by a basic principle that maintains state sovereignty to exercise their rightst to land and development, although accompanied by a principle of “responsibility not to cause damage and harm” (AATHP, 2002, p. 3; Elliott, 2012). Consequently, state sovereignty remains at the core of the Agreement whilst partially giving authority to scientists and ASEAN technocratic body to deal with haze through scientific measurement.

Table 2. provides a list of institutional framework and mechanism that relates to haze crisis. It is clear, from the picture, that ASEAN attempts to establish a new model of institutional framework within ASEAN that is not violated the principle of ‘non-interference’. This was done by combining “environmental sovereignty”, which has been set forth earlier, with a specific technocratic and scientific mechanism in ASEAN secretariat and related bodies that set the basis of a new regional environmental governance. The AATHP, for example, has recommended the establishment of scientific framework to combat the haze, which was followed by the establishment of ASEAN Peatland Management System (2002). Furthermore, the framework of cooperation has also been further developed by the ASEAN Senior Officer on Enviromment at the ASEAN Secretariat, who meet annually to craft the cooperation in the ASEAN Ministerial Meeting on Environment. The wider role of ASEAN Secretariat marks the “paradigm shift” of ASEAN cooperations on environment, but not necessarily transform the existing idea of “environmental sovereignty” in ASEAN.



Table 2. Institutional Frameworks to Combat Transboundary Pollution in ASEAN

No	Document	Year	Summary
1	ASEAN Specialised Meteorological Centre (ASMC)		Through its website and communication with ASEAN Member States and the ASEAN Secretariat as the Interim ASEAN Coordinating Centre for Transboundary Haze Pollution, ASMC provides monthly weather and haze outlook, satellite images, hotspot information, air quality information, and fire danger rating.. (http://asmc.asean.org/home/)
2	Standard Operating Procedure for Monitoring, Assessment and Joint Emergency Response		These Standard Operating Procedure highlighted the two main bodies National Monitoring Centres (NMC) that will do the monitoring measures and the ASEAN Coordinating Center for Transboundary Haze Pollution (ACC) that will issue weather forecasts and haze outlook on monthly basis..
3	Fire Danger Rating System (FDRS) for Southeast Asia		A system that monitors forest/vegetation fires risk and supplies information that assists in fire management and produce the outputs that can be used to predict fire behaviour and as a guide to policy-makers in developing actions to protect life, property and the environment.
4	Alert Levels and Trigger Points		ASEAN agreed on common four alert levels: (i) Prevention and Preparedness; (ii) First Alert; (iii) Second Alert; and (iv) Third Alert, trigger points, and the corresponding actions to monitor and respond the fire and haze situation in the region Each alert level will be activated based on the agreed respective trigger points, and corresponding actions are to be taken by ASEAN Member States.
5	Panel of Experts		The Panel of Experts have developed the operational procedures for the activation of the experts, deployment procedures, execution (or the conduct of the rapid assessment itself), demobilisation, and reporting procedures. The Panel of Experts convenes at least once every year to do hands-on activities, such as refresher courses on conducting rapid assessment, field trips and table-top/simulation exercises on the procedures for the Panel of Experts.



6	Roadmap On ASEAN Cooperation Towards Transboundary Haze Pollution Control With Means Of Implementation.	2016	The Roadmap serves as a strategic framework for the implementation of collaborative actions to control transboundary haze pollution in the ASEAN region. It consists of four (4) main components, i.e. the vision, the overall goal with indicators, key strategies with measures of progress, and actions.
7	ASEAN Peatland Management Strategy (APMS)	2003	With the big concern on maintenance of peatland since its uniqueness of the soil structure and its character that easily burned, the ASEAN Peatland Management Strategy (APMS) under APMI covering the period 2006-2020 has been developed to guide the countries to sustainably manage peatlands and reduce fires and associated haze within the framework of the ASEAN Agreement on Transboundary Haze Pollution.



4. Where is Environmental rights in ASEAN? A Critical Assessment

The persistence of “environmental sovereignty” in ASEAN has raised further questions as to whether the existing frameworks ASEAN cooperations on environment, and its evolving form of environmental governance after the haze crisis in 1997. This section will move further to locate the position of environmental rights in the evolving forms of cooperation. To do so, we assess four aspects of ASEAN environmental governance, namely (1) metagovernance; (2) institutional, policy, and legal mechanism; (3) actors involved; and (4) structure and level of governance.

4.1. Metagovernance

We begin with the aspect of metagovernance, which relates to the underpinning logic and normative foundation that shapes the environmental cooperations and governance (Jessop 1998, 2004). From the previous section, it could be concluded that that both pre-1997 and post-1997 frameworks of ASEAN cooperations on environment has crafted, and sustained, environmental sovereignty, in which the state define the direction and the content of cooperation. This is particularly evident in three key documents on ASEAN environmental cooperation prior to 1997 (Manila Declaration, 1981; Bangkok Declaration, 1984; Jakarta Resolution, 1987; Jakarta Declaration, 1997), which makes no explicit mention on ‘Human Rights’ or ‘Rights to Environment’, and instead prefer to embrace ‘sustainable development’. The exception is the ASEAN Agreement on the Conservation of Nature and Natural Resources (1985), which “requires contracting parties to circulate information on the significance of conservation measures and their relationship with sustainable development objectives” (Shelton, 1991). What is at stake in this Agreement is that this agreement makes no explicit mention on the practice of mining and extractive industries, as well as its relationship with the rights to healthy environment. Thus, whilst providing an obligation for the contracting parties in natural resources industries to provide information, this Agreement does not specifically mention the rights to healthy environment that is central in our understanding of Environmental rights.

This pattern occurs in other documents. The objective of Manila Declaration (1981) focuses on “the sustainability of its natural resources so that it can sustain continued development”, which explicitly refers the environmental cooperation to state-led development and natural resource extractive industries. The ASEAN Agreement on Transboundary Haze Pollution (2002) acknowledge the terms “rights” as a basic principle, but referring it to “the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies” (AATHP, 2002). Consistent with the previous statements, other post-1997 documents, such as ASEAN Declaration on Sustainable Development (2007) or Bangkok Resolution on Environmental Cooperation (2015) have evidently made no mention, at all rates, to the notion ‘rights’. It could be concluded that the discussion on rights in ASEAN cooperations on environment has been marginalised at the expense of ‘sustainable development’ or environmental conservation’.

4.2. Institutional Design and Policy Frameworks

The negligence of rights in the construction of ASEAN environmental governance, particularly after 1997, has a significant impact in the institutionalisation of Human Rights on Environment in ASEAN. To date, ASEAN makes only a little progress to incorporate



international legal standards on the Human Rights on the Environment, such as the Stockholm Declaration on the Human Environment (1972), the Rio Declaration on Environment and Development (1972), the Aarhus Convention on Access To Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (1998), or the Declaration on the Rights to Indigenous People (2007). Some documents have partially referred to the Rio Declaration (1992) on the rights to development but does not fully accommodate some Human Rights aspects on environment and development. Furthermore, whilst ASEAN has formally established declarations, resolutions, and even Agreements that encompass several international legal frameworks on the environment and development (see appendix), the idea of environmental rights have been diminished at the expense of sustainable development or natural conservation, rendering “environmental rights” to state sovereignty in managing their development. The persistence of “environmental sovereignty” as the metagovernance in ASEAN, as previously discussed, halted further incorporation of environmental rights in ASEAN.

The limits of ASEAN Human Rights System, which has been developed since 2007, has also contributed to the lack of progress in incorporating Human Rights to Environment in the regional level. The establishment of ASEAN Community in 2003, which consists of political security, economic, and social cultural sector as the main pillar of the regional integration, has provided some opportunities to establish a more developed Human Rights system in the region. It was started with the establishment of ASEAN Intergovernmental Commission on Human Rights (AICHR), which was initiated in 2007 and was formally established in 2009. The Commission has been able to draft an ASEAN Human Rights Declaration (AHRD), which was signed in 2013. However, even though ASEAN has set up a set of regional Human Rights institution, its function was not effective enough to enforce Human Rights standard in the region (Tan, 2013; Ginbar, 2010). Even the ASEAN Human Rights Declaration (2012) was rendered as controversial because it endorses particularism in approaching Human Rights (Nandyatama, Prabandari and Umar, 2014). At the Terms of Reference (ToR) that guides the legal basis of AICHR, there is only a limited role of the Commission to socialise Human Rights across the region. There are, however, no specific role to investigate, report, or even enforce Human Rights rule in ASEAN member states (see Terms of Reference, 2009).

The lack of enforcement and compliance has therefore been considered as major obstacle in ASEAN Human Rights system, along with the absence of monitoring bodies and a coordinated Human Rights institution across the region. Jirajindakul (2016) furthermore argues that the lack of strong institutional and legal mechanism in environment-related issue has made ASEAN unable to resolve some problems resulted from growing trade and economic cooperation in the region, such as pirate fishing, logging industries, and the rights of indigenous people. Consequently, when it comes to Human Rights on the Environment, ASEAN has not yet providing a specific legal, institutional, and policy mechanism. In contrast, ASEAN tends to bring back state sovereignty in dealing with environmental issues rather than functioning Human Rights standards. This leads to the absence of coherent policy mechanisms in regional and national level.

4.3. Deliberative Outreach

The lack of Rights-based institutional, policy, and legal mechanism in ASEAN environmental cooperation has also affected two other factors in establishing deliberative global governance, namely the participation of nonstate actors and the acknowledgement of multi-level structure of ASEAN environmental governance, particularly after the 1997 haze crisis. The persistence



of environmental sovereignty has resulted in the dominance of state as the key player in crafting ASEAN environmental governance. Prior to 1997, it is state representative who define the area of environmental cooperation through ASEAN Ministerial Meeting on Environment. The post-1997 structure of cooperation witnessed growing involvement of several technocratic and scientific institution in transforming the cooperation in a more complex form of governance, particularly related to haze. However, it is still founded upon the principle of ‘non-interference’. This transformation, whilst giving some spaces to a limited ‘stakeholder’ (particularly, scientists and bureaucrats within ASEAN secretariat), does not open wider participations from non-state actors in the policymaking processes.

Take, for example, the case of indigenous rights in the absence of ‘the right to development’. The absence of “indigenous” people in the regional legal-institutional frameworks reflects the lack of participation of non-state actors in the ASEAN cooperations on environment. Whilst ASEAN Human Rights Declaration has acknowledged the protections and freedoms of indigenous rights (Article 4), it does not mention their role and participation, thus rendering this to national legislatures. Therefore, as similarly happened to wider civil society organisations, the role of indigenous groups who live alongside the environment (such as *Orang Asli* of Malaysia or various ethnic groups in Indonesia and Thailand) has also yet to be acknowledged in ASEAN (Tessier, 2015). This absence thus made further issues of economic exploitation over the natural resources and indigenous community being neglected in ASEAN.⁵

4.4. Structure of Governance

Finally, it is also important to consider how the state of ASEAN Cooperations on Environment address the multi-level structure of governance in regional. The construction of ASEAN environmental cooperation prior to 1997 has arguably built upon one-level governance, in which interstate relations shape the regional cooperation with no underlying authority in regional level. In this period, interstate relations dominates the framework of environmental cooperation in ASEAN. After 1997, ASEAN established technocratic and scientific institutions, which transfer some of authority to the ASEAN Secretariat (as well as related scientific bodies) in crafting a new form of environmental governance. From this viewpoint, ASEAN cooperations on environment has acknowledged two structure of governance after the 1997 haze crisis, namely ‘regional’ and ‘national’. It is an advanced position from the pre-1997 cooperation that relies upon interstate cooperation with limited role of regional institutions.

However, whilst the cooperation has been gradually transformed, it still overlooks another level in ASEAN regional governance, namely the subnational authority in a decentralised –or even devolved and federalised— form of governance (Tan, 2005). It is important, for example, to acknowledge the federal system in Malaysia or decentralisation in Indonesia to understand the distribution of power and authority from national to subnational authority. In the environmental context, decentralisation plays important part because the authority to grant extractive licence and execute environmental policies were given to subnational government (Federal or Province). The construction of ASEAN environmental governance as discussed in previous section tends to overlook this layer and at the same time overemphasising the national government as the overarching authority in ASEAN regional

⁵ As Kingsbury (1998) pointed out, the acknowledgement of “indigenous people” has also been lacking in broader international law, not only in ASEAN. We thank Cahyo Seftyono for suggesting this point.



governance. It resulted in the non-compliance of subnational authorities in handling, for example, transboundary haze pollution and peatland management (Varkkey, 2015).

The negligence of subnational level of governance affect the construction of environmental rights. Since 'environmental rights' also deal with issues related to environmental justice and political power (Osofsky, 2005), the implementation also requires the acknowledgement of subnational level of governance. The negligence of subnational authority in ASEAN environmental governance could result in the uneven understanding of environmental rights by political authority, which will makes the idea of environmental rights to be understood only at a certain amount of policymakers. Addressing the issue of non-compliance by subnational government is therefore vital in exacerbating ASEAN regional environmental governance.

5. What is to be Done? Prospects for Institutional Changes in ASEAN Environmental Governance

Thus, with the persistence of environmental sovereignty and the visible tension with environmental rights, what is the prospects for future institutional change? Since 1977, Environmental issue has emerged as a prominent issue in ASEAN regional governance since which leads to a more complex institutionalisation of ASEAN environmental cooperation in the aftermath of the 1997 haze crisis. Some scholars argued that ASEAN since 1997 has developed some complex forms of ASEAN environmental governance, even though they are unable to change the non-interference norms that underpins the practices of cooperation (see Elliott, 2012; Nguitrageol, 2010; Aggarwal and Chou, 2010). This paper supports this finding, but provide another explanation as to why the idea persists: the lack of institutional changes that is able to drive ASEAN into *paradigm shift*. Whilst ASEAN has limitedly propose an institutional adjustment to deal with the haze crisis, by strengthening the technocratic and secretariats to promote scientific programs to cope with transboundary haze problem, it still maintains reliance to environmental sovereignty as the political and institutional foundation. Therefore, this attempt is still incompatible with desires to promote environmental rights in the regional policy framework. As we have showed in this article, the current ASEAN environmental governance is still marginalising environmental rights, in the sense that it was primarily driven by state with limited participations from non-state actors, it neglects multiple structure of governance, and, consequently, it marginalises actors who are impacted by the environmental deteriorations, such as indigenous people. It therefore constrains the institutionalisation of environmental rights in ASEAN.

However, ASEAN has also showed some possibilities to internal reform. The ASEAN's responses to the haze crisis in 1997, despite the general reluctance to incorporate environmental rights, shows some degree of *institutional change* in the ASEAN frameworks for cooperation. We observe two patterns of institutional change in ASEAN environmental governance. *First*, the establishment of technocratic and scientific bodies to cope with environmental crisis (more specifically, haze) under ASEAN Secretariat and the Conference of Parties to ASEAN Agreement on Transboundary Haze Pollution. The introduction of this new institutional mechanism, albeit relatively with limited authority when compared to IPCC, has moved ASEAN's institutional mechanism to deal with transboundary pollution in a more complex strategy. *Secondly*, the production of knowledge related to transboundary haze pollution, in which the scientific and technocratic bodies are able to provide scientific rationale of further institutionalisation. We acknowledge that these patterns are still subject to the



Conference of Parties itself (even Indonesia ratified the Agreement in 2014, more than a decade after it was proposed). However, it gives us a sense of possibilities to establish change ‘from within’ and through different strategies other than confronting state sovereignty with environmental rights.

It is in this context institutional changes from within is important. From a deliberative point of view, ‘institutional changes’ is important for ASEAN environmental governance in the future. We suggest that it could be started by, firstly, developing a more practical and executable concept of environmental rights that is able to cope with ‘crisis’. Our observation shows that ASEAN tends to adjust its institutional framework when there is a crisis, in which ASEAN member states are forced to render their sovereignty to a broader ‘common good’. Environmental rights could be developed in this practical way, by connecting the normative and ideational underpinning of ‘rights’ with the practical concerns to cope with environmental crisis. Proposing strategies of institutional change is, therefore, required further deliberations and negotiations, not only in the state-level, but also in the ‘everyday’ practices of negotiations in ASEAN secretariat, related bodies, or state-non state engagement in the regional level.

In this regard, in ASEAN context, we suggest five governance strategies to deal with those problems. **First**, putting Environmental rights at the Centre of ASEAN Debates and Policymaking Processes, which requires the politics of ‘knowledge production’ to mainstream the idea of Human Rights and the environment in ASEAN. Having said that, the role of epistemic communities in developing specific ideational is essential. **Second**, it is important to formulate a strategy of ‘discursive engagement’ with policymakers in national and regional level by translating the complex idea of environmental rights into a set of operational mechanism. **Third**, formulating a guiding principles on environmental rights as an operational ‘handbook’ and ‘guiding principles in order to incorporate environmental rights deeper in institutional, policy, and legal mechanism in ASEAN. **Fourth**, Institutionalising Participation of non-state actors in Environmental Governance through (1) endorsing participations from those affected by environmental problems, and (2) advocating for more spaces and interactions in regional level for non-state actors. **Fifth**, integrating Policy Framework to Subnational Policy Process. ASEAN also needs to acknowledge the multiple political structure in the region by constructively engaging with subnational government, along with multiple stakeholders.

These forms of institutional changes requires strategic action to challenge the persistence of environmental sovereignty in ASEAN. So far scholars have agreed that environmental sovereignty will conflict with environmental rights. In this context, however, ‘institution’ has also played role in establishing change, albeit relatively limited in the regional context. Our study has showed that scientific and technocratic actors have played role in modifying ‘non-interference’ by integrating it with existing ASEAN’s institutional framework, which suggests that knowledge also matters in environmental governance. From the basis of this simple observation, we suggest that ‘institutional changes’ is important to incorporate environmental rights in ASEAN. Indeed, with the persistence of ‘non-intervention’ as the main framework for ASEAN environmental cooperation, institutional re-designing is not an easy task. However, as Nair (2015) has showed in his fruitful study of ASEAN Secretariat, the decision-making process itself is not merely dominated by the state-centric diplomatic processes. Rather, it also involves the interplay between ASEAN bureaucratic institutions (“the Secretariat”) and the State. Dissecting the power of these institutional actor, and embracing participation ‘from below’ by accounting for non-state actors is therefore important to understand how a specific reform might be taken place in ASEAN. The challenge for future



researches of ASEAN environmental governance is to understand how this politics of institutional changes might takes place in ASEAN in the future.

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