Prosperous and green in the Anthropocene:
The human right to a healthy environment in Southeast Asia
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The human right to a healthy environment in Southeast Asia

Claudia Ituarte-Lima
Victor Bernard
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Editors

September 2020
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The project was funded by the Swedish International Development Cooperation Agency (Sida) of the Government of Sweden. The views expressed in this study do not necessarily reflect the Government of Sweden’s official policies. Sida’s financial support is gratefully acknowledged.
This research emerged from the experience of the Raoul Wallenberg Institute (RWI) in the Asia-Pacific region and is aimed at contributing to existing discourse and momentum towards ensuring human rights are better incorporated in decision makers’ considerations. A healthy environment is fundamental to ensuring thriving national, regional and global communities. Appreciating the interconnectivity of actions and policies on rights-holders, particularly the most vulnerable, and recognising the need for synergies between initiatives led by duty-bearers and rights-holders are critical to finding solutions and achieving sustainable development at all levels.

RWI’s Regional Asia Pacific Programme (2017-21) (https://rwi.lu.se/where-we-work/offices/jakarta/) is financially supported by the Swedish International Development Cooperation Agency (Sida) and has engaged with human rights and environment stakeholders across the region. Through a process of action-oriented research and direct engagement with decision makers, RWI has contributed to a more nuanced understanding of how a human rights-based approach contributes to tangible results for those who can effect change. RWI takes the journey with changemakers, engaging in dialogue and co-developing research that considers the connections between contemporary international trends and national and local experiences. This research reflects RWI’s commitment to this process and its understanding of the ASEAN region.

RWI provided financial and technical support to 11 authors from across the ASEAN region to contribute to this research, thereby ensuring that regional voices and experiences are represented in the work. Furthermore, RWI’s commitment to practical solutions is reflected in the ‘policy brief series’ that builds on this foundational research. RWI’s policy brief series is purposefully designed to speak directly to specific groups, such as national human rights institutions, the business community, legal practitioners and environmental policymakers and practitioners.

This research coalesces with concurrent research outputs from RWI’s Regional Asia Pacific Programme. For example, RWI has produced a significant research contribution which addresses Displacement in the Context of Disasters and Climate Change. Bringing together and analysing contemporary legal and policy frameworks from 10 countries across the Asia Pacific, the result enables stakeholders and RWI to transfer research into practice through evidence-based conversations at the country and regional levels. Similarly, RWI’s thematic study on the Right to Safe Drinking Water in Southeast Asia provides a comprehensive overview of the procedural and substantive obligations related to safe drinking water in individual Southeast Asian countries. RWI’s research on Human Rights Cities and SDGs highlights how critical good governance, inclusion, diversity and human rights commitments are to cities achieving the Sustainable Development Goals. For further examples, please visit the RWI website.
We are living in an unprecedented global environmental emergency, comprised of the climate crisis, the catastrophic decline in biodiversity, pollution that kills millions of people annually, and production and consumption patterns that exceed planetary boundaries. Michelle Bachelet, UN High Commissioner for human rights, recently warned that, ‘The world has never seen a human rights threat of this scope.’ At the same time, there are billions of people living in poverty, many of whom lack access to clean water, adequate sanitation, electricity, safe housing or sufficient nutrition. The nations of Southeast Asia, like nations in all regions of the world, must summon the means to face these daunting problems.

Society has an ambitious agenda to address these interlinked challenges of environment and development, known as the 2030 Agenda for Sustainable Development, which has 17 Sustainable Development Goals (SDGs). If achieved, these 17 sweeping aspirations, from eliminating poverty and hunger to effective climate action and safeguarding life on land and under water, would usher in an era of unprecedented sustainability and prosperity. But that is a very large ‘if.’

The world is not currently on track to achieve the SDGs and the COVID-19 pandemic is, understandably, diverting considerable attention and resources. Yet one of the most powerful ways to accelerate action toward the SDGs and prevent future pandemics, in Southeast Asia and across the world, is through placing human rights at the heart of both environmental and development policies.

Leading scientific bodies, including the Intergovernmental Panel on Climate Change, the World Health Organization, and the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services, are calling for transformative and systemic changes. Examples of urgently needed solutions include replacing fossil fuels with renewable energy, shifting to a circular economy that eliminates waste and pollution, and scaling up protection for biodiversity and healthy ecosystems.

Human rights have a proven track record of contributing to important societal transformations. The abolitionists invoked freedom and equality in successfully ending slavery. Women, the civil rights movement, indigenous peoples, and persons with disabilities have all used human rights to catalyse societal transformations. Human rights are not an instant, easy, or omnipotent solution, but history proves that rights are one of the most powerful catalysts for transformative changes. In addition, applying a rights-based approach will ensure that as major changes are undertaken across a wide array of systems, the process of developing and implementing those changes will respect human rights, through information, participation, non-discrimination and special consideration for vulnerable and marginalised people.
The right to a safe, clean, healthy and sustainable environment may prove to be the most important human right of the 21st century. This fundamental human right is now legally recognised in over 80 per cent of UN Member States (156 out of 193 nations), through constitutions, environmental laws and legally binding regional treaties. To their credit, this includes Indonesia, the Philippines, Thailand and Viet Nam, four countries where the right to a healthy environment enjoys both constitutional and legislative protection. The other six Southeast Asian nations lag behind. It is encouraging that the right to a healthy environment is included in the ASEAN Declaration on Human Rights, but this declaration currently lacks the strength needed to ensure responsibility, accountability and justice. Stronger measures are required to ensure that the right to a healthy environment is respected, protected and fulfilled throughout Southeast Asia. In all 10 Southeast Asian nations, implementation of environmental protection laws and policies must be a focus for improvement.

This new thematic report, ‘Prosperous and green in the Anthropocene: the human right to a healthy environment in Southeast Asia’, clarifies the way that international, regional, and national legal instruments have established a framework for the right to a healthy environment in Southeast Asian countries. Building on lessons learned from Southeast Asia and beyond, it provides concrete pathways to implement this right in order to enable a good quality of life in the region, leaving no one behind.

Research demonstrates that recognition of the right to a healthy environment contributes to improved environmental outcomes, including cleaner air, enhanced access to safe drinking water, and reduced greenhouse gas emissions. Of particular importance are the positive effects of the recognition of the right to a healthy environment for vulnerable populations, including women, children, persons living in poverty, indigenous peoples and members of traditional communities, older persons, persons with disabilities, minorities and displaced persons.

The right to a healthy environment is essential to the health, well-being and dignity of all human beings. In view of the environmental crisis that currently violates and jeopardises the human rights of billions of people throughout the world, recognising and implementing the right to a safe, clean, healthy and sustainable environment should be a matter of the utmost urgency. I strongly encourage Southeast Asian countries, individually and collectively, as ASEAN, to follow the bold recommendations put forward in this report.

David R. Boyd
UN Special Rapporteur on human rights and the environment
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<tr>
<th>Abbreviation</th>
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<tr>
<td>AACNNR</td>
<td>ASEAN Agreement on the Conservation of Nature and Natural Resources</td>
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<td>AATHP</td>
<td>ASEAN Agreement on Transboundary Haze Pollution</td>
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<td>ACCC</td>
<td>Aarhus Convention Compliance Committee</td>
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<td>ACWC</td>
<td>ASEAN Commission for the Promotion and Protection of the Rights of Women and Children</td>
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<td>AEC</td>
<td>ASEAN Economic Community</td>
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<tr>
<td>AICHR</td>
<td>ASEAN Intergovernmental Commission on Human Rights</td>
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<td>ASEAN</td>
<td>Association of Southeast Asian Nations</td>
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<td>AHRD</td>
<td>ASEAN Human Rights Declaration</td>
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<td>APSC</td>
<td>ASEAN Political-Security Community</td>
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<td>ASCC</td>
<td>ASEAN Socio-Cultural Community</td>
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<tr>
<td>CBD</td>
<td>Convention on Biological Diversity</td>
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<td>CEDAW</td>
<td>Convention on the Elimination of Discrimination Against Women</td>
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<tr>
<td>COP</td>
<td>Conference of the Parties</td>
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<tr>
<td>CSO</td>
<td>Civil society organisation</td>
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<tr>
<td>ECLAC</td>
<td>Economic Commission for Latin America and the Caribbean</td>
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<tr>
<td>EIA</td>
<td>Environmental impact assessment</td>
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<tr>
<td>FAO</td>
<td>Food and Agriculture Organization of the UN</td>
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<tr>
<td>FOI</td>
<td>Freedom of information</td>
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<tr>
<td>HDI</td>
<td>Human Development Index</td>
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<td>HRC</td>
<td>Human Rights Council</td>
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<td>IEA</td>
<td>International Energy Agency</td>
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<td>IFAD</td>
<td>International Fund for Agricultural Development</td>
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<td>ILC</td>
<td>Indigenous and local community</td>
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<td>ILO</td>
<td>International Labour Organization</td>
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INDC  Intended Nationally Determined Contribution
IPBES  Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services
JBIC  Japan Bank for International Cooperation
Lao PDR  Lao People’s Democratic Republic
MEA  Multilateral environmental agreements
NCP  Nature’s contributions to people
NDC  Nationally Determined Contribution
NGO  Non-governmental organisation
NHRI  National human rights institution
OECD  Organisation for Economic Co-operation and Development
OHCHR  Office of the High Commissioner for Human Rights
PTSM  Policy-support tools and methodologies
SDG  Sustainable Development Goal
SEA  Strategic environmental assessment
UNDP  UN Development Programme
UNECE  UN Economic Commission for Europe
UNEP  UN Environment Programme
UNFCCC  UN Framework Convention on Climate Change
UNGA  UN General Assembly
## Table of Contents

**Authors** ................................................................................................................. 3  
**Acknowledgements** .............................................................................................. 4  
**Preface** .................................................................................................................. 5  
**Foreword** ............................................................................................................... 6  
**Abbreviations and Acronyms** ............................................................................ 8  

### Executive Summary

**Chapter 1: Thriving in the Anthropocene: Why the human right to a healthy environment**

**Claudia Ituarte-Lima**

Main messages .............................................................................................................. 18  
Background .................................................................................................................. 18  
What this study aims to do ......................................................................................... 19  
Methodology ............................................................................................................... 19  
Human rights and the environment at interacting geographic scales .................... 21  
Legal instruments relevant for Southeast Asian countries ...................................... 24  
Cross-cutting dynamics in the realisation of the right to a healthy environment .......... 28  
References ............................................................................................................... 30  

**Chapter 2: Substantive dimensions of the human right to a healthy environment**

**Channraksmeychhoukroth Dany**

Main messages .............................................................................................................. 36  
Background .................................................................................................................. 36  
Threats to a healthy environment ............................................................................. 36  
The right to a healthy environment in constitutions and national legislation .......... 38  
Understanding of substantive elements .................................................................... 44  
The right to a healthy environment in regional developments ............................. 49  
Conclusion ................................................................................................................. 49  
References ............................................................................................................... 50  

Chapter 5: Women’s rights and contributions to the enjoyment of the human right to a healthy environment

May Thida Aung, Min Myat Aung and Sophany San

Main messages ....................................................................................... 86
Background ............................................................................................. 86
International and regional frameworks for gender equality, women’s rights, and sustainable development ..................................... 87
National frameworks and implementation of measures for women’s empowerment to contribute to a healthy environment......... 91
Women’s contributions to the enjoyment of a healthy environment:
Substantive elements ............................................................................. 93
Women’s contributions to the enjoyment of a healthy environment:
Procedural elements ............................................................................... 96
Challenges and opportunities in enhancing women’s contributions to a healthy environment in the region .............................. 99
Conclusion ............................................................................................ 100
References ............................................................................................ 101

Chapter 6: Lessons for ASEAN from the Aarhus Convention and Ezcáizú Agreement

Dyah Paramita

Main messages .......................................................................................... 110
Background ............................................................................................. 110
Similarities and differences between the Aarhus Convention and ASEAN instruments ..................................................... 112
Compliance and review mechanisms ................................................... 120
Lessons for ASEAN regarding the protection of environmental human rights defenders under the Escazú Agreement ..................... 122
Conclusion: Prospects for an ASEAN regional mechanism on procedural rights .......................................................... 123
References ............................................................................................. 124
Chapter 7: Realising the right to a healthy environment in Southeast Asia
Claudia Ituarte-Lima, Victor Bernard, Delia Paul, Sophany San, Min Myat Aung, Channraksmeychhoukroth Dany, Thitat Chavisschindha, Dyah Paramita, May Thida Aung, and Naphaphorn Saenphit

Main messages ................................................................. 130
Background ........................................................................ 130
National action ................................................................ 131
Regional action ................................................................ 134
Conclusion ....................................................................... 138
References ...................................................................... 138

Annex 1: Guiding questions on gender
Sophany San
Substantive elements of the right to a healthy environment .......... 142
Procedural elements of the right to a healthy environment .......... 143

Annex 2: About the authors .................................................. 146

List of tables
Table 1: Ratification of core human rights treaties by ASEAN countries
Table 2: Legal recognition of the right to a healthy environment in ASEAN countries
Table 3: Examples of laws and policies for accountability under environmental rule of law in ASEAN countries
Table 4: The Environmental Impact Assessment (EIA) process
Table 5: Percentage of women workers in weeding, transplanting, threshing and harvesting activities in the Lower Mekong Subregion

List of figures
Figure 1: Southeast Asia
Figure 2: IPBES conceptual framework and human rights
Figure 3: ASEAN and human rights
Figure 4: The Sustainable Development Goals (SDGs)
Introduction

For the first time in human history, people are collectively modifying the Earth’s environment and ecosystems on a global scale. Some scholars suggest the world is entering a new geological era, the Anthropocene, in which Earth systems are moving into a risky and unstable state as a result of people’s impacts on the environment.

The social-ecological crises we are experiencing do not affect all people in the same way. People in already vulnerable situations are experiencing the most severe impacts, although they may bear least responsibility for these changes. Humanity must shift towards new ways of living through just and sustainable pathways. Successfully tackling these challenges at the global, regional, and national levels will require the collaboration of law and policy makers, scholars, and practitioners who bring with them diverse life experiences, expertise, and place-based knowledge.

Like other regions of the world, Southeast Asia is faced with unprecedented social-ecological challenges. Events, such as the rapid emergence and spread of the COVID-19 virus, have wide-ranging implications for both human rights and the environment. As countries seek to solve such problems within and beyond their borders, effective human rights and environmental legal and policy frameworks are needed to support and coordinate efforts in line with international cooperation norms.

Recognising the human right to a healthy environment helps protect people and nature, and ensures the conditions for continued sustainable development and prosperity. Southeast Asian countries have already taken important steps towards mainstreaming human rights and sustainability through their legislative systems and institutions, setting a framework for the Association of Southeast Asian Nations (ASEAN) to strengthen current approaches as a regional body through its existing human rights instruments and regional environmental agreements.

Substantive elements of the right to a healthy environment

Most Southeast Asian countries recognise substantive elements of the right to a healthy environment in their national laws and regulations, with references to clean air, clean water and adequate sanitation, a safe climate, and healthy biodiversity and ecosystems. Other elements of the right to a healthy environment, specifically healthy and sustainably produced food, and
to live, work, study and play in a non-toxic environment, are recognised at the international level, but have been given relatively less attention in Southeast Asia. Yet, all elements of the right to a healthy environment are connected. For example, a non-toxic environment is a condition for having clean water and productive soil. Healthy ecosystems and biodiversity underpin all the elements of the right to a healthy environment.

Four Southeast Asian countries have explicitly recognised the human right to a healthy environment in their domestic laws, and one country has implicitly recognised this right. Five other Southeast Asian countries do not explicitly recognise the human right to a healthy environment. The Philippines and Thailand lead the region in elaborating the content of the right to a healthy environment through court decisions. Some other countries also reflect the recognition of this right through various legal and policy mixes. No country in the region has taken a stance against recognition.

Procedural elements of the right to a healthy environment

The procedural dimensions of the human right to a healthy environment include access to information, public participation in environmental decision making, including the right to participate in environmental impact assessment (EIA) of large development projects, and access to justice and remedies — not least when local communities are at risk of environmental harm.

There is evidence from Southeast Asia that domestic provisions for accountability under environmental rule of law and national human rights institutions (NHRIs) have been helpful in safeguarding the right to a healthy environment. Seven out of 10 ASEAN Member States have such domestic provisions, and five out of 10 have established NHRIs.

In some instances, civil society actors in Southeast Asian countries have successfully invoked existing national laws and policies to assert their right to a healthy environment. Such cases have enabled indigenous and local communities to secure land tenure over their ancestral lands, avoid pollution of biodiversity-rich marine areas upon which people’s livelihoods depend, and protect the rights of future generations. Recent innovations, such as electronic access to information in Viet Nam and agrarian land reform in the Philippines, hold promise for promoting implementation of the right to a healthy environment.

Women’s roles and contributions

Women’s contributions, participation and representation in public decision-making processes have promoted the well-being and security of families and communities in rural and urban settings, and have furthered environmental sustainability. However, only a few ASEAN countries have legally committed to ensuring a significant percentage of women’s participation in various sectors and levels of public decision making. Most countries provide for women’s participation through policies and strategic plans, although laws covering substantive and procedural rights would offer stronger protection.

The rights and roles of women should be recognised and enabled through legal provisions, and women should be seen as agents rather than victims in achieving the enjoyment of the human right to a healthy environment in national, regional and international processes.

ASEAN institutional arrangements

The 2012 ASEAN Human Rights Declaration (AHRD) reflects some elements of the right to a healthy environment in its use of the terms ‘safe’, ‘clean’, and ‘sustainable’. However, subsequent ASEAN legal and policy instruments, such as the ASEAN community blueprints, have not expanded on these elements, and the region lacks a review mechanism to ensure consistent interpretation and implementation.

ASEAN’s regional human rights body, the ASEAN Intergovernmental Commission on Human Rights (AICHR), could help promote the recognition of the right to a safe, clean, and sustainable environment in countries that have not yet recognised this right, and could promote implementation in all ASEAN countries. To do this effectively, ASEAN would benefit from reviewing and expanding the AICHR’s mandate and scope of work to include, for example, receiving and investigating human rights complaints, which would be complementary to its current promotional mandate. The AICHR’s areas for improvement also include strengthening its independence and building further expertise on issues concerning a healthy environment.
ASEAN could also choose to establish a review mechanism on the right to a safe, clean, and sustainable environment, and could engage with both state and non-state actors concerning their obligations to respect, protect and fulfil human rights. These responsibilities would include heightened obligations towards vulnerable groups to make a healthy environment a reality for all people of Southeast Asia.

**International and other regional models**

ASEAN has the opportunity to learn from a variety of legal and institutional arrangements to further develop its regional instruments and institutions in line with international standards and the progressive interpretation of human rights. Several instruments have elaborated further than ASEAN instruments the right to a healthy environment. These include:

- the Espoo Convention and its associated Kyiv Protocol on Strategic Environmental Assessment, which address EIA in a transboundary context;
- the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the Aarhus Convention); and
- the Escazú Agreement in Latin America and the Caribbean region, which addresses concerns of the Aarhus Convention within a regional context.

Existing ASEAN instruments are relatively weaker than these models and provide less clarity on who can access information, in what context public participation should take place, and how decisions made in national court systems can be enforced and implemented in the region.

One approach to strengthening the right to a healthy environment at regional and national levels could be through an ASEAN regional agreement on access to information, public participation and access to justice. Such an agreement could support ASEAN Member States’ domestic and regional efforts to ensure the safety of environmental human rights defenders, promote the rights of women and girls, provide a foundation for engaging civil society in environmental governance, and promote the accountability of both state and non-state actors, including those in the business sector.

**Conclusion**

There are several options open to ASEAN and its Member States to strengthen the right to a healthy environment. Countries could individually become party to the Aarhus Convention, which is open for global signature. ASEAN Member States could adopt a regional convention that is tailored to the regional context, and that addresses substantive and procedural elements of the right to a healthy environment. Alternatively, Member States could negotiate a regional agreement that focuses on countries’ procedural rights, while recognising that both substantive and procedural elements are interconnected. Member States could also revise the AICHR’s terms of reference to enable it to receive and investigate complaints.

Finally, Southeast Asian countries’ participation in various multilateral environmental agreements (MEAs) and human rights conventions could be opportunities for further synergies between human rights and environmental law. This could be achieved through ASEAN joint statements, regional coordination of MEA commitments, and presentation of ASEAN joint universal periodic reviews (UPRs) under the various human rights conventions, in addition to Member States’ national UPR submissions.

Southeast Asian countries and ASEAN as a regional body can play a strategic and proactive role towards the global recognition of the right to a healthy environment at the United Nations. Such a milestone, if reached, would be a victory for both people and nature.
Main messages

• Successfully tackling the current social-ecological crisis will require transformative changes and innovations at global, regional, and national levels, catalysed by people with diverse experience, fields of expertise and place-based knowledge.

• The process that was undertaken to produce this report has modelled peer-to-peer learning among scholars and practitioners from the fields of both human rights and environmental law.

• Recognising the human right to a healthy environment helps protect people and nature, and ensures the conditions for continued sustainable development and prosperity, leaving no one behind.

• International, regional, and some national legal instruments have set a framework for ASEAN to mainstream sustainability in its human rights instruments and, conversely, to mainstream a human rights-based approach in regional environmental agreements.

Background

The UN Human Rights Council (HRC) affirms that ‘States have the obligation to respect, protect and fulfil human rights, including in all actions undertaken to address environmental challenges, and to take measures to protect the rights of all, as recognised in different international instruments’ and has called upon states to fully implement their human rights obligations concerning a clean, healthy, safe and sustainable environment.

The UN Special Rapporteur on human rights and the environment, David Boyd, further notes that the right to a safe, clean, healthy and sustainable environment is recognised in at least 155 UN Member States through their domestic laws, recognition of international agreements, or both. Boyd describes the substantive elements of this right as: a safe climate; clean air; clean water and adequate sanitation; healthy and sustainably produced food; non-toxic environments in which to live, work, study and play; and healthy biodiversity and ecosystems. Procedural elements include access to information, public participation in environmental decision making, and access to justice and effective remedies. In this report, we use the term ‘the right to a healthy environment’ as an umbrella category that includes both types of elements.

This thematic report aims to contribute to the implementation of HRC resolutions on human rights and the environment, as well as the realisation of ‘the right to a safe, clean and sustainable environment’ in Southeast Asia, as recognised in Article 28(f) of the 2013 ASEAN Human Rights Declaration (AHRD).

At a time when planetary ecosystems are under threat, innovative legal approaches at various jurisdictional levels can contribute to transformations for sustainability and promote effective interaction across multiple scales of environmental governance. ASEAN Member States have chosen to recognise the right to a healthy environment through a non-binding declaration, rather than a binding treaty as some other regions have adopted. Examples of such regional agreements are the African Charter on Human and Peoples’ Rights, the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights and the Arab Charter on Human Rights.
The ASEAN approach poses specific challenges that are not, as yet, well understood. This report contributes towards filling the knowledge gap and enabling practical action, responding to current challenges and building on many positive measures that have already been taken by Southeast Asian countries.

What this study aims to do

This report has three objectives:

- mapping the obligations of Southeast Asian countries with regard to the right to a healthy environment;
- identifying good practices in realising the right to a healthy environment in Southeast Asia; and
- examining progress, innovations and obstacles in realising the right to a healthy environment, and recommending strategies for action that will contribute to sustainability and prosperity in the Southeast Asian region.

This report uses the term ‘green’ in its title to refer to both land and water-related ecosystems and their connections to the right to a healthy environment. Besides addressing niche areas such as forests or freshwater, the authors have worked jointly to shed light on connected regional challenges, and to build bridges between the human rights community and the environment community. (see Annex 2 for authors’ profiles and experience). The term ‘prosperous’ refers to ‘a good quality of life.’ While ‘quality’ is context-dependent and varies across different societies and groups, the concept includes key elements such as access to food, clean water and adequate sanitation, livelihood security, health, cultural identity, and freedom of choice and action. Examples of different perspectives on a good quality of life and a prosperous life are ‘living in harmony with nature’, ‘living well in balance and harmony with Mother Earth’, and ‘human well-being’ (see Figure 2). A prosperous life on Earth implies a context in which everyone, without discrimination, can enjoy a good quality of life derived from nature’s contributions to people (NCP). A prosperous life also implies that people can contribute to safeguarding healthy ecosystems without threat or intimidation. Environmental impacts are felt at every scale, so collective action is needed at all governance levels—international, regional, national and local—to enable a good quality of life.

Methodology

This report aims to inform legal practitioners in their deliberations and support environmental human rights defenders in using existing frameworks of law and policy. Authors applied doctrinal methods involving the analysis of authoritative texts, including case law, statutes and other legal documentation to discuss how different Southeast Asian countries define the right to a safe, clean, healthy and sustainable environment. They then compared relevant legal instruments at the national, regional and international levels to reveal the ways in which existing instruments have established a framework for Southeast Asian countries to respect, protect and fulfill the right to a healthy environment.

While good practices in national legal systems are key to country-driven solutions, our shared social-ecological crises require action at various jurisdictional levels, as national, regional and international processes interact with each other. Southeast Asian countries’ obligations arise from signing and ratifying a significant number of multilateral environmental agreements (MEAs) and international human rights treaties (see Table 1). The report examines how and to what extent national legislation and ASEAN legal, policy and institutional frameworks have institutionalised the right to a healthy environment, and identifies obstacles to their ability to do so. Likewise, it identifies opportunities for ASEAN to strengthen its capacities to contribute to the realisation of the right to a healthy environment in Southeast Asia.

Whereas legal scholarship primarily applies doctrinal methods, a combination of doctrinal and other methods can help unpack the content, meaning and operation of the law. One limitation of this thematic report is that empirical methods, such as interviews or ethnography, were not applied. Empirical methods would have served to illuminate the various perspectives of duty-bearers and rights-holders in different ASEAN countries with regard to the obstacles and opportunities they face in realising the right to a healthy environment. Doctrinal analysis, in this case, has been a first step, and has provided findings that could be further enriched by empirical methods in the future.

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5. ibid
6. ibid
In working together across different countries in the Southeast Asian region, the team of authors adopted a ‘co-creation of knowledge’ approach, informed by sustainability science.9 The co-creation approach is problem focused, and entails collaboration between academics and practitioners.9 Informal interactions are important for collaboration on sustainability issues,10 so the process for producing this report sought to create opportunities for such interaction.

At an authors’ workshop from 20-22 September 2019 in Bangkok, a Thailand-based organisation, Artipania, supported the co-generation of knowledge through a graphic recording process that illustrated and synthesised the discussions in real time. Graphic recording is a method for depicting scientific presentations and conversations about environmental issues, using a combination of words and drawings.11 Research has shown that this method is helpful in examining how ideas are connected, and promotes the ability of groups to propose joint solutions.12

As a practical exercise in the co-creation of knowledge, the authors undertook a field trip to Bang Krachao National Park, located south of Bangkok on an artificial island created within a bend in the Chao Phraya River. Here, the team encountered real-life sustainability challenges and discussed, in an informal setting, the various actions that could be effective in addressing the problem of plastic waste in the national park. Although Bang Krachao residents have organised to clean up plastic waste, it was clear that these local efforts needed to take place in combination with actions at other jurisdictional levels. Through their shared experience at Bang Krachao, the authors acknowledged their different experiences of plastic pollution in their countries, and reflected on the dynamics of environmental change at various geographic scales. The process of mutual learning and co-producing this report has enabled the strengthening of participants’ capacities and the exchange of lessons learned from different countries. The experience also furthered authors’ understanding of the systemic and root causes of global unsustainability.

The elements of the right to a healthy environment, such as a safe climate and healthy biodiversity and ecosystems, are facing complex and systemic challenges that affect all people and living beings. Effective approaches to tackling these challenges necessarily involve academics and practitioners with diverse learning styles and modes of communication. The authors’ workshop highlighted the complexity of examining how different countries recognise and interpret the right to a healthy environment, and of identifying good practices towards the realisation of this right.

Current sustainability and social-justice challenges need to be tackled with intellectual insights from all over the world, including from scholars in Southeast Asia, who are currently under-represented in international social science journals.13 Scholars from developing countries should have opportunities to further elaborate on their ideas and receive feedback from their peers in both developing and developed countries through collaborative processes. Processes such as the one behind this report are helping to foster a truly global representation of scholars and perspectives in seeking solutions to the world’s social-ecological crisis.

10. KS Cheruvelil, PA Soranno, KC Weathers, PC Hanson, SJ Goring, CT Filstrup, EK Read (2014) ‘Creating and maintaining high-performing collaborative research teams: the importance of diversity and interpersonal skills’ in Frontiers in Ecology and the Environment, 12, pp. 31-38
13. See e.g. Cummings et al, 2017; Medie et al 2018; Ituarte-Lima (forthcoming)
The Anthropocene is a concept that denotes a new geological era in which humans have become the main driving force in the Earth system. It suggests that Earth systems are strongly interconnected, and are rapidly moving into a risky and critically unstable state as a result of global human environmental impacts.\(^\text{14}\) While referring to human impacts, it is important to recognise that, just as economic wealth is unequally distributed, not all groups in society share the same responsibility for provoking the current social-ecological crisis.\(^\text{15}\) Humanity is faced with responsibilities to shift towards both sustainable and just pathways.

In the context of the Anthropocene, crises of nature are interconnected with new challenges such as the COVID-19 pandemic. Only concerted multilateral action and solidarity in line with human rights principles will enable us to address these unprecedented challenges and to become more resilient for the benefit of present and future generations.

Human rights principles are at the heart of international agreements and of the United Nations (UN), but are increasingly under threat. UN Special Rapporteurs view COVID-19 as a serious international challenge but

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\(^{14}\) Galaz et al (2017); Kotzé (2014)  
\(^{15}\) See e.g. Libert et al (2019); Boonstra (2016)
also a ‘wake-up call for the revitalization of universal human rights principles.’ Jamison Ervin from the UN Development Programme (UNDP) highlights the importance of preventive action to address the global biodiversity crisis, including the risk of further pandemics such as COVID-19, noting that, ‘Early actions have exponential benefits, late actions are exponentially more difficult, and actions beyond the point of no return may have little or no benefit at all.’

Understanding how human rights and the environment are intertwined

The roots of the right to a healthy environment date back to the Declaration of the UN Conference on the Human Environment (Stockholm Declaration) of 1972. In recent decades there has been a ‘greening’ of human rights, such as the right to life and right to property, as people increasingly recognise how environmental degradation affects the ability to enjoy these rights.

It is now more urgent than ever to act effectively upon the connections between environmental and human rights law in view of current social-ecological challenges that include large-scale impacts of climate change and biodiversity loss, and the way they affect the ability of everyone, especially vulnerable groups, to fully enjoy their human rights.

UN General Assembly resolutions and HRC resolutions adopted by governments have recognised the ways in which environment and human rights, including gender equality, are intertwined. These resolutions build on the work done by UN Special Rapporteurs, including that of David Boyd and John Knox, the current and former Special Rapporteurs on human rights and environment. Their thematic reports clarify state obligations and business responsibilities concerning, for example, climate, biodiversity and air quality. Boyd, in presenting his report to the UN General Assembly, noted that the recognition of the human right to a healthy environment could lead to stronger environmental laws and increased public participation in environmental decision making. Knox highlights that sustainable development requires healthy ecosystems and climate stability, and development must not destroy ecosystem services.

Mapping the ASEAN environmental context

Human rights law and policy-support tools and methodologies (PSTM) are part of the institutions and governance that help protect nature and ensure a good quality of life for all. For example, nature’s provision of safe and clean water is vital for public health and to maintain the integrity of ecosystems that sustain key economic sectors such as fisheries. Capture fisheries production in the Southeast Asian region—a major contributor to global fish catches—grew rapidly in recent decades, putting pressure on wild fish stocks. In Asia overall, further increases in capture fisheries over the next 10 years are expected to be largely led by the Philippines and Indonesia. Reducing pressure on fish stocks in Southeast Asia will require concerted action on a number of factors, including climate change-induced ocean warming and acidification, overfishing, and coastal pollution.

Safe drinking water, nutritious food, and clean air are all part of NCP—otherwise known as ecosystem goods and services. Figure 2, adapted from the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES) conceptual framework, includes examples of NCP and shows their relationship with a good quality of life.

17. See Knox and Boyd, 2018
18. See e.g. HRC Resolution 34/20 2017
20. Boyd, 2018
22. Fifth ASEAN State of the Environment Report, 2017
Asia has a strong role to play in fostering healthy oceans, coastlines and rivers, as the largest amounts of plastic waste are found in eight rivers in Asia, accounting for up to 95 per cent of global plastic pollution in oceans. An assessment of Brunei Darussalam, Cambodia, Indonesia, Malaysia, Myanmar, Philippines, Thailand, and Viet Nam found significant economic losses deriving from the loss of ecosystem services. For example, the degradation of mangroves has resulted in a decrease in coastal protection, making communities more vulnerable to natural disasters and climate change. Climate change, sea level rise, saltwater intrusion and typhoons are expected to increase pollution of groundwater or freshwater reservoirs in coastal areas. The numerous small islands in Southeast Asian countries are at even more risk because they often depend on groundwater sources, which are limited and likely to run dry during periods of drought, and may be contaminated with saltwater during storms.

Like the marine and coastal contributions to people’s livelihoods, healthy terrestrial ecosystems support livelihoods across the region. NCP supports food-production systems that provide income and nutrition. Women play a critical role in fostering NCP, as food from agroforestry systems contributes to a good quality of life (see Chapter 6 for a further discussion). But women also face significant challenges. In some Southeast Asian countries, the right to forest tenure is influenced by hierarchies, gender, and religion. Unfair distribution of land and forest tenure, together with difficult administrative procedures to permit small-scale forest producers to harvest wood, limit the possibilities for women to access and benefit from forests.

While some communities depend directly on NCP more than others, safeguarding a healthy environment is a concern for all. About four billion people worldwide depend primarily on natural medicines found in

Source: Adapted from IPBES, Diaz et al 2018, Ituarte-Lima and Stromberg 2018
Illustration adaptation: Kautsky/Azote
various ecosystems for their healthcare. About 70 per cent of drugs used for cancer have a natural origin or are synthetic products inspired by nature. The IPBES Global Assessment Report shows that the unprecedented global decline in biodiversity and ecosystem services has serious implications for human health, prosperity and long-term survival. ASEAN regional cooperation is essential to safeguarding the health of both people and ecosystems.

Efforts to solve environmental challenges and safeguard life, both below water and on land, are intertwined with eradicating poverty. Although the situation is improving, the Asia-Pacific region is home to 400 million people living in poverty, out of the world total of 767 million. Under human rights law, states have specific obligations towards people in vulnerable situations such as those living in poverty, many of whom depend directly on NCP for food, building materials, and natural health remedies.

**Legal instruments relevant for Southeast Asian countries**

The recognition of the human right to a safe, clean and sustainable environment by ASEAN countries builds on progress made internationally, in Southeast Asia, and in national legal systems, including in constitutional law.

**International legal instruments**

ASEAN countries have signed and ratified many international human rights treaties. The Framework Principles on Human Rights and the Environment clarify the way in which human rights obligations relate to the enjoyment of a safe, clean, healthy and sustainable environment. Examples of international human rights treaties that ASEAN Member States have signed and ratified include the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW); all 10 countries are parties to this treaty (see Table 2). Under CEDAW, states’ obligations are highly relevant to environmental issues, especially with regard to women’s rights in rural areas. Article 14 of this Convention notes that:

States Parties shall take into account the particular problems faced by rural women and the significant roles which rural women play in the economic survival of their families, including their work in the non-monetized sectors of the economy, and shall take all appropriate measures to ensure the application of the provisions of the present Convention to women in rural areas. Article 14 further states that women have the right to:

(a) participate in the elaboration and implementation of development planning at all levels...
(e) organise self-help groups and co-operatives in order to obtain equal access to economic opportunities through employment or self-employment; and
(f) participate in all community activities.

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30. ibid
Table 1: Ratification of core human rights treaties by ASEAN countries

<table>
<thead>
<tr>
<th></th>
<th>Brunei Darussalam</th>
<th>Cambodia</th>
<th>Indonesia</th>
<th>Lao PDR</th>
<th>Malaysia</th>
<th>Myanmar</th>
<th>Philippines</th>
<th>Singapore</th>
<th>Thailand</th>
<th>Viet Nam</th>
<th>%</th>
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</thead>
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<tr>
<td>ICERD</td>
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<td>R</td>
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<td>S</td>
<td>R</td>
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<td>R</td>
<td>R</td>
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<td>R</td>
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<td>CEDAW</td>
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<td>R</td>
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<td>R</td>
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<td>R</td>
<td>R</td>
<td>R</td>
<td>R</td>
<td>R</td>
<td>R</td>
<td>100</td>
</tr>
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<td>R</td>
<td>R</td>
<td>R</td>
<td>R</td>
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</tr>
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<tr>
<td>%</td>
<td>23</td>
<td>89</td>
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<td>78</td>
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<td>89</td>
<td>34</td>
<td>78</td>
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<td></td>
</tr>
</tbody>
</table>

Source: Nonthasoot, S. (2016)

S=signed; R=ratified

Figure 3: ASEAN and Human Rights

Source: Adapted from Nonthasoot, S. (2016)
Just as ASEAN countries are parties to various international human rights treaties, they are also parties to a significant number of MEAs. Mainstreaming the human rights-based approach into MEAs and legal environmental instruments at the regional, national and sub-national levels is as important as the converse process mentioned earlier of integrating environment in human rights instruments (see Sections 3.2 and 3.3).

The 2030 Agenda for Sustainable Development and the associated Sustainable Development Goals (SDGs), illustrated in Figure 4, emphasise the importance of international collaboration for safeguarding the planet and fostering people’s well-being. SDG 16 seeks to ‘promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels.’ This goal has interconnections with other SDGs, such as those addressing life below water (SDG 14), life on land (SDG 15), climate change (SDG 13) and gender equality (SDG 5).

**ASEAN regional instruments**

ASEAN countries are diverse. For example, while more than 100 million people live in the Philippines, Brunei has a population of less than half a million. In 2018, Singapore had the highest Human Development Index (HDI) value (0.935) among ASEAN countries, and ranked 9th in the world, while Cambodia had the lowest HDI value (0.581) in ASEAN, ranking 146th in the world. This diversity has not prevented countries from reaching consensus on recognising the human right to a safe, clean and sustainable environment in the AHRD, or from adopting several regional environmental agreements. Significant challenges remain in implementing these regional instruments, but this makes it even more important for ASEAN to mainstream sustainability in human rights instruments. Its relevant legal instruments include the ASEAN Charter (2008), which has been ratified by all 10 Member States. The Charter refers to the promotion and protection of human rights in its preamble and, in Article 14, mentions the establishment of a human rights body. The ASEAN Intergovernmental Commission on Human Rights (AICHR) was formally established in October 2009. Mechanisms to promote the rights of specific groups of people include the ASEAN Commission for the Promotion and Protection of the Rights of Women and Children (ACWC) in 2010 (see Figure 3).

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32. See UNEP, ‘Access Information on Multilateral Environmental Agreements’, InforMEA
33. UN Department of Economic and Social Affairs, ‘SDG 16’, SDGs Knowledge Platform, accessed 15 April 2020
34. UN Department of Economic and Social Affairs, World Population Prospects (2019)

Source: UN Sustainable Development Goals

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Figure 4: The Sustainable Development Goals (SDGs)
The AHRD (2012) explicitly recognises the right to a safe, clean and sustainable environment:

Every person has the right to an adequate standard of living for himself or herself and his or her family including...the right to a safe, clean and sustainable environment.

—Article 28(f), emphasis added

Looking ahead, the ASEAN Community Vision 2025 (2015) explicitly mentions, as key elements:

... human rights and fundamental freedoms, higher quality of life, and the benefits of community building, reinforcing our sense of togetherness and common identity, guided by the purposes and principles of the ASEAN Charter.

ASEAN Member States adopted the Declaration on the Gender-Responsive Implementation of the ASEAN Community Vision 2025 and SDGs in 2017.36

Similar to its role in mainstreaming sustainability in human rights instruments, ASEAN could mainstream a human rights-based approach into ASEAN environmental instruments. At the regional level, ASEAN has developed environmental laws and policies to address environmental challenges relating to water, land, and air. ASEAN has strategic plans with regional scope that cover distinct and complementary thematic areas such as sustainable forest management, biodiversity, and illegal wildlife trade.37 In order to address forest fires and the associated air pollution that affect the health of people and ecosystems, ASEAN countries have adopted a legally binding environmental agreement, the ASEAN Agreement on Transboundary Haze Pollution (AATHP).

**Progress in national legal frameworks**

More than three-quarters of the world’s countries have made explicit references to environmental rights and/or environmental responsibilities in their constitutions.38 In ASEAN countries, there have been legal advances in the recognition of the right to a healthy environment in constitutions and other legislation (see Table 2). For example, Section 16 of the Philippines’ Constitution affirms that, ‘the State shall protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature.’39 Yet, the ASEAN region still experiences challenges in the recognition and implementation of this right.

**Table 2: Legal recognition of the right to a healthy environment in ASEAN countries**

<table>
<thead>
<tr>
<th>Country</th>
<th>National Constitution</th>
<th>National Legislation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Brunei Darussalam</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Cambodia</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Indonesia</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Lao PDR</td>
<td>No</td>
<td>No</td>
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<td>Malaysia</td>
<td>Yes (implicit)</td>
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</tr>
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<td>Myanmar</td>
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<td>Philippines</td>
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<tr>
<td>Singapore</td>
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<tr>
<td>Thailand</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Viet Nam</td>
<td>Yes</td>
<td>Yes</td>
</tr>
</tbody>
</table>


36. ASEAN Declaration on the Gender-Responsive Implementation of the ASEAN Community Vision 2025 and Sustainable Development Goals,


38. See Boyd (2011, 2012 and 2018)

Cross-cutting dynamics in the realisation of the right to a healthy environment

International, regional and national legal progress on the right to a healthy environment will be key to addressing contemporary social-ecological challenges and opportunities in Southeast Asia. Certain cross-cutting issues should also be addressed, namely: gender equality; generational justice; the rights of environmental human rights defenders; and the rights of people living in vulnerable situations.

Achieving gender equality and empowering all women and girls (SDG 5) requires transforming unfair social norms and power dynamics, as well as developing progressive legal frameworks that promote equality between women and men, and between girls and boys. Based on data from about 90 countries from 2000-2016, women were found to spend about three times more hours than men in unpaid work, leaving them with less time to participate in other activities, including environmental action. There are also specific gender and generation-specific vulnerabilities; for instance, toxic waste pollution of drinking water has significant implications on human health, with especially severe effects on pregnant women and children.

In addressing issues of gender equality and generational justice (such as climate justice between present and future generations), this report moves beyond a ‘vulnerability’ narrative that would present women, children and youth as being weak or passive. While recognising the challenges faced by women, the report highlights, with examples from Southeast Asian countries, how women are agents of change for safeguarding and managing the environment sustainably. This approach resonates with the 2018 UN HRC resolution, which requests the UN Special Rapporteur on human rights and the environment to ‘apply a gender perspective by, inter alia, considering the particular situation of women and girls and identifying gender-specific discrimination and vulnerabilities, and addressing good practices where women and girls act as agents of change in safeguarding and managing sustainably the environment’ (A/HRC/RES/37/8, Paragraph 7 (h), emphasis added).

In 2018, it was estimated that at least 1,019 human rights defenders, journalists and trade unionists had been killed in 61 countries worldwide since 2015. This is the equivalent of one person per day. The HRC expressed deep concern ‘that human rights defenders addressing environmental issues and corporate responsibility are among the human rights defenders...’

40. UN Economic and Social Council, special edition: Progress towards the Sustainable Development Goals: Report of the Secretary-General, 8 May 2019, E/2019/68
41. ibid
42. See various resources on women, children and chemicals at http://gender-chemicals.org/protecting-the-health-of-women-children-and-future-generations
rights defenders most exposed and at risk. Across several Southeast Asian countries, numerous groups are experiencing curtailment of their right to freedom of opinion and expression. This situation seriously affects the work of environmental human rights defenders in safeguarding lands, livelihoods and the environment. Although there has been progress, such as the creation of the ASEAN Civil Society Conference/ASEAN Peoples’ Forum (ACSC/APF), civil society has faced significant challenges in having their voices heard and connecting at the regional level to effectively influence ASEAN decision making.

In Chapter 5, concrete examples of women and girls acting as agents of change in Southeast Asia are showcased. While the focus of this chapter is primarily on women’s rights, we recognise that more research is needed to fully understand the issue of gender equality and the right to a healthy environment. The issue of gender equality is a broad topic that includes the rights, resources and opportunities of women and men, girls and boys, as well as other gender identities that are outside the gender binary, including lesbian, gay, bisexual, transgender, queer and intersex (LGBTQI).

Efforts to realise the human rights of people in vulnerable situations must include consideration of the social-ecological and power dynamics that contribute to their vulnerability and marginalisation. Specific groups, such as peasants, the urban poor, fishers, women, youth and children, indigenous peoples, migrants, and persons with disabilities may be in vulnerable situations and may need to respond to overlapping risks. Understanding these dynamics in the ASEAN context will help duty-bearers—including state officials working in the legislative, executive and judiciary branches of government, as well business executives—work together with rights-holders to address the root causes of unsustainability and inequality, and contribute to the realisation of the human right to a healthy environment, leaving no one behind.

International, regional, and national legal instruments have set a framework for ASEAN to mainstream sustainability in its human rights instruments and, conversely, to mainstream a human rights-based approach in regional environmental agreements. Legal progress and good practices in the region show the very real possibility of transformative change for ambitious and effective action towards the enjoyment of the right to a healthy environment and achieving the SDGs. Importantly, these good practices are led not only by duty-bearers but also rights-holders. These practices demonstrate that responses to the systemic challenges of the Anthropocene—such as climate change, the degradation of ecosystems and the mass extinction of species—are indeed feasible. Yet much more needs to be done. Successfully tackling these challenges will require the collaboration of law and policy makers, scholars and practitioners with diverse experience, fields of expertise and place-based knowledge. Building on this co-produced knowledge, human rights and nature-based solutions will promote a green and prosperous Southeast Asia in the Anthropocene.
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Karki, M et al (eds) *The IPBES regional assessment report on biodiversity and ecosystem services for Asia and the Pacific* (IPBES 2018)


**Web resources**

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Main messages

- The substantive elements of the right to a healthy environment include clean air, clean water and adequate sanitation, a safe climate, healthy and sustainably produced food, non-toxic environments in which to live, work, study, and play, and healthy biodiversity and ecosystems. These natural assets have been negatively affected by rapid development in Southeast Asian countries.

- Four Southeast Asian countries have explicitly recognised the human right to a healthy environment in their domestic laws, and one country has implicitly recognised it. Five other Southeast Asian countries do not explicitly recognise this right.

- Most countries in the region recognise substantive elements of the right to a healthy environment in their national laws and regulations in terms of clean air, clean water and adequate sanitation, a safe climate, and healthy biodiversity and ecosystems. Food safety and sustainability issues, and problems of hazardous chemicals and waste in the environment, have been given relatively less attention in laws and policies.

- The Philippines and Thailand lead the region in implementing the right to a healthy environment through court decisions. Some other countries also reflect the protection of this right through various means, while no country in the region has taken a stance against recognition.

Background

The right to a healthy environment is critical for healthy ecosystems and biodiversity protection in Southeast Asia, which has large tropical forests with an extraordinary range of species that are the foundations for a good quality of life. Governments of Southeast Asian countries face serious challenges in addressing threats to biodiversity and restoring ecosystems. Recognising the right to a healthy environment can play a crucial role in these efforts.

The UN Special Rapporteur on human rights and the environment provides evidence of how the recognition of the right to a healthy environment at the national level has significant legal implications and tangible consequences for human and ecosystem health, yet these studies do not focus on Southeast Asia. This chapter will examine to what extent the distinct substantive elements of the right to a healthy environment have been recognised in Southeast Asian countries’ constitutions, national legislation, and court decisions.

Threats to a healthy environment

The 10 countries of Southeast Asia are home to an extraordinary variety of species of flora and fauna. The rapid acceleration of human activity, as characterised by economic growth and increased production and consumption in the region, is having an adverse impact on the environment. Examples of these environmental...
challenges include the destruction of ecosystems, alteration of weather patterns, increased severity of drought, floods and other extreme weather events, and adverse impacts on agriculture and water resources which, in turn, influence the spread of disease and affect human health. These impacts have disproportionately affected vulnerable groups and those who depend directly on land, water, biodiversity or marine resources.

**Climate change** is an undeniable challenge for Southeast Asian countries as well as the world community. In its General Recommendation No. 37, the Committee on the Elimination of Discrimination Against Women mentions that the impacts of climate change have a disproportionate effect on women, specifically older and rural women. At the same time, women have been recognised for their meaningful and active roles as agents of change in developing innovative solutions to climate change.

**Food security and food production systems** will be adversely affected by climate change, both from its direct impacts on crop yields in relation to increasing frequency of extreme weather events, and indirect effects through climate impacts on water availability and pests and diseases. These conditions are forecast to have devastating impacts on crop and terrestrial food production, as well as aquaculture production systems in low-latitude countries, including Southeast Asian nations, risking widespread food instability, as well as a reduction in crop nutritional value. The changes in food production and quality may cause spikes in food prices which, in turn, would reduce availability, accessibility and adequacy of food, and would put the poorest and most marginalised groups in Southeast Asia at heightened risk of hunger and malnutrition. Decreasing access to safe, sufficient, and nutritious food therefore makes it difficult to sustain life and health. No Southeast Asian country was among the acute food-insecurity hotspots identified by the Food and Agricultural Organization of the UN (FAO) and the World Food Programme (WFP) in mid-2020. But the two UN agencies warned in a joint report that East Asia overall was suffering “severe economic consequences” from the COVID-19 pandemic, “which will have an impact on the agricultural livelihoods of many vulnerable families.”

The degradation of land and water resources, including through extractive industries, urban development, industrial development, dam construction

Many traditional crop varieties are well-adapted to local soil and pest conditions.

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54. ibid 28
and other activities, raises both human rights and environmental issues. Most countries in Southeast Asia are developing countries with economies that rely heavily on agriculture, and the use of agricultural pesticides and fertilisers has contaminated the land and soil. The production capacity of agricultural land has been affected through the loss of soil fertility which, in turn, has serious impacts on human health.

Transboundary air pollution is another major environmental issue in Southeast Asia. Land-clearing activities in Indonesia for oil palm plantations have been conducted by large companies for more than two decades. The impacts of such large-scale land clearance include the transboundary ‘haze’ or air pollution that has repeatedly occurred in Sumatra and Borneo. Air pollution created by forest fires in Indonesia has severely affected neighbouring countries, including Malaysia, Singapore and Thailand, causing economic losses and impacts on human health.

The recent increase in dam construction on major rivers in Southeast Asia for the purposes of electricity generation, irrigation, and navigation has resulted in the displacement of large numbers of people from their traditional lands. The displaced include indigenous peoples and local communities which rely heavily on forests, rivers, lakes and marine and coastal areas for the products from Mother Nature for food, medicine, and fuel.

The right to a healthy environment in constitutions and national legislation

The human right to a safe, clean and sustainable environment, commonly known as ‘the right to a healthy environment’, is now recognised in more than 100 constitutions worldwide. The terms used in various national systems include: ‘healthy’, ‘clean’, ‘safe’, ‘sound’, ‘ecologically balanced’, ‘secure’, ‘decent’, ‘satisfactory’, ‘sustainable’, ‘free from contamination’ or ‘suitable for the development of the person’.

As discussed in Chapter 1, Article 28 (f) of the ASEAN Human Rights Declaration (AHRD) recognises ‘the right to a safe, clean and sustainable environment’. At the national level, Southeast Asian countries use different terms to refer to the right to a healthy environment. Four Southeast Asian countries, Indonesia, the Philippines, Thailand and Viet Nam, have an explicit provision recognising this right under their constitutions, using the terms ‘healthy environment’ (Indonesia), ‘balanced and healthful ecology’ (Philippines), ‘balanced and sustainable manner’ (Thailand), and ‘fresh environment’ (Viet Nam). Malaysia implicitly recognises this right in its recognition of the right to life (see the discussion under ‘Implicit Recognition of the Right to a Healthy Environment’). Brunei, Cambodia, the Lao People’s Democratic Republic (Lao PDR), Myanmar and Singapore do not explicitly recognise this right in their national constitutions.

Explicit recognition

Indonesia: Article 28h(1) of the 1945 Constitution of Indonesia states that,

> Every person shall have the right to live in physical and spiritual prosperity, to have a home and to enjoy a good and healthy environment, and shall have the right to obtain medical care.

Additionally, Article 65 of its Law on Environmental Protection and Management goes further to draw a clear link between a healthy environment and human rights, as well as referring to related procedural rights. This law also grants the right for everyone to submit recommendations or objections against businesses or activities that have the potential to affect the environment.

Philippines: The Philippines recognises the right to a healthy environment in Section 16 of Article II of the 1987 Constitution, which reads:
The State shall protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature.

This provision was relied on in the case of Minors Oposa v Factoran, which called into question the granting of commercial logging licences over 3.89 million hectares of land. The Supreme Court of the Philippines ruled that the plaintiffs had a clear and constitutional right to ‘a balanced and healthful ecology’ as being linked with the right to health, and were thus entitled to protection by the state in its capacity as parens patriae. The doctrine of parens patriae is a Latin term for ‘parent of the nation.’ Under this doctrine, the state has the power of guardianship over persons who are unable to take care of or protect themselves.

Thailand: Under the 2017 Constitution of Thailand, the right to a healthy environment is recognised in two sections. Section 43(2) of the constitution recognises that a person or community has the right to:

...manage, maintain and utilise natural resources, environment and biodiversity in a balanced and sustainable manner, in accordance with the procedures provided by law.

Section 57(2) makes explicit the state’s obligation to:

...conserve, protect, maintain, restore, manage and use or arrange for utilisation of natural resources, environment and biodiversity in a balanced and sustainable manner, provided that the relevant local people and local community are allowed to participate in and obtain benefits from such undertakings.

The 2017 constitution recognises the right to a healthy environment in a different way from Thailand’s previous constitutions. It will be important to monitor how judicial decisions and government policies further elaborate on the content of this right. In line with the principle of non-regression of human rights, environmental rights should likewise be protected and progressively developed when new laws are drafted. Some statutory developments reflect a positive trend; in particular, Thailand promulgated the Enhancement and Conservation of the National Environmental Quality Act (2018), which contains a clear definition of environmental impact assessment (EIA), previously absent in the 1992 version of the Act.

Along with the Philippines, Thai courts have played a significant role in protecting the right to a healthy environment, and have also shown how substantive and procedural elements of the right to a healthy environment are interconnected. (Chapter 3 in this report focuses on procedural elements.) The Administrative Court of Thailand is mandated to adjudicate on environmental disputes between citizens, local communities, government agencies, and private companies. A recommendation by the president of the Supreme Administrative Court of Thailand defined the meaning of an ‘environmental case’ to include civil cases relating to acts that cause damage to natural resources, the ‘community environment’ and ecosystems, as well as omissions or failures on the part of state authorities to protect natural resources or to compensate for such damage.

Additionally, in 2005, the Thai judiciary body established a Division of Environmental Investigation in its Court of Appeal and Supreme Court, aimed at overseeing complex environmental cases. The division eliminates the administrative burden on plaintiffs who file an environmental complaint, and supports a more inquisitorial system in which the court itself performs the duties of fact finding and collecting evidence. The Division of Environmental Investigation has the jurisdiction to hear cases related to:

- climate change or the destruction of resources or ecosystems;
- protection of natural resources or the environment of the community.

67. Oposa v Factoran (1993) Supreme Court of the Philippines G.R. No. 101083
69. ibid
70. Antonio Vasco vs. Court of Appeals et al (1978) Supreme Court of the Philippines G.R. No. L-46763
72. See Enhancement and Conservation of National Environmental Quality Act (Thailand), s 46. EIA means ‘a procedure for studying and assessing impacts that may occur due to carrying on any project, undertaking, or operation of the State or which the State will give permission to operate, that may directly or indirectly impact natural resources, health, sanitary, life quality, or other interests of people or communities by going through the process of public participation, in order to determine measures to prevent and rectify such impacts. Results of the study shall be called an environmental impact assessment report.’
73. Supreme Administrative Court of Thailand, ‘The Administrative Judge and Environmental Law’ (Report to the 11th Congress of IASAJ 2013) 41-42
• compensation for environmental damage and remediation through eliminating pollution or restoring the environment; and

• compensation for damage to life, physical health or the rights of the plaintiff arising from environmental damage.²⁴

There are several examples of court rulings that have upheld principles relevant to the right to a healthy environment:

• In 2014, the Supreme Administrative Court of Thailand ordered the Bangkok Mass Transit Authority to perform its duties in accordance with the provisions of the Constitution of Thailand, in particular, those relating to the protection of environment for health and people’s quality of life. As a state enterprise, the failure of the Bangkok Mass Transit Authority’s public buses to meet vehicle emission standards was seen as negligence of its duties under Thailand’s Constitution and its Land Traffic Act.²⁵

• The Mae Moh Power Plant case provides a good example of how citizens benefited from monetary compensation for damage caused to human health. The power plant project displaced 30,000 people and caused health problems in local communities due to its emissions of sulphur dioxide, carbon dioxide, mercury and other contaminants.²⁶ After a 12-year battle, the Supreme Administrative Court of Thailand ordered the Electricity Generating Authority of Thailand to pay compensation to 131 plaintiffs among the 500 individuals who had brought the initial complaint in 2003.²⁷

• Citizens have also turned to the court system to resolve issues related to the impacts of mining operations on local communities in Loei province²⁸ and lead contamination of Klity Creek in Kanchanaburi province.²⁹

Viet Nam: The 2013 Constitution of Viet Nam explicitly recognises the right to a healthy environment under Article 43, which states that ‘Everyone has the right to live in a clean environment and has the duty to protect the environment.’ Article 63(1) of the Constitution enshrines the state’s obligation to:

…protect the environment; manage, and effectively and stably use natural resources; protect nature and biodiversity; take initiative in prevention and resistance against natural calamities; and respond to climate change.

It is also the state's obligation to encourage all acts of protection of the environment. The Constitution (Article 63(3)) further states that:

Organisations and individuals causing harm to the environment must be responsible to remedy and provide compensation for damage.

A year after the entry into force of its constitution, Viet Nam also adopted its Law on Environmental Protection (2014) addressing principles of environmental protection to ensure the human right to live in ‘a pure environment.’³⁰

Implicit or no recognition

Malaysia: While Malaysia has no explicit provision recognising the right to a healthy environment, judges in Malaysia have relied on Article 5 of the 2013 Federal Constitution of Malaysia to interpret the recognition of this right. Article 5 states that, ‘No person shall be deprived of his life or personal liberty save in accordance with law.’

75. See Foundation for Anti Air Pollution and Environmental Protection (P1) et al v. Bangkok Mass Transit Authority (D1) and Pollution Control Department (D2)., (2014) Supreme Administrative Court Judgment No. A. 11 – 14/2557
78. An application was made to the Udon Thani Administrative Court, Case Red No. Sor 5/2557, 17 November 2560 BE to revoke a mining concession, and in Loei Court Case No. Sor Wor (por) 1/2561 BE, a claim was made for damages due to impacts from the gold mine in Wang Saphung district, Loei province. In the latter case, the application requested the mining company to address toxic contamination and rehabilitate the environment.
79. The Klity Creek case came before the Supreme Administrative Court in Case Red No. Aor 743/2555, and as a civil case, which the Supreme Court ruled on in Decision No. 15219/2558. The cases are listed here: https://enlawfoundation.org/newweb/wp-content/uploads/Summary-KlityCreek-AdminCase-Judgement.pdf (Eng) and https://enlawfoundation.org/newweb/?page_id=1549 (Eng)
80. Law on Environmental Protection 2014 (Viet Nam), art 4.2
In Tan Teck Seng v Suruhanjaya Pendidikan & Another, the court argued that:

The expression ‘life’ appearing in Art. 5 does not refer to mere existence. It incorporates all those facets that are an integral part of life itself and those matters that go to form the quality of life. Of those are [the] right to seek and be engaged in lawful and gainful employment and to receive those benefits that our society has to offer to its members. It includes the right to live in a reasonably healthy and pollution-free environment.\(^81\)

This interpretation by the Malaysian court suggests that the ways forward for promoting recognition of the right to a healthy environment in Malaysia are through dynamic jurisprudence and the constitutional framework.\(^82\)

The right to a healthy environment is not a new discussion in Malaysia, as there were two occasions when this right was proposed for inclusion in the constitution. First, in 1992 the Environmental Law Review Committee made a recommendation to amend the constitution to include the right of the individual to have a healthy and clean environment.\(^83\) Second, during the 1996 Consumers’ Association of Penang and Sahabat Alam Malaysia (CAP-SAM) National Conference on ‘The State of the Malaysian Environment’, there was another proposal to amend the constitution and recognise the right to a clean and safe environment.\(^84\) The argument put forward by the delegates at that time was that environmental protection is essential to ensure the survival of humanity and other living things, as acknowledged by world leaders during the 1992 UN Conference on Environment and Development in Rio de Janeiro; it would therefore be timely to incorporate the right to a clean and safe environment in Part II of the constitution, dealing with fundamental liberties.\(^85\) However, the right has not been explicitly recognised.

**Singapore:** Although Singapore has not recognised the right to a healthy environment in its constitution or secondary legislation, the city state is thought to be one of the cleanest and greenest countries in Asia.\(^86\) Singapore has promulgated a Clean Air Act, Water Pollution Control and Drainage Act, and Pollution Control Act;\(^87\) however, there is no mandatory requirement to conduct EIAs in Singapore.\(^88\) The argument advanced by Singapore’s Ministry of Environment is that environmental assessment is not practical for ‘a small, crowded city state that is continually hungry for development and high economic growth.’\(^89\)

**Brunei Darussalam:** Brunei has not recognised the right to a healthy environment in its constitution or laws. Promulgated in 1959 and amended in 2006, the Constitution of Brunei Darussalam contains no modern constitutional concepts, such as popular sovereignty, a bill of rights, limited government, separation of powers or the rule of law.\(^90\) The constitution includes explicit provisions that protect, preserve and maintain the prerogative powers of the Sultan.\(^91\) In particular, Section 83(3) of the constitution confers upon the Sultan absolute discretion to make any order that he considers desirable in the public interest.\(^92\) Two significant orders have been made under this section concerning environmental matters: a Prevention of Pollution of the Sea Order (2005)\(^93\) and an Environmental Protection and Management Order (2015). The latter includes a definition of EIA.\(^94\)


\(^85\) ibid 62, 63

\(^86\) Clive Briffett and Jamie Mackee, ‘Environmental Assessment in Singapore: An Enigma Wrapped up in a Mystery!’ (2002) 20 no. 2 *Impact Assessment and Project Appraisal* 113

\(^87\) ibid 117


\(^89\) Briffett and Mackee, ibid 116


\(^91\) Clauspeter Hill and Jörg Menzel (eds), *Constitutionalism in Southeast Asia* (Konrad Adenauer Stiftung 2008) 14

\(^92\) Constitution of Brunei Darussalam 1959, s 83(3)

\(^93\) Prevention of Pollution of the Sea (Garbage) Regulations and Prevention of Pollution of the Sea (Reporting of Pollution Incidents) Regulations 2008 (Brunei)

\(^94\) Environmental Protection and Management Order of Brunei Darussalam 2015, s 3
Cambodia: The 1993 Constitution of the Kingdom of Cambodia contains no specific provision recognising the right to a healthy environment for its citizens as a standalone right. However, there are a number of relevant articles. Article 32(1) of the constitution states that, "Everybody shall have the rights to life, freedom and personal security."

Article 72(1) of the constitution provides that the health of the people shall be guaranteed, but does not specifically mention the right to a healthy environment. The constitution does, however, acknowledge the government's obligation to protect the environment in Article 59, which states that:

The State shall protect the environment and the balance of natural resources and establish a precise plan for the management of land, water, airspace, wind, geology, ecological systems, mines, oil and gas, rocks and sand, gems, forests and forestry products, wildlife, fish and aquatic resources.

Article 59 of the constitution contains keywords and phrases that endorse environmental human rights under 'State Objectives,' where it is stated that the state has the obligation to protect the environment. However, it does not represent an explicit recognition of the right to a healthy environment.

In 1996, three years after the enactment of the constitution, the Royal Government of Cambodia enacted the Law on Environmental Protection and Natural Resources Management in compliance with Article 59. This law covers the protection of human health, environment and natural resources including biodiversity. It also serves as a basic tool to prepare other laws in Cambodia. The law addresses:

- protecting and promoting environmental quality and public health through the prevention, reduction, and control of point sources and non-point sources of pollution;
- assessing the environmental impact of all proposed projects prior to issuance of a decision by government;
- ensuring the rational and sustainable conservation, development, management and use of natural resources;
- encouraging and enabling public participation in environmental protection and natural resource management; and
- suppressing any acts that cause harm to the environment.

Although this law respects, in spirit, the right to a healthy environment, without a constitutional provision it is still difficult in practice to fulfil this right. There is significantly more scope for courts in Cambodia to interpret existing environmental laws through a human rights lens.

The 2019 draft of the Environment and Natural Resources Code of Cambodia incorporates the basic principles of public participation, access to information, access to effective remedies, polluter pays, precautionary action, prevention,
intergenerational equity, gender equality in environmental protection and natural-resource management, public interest, free, prior, and informed consent for indigenous communities, and others. Although the draft code contains these basic principles, it does not explicitly recognise the right to a healthy environment. Beside the draft code, there are other domestic instruments that centre on the protection of the environment, but do not explicitly recognise the right to a healthy environment.

**Lao PDR:** The Constitution of Lao PDR, promulgated in 1991 and amended in 2003, does not recognise the right to a healthy environment. There is, however, a provision under Article 19, which calls for protection of the environment and natural resources by all organisations and citizens. Article 70(5) of the constitution empowers the government to issue decrees and resolutions on management in the fields of national resources and environment.

**Myanmar:** There is no explicit recognition of the right to a healthy environment. However, Article 45 of the 2008 Constitution of the Union of Myanmar establishes the state’s duty to protect and conserve the natural environment. To comply with this article, the government promulgated the Environmental Conservation Law in 2012; one of its eight objectives is to enable a healthy and clean environment. This law also requires the Ministry of Environment to lay down a system of EIA, as stated in Section 7(m). The 2018 Forest Law, which replaced the 1992 Forest Law, contains no recognition of the right to a healthy environment; however, it does contain an objective to ensure long-lasting forest management and sustainable development. The Myanmar court has taken a positive stance with regard to this right, providing civil enforcement and civil remedies for environmental disputes.

**Judicial recognition and interpretation**

In countries where the right to a healthy environment is recognised in the national constitution or domestic legislation, specialist environment courts or green tribunals have been established, for example, in the Philippines, Thailand and Malaysia. The discussions on green courts and tribunals have attracted the attention of legal professionals, academics and civil society. The participants of the Amritsar Dialogue in India demonstrated their commitment to ensure that green courts or tribunals, regardless of variations in different jurisdictions, will effectively address the simmering challenge of a deteriorating environment. Increasing the establishment of these types of courts could encourage further interpretation or application of constitutional human rights provisions and improve the implementation of environmental legislation. Court judgments and scholarly opinion have linked the right to a healthy environment with the right to life, right to health, and state obligations to protect the environment.

The Philippines stands out among its Southeast Asian neighbours when it comes to the recognition and interpretation of the right to a healthy environment. The Supreme Court of the Philippines has developed Rules of Procedure for Environmental Cases, effective from 2010, whereby special procedures for environmental cases are applicable. For instance, Rule 2 Section 5 allows for minors or generations yet unborn to be represented by any Filipino citizen. Another example is Rule 4 Section 5, which requires the court to prioritise the adjudication of environmental cases and to decide cases within one year from the filing of the complaint. In a case brought by a group of 14 young Filipinos, known as Concerned Residents of Manila Bay, the Supreme Court of the Philippines upheld the lower court’s decisions granting them the right to file a lawsuit against 10 government departments and agencies for

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106. ibid, art 11
107. ibid, art 14
108. ibid, art 15. This principle requires the state to prioritise the public interest over the interests of private persons or legal entities in all environment and natural-resource decision making
109. ibid, art 18
110. Law on the Protected Areas 1993; Sub-Decree on Water Pollution Control 1999; Sub-Decree on Solid Waste Management 1999; Sub-Decree on Environmental Impact Assessment Process 1999; Sub-Decree on Air Pollution and Noise Disturbance Control 2000; and Prakas on Guideline for Conducting Environmental Impact Assessment Report 2000
111. Constitution of Lao People’s Democratic Republic 1991, art 19
112. ibid, art 70(5)
113. Environmental Conservation Law of Myanmar 2012, s 3(c)
117. ibid
their negligence in failing to protect Manila Bay, and directed the agencies to clean up and protect the bay for the benefit of future generations. The court also granted the citizens’ request to enjoin the government from issuing any further permits for activities that would pollute the bay.

**Understanding of substantive elements**

As discussed in the report by David Boyd submitted to the UN General Assembly in July 2019, the substantive elements of the right to a healthy environment include clean air, clean water and adequate sanitation, a safe climate, healthy and sustainably produced food, non-toxic environments in which to live, work, study, and play, and healthy biodiversity and ecosystems. These substantive dimensions are recognised in various ways in Southeast Asian countries’ national laws and policies, with the exception of references to the right to healthy and sustainably produced food and to live in a non-toxic environment.

**Clean Air**

The main sources of air pollution are biomass burning, vehicle emissions, and emissions from industrial activities. Both indoor and outdoor air pollution pose threats to people’s health. Air quality data from public sources in 2018 showed that Jakarta and Hanoi were the most polluted cities in Southeast Asia. Based on data from 73 countries, Indonesia ranked as having the 11th-worst air quality, Viet Nam ranked 17th, Thailand ranked 23rd, Cambodia ranked 36th, Singapore ranked 47th and the Philippines ranked 48th. Other Southeast Asian countries were not ranked, due to lack of data.

Some progress has been made in improving the air quality in the region as governments have taken action, including developing and implementing national air quality standards and regulations. Air quality standards have been put in place in seven out of the 10 ASEAN countries, although not all the standards align with World Health Organization (WHO) guidelines.

The Philippines leads in this field as it has established an Air Quality Management Fund to finance clean-up operations in air pollution cases. It also enacted a Clean Air Act that restates the right to a healthy environment as provided for in the Constitution of the Philippines. The act also recognises the rights of citizens to breathe clean air and have access to the procedural dimensions of the right to a healthy environment.

Singapore has implemented the most stringent emissions regulations to minimise motor-vehicle and industrial pollution.
Malaysia has enacted the Environmental Quality Act (1974) and the Environmental Quality (Clean Air) Regulation (2014). The latter contains comprehensive standards for the protection of public health and quality of the environment.\(^\text{128}\)

Indonesia has issued Government Regulation No. 41/1999 on Air Pollution Control and various ministerial regulations on vehicle emission standards, which together represent a basic regulatory framework for air quality control.

Cambodia has enacted a Sub-Decree on the Control of Air Pollution and Noise Disturbance in 2000, which aims to protect environmental quality and public health through activities to monitor, curb, and mitigate air pollutants and noise disturbance.\(^\text{129}\) The sub-decree mandates the Ministry of Environment as the responsible ministry for dealing with the issue and ensuring that human health and environmental quality are protected.\(^\text{130}\) The sub-decree also specifies ambient air quality standards, maximum allowable concentrations of hazardous substances in ambient air, maximum allowable standards of polluting substances in ambient air from immovable sources, and gas emission standards from mobile sources.\(^\text{131}\)

Since 2010, Viet Nam has revised its national air quality standards to make compliance mandatory.\(^\text{132}\) Viet Nam also plans to develop a Clean Air Act.\(^\text{133}\)

Myanmar has not developed air quality standards or policies, beyond the passing of its Environmental Conservation Law.\(^\text{134}\) Similarly, Lao PDR has no ambient air quality standards\(^\text{135}\) and no substantial air pollution legal framework beyond its Environmental Protection Law. Brunei has no agency solely responsible for environmental matters; instead, responsibility is fragmented among different ministries and departments.\(^\text{136}\)

This overview of air quality standards and regulations indicates that most Southeast Asian countries have implicitly and explicitly recognised the clean air element of the right to a healthy environment in their laws. The Philippines stands out, compared to others, as it has explicitly recognised the right to breathe clean air as part of the right to healthy environment, which is guaranteed in its constitution.

### Clean Water

Access to safe drinking water and adequate sanitation is recognised internationally as a standalone right.\(^\text{137}\)

As stated by the UN Special Rapporteur on the human right to safe drinking water and sanitation, ‘There is no life without water, and there is nothing that can be substituted for it when water is scarce. Every woman, man, and child requires access to at least a minimum daily amount of water to live healthily.\(^\text{138}\) Clean water is also one element of the right to a healthy environment.

The 2017 Constitution of Thailand, Section 72(4) of Chapter VI, titled, ‘Directive Principles of State Policies,’ sets out the obligation of the state to provide ‘quality water resources which are sufficient for consumption by the people, including for agriculture, industry and other activities.’ The constitution goes further in Chapter XVI on National Reform: Section 258 requires national reform to achieve:

> …a water resource management system which is efficient, fair and sustainable, with due regard given to every dimension of water demand in combination with environmental and climate change.

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128. Environmental Quality (Clean Air) Regulations 2014 (Malaysia)
129. Sub-Decree on the Control of Air Pollution and Noise Disturbance 2000 (Cambodia) art 1
130. ibid, arts 28, 30
131. ibid, Annex 1 – 4
132. ibid
135. UNEP, ‘The South East Asia Air Quality Regional Report’ [nd] 4
136. Clean Air Asia website, ‘Brunei Darussalam’ <https://cleanairasia.org/node7303/>
137. SDG Targets 6.1 and 6.2
Cambodia has passed a Sub-Decree on Water Pollution Control (1999) with the purpose of protecting human health and ensuring the conservation of biodiversity by preventing and reducing pollution of public water bodies. The sub-decree mentions the importance of protecting human health, as does Article 72 of the Constitution of Cambodia, which guarantees the right to health.

Viet Nam passed a Law on Water Resources in 2012, acknowledging the need for people to have access to clean water. Articles 2.11 and 2.12 provide for interpretation of the terms ‘domestic water’ and ‘clean water’. Additionally, Article 45.2 obliges the people’s committees at all levels and relevant state agencies to ‘implement master plans, plans and projects on the supply of domestic water and clean water’.

These efforts by Southeast Asian countries have demonstrated their recognition of the need for clean water as an important element of a healthy environment.

Safe climate

Six out of 10 countries in Southeast Asia, namely Indonesia, Malaysia, Myanmar, the Philippines, Thailand, and Viet Nam, are extremely vulnerable to climate change, ranking among the top 20 of the world’s most vulnerable countries, making Southeast Asia one of the most at-risk regions. In preparation, governments of Southeast Asian countries have taken significant steps, both domestically and internationally, to mitigate climate-related risks.

All 10 Southeast Asian countries have ratified the UN Framework Convention on Climate Change (UNFCCC), which aims to stabilise greenhouse gas concentrations in the atmosphere and prevent dangerous anthropogenic interference with the climate system (Article 2). All signatory states were asked to submit their Intended Nationally Determined Contributions (INDCs) and 10 Southeast Asian countries had done so by 2015. However, at the time of writing, no Southeast Asian country had submitted its Nationally Determined Contribution (NDC). The next round of NDC submissions is due in 2020. As will be discussed in Chapter 7, this can be understood as a commitment by states to ensure a safe climate that is vital to the enjoyment of a broad range of human rights.

In addition, Southeast Asian countries have developed national climate change institutions and action plans. For instance, Cambodia has established a National Climate Change Committee to oversee the preparation, coordination, implementation and monitoring of climate change policies, strategies and programmes. Cambodia has also implemented the Cambodia Climate Change Strategic Plan 2014-2023.

Indonesia introduced a National Action Plan on Climate Change Adaptation in 2012. It has launched a National Medium-Term Development Plan 2015-2019, which identifies a green economy as the foundation of Indonesia’s development programme, emphasising environmental quality, disaster mitigation and tackling climate change.

Malaysia established a National Policy on Climate Change in 2009 and a National Strategy on Climate Change 2018-2030. In 2018, Malaysia indicated its intention to draft a Climate Change Act, demonstrating how seriously it views the issue.

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Myanmar developed a Climate Change Strategy and Action Plan 2016-2030\textsuperscript{150} and a Climate Change Master Plan (2018 – 2030) to be implemented by its partners in six key sectorial areas, with the purpose of transforming Myanmar to a low-carbon and resilient country.

The Philippines passed a Climate Change Act in 2009, which established its Climate Change Commission, the sole policy-making body of the government that coordinates, monitors and evaluates programmes and action plans relating to climate change.\textsuperscript{151} Recognising the vulnerability of women, children, and the poor, Section 2 of this act requires the state to ‘incorporate a gender-sensitive, pro-children and pro-poor perspective in all climate change and renewable energy efforts, plans and programmes.’\textsuperscript{152} This recognition makes the Philippines a leader in adopting progressive domestic laws related to gender equality and climate change.\textsuperscript{153}

Thailand created a National Committee on Climate Change in 2006 and, in January 2008, issued its first National Strategy on Climate Change.\textsuperscript{154} Furthermore, Chapter XVI of the current Constitution of Thailand, titled ‘National Reform’, notes the state’s responsibility with regard to action on climate change.\textsuperscript{155}

Viet Nam developed a National Climate Change Strategy 2011-2020 and an Action Plan for Adaptation to Climate Change in the Agriculture and Rural Development Sector 2008-2020. The Constitution of Viet Nam recognises the state’s responsibility to ‘take initiative in prevention and resistance against natural calamities and respond to climate change.’\textsuperscript{156} Furthermore, the Law on Environmental Protection of Viet Nam dedicates a whole chapter to addressing ‘Response to Climate Change.’\textsuperscript{157}

All of these actions illustrate the commitment and recognition of the importance of a safe climate by Southeast Asian countries.

**Healthy ecosystems and biodiversity**

Biological diversity is defined in the Convention on Biological Diversity (CBD) as:

‘the variability among living organisms from all sources including, inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part: this includes diversity within species, between species and of ecosystems.’\textsuperscript{158}

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150. ASEAN Secretariat, *Fifth ASEAN State of the Environment Report (2017)* 68
151. Climate Change Act 2009 (Philippines), s 4
152. ibid, s 2
153. ‘A Safe Climate: Good practices’ (Supplementary information on the report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment), 74th sess UN Doc A/74/161/Annex (2019) 4
154. Danny Marks, ‘Climate Change and Thailand: Impact and Response’ [2011] *Contemporary Southeast Asia Journal of International and Strategic Affairs* 243,244
155. Constitution of the Kingdom of Thailand 2017, s 258
156. Constitution of the Socialist Republic of Viet Nam 2013, art 63
157. Law on Environmental Protection 2014 (Viet Nam), ch VI
158. Convention on Biological Diversity 1992, art 2
Biodiversity is thus an integral part of ecosystem services that underpin the full enjoyment of the human rights to life, health, food, water, and culture. Biodiversity loss contributes to ecosystem degradation and consequently affects human health and well-being, and undermines human rights.

In Cambodia, ethnic minorities who depend directly on natural resources and ecosystem services for food, water, and biomass have been at the forefront of the struggle to protect human rights. In 2001, the government issued an order to temporarily suspend logging activities in timber concessions, due to the impact on the livelihoods of ethnic minorities who collect resin and other non-timber forest products, and the lack of a sustainable development management plan. A year later, after the establishment of a Department of Ethnic Minorities’ Development, threats to the customary rights of indigenous peoples and local communities posed by commercial plantations, logging and immigration began to be addressed, and a draft policy on indigenous people was revived.

Myanmar promulgated a Protection of Wildlife and Conservation of Natural Areas Law in 1994. The law was revised and enacted as the Conservation of Biodiversity and Natural Areas Law in 2018. Myanmar has also developed a National Biodiversity Strategy and Action Plan 2015-2020 to restore and conserve biodiversity.

Viet Nam recognises the state’s obligation to protect nature and biodiversity in Article 63 of the constitution. However, even before this recognition, Viet Nam had promulgated the Biodiversity Law in 2008 which sets forth the rights and obligations of the state, organisations, households and individuals in biodiversity conservation and sustainable development.

In addition to this domestic recognition of the importance of biodiversity, all Southeast Asian countries are parties to the CBD. As such, ASEAN Member States are required to submit National Biodiversity Strategies and Action Plans (NBSAPs) and national reports. To date, Singapore and Thailand have submitted four versions of their NBSAPs, Indonesia, the Philippines and Viet Nam have submitted three versions, Cambodia, Lao PDR, Malaysia and Myanmar have submitted two, and Brunei has submitted one. Singapore was the first country to begin its NBSAP submission in 1992 and most recently has submitted its updated NBSAP in 2019. As for the national reports, Cambodia, Lao PDR, Thailand and Viet Nam are the four countries that have recently submitted their reports to the CBD.

160. ibid 21
162. ibid
164. Convention on Biological Diversity, ‘List of Parties’
165. NBSAPs under the Convention on Biological Diversity
166. See National Reports under the Convention on Biological Diversity

Photo: Olga Ozik/Pixabay

Solid waste management is part of maintaining a healthy urban environment in Pham Ngú Lao St, Ho Chi Minh City, Viet Nam
In general, Southeast Asian countries have adopted agreements and initiatives to protect their biodiversity, including putting in place NBSAPs and national reports in fulfilment of their obligations under the CBD.

The right to a healthy environment in regional developments

Environmental protection is essential to the full enjoyment of human rights in Southeast Asia. Recognising this linkage, ASEAN Member States adopted the ASEAN Agreement on the Conservation of Nature and Natural Resources in 1985, which highlights the interdependence of people and nature. However, this agreement has not attracted a sufficient number of ratifications from ASEAN Member States for it to enter into force. If ratified by all states, it would be the only ASEAN hard-law instrument concerning natural resources. While the agreement has not entered into force, it has nevertheless been influential in promoting environmental rights and management in Southeast Asia, especially with regard to the recognition of the right to a healthy environment. The four countries which recognise the right to healthy environment in their constitutions—India, the Philippines, Thailand and Viet Nam—have all ratified the agreement. India, the Philippines, and Thailand signed the agreement on the same date in 1985 and ratified it in 1986; Viet Nam did not sign the agreement but ratified it in 1997. Myanmar ratified the agreement in 1997 and Cambodia in 1999.

Brunei, Malaysia, and Singapore signed the agreement in 1985 but did not ratify it. Lao PDR is the only country that has neither signed nor ratified the agreement. The delay in this agreement’s entry into force should not been seen as an obstacle to the recognition of the human right to a healthy environment in Southeast Asia, as the region has recognised ‘the right to a safe, clean and sustainable environment’ in Article 28(f) of the AHRD. This declaration will be discussed in Chapter 4.

Conclusion

The right to a healthy environment is not a new topic of discussion in Southeast Asian countries. It has been explicitly recognised in four national constitutions—those of Indonesia, the Philippines, Thailand, and Viet Nam—and implicitly recognised in Malaysia. The other ASEAN countries—Brunei, Cambodia, Lao PDR, Myanmar and Singapore—have not provided constitutional recognition of this right. Nevertheless, they do recognise, to a certain extent, the substantive dimensions of this right in their domestic laws and court decisions.

While procedural dimensions of the right to a healthy environment will be discussed in Chapter 3, this chapter has shown how substantive and procedural elements are interconnected. The Philippines and Thailand are the leading countries in defining the content of the right to a healthy environment, and recognising it through court decisions. In a number of cases involving the discussion of the right to a healthy environment, their courts have clearly acknowledged the constitutional protection of this right. Among the remaining countries that have not acknowledged the human right to a healthy environment, the prospects for recognition are hopeful, as no country has taken a stance against its recognition.

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Law on Environmental Protection and Management 2009 (Indonesia)
Law on Environmental Protection and Natural Resources Management 1996 (Cambodia)
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Main messages

• The procedural dimensions of the human right to a healthy environment include access to information, public participation in environmental decision-making—including participation in environmental impact assessment (EIA) for large development projects—and access to justice and remedies in cases of environmental harm.

• There is evidence from Southeast Asia that domestic provisions for accountability under environmental rule of law and national human rights institutions (NHRIs) have been helpful in safeguarding the right to a healthy environment. Seven out of 10 ASEAN Member States have such domestic provisions, and five have established NHRIs.

• Some businesses have established environmental and social protection policies that are helpful in safeguarding the human right to a healthy environment, as they provide for communities to assert their procedural rights.

• In some instances, civil society actors in ASEAN countries have successfully used such arrangements to assert the rights of indigenous and local communities to secure land tenure over their ancestral lands, avoid pollution of marine protected areas, and protect the rights of future generations.

• Recent innovations such as electronic access to information in Viet Nam and agrarian land reform in the Philippines hold promise for promoting the implementation of the right to a healthy environment.

Background

This chapter first synthesises information about accountability in environmental regulations and other mechanisms, and secondly focuses on citizens’ right of access to information under national legal systems and their ability to access this in practice. Thirdly, provisions for public participation in EIA processes are analysed. Parts four and five present several legal innovations and recommendations. Examples of good practices in implementing the procedural elements of the right to a healthy environment in Southeast Asian countries are discussed.

Environmental rule of law and accountability

Environmental rule of law is present ‘when laws are widely understood, respected, and enforced and the benefits of environmental protection are enjoyed by people and the planet.’ Hence, under an effective regime, environmental rule of law would support the right to a clean and healthy environment as fundamental to human existence. Accountability under environmental rule of law includes the obligation of governmental officials and enterprises to monitor the impacts of their activities, accept responsibility for them, disclose and justify results, and provide remedy when harm has been inflicted. The table on the next page lists environmental laws and policies that contain elements of accountability in each ASEAN country.
NHRIs have been established in five ASEAN countries, namely the National Human Rights Commission of Indonesia (KOMNAS HAM), the Human Rights Commission of Malaysia (SUHAKAM), the Commission on Human Rights of the Philippines (CHRP), the National Human Rights Commission of Thailand (NHRCT), and the Myanmar National Human Rights Commission. Such institutions can play a significant role in realising the right to a healthy environment and promoting the accountability of duty-bearers.

For example, the NHRCT, established by the Constitution of Thailand as an independent organisation, has provided guidelines for government authorities and businesses to comply with human rights principles under the UN Guidelines on Business and Human Rights. The NHRCT issues an annual report on the examination of human rights issues in Thailand, which has revealed complaints of human rights violations in the past. Its Report No. 36-39/2016, for example, recommended that the Thai government should review the impact of its draft Minerals Act with regard to its potential impact on community rights and the right of people to participate in natural and environmental resource management. The NHRCT also acts as the focal point that coordinates the work of domestic government agencies and international organisations to enhance human rights protection in Thailand.

Besides national-level actions through NHRIs, some Southeast Asian countries are also promoting environmental rule of law and accountability at the regional and subnational levels.

At the regional level, NHRIs are cooperating to develop common practices. On 28 June 2007, the four NHRIs then in existence—in Indonesia, Malaysia, the Philippines and Thailand—signed a Declaration of Cooperation in Bali, Indonesia. The declaration included a commitment to ‘develop regional strategies for the promotion and protection of human rights within and among the four national human rights commissions.’ This grouping, known as the South East Asia National Human Rights Institution Forum, and which now includes national institutions from Myanmar and Timor-Leste, holds annual meetings to pursue this objective. Among the areas of common concern are the implementation of economic, social and cultural rights and the right to development, and the enhancement of human rights education.

Table 3: Examples of laws and policies for accountability under environmental rule of law in ASEAN countries

<table>
<thead>
<tr>
<th>Country</th>
<th>Examples of laws and policies</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cambodia</td>
<td>National Environment Strategy and Action Plan 2016-2023</td>
</tr>
<tr>
<td>Indonesia</td>
<td>Article 65 of Law No. 32/2009 on Environmental Protection and Management</td>
</tr>
<tr>
<td>Lao PDR</td>
<td>Constitution of the Lao People’s Democratic Republic (revised 2015)</td>
</tr>
<tr>
<td>Myanmar</td>
<td>Article 354(a) and Article 21(a) of the 2008 Constitution; Environmental Conservation Law (2012)</td>
</tr>
<tr>
<td>Philippines</td>
<td>Article II, Section 16 and Article XI, 1987 Constitution of the Republic of the Philippines;</td>
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<td></td>
<td>Republic Act No. 6713, February 20, 1989</td>
</tr>
<tr>
<td>Thailand</td>
<td>Sections 3, 43, 50, 57, 58, 68, 72, Chapter III and Clause 5, Article 78, Part 3, Constitution 2008</td>
</tr>
<tr>
<td>Viet Nam</td>
<td>Article 17 of the 2013 Constitution; Article 26 of the Law on Environmental Protection 2014;</td>
</tr>
<tr>
<td></td>
<td>Article 5 of Decree 18/2015/ND-CP on environmental protection master planning, strategic</td>
</tr>
<tr>
<td></td>
<td>environmental assessment, EIA and environmental protection plans</td>
</tr>
</tbody>
</table>

172. Indonesia also has Komnas Perempuan (on violence against women) and Komnas Perlindungan Anak (on children).
174. See e.g. NHRCT website, ‘Reports on the Results of the Human Rights Violation Examination’ (2009)
175. pers comm Thitat Chavisichindha; see also Constitution of the Kingdom of Thailand and NHRCT website, ‘Background and history’
177. Philippines Commission on Human Rights website, ‘SEANF’
An example of environmental rule of law and accountability at the subnational level can be found in the Philippines’ Local Government Code, which requires that local government authorities ‘… shall ensure and support … the right of the people to a balanced ecology.’ This provision has been the basis for establishing many environmental protection programmes and offices at the local government level. Environmental and national resources offices have been set up in all local government authorities in the Philippines. Local comprehensive land-use plans are required to include chapters on the environment, and must consider environmental protection and indigenous peoples’ rights in the zoning of territory. Local government authorities also regulate the use and protection of local water resources through issuing of environmental permits to businesses.

Complementing international and domestic regulations for accountability, the rise of online platforms and social media is enabling rights-holders to expose the impacts of business and public works, and report corruption or illegal development that damages the environment.

While businesses policies and strategies to maintain healthy ecosystems do not replace the need for strong international and national public regulations and mechanisms for accountability, there have been instances when local communities in the ASEAN region have used the grievance mechanisms established under such arrangements. For example, from 2017 to 2018, a Vietnamese community affected by a coal power plant financed by the Japan Bank for International Cooperation (JBIC) was able to hold a dialogue with the bank on the impacts of the plant. The dialogue was enabled under JBIC Guidelines for Confirmation of Environmental and Social Considerations (Environmental Guidelines), which set out the guiding policy and procedures for confirming that borrowers or project proponents have taken appropriate steps for environmental and social considerations.

Access to information and public participation

Certain ASEAN countries have recognised the right to access information under domestic laws. Individuals and local communities affected by development projects have access to different methods of participation and representation within the human rights and business framework. Some ASEAN governments have codified these methods within their laws.

Viet Nam, for example, recognises the right of access to information on environmental matters. Article 25 of the 2013 constitution states that, ‘The citizen shall enjoy the right to freedom of … access to information …The practice of these rights shall be provided by the law.’ In 2018, Viet Nam enacted the Law on Access to Information, which sets out the responsibilities of competent agencies and the rights of parties to have access to information via certain mechanisms.

The right of access to information was invoked in the case of Vinh Tan 1 Thermal Power Plant. On 23 June 2017, the Law & Policy of Sustainable Development Research Center (LPSD) requested an explanation from the Viet Nam Ministry of Natural Resources and the Environment (MONRE) regarding the ministry’s approval of a permit to dump one million cubic metres of mud and soil at a sensitive marine site. LPSD explained its intention to file an administrative lawsuit over the issue. MONRE responded to LPSD in an urgent meeting and subsequently cancelled the dumping permit in favour of an alternative plan to use the mud and soil for land grading. The decision helped protect a 30-hectare, 36-metre deep marine area in Vinh Tan Commune, only eight kilometres away from the environmentally-sensitive Hon Cau Marine Protected Area. It has also ensured the livelihoods of people in the surrounding area, including shrimp farmers who rely on the spawning grounds within the protected area.

179. JBIC Guidelines for Confirmation of Environmental and Social Considerations (Environmental Guidelines)
181. Transportation Newspaper, Youth Newspaper, ‘Sue MONRE if not withdraw the permit for dumping mud in Binh Thuan sea’; Thanh Nien news video
Similarly, Myanmar has ruled that certain documents must be publicly available within specific time frames. Article 354(a) of its 2008 constitution stipulates that, ‘Every citizen has the right to express and publish freely their convictions and opinions unless contrary to laws, security and public order.’ Article 21(a) states that ‘Every citizen shall enjoy … the right of justice as prescribed in this Constitution.’ These two articles can be interpreted as affirming that Myanmar citizens have the right to access information from the government, as well as to disseminate relevant environmental information.

The right of access to environmental information is interdependent with public participation in environmental matters. In Thailand, for example, the 2017 constitution recognises citizens’ participation rights, while its 2017 Minerals Act requires that applications for mining concessions must be posted publicly for at least 30 days in local districts, and allows for community referenda to take place (Section 56). Following a request by the NHRCT, Thailand’s National Legislative Assembly undertook to improve its draft Minerals Act and related laws, making them consistent with human rights principles.

Another example of an ASEAN Member State supporting people’s right to have access to information is the 2014 Decree on Internet issued by the Government of the Lao PDR. The decree covers internet and social media use, and forms a legal basis for people to access information and express opinions in a responsible manner.

Women’s participation in environmental matters is enabled by the existing human rights framework. In Viet Nam, for example, although there are no direct regulations about enabling women to access information specifically on environmental matters, the right of women to participate in political and managerial roles is addressed in the Law on Gender Equality 2006, which covers gender equality in public and political life (Article 11). The law establishes women’s right to participate in political processes and decision making, and to exercise leadership at all levels of government (Article 30).

Despite some instances of good practice, the absence of explicit provisions for access to information and public participation are serious barriers to the creation of an effective business and human rights framework in ASEAN. Civil society, communities, and the general public are important rights-holders who should be included in decision-making processes, especially when business activities impact lives and livelihoods. They can encourage state agencies and businesses to adopt good practices by applauding those that respect human rights and the environment, monitoring impacts, and protesting against those that do not adhere to human rights and environmental protection standards.

**Public participation in the EIA process**

EIA is a formal study that is conducted prior to project approval and implementation to assess a project’s potential effects on the environment; in some cases, EIAs also include evaluation of whether or not impacts can be mitigated and managed.

The EIA process aims to ensure that environmental issues are raised when a project or plan is first discussed, and that all concerns are addressed as a project gains momentum from the initial planning stages through to implementation.

183. Constitution of the Kingdom of Thailand, ss 58 and 70
184. Thailand Department of Primary Industries and Mines, Minerals Act, BE 2560 (2017)
185. Universal Periodic Review - Lao People’s Democratic Republic, Second Cycle, National Report, paras 47, 14
If conducted appropriately, EIAs reduce the risk of negative social-ecological impacts, including the risk of social conflict arising from development projects. To be effective, public participation must occur in a structured and planned manner throughout the EIA process (see Table 4 on the EIA process), and should ensure that all stakeholders are involved, valued and respected in decision making on development proposals. Efforts to involve the public must be genuine and meaningful, not simply undertaken to complete a regulatory requirement.

Brunei, Cambodian, Indonesia, Lao PDR, Malaysia, Myanmar, Philippines, Thailand and Viet Nam have EIA laws and/or regulations, and some countries also have specific provisions concerning access to information and public participation in EIAs. For example, in Indonesia, the public may provide oral or written comments to the commission responsible for EIAs, known as Analysis Mengenai Dampak Lingkungan (AMDAL), before it issues a decision on any proposed business or activity. During the evaluation stage, all AMDAL documents are required to be open for public inspection.

Similarly, in Malaysia, detailed EIA reports are to be displayed publicly and at university libraries for comments. In Myanmar, public consultations are the responsibility of the Ministry of Environmental Conservation and Forestry and EIA approvals are publicised.

This review of laws and regulations shows a number of similarities among ASEAN countries with regard to public participation in EIA procedures, and also some significant differences. Women can participate directly in EIA processes, even though the relevant laws are silent on specific obligations to ensure women’s inclusion in environmental decision-making processes. One of the greatest challenges now is how to promote and enhance public participation and stakeholder engagement in the region to ensure that projects are developed and implemented in a socially inclusive and environmentally sound manner.

<table>
<thead>
<tr>
<th>Steps in EIA</th>
<th>Activities</th>
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<tbody>
<tr>
<td>Screening</td>
<td>During screening, a decision is made on whether or not a full EIA should be conducted.</td>
</tr>
<tr>
<td>Scoping</td>
<td>This is the process of determining which are the most critical issues to study.</td>
</tr>
<tr>
<td>Reporting</td>
<td>The EIA report describes all environmental impacts of a proposed project or development, taking into account inter-related socio-economic, cultural and human health impacts.</td>
</tr>
<tr>
<td>Evaluation and approval</td>
<td>These are steps conducted by state agencies. The evidence of benefits or adverse impacts is weighed up, and a permit may be issued.</td>
</tr>
<tr>
<td>Monitoring and project implementation</td>
<td>Ongoing inspections of the project safeguard against unforeseen environmental issues or dangers to society.</td>
</tr>
</tbody>
</table>

Table 4: The EIA process

188. Indian Agricultural Statistics Research Institute, Irrigation Engineering, ‘Lesson 4: Environmental Impact Assessment & Inter Basin Water Transfer – Online course’
189. Constitution of Brunei Darussalam (2016) Environmental Protection and Management Order, parts III and IV
191. United Nations University, Conducting Environmental Impact Assessment in Developing Countries (1999), Part 3.6.1
193. Ministry of Environment and Water, Malaysia, EIA: Procedure and requirements in Malaysia
195. Philippines Department of Environment and Natural Resources, Guidelines on public participation under the Philippine environmental impact statement (EIS) system (2017)
197. Viet Nam Investment Law (2014) and Environmental Protection Law (2014)
Access to justice and remedies

Increased investment in the ASEAN region is leading to the expansion of business practices that violate human rights and cause severe loss of natural resources on which many people in the region traditionally depend for their livelihoods. Good governance can counter this trend by strengthening the rule of law and accountability, including access to information, public participation and access to justice. The following practices should be introduced or strengthened to promote access to justice and effective remedies, as well as legal empowerment.

- **Using the existing legal basis for organisations/individuals to protect the environment:** Individuals and organisations can base their claims on the existing national, regional, and international legal frameworks that establish their rights and legal status to participate in environmental protection. For example, under Viet Nam’s constitution and its Law on Environmental Protection, all stakeholders are responsible for environmental protection, and the state has the duty to encourage organisations and individuals to protect the environment. According to the Viet Nam Civil Procedure Code 2015, organisations and individuals have the right to file a lawsuit to protect public interests and the environment.

- **Increasing electronic access to government agencies:** Electronic access potentially simplifies access to justice. Toll-free numbers, e-mail and web services can improve accessibility to government services and enable transparency. Citizens may request information and notify government agencies of violations of environmental laws, while governments can provide up-to-date environmental information via the internet.

At the national level, an example of such electronic access is the online portal of the Supreme People’s Court of Viet Nam, which publicises court activities at all levels, except for information and documents related to national secrets or affecting national traditions and customs. The portal provides users with a system for sending and receiving lawsuit petitions, documents, and evidence, and for serving, delivering or notifying parties of judgments, decisions, summonses, invitations and other papers of courts. Citizens can easily look up past judgments and give their feedback. The portal currently enables citizens to provide information and make petitions only, but there is no requirement for government to respond to petitioners via this channel. Environmental cases are rare, and only one such judgment has ever been published.

At the regional level, the Council of ASEAN Chief Justices has established the ASEAN Judiciaries Portal to showcase the laws of the ASEAN Member States, foster judicial cooperation, and encourage the development of trade and investment in the ASEAN region by enhancing transparency. Judgments and decisions are categorised under the following subject areas: intellectual property rights enforcement; bankruptcy and insolvency; convergence and harmonisation of ASEAN commercial laws; and environmental law. Electronic access to information, as provided through the ASEAN Judiciaries Portal, is helpful in understanding the legal and practical frameworks applicable to environmental lawsuits in ASEAN countries.

- **Legal assistance and justice services:** Indigenous and local communities are frequently the victims of environmental violations, and often lack information on the rights and responsibilities of stakeholders to maintain a healthy and balanced environment. They may benefit from capacity development, training, and opportunities to represent their interests. Some civil society actors in the ASEAN region have experimented with strategies to improve access to legal services and justice for indigenous and local communities who have experienced environmental violations. For example, Balaod Mindanaw, a law firm in the Philippines, has developed a training toolkit for local communities and grassroots organisations, which provides guidance for training paralegals and initiating community legal empowerment for protecting watershed forest reserves. The toolkit was designed as a useful reference for government agencies and civil society organisations (CSOs).

Providing this kind of support, including access to understandable legal information, legal representation and appropriate non-legal services, and assistance to participate in legal proceedings, is likely to be helpful in promoting individual and collective abilities to assert the right to a healthy environment.

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• Recognising the principle of intergenerational responsibility: The principle of intergenerational responsibility was upheld in the case of *Oposa v. Factoran* in the Philippines. In this case, the secretary of the Department of Environment and Natural Resources (DENR) and his predecessors had granted commercial logging licences covering 3.89 million hectares of forest. Petitioners, through their parents, applied to prevent the secretary from issuing further licences to cut timber, invoking their right to a healthy environment pursuant to Sections 15 and 16 of Article II of the 1987 Constitution of the Philippines. The court allowed the petitioners to file a class suit and recognised their legal personality to sue on behalf of succeeding generations, based on the concept of intergenerational responsibility. The court upheld the principle that every generation has a responsibility to the next to preserve “the rhythm and harmony of nature” for the full enjoyment of “a balanced and healthful ecology.” This has become a landmark decision that effectively recognised the responsibility to maintain a healthy environment for future generations. The case also established a precedent whereby a Supreme Court decision strengthened and empowered a vulnerable group, namely children, to demand environmental justice. The case highlights the importance of legal empowerment of local actors in developing countries.

• Securing farmers’ land rights: In the mid-1990s, a coalition of local CSOs was formed in the Philippines to promote the implementation of a new Agrarian Reform Law. The coalition trained more than 1,000 farmers as community paralegals, conducted legal clinics across 22 project areas, and helped with administrative procedures for the transfer of more than 100,000 hectares. An Asian Development Bank (ADB) report, based on interviews with officials from the Department of Agrarian Reform, surveyed responses from about 400 villagers, and focus groups with local communities highlighted the benefits of the legal-empowerment process. The ADB researchers compared communities where legal-empowerment activities had taken place, to similar communities that had not experienced legal empowerment. They concluded that residents of villages where legal-empowerment activities took place had higher levels of productivity, higher incomes, more disposable income, and greater investment in their farms.

In 2008, the CSO coalition also helped organise and file a successful class action case on behalf of hundreds of Sumilao farmers in Bukidnon province to restore land that had been illegally expropriated by a large corporation. This case likewise showed that legal empowerment and knowledge of human rights could be used as tools by the Sumilao farmers to seek redress when they were deprived of their ancestral lands, which comprised residential lands, farmlands and natural ecosystems. Legal support services given to farmers, who were vulnerable due to their limited legal literacy, contributed to the success of farmers’ efforts to protect the living environment.

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204. *Oposa v Factoran* Supreme Court of the Philippines G.R. No. 101083 (1993)
Conclusion

Most ASEAN countries have environmental rule of law with provisions for accountability, access to information, public participation, and access to justice and remedies. Freedom-of-speech provisions are sometimes included in legal frameworks, such as national constitutions, as in Thailand and Viet Nam. Such provisions provide a legal basis for implementing the procedural elements of the right to a healthy environment in these countries.

In several ASEAN countries, the principles of accountability, access to information and public participation in environmental decision making are explicitly regulated in by-laws or administrative guidance. Where regulations do not provide explicit guidance on how these principles may be implemented, there is an opportunity for flexibility in the application of legal instruments, and for people to advocate for favourable interpretations of existing provisions to serve the best interests of society and nature.

Coordination among local communities, government and the private sector is crucial for the full enjoyment of the procedural elements of the right to a healthy environment. When citizens are vocal in asserting their rights, government officers become more aware of their duties and are more likely to strictly observe the provisions of the law when conducting their assigned tasks and functions. When people’s voices are heard and government officers carry out their duties, it is harder for vested interests to exploit ignorance, community discord, or limitations in governance. Public participation thus promotes the accountability of the state and businesses. Effective institutions for safeguarding the right to a healthy environment will contribute to strengthening national, regional and international stability, help protect people against abuses of power in matters of human rights and the environment and thereby enable a good quality of life in Southeast Asia.
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Main messages

• The ASEAN Human Rights Declaration (AHRD) recognises the right to a safe, clean and sustainable environment as being necessary for the full enjoyment of the rights to development and an adequate standard of living. ASEAN environmental agreements and the ASEAN Community Blueprint 2025 documents also recognise some elements of the right to a healthy environment.

• Subsequent policy instruments have implicitly recognised these elements, but they have not covered all relevant aspects. The region lacks a review mechanism to ensure consistent interpretation and implementation of this right.

• ASEAN's regional human rights body, the ASEAN Intergovernmental Commission on Human Rights (AICHR), could help promote understanding and recognition of the right to a healthy environment in all its dimensions. The AICHR mandate should be expanded beyond promoting awareness of human rights.

• ASEAN could establish a review mechanism on the right to a healthy environment, and should engage with both state and non-state actors to fulfil their obligations, protect vulnerable groups, and make this right a reality for the people of the ASEAN region.

Background

Several ASEAN countries have recognised the substantive and procedural elements of the right to a healthy environment at the national level. However, current environmental regional protection standards have not effectively tackled the emerging environmental threats facing the region as a whole, which can be more effectively addressed through coordinated regional action. These challenges include changing land-use patterns and land degradation linked with unsustainable agricultural or commercial practices, threats to existing water resources, and increasing soil and river pollution. Greenhouse gas emissions are still on the rise, contributing to a changing climate that will amplify environmental hazards for all countries.

This chapter examines to what extent and how ASEAN legal policy and institutional frameworks have institutionalised the right to a healthy environment, based on analysis of ASEAN legal, strategic and policy documents relevant to both human rights and the environment. Where relevant, the analysis refers to the right to a safe, clean, and sustainable environment to capture the specific dimensions referred to in the AHRD and related documents. The analysis maps existing regional obligations relating to these dimensions of the right to a healthy environment. It also examines ASEAN institutional frameworks for implementing this right, and assesses existing legal and institutional challenges.

The right to a healthy environment in ASEAN regional instruments: Substantive elements

ASEAN has traditionally treated human rights and environmental law as two separate areas of law, with the development of environmental protection standards predating the adoption of ASEAN’s core human rights instruments. One reason for this separation was ASEAN’s role as a political entity rather than a human rights organisation. Human rights and fundamental freedoms were thus not mentioned or included in any of its first legal instruments, including the 1967 Bangkok Declaration that established ASEAN.

ASEAN Member States adopted two environmental conventions before negotiating any regional human rights instruments, while a third, the Framework Agreement on Access to Biological and Genetic Resources, was negotiated but not adopted.

ASEAN Agreement on the Conservation of Nature and Natural Resources 1985: The Agreement (AACNNR) aims to maintain essential ecological processes and life-support systems, preserve genetic diversity and ensure the sustainable utilisation of living resources. This was ASEAN’s first hard-law instrument for environmental protection, and the first to consider the concepts and principles that are necessary to achieve sustainable development. The AACNNR reiterates principles of intergenerational equity and the need to balance environmental conservation with socio-economic development. It is silent, however, on human rights and gender-equality principles. Nor does it address environmental protection to safeguard the right to a healthy environment in terms of food, clean air, safe drinking water, a safe climate, healthy biodiversity and ecosystems, and a non-toxic environment. The agreement lacks a compliance mechanism or access to effective remedy for victims, placing that role mainly on national institutions. The AACNNR has been signed by six of the 10 ASEAN Member States.

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210. ibid


213. ASEAN Agreement on the Conservation of Nature and Natural Resources Preambles (1985) 311


215. Syarif, 31
countries, only three of which have ratified the agreement. This has precluded its entry into force. ASEAN Member States have cited concerns over the agreement’s scope and level of ambition as reasons for not signing. When the 1992 UN Convention on Biological Diversity entered into force, ASEAN Member States questioned whether that treaty had superseded the AACNNR.216

**ASEAN Agreement on Transboundary Haze Pollution (AATHP) 2002: The AATHP is the first regional agreement in the world that prescribes preventive measures and emergency-response interventions to combat transboundary haze caused by forest and land fires.217 Unlike the AACNNR, the AATHP successfully entered into force in 2003, and every ASEAN Member State had ratified the agreement by 2014.218 The agreement includes a clear commitment to the fundamental ‘no harm’ principle, meaning that states have the responsibility to ensure that activities within their territories do not cause damage to the environment or human health of other states or of areas beyond the limits of national jurisdiction.219 Article 3(5) of the agreement states, as a principle, that parties should involve, ‘as appropriate, all stakeholders, including local communities, non-governmental organisations, farmers and private enterprises.’ Furthermore, the Roadmap on ASEAN Cooperation towards Transboundary Haze Pollution Control with Means of Implementation, adopted by the 12th Meeting of the Conference of the Parties (COP-12) to AATHP in 2016, encourages stakeholder participation in forest protection and fire prevention.220

Such involvement, however, does not necessarily extend to protection of rights-holders—the people and local communities who suffer most from the impacts, and who may be located within or beyond the territory of the offending state. The AATHP does not contain any rule on civil or state liability for compensating victims, nor access to justice for victims to bring charges against the offending state.221 In addition, the AATHP neither recognises clean air as a standalone right and prerequisite for the enjoyment of other fundamental human rights, nor does it provide victims with access to effective remedy for non-compliance. Instead, non-compliance is addressed through diplomacy and consensus rather than by prescriptive means in the form of adjudication, inspection and observation.

Despite the agreement’s entry into force, transboundary haze pollution continues to be a recurring problem in the region due to unsound and unsustainable natural resource management and agricultural practices, and a failure to end illegal logging. Several factors undermine the agreement’s effectiveness, including its lack of sanctions for non-compliance, limited information-sharing obligations, generic and weak state obligations for 'cooperating in developing and implementing measures to prevent and monitor transboundary haze pollution,' and failure to draw any links between poor air quality and human rights.222 As such, efforts to ensure clean air across the region and the realisation of the right to a healthy environment require not only legal agreement but also strong political will concerning the universal application of human rights.223

**Draft Framework Agreement on Access to Biological and Genetic Resources 2000:** The framework agreement, initiated by ASEAN and currently in its draft form, acknowledges the need to ensure uniformity and consistency of regulation on access to genetic resources and equitable benefit sharing in ASEAN.224 It formulates minimum requirements for national implementation and maximises opportunities for the conservation and sustainable use of biological genetic resources.225 This draft exceeds other regional environmental agreements in several ways:

- It extends environmental protection to non-state actors, such as indigenous peoples and local communities (ILCs) as defined by the International Labour Organisation (ILO) Indigenous and Tribal Peoples Convention 1989 (ILO Convention No. 169), based on recognition of the ILCs’ shared identity, territory, culture, tradition and knowledge.226

216. Koh, 47-50
217. Heilmann, 96, points out the weakness of agreement mechanisms in the agreement for reducing haze pollution because of character of the ‘ASEAN Way’: non-intervention and principles of state sovereignty.
218. Laely Nurhidayah, Shawkat Alam and Zada Lipman, ‘The Influence of International Law Upon ASEAN Approaches in Addressing Transboundary Haze Pollution In Southeast Asia’, 191; Dio Herdiawan Tobing, ‘Indonesia Drags Its Feet on ASEAN Haze Treaty’; Laode, 314
219. ASEAN Agreement on Transboundary Haze Pollution 2002 (AATHP), art 3(1)
220. Roadmap on ASEAN Cooperation towards Transboundary Haze Pollution Control with Means of Implementation (201602020) (Haze-free Roadmap), Strategy 6
221. Nurhidayah, Alam and Lipman, 191-192; Heilmann, 103-104
222. AATHP, art 4(1); Laode, 315
223. Heilmann, supra note 2, at pp. 112-113; Laode, at supra note 13, at pp. 316-317.
225. Koh, 53
• It includes substantive rights through recognising the importance of ensuring food security in the region, as well as considering the environmental and social impacts of access to genetic resources.\(^{227}\)

• It contains several provisions guaranteeing ILCs’ right to participate, consistent with the principle of prior informed consent and access to information regarding the benefits and the environmental or social implications of biological and genetic resources (Article 10).\(^{228}\)

The framework agreement is still in draft form due to ongoing disagreements over Article 10, which will be further discussed in this chapter in the context of procedural elements.\(^{229}\)

Since the three environmental agreements were negotiated and two of them adopted, ASEAN has also taken significant steps towards institutionalising human rights through other regional instruments. Substantive elements of the right to a healthy environment are recognised as being part of human rights in the ASEAN charter, AHRD, and the three ASEAN ‘blueprints’ that set out ASEAN’s policy objectives as a political-security community, an economic community, and a socio-cultural community.\(^{230}\)

**Charter of the Association of Southeast Asian Nations (ASEAN Charter):** The ASEAN Charter, adopted in 2008, established ASEAN as a legal entity. The charter explicitly refers to human rights, democracy, rule of law and good governance as core principles. The charter also establishes AICHR as the regional human rights body.\(^{231}\) In its preamble, the charter refers to sustainable development as a fundamental part of the ASEAN community-building process, resolving:

\[...\] to ensure sustainable development for the benefit of present and future generations and to place the well-being, livelihood and welfare of the peoples at the centre of the ASEAN community building process.\(^{232}\)

**AHRD:** The AHRD is the most comprehensive of these documents. The declaration institutes a broad range of rights, ranging from political and civil rights to economic and cultural rights.\(^{233}\) The AHRD was also the first regional document to recognise the right to a safe, clean and sustainable environment, referring to it in the context of the right to an adequate standard of living. Article 28 of the AHRD states that:

> Every person has the right to an adequate standard of living for himself or herself and his or her family including: a) the right to adequate and affordable food, freedom from hunger and access to safe and nutritious food; b) the right to clothing; c) the right to adequate and affordable housing; d) the right to medical care and necessary social services; e) the right to safe drinking water and sanitation; and f) the right to a safe, clean and sustainable environment.\(^{234}\)

The article does not, however, mention other substantive elements commonly associated with the right to a healthy environment, namely clean air, a safe climate, non-toxic environments in which to live, work, study and play, and healthy biodiversity and ecosystems.\(^{235}\)

\(^{227}\) ibid

\(^{228}\) ibid art 2 and 10.

\(^{229}\) ibid, art 10; Koh, 53.


\(^{231}\) ASEAN Charter, arts 1(7) and 14; Muntarbhorn, 209

\(^{232}\) ASEAN Charter, Preamble, 2

\(^{233}\) AHRD Preamble and Principle 10-34

\(^{234}\) AHRD Principle 28(f)

\(^{235}\) See more on the elements of the right to a healthy environment at HRC A/HRC/43/53
The AHRD frames the right to a safe, clean, and sustainable environment as a prerequisite to improving quality of life and standards of living. It affirms that the right to development ‘should be fulfilled so as to meet equitably the developmental and environmental needs of present and future generations.'

The AHRD further states that:

ASEAN Member States should adopt meaningful people-oriented and gender-responsive development programmes aimed at poverty alleviation, the creation of conditions including the protection and sustainability of the environment for the peoples of ASEAN to enjoy all human rights recognised in this Declaration on an equitable basis, and the progressive narrowing of the development gap within ASEAN.

While there are tensions between the right to a safe, clean, and sustainable environment and the right to development due to some aspects of development contributing to environmental degradation, recognition of their links is crucial since an adequate standard of living cannot be achieved if environmental concerns are neglected. The AHRD also urges ASEAN Member States to ensure that environmental sustainability and protection are addressed in development programmes, together with a gender-responsive approach. The AHRD, however, stops short of linking the right to a safe, clean and sustainable environment to related rights, such as the right to health and life. Although the AHRD is the first core human rights instrument to recognise some elements of the right to a healthy environment, this right is vaguely phrased. The AHRD does not clarify what this right entails, beyond achieving an adequate standard of living and development. Furthermore, the AHRD fails to define the meaning and scope of the terms ‘safe’, ‘clean’ and ‘sustainable’, in relation to the environment. The limited specification of the content of this right has led to legal difficulties in understanding how this provision can be implemented and undermined its practical usefulness.

These shortcomings could, to some extent, be resolved by the AICHR further elucidating this right. To date, the AICHR has not shed new light on the content of this right; however, the ASEAN Community blueprints, discussed below, show that understanding of the links between human and environmental well-being has somewhat progressed in the region.

The ASEAN Political-Security Community (APSC) Blueprint is ASEAN’s roadmap towards a rules-based community united by principles of human rights, fundamental freedoms and social justice. The APSC blueprint sets out a vision for a resilient ASEAN Community in a peaceful, secure and stable region, an outward-looking community that engages in international cooperation, and a community with strengthened institutional capacity. The Blueprint stipulates that human rights form a core part of ASEAN as a rules-based community. Some related objectives, include promoting and protecting human rights and fundamental freedoms by strengthening human rights education, encouraging ASEAN Member States to accede to core international human rights instruments, ratify them, engage with the UN and other human rights bodies to ensure compliance, and promote mainstreaming of human rights across the three pillars of the ASEAN Community—the APSC itself, the ASEAN Economic Community (AEC) and the ASEAN Socio-Cultural Community (ASCC). The APSC Blueprint also covers marine environmental issues, including ambitions to explore or undertake cooperative activities for protection of the marine environment and biodiversity, sustainable use of marine resources, and related awareness raising. However, these environmental issues are addressed from a security aspect rather than a gender and human rights-based perspective.

The AEC Blueprint is the roadmap that aims to further integrate and contribute to a highly cohesive ASEAN economy, and support sustainable and inclusive economic growth and resilience. Although neither the right to a safe, clean and sustainable environment nor human rights in general are directly referenced, the AEC
Blueprint contains some provisions for environmental protection. The section on sustainable economic development outlines measures to achieve sustainable development, including the use of clean and renewable energy, and the adoption of sustainable consumption and production patterns, which are viewed as integral to ensuring continued economic growth across the region.\(^{248}\) These include measures to:

... develop new and appropriate technologies, best practices and management systems to ensure food safety and address health/disease and environmental issues, particularly in fast growing aquaculture, livestock and horticulture sub-sectors.

The AEC Blueprint includes measures for promoting agricultural practices that minimise negative effects on natural resources, such as soil, forests, and water resources, and that reduce greenhouse gas emissions.

Finally, the blueprint calls for sustainable forest management, involving communities living within and around forests, to achieve environmental sustainability and prosperity of the people.\(^{249}\)

In effect, the AEC Blueprint sets out measures and goals to mitigate the negative impacts of economic development on the environment in the interests of safeguarding people’s health and ensuring food security, continued access to safe drinking water, and a safe climate. However, the blueprint does not cover all substantive dimensions of the right to a healthy environment as it is understood internationally, nor does it frame them as human rights, with the exception of the provision regarding local communities in and around forests.\(^{250}\) The AEC Blueprint lacks provisions to safeguard women’s rights, and does not acknowledge women’s connections to environmental issues.

The inclusion of environmental protection in the AEC Blueprint recognises that ASEAN Member States need to strike a balance between environmental protection and other issues of social importance, such as economic development. However, the AEC does not clarify how the balance between reasonable development and environmental protection should be struck.\(^{251}\) Striking such a balance deserves greater attention in light of growing critiques of the pro-economic growth agenda being incompatible with environmental protection and sustainability.\(^{252}\)

The AEC Blueprint recognises that ASEAN Member States need to strike a balance between reasonable development and environmental protection. However, the AEC does not clarify how the balance between reasonable development and environmental protection should be struck.\(^{251}\) Striking such a balance deserves greater attention in light of growing critiques of the pro-economic growth agenda being incompatible with environmental protection and sustainability.\(^{252}\)

The ASCC Blueprint is the roadmap to ‘…lift the quality of life of its peoples through cooperative activities that are people-oriented, people-centred, environmentally friendly, and geared towards the promotion of sustainable development.’\(^{253}\)

The ASCC Blueprint is the most progressive of the three ASEAN community blueprints in linking human rights and the environment.\(^{254}\) This blueprint establishes that the ASCC should be underpinned by principles of sustainability and environmental protection by 2025, as well as by other considerations. It comprises measures for six strategic priorities, including the substantive rights of food, clean air, safe drinking water and adequate sanitation, a safe climate, non-toxic environments, and biodiversity.\(^{255}\)

**Food:** The ASCC Blueprint calls for making resources more available, accessible, affordable and sustainable in times of crisis. The blueprint calls for cross-sectoral and cross-pillar coordination to ensure adequate and accessible food supply at the household level, especially for vulnerable households, and to promote household ability to cope with disasters, food price shocks and scarcity.\(^{256}\)

**Air:** The ASCC Blueprint covers clean air under its objective to establish environmentally sustainable cities.\(^{257}\)

**Water:** Member States are required to develop policy, capacity and best practices to conserve, develop and sustainably manage water resources, including measures to address the impact of

\(^{248}\) ibid, s B.6, 40, 19  
\(^{249}\) ibid, s B.6, 41, vi-viii, 20  
\(^{250}\) ibid, s B.8. 41, viii, 20  
\(^{252}\) For more information on the relationship between economic growth and environmental sustainability see Martin Fritz et al, ‘Economic development and prosperity patterns around the world: Structural challenges for a global steady-state economy,’ Global Environmental Change (2016); Mohan Munasinghe, ‘Is environmental degradation an inevitable consequence of economic growth? Tunneling through the environmental Kuznets curve’ Ecological Economics 1999, 29, 89-109  
\(^{253}\) ASEAN Socio-Cultural Community Blueprint 2025, s D.5, i  
\(^{254}\) Tan and Kamaruddin, 158  
\(^{255}\) ibid,159  
\(^{256}\) ASEAN Socio-Cultural Community Blueprint 2025, s D.5, i  
\(^{257}\) ibid., s C.2, iii
development projects on coastal and international waters. In relation to environmentally sustainable cities, the blueprint calls for promoting coordination to ensure access to safe water and sanitation. Finally, the blueprint envisages cross-sectoral and cross-pillar coordination to ensure availability of clean water in times of crises.

**Climate change:** The ASCC Blueprint calls for enhancing human and institutional capacity to mitigate and adapt to the impacts of climate change, especially in relation to vulnerable and marginalised communities. The blueprint calls for strengthening the capacity of sectoral institutions and local governments to conduct greenhouse gas inventories, strengthen global partnerships, and support the implementation of international agreements and frameworks, such as the UN Framework Convention on Climate Change (UNFCCC).

**Non-toxic environments in which to live, work, study and play:** The ASCC Blueprint encourages the adoption of good management practices and policies to address the transboundary environmental impacts of development projects on coastal and international waters, including the illegal movement and disposal of hazardous substances and waste. It also encourages the use of existing regional and international institutions and agreements to do so. The ASCC seeks to pave the way for a safer ASEAN that is able to respond to all health-related hazards, including biological, chemical and nuclear-radiation threats. Doing it would entail:

- strengthening the capacity of health systems to address all health-related hazards;
- promoting regional standards to enhance interoperability, ensure unity of action and reinforce collective resilience; and
- enhancing institutional and human capacities and approaches to support the effective implementation of policies, strategies and programmes in preparing and responding to all health-related hazards and imminent threats.

The ASCC Blueprint does not explicitly refer to the right to a safe, clean and sustainable environment as set out in the AHRD, and does not frame its substantive dimensions in human rights terms. Nor does it refer to environmental-protection measures that address women’s specific vulnerabilities or contributions to realising this right.

**Healthy biodiversity and ecosystems:** The ASCC Blueprint dedicates a whole section to the conservation and sustainable management of biodiversity and natural resources. The blueprint states that Member States should foster cooperation to ‘protect, restore and promote sustainable use of terrestrial ecosystems resources, combat desertification, halt biodiversity loss, and halt and reverse land degradation.’ Member States should also strengthen regional cooperation on sustainable forest management, including through the implementation of the AATHP. The blueprint further calls for enhanced policy, best practices and capacity development pertaining to conservation, development and sustainable management of marine, wetlands, peatlands, biodiversity and land and water resources. Finally, the blueprint seeks to promote:

- enhanced cooperation on environmental management towards the sustainable use of ecosystems and natural resources through environmental education, community engagement and public outreach;
- stronger global and regional partnerships in support of implementing relevant international agreements;
- a robust ASEAN Centre for Biodiversity; and
- support for the full implementation of the Strategic Plan for Biodiversity 2011-2020 and the Aichi Targets.

However, ASEAN Member States contend that establishing an environmental pillar may open a ‘Pandora’s box’ of calls for new pillars on other issues, such as on human rights. This response suggests that, despite Member States’ awareness and desire to strengthen environmental protection in ASEAN, the environment is yet to become a priority issue in its own right on the ASEAN policy agenda.

The right to a healthy environment in ASEAN regional instruments: Procedural elements

ASEAN agreements recognise some procedural elements relevant to the right to a healthy environment, namely access to information and public participation in the environmental decision-making process. In particular, regional provisions for access to information, participation in decision-making processes, and effective remedy were strengthened after the adoption of the ASEAN Charter, AHRD and the ASEAN community blueprints. However, these are not consistently framed as standalone rights, nor are they framed as elements of the right to a safe, clean and sustainable environment.

ASEAN Agreement on the Conservation of Nature and Natural Resources 1985: Participatory rights and the right to information emerged as a part of the AACNNR, which stipulates that contracting parties shall circulate as widely as possible information on the significance of conservation measures and their relationship with sustainable development and, to the greatest extent possible, organise public participation in the planning and implementation of conservation measures. However, these procedural elements are limited to measures involving conservation, and do not extend to the human rights dimensions of other biodiversity-related issues, such as sustainable use, and access and benefit sharing. Additionally, the treaty does not use rights-oriented language, but rather addresses its prescription only to the state.

ASEAN Agreement on Transboundary Haze Pollution 2002: The AATHP does not significantly expand on these rights, only prescribing that all parties should undertake measures to prevent and control activities related to land use and fire management, including by strengthening community participation in fire management. Also, the right to information under AATHP applies to information-exchange processes between states, which rights-holders cannot access. The AATHP falls short of framing participation and information as a human right, and victims do not have access to claim effective remedy for violations in relation to continued pollution.

Framework Agreement on Access to Biological and Genetic Resources 2000 (draft): The framework agreement is ASEAN’s most ambitious environmental instrument in relation to procedural rights. One of its objectives is to establish effective and participatory measures for granting of prior informed consent (Article 2). The agreement commits state parties to acquire prior informed consent from each other before any transfer of biological and genetic resources. The state would also be mandated to set up legally binding procedures for the determination of prior informed consent from local communities, including indigenous peoples and traditional knowledge holders. The process of prior informed consent must respect and comply with customary laws, practices and protocols of ILCs, and information shall be in a language understandable to them. State parties are also required to provide evidence of prior informed consent with each application for biological and genetic resources and must disclose information on the potential environmental and ecological impacts of their bioprospecting activities (Article 10).

Finally, the framework agreement also contains some elements of access to justice in a clause requiring ASEAN Member States to recognise ILCs as legitimate users and custodians of biological and genetic resources and traditional knowledge. In this vein, states shall establish legal processes to ensure fair and equitable sharing of benefits arising from the use of such knowledge and resources. However, the framework agreement does not cover access to effective remedy, nor does it provide a right to a fair trial in the event of non-compliance. These omissions are inconsistent

266. Koh, Karim, 328
267. ibid
268. ASEAN Agreement on the Conservation of Nature and Natural Resources, art 16
269. ibid, art 16 (2); Atapattu and Schapper 131-132
270. ASEAN Agreement on Transboundary Haze Pollution, art 9(c)
271. ibid, art 12 (5); see also Syarif, 317
272. ASEAN Framework Agreement on Access to Biological and Genetic Resources (2000) (Draft) art 2
273. ibid
274. ibid, art 10
275. ibid, art 1
with international human rights treaties on access to justice. Nor does the framework agreement include any provision that takes into consideration women’s specific needs, vulnerabilities and contributions to the conservation and sustainable use of biodiversity.

The right to prior and informed consent has been a controversial point for Member States, so the framework agreement remains in its draft form to date. The 1992 Convention on Biological Diversity (CBD), to which all ASEAN countries are state parties, contains language on prior informed consent; however, not all ASEAN countries are party to the Nagoya Protocol on Access and Benefit Sharing, a 2010 supplementary agreement to the CBD. Brunei, Singapore and Thailand are yet to sign the Nagoya Protocol.

Commitment to participatory rights was strengthened in the ASEAN Charter and AHRD, as well as in two of the three ASEAN community blueprints.

**ASEAN Charter:** The charter states that the purpose of ASEAN is to strengthen democracy, enhance good governance and the rule of law, and promote and protect human rights and fundamental freedoms (Principle 7). It also states that ASEAN should promote ‘a people-oriented ASEAN’ in which all sectors of society are encouraged to participate in the process of ASEAN integration and community building, as well as to promote and protect human rights and fundamental freedoms, all of which reinforce procedural rights (Principle 13).

**ASEAN Human Rights Declaration (AHRD):** Procedural rights are affirmed and elucidated in the AHRD, which declares the right to participation is vital to realising human rights, including elements of the right to a healthy environment, in accordance with its Principle 9. Participation is also referenced in ‘The Right to Development’ section, which states that ‘people should be able to participate in, contribute to, enjoy and benefit equitably and sustainably from economic, social, cultural and political development.’

The declaration, in Principles 35 and 36, calls on Member States to adopt meaningful people-oriented and gender-responsive development programmes, which are to also address the specific needs of women and vulnerable groups. These provisions extend the right to participate in environmental-protection measures to apply to all forms of development activity.

The AHRD, in Principle 5, further provides that:

> Every person has the right to effective and enforceable remedy, to be determined by a court or other competent authorities for acts violating the rights granted to that person by the constitution or by law.

This principle refers to the national constitutions of ASEAN Member States; however, only four of the 10 Member States enshrine this right in their constitutions. Thus, in practical terms, only citizens of those countries have a right to remedy, as the AHRD itself does not establish a right to remedy for violating the rights granted by ASEAN human rights instruments.

**ASEAN community blueprints 2025:** Two of ASEAN’s three Blueprints refer to procedural rights.

- **The APSC Blueprint,** which is underpinned by a strategy to strengthen rule of law, judicial systems and legal infrastructure in the region, sets forth measures including enhancing access to legal assistance in Member States to promote social justice through public education. Regarding the right to information, the blueprint addresses this right only with respect to awareness of human rights.

- **The AEC Blueprint** does not refer to procedural rights.

- **The ASCC Blueprint** calls for an ASEAN community that is inclusive, sustainable and resilient, also proposing a mechanism or platform for people, including women, children, youth, the elderly and persons with disabilities, to participate in ASEAN processes. This is one of the few provisions that specifically addresses women and vulnerable groups. The blueprint also calls for measures to promote equitable access to social protection and enjoyment of human rights by all. In the same vein, it urges countries to ensure inclusive, participatory and representative decision making at all levels, including at national levels, with special attention to the needs of those in disadvantaged groups. Remarkably, the blueprint seeks to enhance participatory and integrated approaches in urban planning and management for sustainable urbanisation towards a green and clean ASEAN. This is the first such provision

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276. Koh, supra note 15
277. CBD website, ‘Parties to the Nagoya Protocol’
278. ASCC Blueprint 2025, ss A.8 and B.2.i
279. ibid, s B.2. IX
linking the right to participate with environmental-protection measures, albeit confined to the context of sustainable cities. The blueprint further proposes a measure to promote cooperation on environmental management towards the sustainable use of ecosystems and natural resources through community engagement and public outreach.

The ASCC Blueprint includes environmental-protection measures and refers to vulnerable and marginalised communities, particularly in relation to food and climate change. This represents progress from the AHRD’s recognition of elements of the right to a safe, clean, and sustainable environment and the linkages between human rights and environmental protection, although women are not specifically mentioned.

Assessing legal challenges

While ASEAN legal and policy frameworks express commitment to both substantive and procedural rights, such frameworks have so far not been able to implement common environmental standards to systematically prevent and mitigate harm to human rights and health. An example of this challenge is seen in the regular occurrence of transboundary air pollution or ‘haze’ from forest fires, despite long-standing intergovernmental discussions and the adoption of the AATHP.

As shown in this discussion, ASEAN first introduced some substantive elements of the right to a safe, clean, and sustainable environment in its environmental agreements. Then from 2010 onwards, ASEAN began drafting and adopting a number of legal instruments, policies and plans, which included obligations that strengthened the procedural aspects of this right.

Key ASEAN instruments have recognised the link between human rights and environmental protection. The AHRD, adopted in November 2012, includes ‘a safe, clean and sustainable environment’ as one aspect of the right to an adequate standard of living and recognises environmental sustainability as an important consideration in realising the right to development for both present and future generations.

Subsequently, the ASCC Blueprint, adopted in 2016, framed environmental sustainability as a necessity, together with human rights and sustainable development. Some representatives of the AICHR—from Malaysia, Myanmar, Singapore and Thailand—have viewed countries’ contributions to transboundary haze pollution as violating the right to a healthy environment.

This increased recognition of the links between human rights and a healthy environment is important, yet much more is needed, to address contemporary social-ecological challenges. Since the AHRD was adopted, ASEAN has neither adopted a legally binding regional environmental agreement nor any documents that further refer to the right to a safe, clean and sustainable environment.

The AHRD has had limited impact because, firstly, it does not possess legally binding powers, serving only as a soft-law instrument. Secondly, the language around the right to a safe, clean, and sustainable environment is too vague and general, lacking practical guidelines and hard targets that could be considered and further developed in subsequent ASEAN law and policies. Thirdly, the AHRD does not acknowledge the listed rights as being universally binding, but rather as being contingent on regional and national particularities. This approach—sometimes referred

280. ibid, s C.2. I
281. ibid, C.1 viii
284. AHRD Principle 28(f); see also Dian Septiari, ‘AICHR Representatives Call for Implementation of Haze Treaty’ (The Jakarta Post, 14 October 2019); Danial Dzulfiqly, ‘Asean Human Rights Body Urges Member Nations to Commit to Transboundary Haze Agreement’ (Malay Mail, 2020)
285. AHRD Principle 28(f); see also Dian Septiari, ‘AICHR Representatives Call for Implementation of Haze Treaty’ (The Jakarta Post, 14 October 2019); Danial Dzulfiqly, ‘Asean Human Rights Body Urges Member Nations to Commit to Transboundary Haze Agreement’ (Malay Mail, 2020)
288. Chenwi, 85
to as ‘the ASEAN Way’—enables Member States to make their own interpretations that may deviate from international standards and practice, as well as to ‘cherry-pick’ obligations.\(^{289}\) The AHRD states that:

All human rights are universal, indivisible, interdependent and interrelated. At the same time, the realisation of human rights must be considered in the regional and national context, bearing in mind different political, economic, legal, social, cultural, historical and religious backgrounds.\(^{290}\)

This shortcoming was later ameliorated by the accompanying Phnom Penh Statement in 2012, which affirms that the AHRD is to be implemented in accordance to international instruments, meaning that the human rights recognised both in the declaration and internationally cannot be sidestepped.\(^{291}\)

Efforts are currently being made at the regional level to develop a compendium of existing national environmental impact assessment (EIA) procedures in ASEAN Member States. The content of this compendium will underpin the development of a rights-based framework for effective EIAs and further strengthen people’s rights to participate and access information about development projects that could affect the environment. Taking a similar approach to the right to a healthy environment could hold promise for the region to potentially adopt a common understanding in line with international human rights standards.

### Assessing institutional challenges

While the region has taken steps to strengthen the legal frameworks for a healthy environment through its human rights and environmental frameworks, institutional challenges remain to be addressed.

To date, ASEAN lacks a regional enforcement body or judicial court that can offer remedies to victims of human rights violations in countries where domestic remedies are unavailable. ASEAN countries have varying levels of access to justice. Most regional human rights and environmental protection instruments favour diplomacy and negotiation between states over arbitration to address non-compliance, and depend heavily on national institutions to ensure compliance.\(^{292}\) Moreover, inter-state cases of human rights violations are rarely pursued in practice. This is mainly due to a perceived lack of direct injury to the state itself; furthermore, states may prioritise upholding friendly relations at the expense of human rights.\(^{293}\) In the ASEAN context, the procedural obligation to guarantee access to justice, as stipulated in international human rights law, is not adequately supported by the existing regional human rights and environmental frameworks.

To enhance implementation of the right to a safe, clean, and sustainable environment, a regional judicial and enforcement mechanism is needed to provide rights-holders with access to effective remedy, as well as to offer consistent interpretations and judicial decisions that ensure the coherent application of this right to the varying situations and contexts across ASEAN. A regional court could also uphold the right to a safe, clean, and sustainable environment in light of present-day conditions and Member States’ understanding of this concept.\(^{294}\)

The ASEAN Charter calls for the establishment of a ‘regional human rights mechanism’ with a mandate to promote human rights, rather than a human rights court.\(^{295}\) This can be attributed to ASEAN’s prevailing doctrines of non-interference, state sovereignty and consensus-based decision making that have, so far, inhibited the development of regional institutions that may assume powers traditionally held by the state, including the power to interpret and enforce the law.\(^{296}\)

Best practices and lessons concerning access to justice from other regional and international mechanisms are further discussed in Chapter 6.

**AICHR:** Pursuant to the ASEAN Charter, ASEAN established the AICHR as its regional human rights mechanism, marking an important milestone in institutionalising human rights and buttressing its implementation. AICHR is governed by its mandate to promote human rights, and undertakes to host conferences, conduct thematic studies, share information and offer capacity building.

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289. Doyle, 81-82; Muntarbhorn, 212
290. AHRD Principle 7
291. Muntarbhorn, 212
292. ibid 321, 325-326
293. ibid, 322
295. ASEAN Charter art 14(1)
296. Phan Hao Duy, ‘Southeast Asian Court of Human Rights’
However, the AICHR alone cannot ensure full compliance with the right to a safe, clean, and sustainable environment, due to its inherent institutional constraints. For instance, the AICHR is not mandated to undertake investigations, receive complaints, communications, petitions from victims, or offer remedies. Another institutional limitation is that AICHR commissioners are appointed and can be removed by their own countries, as they are, according to Article 5(2) of the AICHR terms of reference, ‘accountable to the appointing government’. These issues raise questions about the commissioners’ independence.

In addition, its consensus-based approach to making decisions could inhibit giving attention to human rights issues that are not fully agreed by ASEAN Member States. Resource constraints are also among AICHR’s limitations. Although the AICHR can request states to provide information about human rights violations, the terms of its mandate do not provide clarity as to whether states are obliged to provide it.

Still, the AICHR has leveraged its strengths in convening conferences to enhance compliance with existing environmental-protection instruments, such as the AATHP, and to galvanise support for new regional agreements that would integrate the right to a safe, clean and sustainable environment as an EIA consideration. The AICHR would benefit from enhancing the human and financial capacity to conduct comprehensive analysis and spearhead policy with regard to this right.

Ultimately, AICHR representatives have different approaches to and views on human rights, and often pursue human rights according to their home state’s interests rather than the interests of ASEAN as a whole. An example of this tension could be seen when the AICHR issued a statement in mid-October 2019, which equated continued non-compliance with the AATHP to violating the right to a safe, clean and sustainable environment as set out in the AHRD. This statement was drafted in response to the transboundary air pollution crisis in 2019, which brought in some of the worst haze levels in years, affecting Brunei, Indonesia, Malaysia, the Philippines, Singapore, Thailand and Viet Nam.

However, the statement was endorsed only by AICHR representatives from Malaysia, Myanmar, Singapore and Thailand. Brunei, Cambodia, Indonesia, Laos, the Philippines and Viet Nam did not endorse the statement.

For AICHR to play a more effective role in promoting the right to a safe, clean, safe and healthy environment, ASEAN Member States can either reform the commission or strengthen its capacity to carry out these tasks.


298. ibid, ASEAN, ASEAN Intergovernmental Commission on Human Rights (Terms of Reference) (2009), arts 4 (10), 5(2)

299. Petir Bhwana, ‘AICHR Says Haze Pollution Still Shroud South-East Asian Countries’ (Tempo, 2019)

300. BBC News ‘What Causes South East Asia’s Haze?’ (2019)
Other intergovernmental frameworks: ASEAN’s environmental and human rights frameworks predominantly clarify state obligations in relation to environmental protection and human rights. The roles and responsibilities of business in observing norms around human rights and the environment remain relatively underdeveloped in legal and policy frameworks at the regional level. The UN Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises are the main guides to the content of such responsibilities. There are also a wide variety of tools available for responsible business. Further research could show how these can be translated into ASEAN-wide guidelines.

Conclusion: Strengthening the human right to a healthy environment in ASEAN

The AHRD recognises some elements of the right to a healthy environment. The declaration both supports and aligns with the steps taken by ASEAN countries to uphold this right (see Chapters 2 and 3). However, this has not yet resulted in the adoption of human rights-based environmental laws and policies with a regional scope. ASEAN does not have a regional judicial and enforcement body that can provide effective remedy and redress to victims of human rights violations in countries where domestic remedies are unavailable. The mandate of the AICHR should be expanded and it should be resourced to fully carry out such an expanded role.

The AICHR can be useful in developing the right to a safe, clean, and sustainable environment at the regional level, as seen by its work so far in spearheading consultations with regard to the air quality issue, and in harmonising EIA frameworks in the region.

Furthermore, setting up a review mechanism on the right to a safe, clean, and sustainable environment, underpinned by a legal framework and supported by a predictable funding stream, would help address this. Further analysis and guidelines to inform state’s human rights obligations and business responsibilities towards vulnerable groups are needed to make the right to a healthy environment a reality for the people of the ASEAN region.

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V Women’s rights and contributions to the enjoyment of the human right to a healthy environment

May Thida Aung, Min Myat Aung and Sophany San

Main messages

• The contribution and participation of women in natural resource management has promoted the well-being and security of families and communities, and furthered environmental sustainability.

• However, only a few ASEAN Member States have legally committed to ensuring the effective participation of women at various levels of public decision making. Most countries provide for women’s participation through policies and strategic plans, rather than laws for substantive and procedural rights.

• The rights and roles of women should be recognised and enabled through legal provision as far as possible, and women should be seen as agents rather than victims in achieving the enjoyment of the human right to a healthy environment.

Background

Women make up 50.2 per cent of the total population of the ASEAN region, which, in 2017, was home to 8.5 per cent of the world’s population.

Women contribute 54 per cent of agricultural labour and make up large portions of the professional, technical and production workforce.

Women’s earnings go towards improving food supply, health and education of households to a far greater extent than men’s earnings, possibly by a factor of 10.

Recognising women as agents in achieving the right to a healthy environment, rather than as victims of environmental change, will be instrumental in achieving gains for all ASEAN countries.

This study first considers international and regional legal and policy frameworks, then national frameworks that recognise and enhance the role of women in advancing the right to healthy environment. Next, the role of women in realising substantive elements of the right to a healthy environment—such as clean air, water, and food, and a safe climate—is discussed. The discussion draws on laws and policies from each country, national reports that governments submit to UN processes such as the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the High-Level Political Forum on Sustainable Development (HLPF), and other literature.

The issue of gender equality is a broad topic that includes the rights, resources and opportunities of women and men, girls and boys, as well as other gender identities outside the gender binary. This chapter’s focus is women’s rights while recognising that more research is needed to fully understand the issue of gender equality and the right to a healthy environment.

302. ASEAN Secretariat, ASEAN Statistical Yearbook 2018 (2018)
303. ASEANstats, ASEAN Statistical Highlights - 2018
Gender inequalities extract high economic costs, leading to social inequities and environmental degradation. Gender equality is thus vital for enabling positive social-ecological outcomes. A number of international frameworks recognise the linkages between women’s rights and a healthy environment. The 1995 Beijing Declaration and Platform for Action affirms that ‘women’s rights are human rights.’ Other international frameworks relevant to women’s rights include the right to life in Article 6 of the 1966 International Covenant on Civil and Political Rights, and the right to an adequate standard of living in Article 11 of the 1966 International Convention on Economic, Social and Cultural Rights, which refers to adequate housing, adequate food, and safe and clean drinking water and sanitation as obligations of the state. CEDAW affirms the need to eliminate discrimination against women in rural areas to ensure that men and women are able to benefit equally from any and all areas of rural development (Article 14(2)) specifically mentioning the need for women to:

- organise self-help groups and cooperatives to obtain equal access to economic opportunities for their own, their families’, and their communities’ livelihoods—Article 14(2);
- participate in all community activities—Article 14(2f);
- have access to agricultural credit and loans, and be subject to equal treatment in land and agricultural reform—Article 14(2g); and
- enjoy adequate living conditions in relation to housing, sanitation, electricity and water supply—Article 14(2h)

The 2015 Paris Agreement on climate urges UN Member States to promote gender equality and women’s empowerment: Article 7(5) has provisions on adaptation and capacity-building efforts to adopt gender-responsive approaches; and Article 11(2) states that capacity-building should be an effective, iterative process that is participatory, crosscutting and gender responsive.

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306. Candice Stevens, ‘Are women the key to sustainable development?’ Sustainable Development Insights, Boston University (2010)
309. Paris Agreement, art 7(5), art 11 (2)
At the regional level, ASEAN has taken steps to advance women’s rights and gender equality, devoting some provisions to protecting women, and applying a gender lens to environmental protection and sustainable development. Article 4 of the 2013 ASEAN Human Rights Declaration (AHRD) affirms that:

The rights of women, children and the elderly, persons with disabilities, migrant workers and vulnerable and marginalised groups are an inalienable, integral and indivisible part of human rights and fundamental freedoms.

This means that women’s rights should be safeguarded in conjunction with the right to a safe, clean and sustainable environment covered in the AHRD, together with the right to adequate and affordable food and the right to safe drinking water and sanitation. In addition, Article 36, on the right to development, states that Member States should:

... adopt meaningful people-oriented and gender-responsive development programmes aimed at poverty alleviation, the creation of conditions, including the protection and sustainability of the environment for the peoples of ASEAN to enjoy all human rights recognised in this Declaration on an equitable basis and the progressive narrowing of the development gap within ASEAN.

The ASEAN community blueprints also cover women’s rights in ways that can be applied to environmental contexts. For example, the ASEAN Socio-Cultural Community (ASCC) Blueprint seeks to ‘ensure inclusive, participatory and representative decision making at all levels with special attention to the needs of those in disadvantaged situations, including … women …’

The ASCC Blueprint encourages regional initiatives to promote and protect the rights of women through the work of the ASEAN Commission on the Promotion and Protection of the Rights of Women and Children (ACWC). The ASCC also contains a strategy for strengthening the social protection of women in times of crises and disasters linked to climate and other kinds of environmental change. Furthermore, ASEAN is mandated to:

... support Member States’ initiative in strengthening national gender and age-disaggregated databases and analyses, including on poverty and equity, and establish a reliable regional data base for key sectors to support ASEAN policies and programmes.

310. The authors would like to thank Victor Bernard for contributions concerning the ASEAN regional context.
311. AHRD, art 4
312. ibid, art 28(a)
313. ibid, art 28(c)
314. ibid, art 36
315. ASEAN Economic Community Blueprint 2025, s B.2, ix
316. ibid, s B.3, vi
317. ibid, s D.4
318. ibid, s B.2, v
In 2010, ASEAN created the ACWC as a regional body with functions that include: acting as a bridge between the international human rights system and each ASEAN Member State, especially complementing the functions of the UN Committees on CEDAW and the Convention on the Rights of Child; and pursuing a constructive, non-confrontational and cooperative approach to enhance, promote and protect the rights of women and children as an important measure to ensure equitable development.\(^{319}\) However, the ACWC’s terms of reference do not define a joint ASEAN approach to women’s rights, nor gender mainstreaming in environmental contexts. The ACWC has no explicit mandate to work on women’s rights in relation to the right to a healthy environment.\(^{320}\) Like the ASEAN Intergovernmental Commission on Human Rights (AICHR), it has a weak and incomplete monitoring system and lacks investigatory powers and processes.\(^{321}\)

In the ASEAN Declaration on the Gender-Responsive Implementation of the ASEAN Community Vision 2025 and Sustainable Development Goals, ASEAN Member States reaffirm their national commitments to CEDAW. All ASEAN Member States have ratified CEDAW as the fundamental and foundational framework for gender equality. They also reaffirm the Beijing Declaration and Platform for Action, and recognise the complementarity of the 2030 Agenda for Sustainable Development with the ASEAN Community Vision 2025. In the declaration, ASEAN Member States acknowledge that gender equality and the empowerment of all women and girls are at the centre of the 2030 Agenda, and that gender equality is a precondition for the realisation of sustainable development.\(^{322}\) The declaration expresses commitment to:

- close resource gaps for achieving gender equality (Paragraph E);
- promote women’s equal access to and full participation in decision making (Paragraph F);
- engage with women’s groups and organisations to ensure the gender-responsive implementation of policies and plans (Paragraph H); and
- conduct gender mainstreaming initiatives across all sectors to ensure the realisation of a people-oriented and people-centred ASEAN where all women and girls are able to reach the fullest of their potentials (Paragraph I).\(^{323}\)

Furthermore, the Vientiane Declaration on Enhancing Gender Perspective and ASEAN Women’s Partnership for Environmental Sustainability recognises the potential and contribution of women to environmental sustainability and the need for gender mainstreaming, and commits to promoting women’s knowledge and skills in environmental management, and their participation in the decision-making process.\(^{324}\)

This overview shows that ASEAN legal and policy frameworks have helped advance women’s rights by recognising their interdependence with all other human rights, as well as clarifying the duty of states to ensure women’s inclusion, participation and representation in decision making. The regional frameworks prescribe gender-responsive development programmes in relation to environmental protection and sustainability in the context of the right to development. The ASEAN frameworks also affirm that states have committed to address gender inequality and conduct gender mainstreaming across all regional programmes. Finally, the ASCC mandates ASEAN to provide support to Member States in collecting and analysing gender-disaggregated data.

People, including women, cannot fully exercise and enjoy the rights to life, health, food, water and sanitation, education and an adequate standard of living in the absence of a safe, clean, healthy and sustainable environment.\(^{325}\) Access to clean water and adequate sanitation, for example, affects the rights of women and girls (see box on the next page).

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319. ASEAN, ‘Terms of Reference of the ASEAN Commission on the Promotion and Protection of the Rights of Women and Children’ (2010), arts 3.2, 2.6
321. ibid, p 337
322. ASEAN Declaration on the Gender-Responsive Implementation of the ASEAN Community Vision 2025 and Sustainable Development Goals, 2
323. ibid, paras E, F, H and I
324. Vientiane Declaration, paras 1-9
325. Former Special Rapporteur on human rights and the environment John Knox and Katherine McDonald, UN Human Rights Council, 18th session. High-level panel on ‘Women and the right to water’ (2011)
Healthy environment: The case of water and sanitation

Achieving universal access to clean water and adequate sanitation, as set out in Sustainable Development Goal 6 (SDG 6), is a challenge for all, as climate change could lead to further environmental degradation and natural-resource scarcity. Women and girls, especially in rural areas, are more likely to be affected by such changes. Risks and dangers such as physical or sexual assault can occur when women and girls do not have access to safe, clean, and private toilets or latrines for urinating, defecating and managing menstruation.

In many developing countries, such as Cambodia and Thailand, local customs and gendered norms require that women and girls have responsibility for finding and fetching water for household use. Lack of access to a clean and safe water supply creates a burden on women and girls, who must spend their time searching for clean water for drinking and cooking, and must carry heavy buckets over long distances. Rather than working or attending school on time as boys do—a target under SDG 4 on education—girls are often charged with spending hours each day making sure there is water in the home. Women and girls are often most responsible for water management, food security and nutrition provision (SDG 2 on ending hunger). As it is mostly women who care for the sick, women’s labour can be reduced by preventing illnesses linked to hazardous chemicals and air, water and soil pollution or contamination (SDG Target 3.9).

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326. Katherine McDonald, UN Human Rights Council, 18th session. High-level panel on ‘Women and the right to water’ (2011)
328. Bethany Caruso, ‘Women still carry most of the world’s water’ (The Conversation, 18 July 2017)
331. ibid
A study by the Food and Agriculture Organization of the United Nations (FAO) on rural women and the environment shows that women are well equipped to manage the environment, having basic expertise in conservation and preservation.\textsuperscript{333} Another study of the role of rural women in environmental management in Myanmar shows that many, since childhood, have been trained to ensure household hygiene and to care for the environment.\textsuperscript{334} However, they were also ill-equipped to manage the environment, due to their lack of power to intervene in public decision-making processes, or to contribute their knowledge to policy formulation.\textsuperscript{335} While knowing what is necessary to maintain a healthy and hygienic environment, rural women often lack the means and access to achieve it.\textsuperscript{336}

Working towards gender equality (SDG 5) means promoting equal opportunities and participation of women, youth, and vulnerable and marginalised groups, as the agents of change and beneficiaries of inclusive and sustainable development.\textsuperscript{337} ASEAN Member States will not be able to achieve the aim of ‘leaving no one behind’, as set out in the 2030 Agenda, if gender inequality persists in the region. This is because achieving social development, environmental protection and social justice will require the involvement of women, youth, and other vulnerable and marginalised groups in eradicating poverty (SDG 1). Gender equality is thus not only a standalone goal, but rather an accelerator for achieving all other SDGs. To promote gender equality, it will be important to recognise and provide spaces for women to take active roles at various levels of community and public life.

National frameworks and implementation of measures for women’s empowerment to contribute to a healthy environment

Gender equality and non-discrimination: The equal rights of women are recognised in the national constitutions of all ASEAN Member States. The principle of non-discrimination is expressed in relation to ‘women’,\textsuperscript{338} ‘any person’,\textsuperscript{339} ‘every person’ and ‘all citizens’,\textsuperscript{340} ‘the people’,\textsuperscript{341} ‘both sexes’\textsuperscript{342} and ‘without discrimination based on gender.’\textsuperscript{343} However, levels of recognition and empowerment by national constitutions, laws and policies in each country vary due to the different political systems, political will, and social and cultural contexts. A number of ASEAN Member States do not use the terms ‘women’ or ‘gender.’ For example, Myanmar’s 2008 constitution does not refer explicitly to ‘women’ or ‘gender.’ Rather, the principle of non-discrimination is referred to in relation to race, religion, birth status and sex.\textsuperscript{344} A similar principle is found in a number of provisions in the constitutions of Cambodia, Thailand and Lao PDR.\textsuperscript{345}

333. Pedrero and Perucci, ibid
335. Pedrero and Perucci, ibid
336. Katherine McDonald, ibid
337. Beijing Declaration and Platform for Action (16) and (27) (1995)
338. This is used in Constitution of the Republic of the Union of Myanmar in arts 348, 352 and 368 and the Constitution of the Kingdom of Cambodia in arts 31 and 45.
339. This terminology is used in the Constitution of Brunei Darussalam.
340. The terms are used by Constitution of the Republic of Indonesia in arts 27 and 28.
341. Thailand uses the term ‘the people’ to cover everyone.
342. Cambodia uses ‘both sexes’ in most of the provisions.
345. Constitution of the Kingdom of Thailand s 27 mentions that ‘unjust discrimination against a person on the grounds of differences in origin, race, language, sex, age, disability, physical or health conditions, personal status, economic and social standing, religious belief, education, or political view which is not contrary to the provisions of the Constitution, or on any other grounds shall not be permitted.’ Article 24 of the Constitution of Lao PDR 2011 states that ‘Discrimination is interpreted as distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing the recognition of right and freedom in the political, economic, social and cultural other field.’
Though women have equal rights to access health and education in all ASEAN Member States by law, some of the provisions in national constitutions can be obstacles to realising equal employment opportunities. For example, though Myanmar became a state party to CEDAW in 1997, Article 352 of its 2008 constitution allows for the appointment of men if the position is considered ‘suitable for men only.’

In contrast, the Constitution of the Republic of the Philippines recognises the vital role of women in nation building (Article 2, Section 14)\textsuperscript{346} and the Constitution of the Kingdom of Cambodia provides for women to freely choose their employment (Article 36).\textsuperscript{347} The Philippines and Indonesia have championed and enacted strong legal frameworks for women’s rights\textsuperscript{348} and their participation in different sectors. Though both countries acceded to CEDAW in the 1980s, the enactment of laws guaranteeing women’s participation in public decision making took place only in the late 1990s, after the adoption of the 1995 Beijing Declaration and Platform for Action.

Indonesia enacted Law No. 39/1999 on human rights, guaranteeing the free choice of employment of women under its Article 38\textsuperscript{349} and women’s participation in politics under Article 49.\textsuperscript{350} There is a 30 per cent quota for women’s participation in national, provincial and district levels of government enshrined in Political Party Law No. 2/2008 and General Election Law No. 10/2008 in Indonesia.

Viet Nam enacted a Law on Gender Equality in 2006 to eliminate gender discrimination and create equal opportunities for men and women, not only in government but also in the private sector and civil society. Viet Nam also encourages adopting gender-responsive strategies in all ministries. Thailand enacted its Gender Equality Law in 2015, which mentions in Section 10 (8)(2) the mandate of its Committee for the Promotion of Gender Equality to promote opportunities for equal access to social, economic and political rights.

**Right to a healthy environment:** The role of women in achieving a clean and healthy environment, for example, through participating in forest management, climate change mitigation, adaptation and disaster risk management, has been integrated by some ASEAN Member States into national laws or policies. To date, only Indonesia and Viet Nam have integrated specific gender-empowerment provisions or references in environmental laws. Viet Nam recognises that environmental protection must be harmonious with the promotion of gender equality, under Section 4 (2) of its 2014 Law on Environmental Protection. Other countries’ policy frameworks have attached great importance to women’s participation.

The Philippines has adopted a Plan for Gender-Responsive Development (1995-2025), which includes detailed strategies for gender-disaggregated data, awareness raising, and increasing women’s participation in environmental and natural resource management. The Philippines’ 1995 National Forest Strategy aims for 30 per cent women’s participation in the community-based forest management sector. Specific gender-related activities have been identified in the Philippines’ National Climate Change Action Plan (2011-2028), namely identification of needs and protection measures through research and development, women’s participation at all levels of planning and programming, and enhancing the role and status of women in promoting food security, water security, ecological and environmental stability, human security, climate-friendly industries and services, sustainable energy, and knowledge and capacity development.

Before promulgating its 2015 Gender Equality Act, Thailand included several paragraphs in its 11th National Economic and Social Development Plan (2012-2016) prioritising the promotion of women’s participation in decision making at subnational and national levels to increase their contribution to national socio-economic development. After Thailand’s enactment of the Gender Equality Act 2015, its 12th National Economic and Social Development Plan placed less emphasis on gender integration in different sectors.

**Climate change and environment:** Myanmar and Cambodia have adopted several policies and strategic plans on the environment and climate change. Their policies and plans recognise gender issues as relevant in delivering the benefits of a healthy and clean environment, as well as noting the need for greater representation of women in public decision making.

Since 2013, Myanmar has integrated gender equality provisions to at least five strategies and action plans.

- Myanmar’s National Strategic Plan for the Advancement of Women (2013-2022) includes a specific chapter on women and the environment, and Paragraph 17 of the section on ‘Women

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346. The state recognises the role of women in nation-building and ensures fundamental equality before the law of women and men
347. Cambodian citizens of both sexes have the right to choose any employment according to their ability and the needs of society
349. All citizens have the right to work and the right to free choice of employment and just conditions of work
350. Women have the right to select and the right to be selected
and the environment’ mentions its objective to strengthen systems, structures and practices to ensure women’s meaningful participation in managing and safeguarding natural resources and the environment, and in adapting to climate change.

- The 2016 Land Use Policy of Myanmar contains a comprehensive recognition of women’s rights, noting the need for special consideration of the barriers that women face in accessing equal entitlement to land, and for equal rights to participate in subnational and national land-use committees, as well as in dispute settlement. However, there is no quota for women’s participation, which would promote the realisation of women’s rights in practice.

- The Myanmar Climate Change Strategy and Master Plan (2018-2030) includes a gender-mainstreaming plan and sets a minimum 30 per cent quota for women to access loans, microcredit, and grants. In addition, the plan stresses that gender analysis and capacity development will be required to integrate gender perspectives into climate change responses to agriculture.

- Unlike earlier policies, the 2019 National Environmental Policy of Myanmar and the 2019 Myanmar Climate Change Policy do not only consider women’s needs, but also open democratic space for women to participate in public decision making.

In Cambodia, the following policies contain gender-related provisions:

- Cambodia’s National Forestry Program (2010-2029) aims to increase women’s participation in management at the national and local levels of forest administration, and to ensure the equitable sharing of benefits.

- Cambodia’s 2013 National Policy on Green Growth seeks to enhance and mainstream ‘green concepts’ by considering gender at all levels of government and private institutions, and by raising awareness among the general public.

- One of the core elements of Cambodia’s 2013 Gender and Climate Change Strategy is to promote women’s participation in decision making on climate change adaptation and mitigation, and in natural disaster management at all levels and domains.

- To implement women’s participation efficiently, Cambodia promotes gender mainstreaming and has set inclusive-growth objectives in its national budget allocation.

Women’s contributions to the enjoyment of a healthy environment: Substantive elements

The right to a healthy environment is an essential element of the right to life for all people.\[351\] However, this right cannot be fully enjoyed without the efforts of women as key contributors at all levels to the management of natural resources and the environment.\[352\] A 43 per cent reduction in hunger and 55 per cent improvement in food security across developing countries from the 1970s to 1990s has been attributed to women’s empowerment through education and training, knowledge and information sharing, technology transfer and financial support.\[353\] Moreover, it is predicted that agricultural yields could increase by 20-30 per cent, decreasing global hunger by 12-17 per cent, if women have equal access as men to farming resources.\[354\] The full realisation of a clean and healthy environment thus cannot be achieved without addressing gender-specific considerations, not only in policy formulation but also in policy implementation.\[355\] Given their important roles in realising the right to


\[354\] FAO The State of Food and Agriculture (FAO, 2011)

\[355\] World Bank, FAO and IFAD, ‘Module 10: Gender and Natural Resource Management—Overview’ in Gender in Agriculture Sourcebook (2009)
a healthy environment for all, women should be seen as catalysts rather than victims in the quest to achieve a healthy and sustainable environment. In particular, women play crucial roles in climate change mitigation, environmental conservation, food security, and disaster risk reduction.

Mitigation of climate change and air pollution: The ASEAN region is seriously affected by the impacts of climate change and natural resource depletion. A large segment—39 per cent of the region’s population—relies on solid biomass (fuelwood, charcoal and agricultural residue) for household cooking. Solid biomass accounts for 93 per cent of household cooking fuel in Myanmar, 88 per cent in Cambodia and 65 per cent in Lao PDR, and for 93 per cent of cooking fuel in Indonesia. The burning of biomass is the most common contributing factor to carbon emissions, indoor and outdoor air pollution, deforestation, and ecosystem degradation. Indoor air pollution caused by solid biomass burning contributes to 3.8 million deaths each year, raising lung cancer rates in women. Household fuelwood consumption accounts for almost 1.36 billion tonnes in developing countries. Carbon dioxide emissions from household fuel combustion account for up to 3 per cent of annual CO2 emissions and 25 per cent of global black carbon emissions annually.

Rural women who depend on biomass fuel for household cooking have a critical role in mitigating climate change and saving forest resources if they can have better access to energy-efficient technology. The use of energy-efficient cooking stoves has primary benefits in the reduction of carbon emissions and related indoor air pollution, and in saving of fuelwood. Additional benefits include time savings as fuelwood collection becomes unnecessary, availability of time for educational pursuits and income-generating activities, improvement in respiratory health, and increased household well-being. In Myanmar, energy-efficient cooking stoves reduced fuelwood use by 40 per cent, cut carbon emissions and improved indoor air quality, compared with traditional stoves. With the time saved, women were able to do extra jobs for household income.

In the ASEAN region, municipal solid waste amounted to 202,000 tonnes per day in 2012 and is expected to double by 2025. Household solid waste emitted about three per cent of global greenhouse gas emissions in 2010. Improving solid waste management, including household waste, has potential to mitigate 10-15 per cent of global greenhouse gas emissions. Household waste is mainly handled by women, who undertake collection, segregation and disposal. Where there is no adequate waste collection and management system, it is often women who carry out community waste management activities such as cleaning, sweeping and collection on a voluntary basis. These contributions are effective in improving household and community hygiene, while reducing air, water and soil pollution as well as global greenhouse gas emissions.

Conservation of natural resources and ecosystems: Across developing countries, the rural poor rely on surrounding ecosystems and biodiversity for their livelihoods. They access not only basic needs in the form of food, fuel and construction materials, but also carry out farming activities that rely on ecosystem services for water supply, arable land, natural pesticides and pollination. More than 41 per cent of rural households in Cambodia rely on forests to provide their livelihoods.

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knowledge about wild fruit, vegetables, and herbs that can bring extra income to their households. Globally, 80 per cent of rural women living around forests collect non-timber forest products.\textsuperscript{371} In Lao PDR, for example, rural women were found to collect 141 different kinds of forest products for food and household income.\textsuperscript{372} Women in Viet Nam contributed their efforts in forestry-related activities such as afforestation, nursery work, forest patrol and fire management.\textsuperscript{373} Women’s knowledge about fauna and flora species, non-timber forest products, and forest conservation means that women’s groups are effective enablers of community-based forest management in Southeast Asia.\textsuperscript{374}

Water is a crucial need for both domestic and productive uses across rural communities.\textsuperscript{375} Women are critical actors in safeguarding and sustainably managing water resources because of their primary role in water collection as well as in maintaining household sanitation facilities.\textsuperscript{376} Moreover, women often have in-depth knowledge and information about the location and quality of water resources, as well as of collection and storage methods. Women’s participation in solving water and sanitation issues can improve health, safety and family well-being.\textsuperscript{377} Water and sanitation-related projects can have effective and sustainable outcomes if conducted with the full participation of women.\textsuperscript{378} In the Mekong River Basin, for example, women’s active involvement in decision making on water resources has led to delivery of an equal share of sustainable development benefits to women.\textsuperscript{379}

**Enhancing food security:** The right to adequate food and nutrition is a substantive human right.\textsuperscript{380} However, 26.4 per cent of the global population, representing two billion people, suffered food insecurity in 2018.\textsuperscript{381} Among undernourished people globally, 60 per cent are women,\textsuperscript{382} despite their critical role in securing food supply and nutrition for their families and communities.\textsuperscript{383} Rural women across developing countries make up 43 per cent of agricultural labour in subsistence and commercial cropping activities, animal husbandry, and aquaculture,\textsuperscript{384} usually as low-paid or unpaid workers. The agriculture sector is the foundation for food security in developing countries, and food security cannot be achieved without women’s contributions at household and community levels.\textsuperscript{385}

### Table 5: Percentage of women workers in weeding, transplanting, threshing and harvesting activities in the Lower Mekong Subregion\textsuperscript{386}

<table>
<thead>
<tr>
<th>Country</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cambodia</td>
<td>65%</td>
</tr>
<tr>
<td>Lao PDR</td>
<td>54%</td>
</tr>
<tr>
<td>Thailand</td>
<td>50%</td>
</tr>
<tr>
<td>Viet Nam</td>
<td>92%</td>
</tr>
</tbody>
</table>

\textsuperscript{371.} WOCAN, ibid
\textsuperscript{372.} Janet Momsen, ‘Gender and biodiversity: A new approach to linking environment and development’ Geography Compass 1(2) (2007) 149
\textsuperscript{373.} Hoang Thi Dzung et al, Gender Issues in the Forestry Sector in Vietnam (Ministry of Agriculture and Rural Development, Viet Nam 2006)
\textsuperscript{374.} WOCAN, ibid
\textsuperscript{375.} IFAD, Gender and Water (IFAD, 2012)
\textsuperscript{376.} Imrana Jalal, Women, Water and Leadership (ADB, 2014)
\textsuperscript{377.} Sida, ‘Women, Water Sanitation and Hygiene (Brief)’ (Sida, 2015)
\textsuperscript{378.} Christine Van Wijk-Sijbesma, Gender in Water Resources Management, Water Supply and Sanitation: Roles and Realities Revisited (IRC, 1998)
\textsuperscript{379.} Jyotiraj Patra, ‘The untapped potential of women in water resource management’ (The Daily Star, 9 March 2019)
\textsuperscript{380.} FIAN, Women Agricultural Workers and the Right to Adequate Food and Nutrition (2014)
\textsuperscript{382.} ADB, Gender Equality and Food Security: Women’s Empowerment as a Tool against Hunger (ADB, 2013)
\textsuperscript{383.} FIAN, Women Agricultural Workers and the Right to Adequate Food and Nutrition
\textsuperscript{384.} Sida, Women and Food Security (Brief) (Sida, 2015)
\textsuperscript{385.} Revathi Balakrishnan, Rural Women and Food Security in Asia and the Pacific: Prospects and Paradoxes (FAO, 2005)
\textsuperscript{386.} WOCAN, Gender Aspects of the Rice Sector in the Greater Mekong Region (2015)
Besides on-farm work, women also conduct off-farm activities for income generation, for example, by working as employees of small and medium-sized enterprises (SMEs) in fish marketing in Indonesia, and livestock raising in Viet Nam and the Philippines. Women’s involvement in productive, on and off-farm activities in households and local communities, and their traditional knowledge about the local environment, means that they contribute greatly to securing household access to food and resources, and play a critical role in sustaining livelihoods and family well-being even during crises.

Reducing vulnerability to climate change and natural disasters: Women are disproportionately affected by climate change and related natural disasters, compared with men, but they are also key agents in reducing vulnerability and enhancing the resilience of households and communities. On a daily basis, women often play a role in subsistence home gardening and in gathering nutritious and medicinal plant species from forests. Women are often the holders of traditional knowledge for agriculture, including knowledge of crop varieties resistant to drought, floods and pests. In disasters, they play a vital role in caring for family members and supporting the basic needs of households for food, water and fuel. Good practices in collecting and saving water and storing food for difficult periods can sustain household livelihoods during and after disasters. Women’s unpaid labour maintains community resilience; for example, rural women in central Viet Nam contributed to securing the well-being of families and communities during and after floods, while taking care of children and the elderly. In Rizal province in the Philippines, rural women carried out a series of climate adaptation practices at both household and farm level through adjusting their home gardening practices and farming methods, including seed saving for the next season’s planting under changing climate conditions. Their work enabled pest management and soil and biodiversity restoration.

Women’s contributions to the enjoyment of a healthy environment: Procedural elements

Whereas development discourses often present women as being especially vulnerable to the impacts of environmental change, women are far from being the ‘silent’ or passive partners in addressing the challenges of achieving a healthy environment. Besides the practical contributions discussed above, many Southeast Asian women play leadership roles in making the right to a healthy environment a reality for all. However, they are also often constrained in their ability to take on such roles, and to fully enjoy the same rights as men.

Access to information: Reliable and easy-to-understand environmental information is crucial in environmental planning, protection, management and decision making from national to local community levels. An indicator of the role of women in promoting access to information is the rate of women’s participation in the media sector. In Malaysia, women represent 55.5 per cent of the sector, and they primarily work in newspapers (54.1 per cent); however, fewer women than men are editors and owners of news media companies in Malaysia. In Viet Nam, women’s participation in...
media, including at mid-management and executive levels, is more than 50 per cent. In Cambodia and Indonesia, however, women news reporters make up fewer than 25 per cent of all news reporters.

Some examples of women in leadership roles in environmental journalism and publishing in the ASEAN region include Devi Thant Sin from Myanmar, who publishes a Burmese-language environmental journal, Aung Pin Lae, and Jessica Cheam from Singapore, the founder of news website Eco-Business.com.

**Participation in decision making:** EIA is recognised as an essential tool for decision making on development, and has been legally established and applied in ASEAN Member States. As discussed earlier in this chapter, several international and regional policy frameworks recognise the rights of women to fully participate in public decision making. However, the practical implementation of these provisions and the involvement of women in decision making varies by country. Development projects bring considerable change that affects local communities, and the impacts of development can differ for women and men; it is therefore important for EIAs to take into account gender differences. However, research shows that women often do not engage in participatory processes as much as men, and even when present may not express their views. Women’s participation in EIA and related consultation processes is often too limited to be truly effective, for a number of reasons.

A case study on gender aspects of EIAs in four Myanmar projects found that women were sometimes present during public consultations, but generally did not speak or provide input due to four main factors:

- lower levels of education and confidence than men;
- military rule in Myanmar has left people fearful about expressing their interests and worries;
- project information was targeted at household heads who are mostly men; and
- there are no explicit guidelines to include women in public participation activities.

In another example, research by the Stockholm Environment Institute on gender and public participation in the Lower Mekong Subregion at seven study sites in Cambodia, Myanmar and Viet Nam found that women participated in EIA processes but comprised fewer than half the participants, for reasons such as lower education levels and language barriers among those from different ethnic backgrounds. Women were seen to be ‘passive recipients’ of development, due to their limited access to reliable information, weak negotiation skills and gender-related factors including biases against women.

In Viet Nam, a study on the Trung Son Hydropower Project in Thanh Hoa province and the Phu Hoa Landfill Project in Hak Lao province showed that women were almost entirely absent in the screening, scoping and baseline study stages of the EIA process. Women also had different views and interests than men, focusing more on environmental issues such as drinking water quality and sources, air pollution, and other health issues affecting their right to a clean, safe, and healthy environment, whereas men were concerned with land and assets compensation.

**Access to justice:** For women to exercise their environmental rights, access to remedy and justice can take place in two ways: through the courts and administrative mechanisms. The practice of seeking justice and remedies for environmental harm through the court system is relatively undeveloped in most ASEAN Member States. This can be attributed to the nature of environmental harm, which often has slow-onset impacts, and the application of the traditional legal concept of locus standi, which allows only people directly affected by development through economic

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395. Fojo Media Institute, *Towards Gender Equality, Women and the media in Vietnam* (Fojo Media Institute, 2018) 14
397. Jennifer Righy, ‘Myanmar’s green princess is a humble activist on a mission’ *Mongabay* (11 January 2017) 9
399. Ministry of Natural Resources and Environment, Office of Natural Resources and Environmental Policy and Planning EIA Guidelines for Business Project Development in the ASEAN Economic Community (AEC) (2018) 7
400. Spectrum Sustainable Development Knowledge Network, *Women and EIA process. A case study on gender aspect of EIAs in four Myanmar projects* 2018
401. ibid
403. Resurreccion, B, Nguyen, H and Taalabekkyz, A, *Gender and public participation in EIAs* USAID and Stockholm Environment Institute
405. ibid
loss, personal harm, or damage to their property to take legal action.

In the Philippines, provisions for public interest litigation and class action cases for the environment have been strengthened by the Supreme Court, especially when it established environmental courts across the country and issued the Rules of Procedures for Environmental Cases that simplified and streamlined measures to expedite environmental litigation. These developments have enhanced opportunities for Filipino women, in particular, to access justice for human rights violations caused by environmental harm.

In contrast, though Malaysia has extensive environmental laws to protect people’s rights to a clean and healthy environment, access to civil litigation for environmental cases is limited due to the Malaysian court’s strict interpretation of locus standi. This was particularly showcased in the landmark Bakun Dam case in which the court held that, although the applicants’ livelihoods and cultural heritage were adversely affected by the dam’s construction, the applicants lacked locus standi because of the environmental harm not amounting to the loss of life or resulting in special injuries over and above the common injuries experienced by the 10,000 people affected by the dam. The court further concluded that enforcing a penal sanction or instituting criminal proceedings on environmental matters is reserved by the Federal Constitution to the Attorney General of Malaysia. This interpretation constrains the possibility for individuals and environmental organisations to launch public interest litigation cases.

Nevertheless, the Malaysian courts have gradually adopted a more relaxed interpretation of locus standi, as demonstrated in the 2014 Malaysian Trade Union Congress case, which pertains to a request by a group of Malaysian trade unions for documents in which the state had justified a 15 per cent increase in water tariffs. The Federal Court decided that public interest litigation in Malaysia is permissible provided that the applicant passes the ‘adversely affected’ test. In other words, the applicants must prove that they have ‘a real and genuine interest in the subject matter’. In contrast to the Bakun Dam case, the court here argued that the applicant is not required to demonstrate an infringement of a private right or suffering of special damage to pass the ‘adversely affected’ test. Accordingly, based on this precedent-setting case, it is possible to bring forward public interest litigation concerning environmental issues in Malaysia, provided that the applicants can demonstrate sufficient connection with interest in the subject matter.

In Viet Nam, citizens affected by pollution can, under the 2014 Law on Environmental Protection, file a complaint or lawsuit against the polluters for damages. However, only those who can illustrate direct harm from the environmental damage caused by the accused polluter can file a lawsuit. Given the complexity of environmental cases, combined with the victims’ limited legal literacy and capacity to compile evidence and conduct investigations in support of their lawsuit, many victims of environmental harm in Viet Nam rarely consider court action. Only one of 17 environmental disputes reported in the MONRE database has resulted in a lawsuit—namely, the pollution of Cha Va River in the Ba Ria-Vung Tau Province case.

406. CECR, ibid Gregorio Rafael P. Bueta, ‘Environmental Jurisprudence form the Philippines: Are Climate Litigation Cases Just around the Corner?’ (2019)
409. Leeroy Ting Kah Sing, ibid
411. Leeroy Ting Kah Sing, ibid
413. ibid, para 58
414. ibid, para 58
415. SEAHRN, ‘An Introduction to Human Rights in Southeast Asia: A Textbook for Undergraduates Volume 1 and 2’ (SEAHRN, 2018), 206; Leeroy Ting Kah Sing, ibid
416. Law on Environmental Protection (2014), 55/2014/QH13, Art 162 (1-3)
When people are barred from accessing the formal justice system due to the lack of legal frameworks or procedural limitations, alternative ways to access justice are through social movements led by human rights defenders and networks. Women in Southeast Asia have been active in promoting access to justice through such social movements to reform laws and practices; for example, women’s movements in Phnom Penh, Cambodia, have succeeded in their demands to obtain land titles for their communities in Borei Keila and Boeung Kak Lake.\(^{418}\)

**Challenges and opportunities in enhancing women’s contributions to a healthy environment in the region**

All ASEAN Member States recognise women’s vulnerabilities to the impacts of climate change, disasters and environmental degradation. Some countries also recognise women’s roles in addressing these challenges. However, social and cultural norms hinder women from fully accessing their rights, thus limiting their ability to respond to environmental challenges.

With regard to information access, environmental news providers—be they state agencies, convenors of multi-stakeholder platforms, or the mass media—face various barriers in providing information directly from government agencies. Such barriers are legal, operational, and cultural in nature. Brunei, Malaysia, Myanmar and Singapore maintain the colonial legacy of official secrets acts, which inhibit the sharing of information from government sources.\(^{419}\) While many countries have begun to provide online access to information via state websites and email communication, some operational barriers are experienced when online requests are not accepted, when they take several days to provide information, and where there are no clear procedures for completing individual information requests. In the mass media, women environmental journalists experience cultural barriers in the physical risks and dangers of field travel.

Integrating environmental news platforms through existing local mobile applications can help impart knowledge. For example, the May Doe Kabar Myanmar Rural Women’s network has launched a mobile phone app that offers information sharing and networking services among rural women.\(^ {420}\) Environmental and climate-related information is especially important for women who have major responsibilities to sustain livelihoods and family well-being, even during critical disasters.

The Philippines leads the region in having well-developed legal channels for access to justice. Nevertheless, 30 activists were killed in 2018,\(^ {421}\) and the country is on record as being the most dangerous for land and environmental rights activists. Three out of the 30 activists killed were women.\(^ {422}\) One of them was Gloria Capitan, an environmental activist opposing coal stockpile facilities in Bataan province, who was shot and killed by two unidentified motorcyclists near the entrance to her family’s business. Indonesian women human rights defenders were imprisoned for organising local communities to stop illegal land grabs and monitor environmental degradation in 2014, even though Indonesia’s Law No. 32/2009 on Environmental Protection and Management guarantees that such actions will not be punished.\(^ {423}\)

Efforts to close gender gaps and create more spaces for women in environment and resource governance institutions must be grounded in law in order to increase women’s representation from local community to national levels. Furthermore, gender-responsive actions and budgets need to be prioritised nationally across all aspects of environment, natural resources and climate change. ASEAN Member States generally do not have gender-disaggregated data regarding the gender aspects of natural resource management, food security, climate change and sustainable development, reflecting a lack of research in these areas. Such research could help in amending existing policy and legal frameworks as well as formulating new laws and policies in line with international standards.

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421. *Forum-Asia, Philippines: Take Concrete Steps to Protect Land and Environmental Defenders* (Brief) (Forum-Asia, 2019)


Conclusion

Women and girls play a vital role in protecting and managing natural resources in Southeast Asia, due to their role as the primary users of such resources in their daily lives. Indigenous women have played an extraordinary role in conservation, battling illegal loggers in their communities, despite threats to their lives. Women’s rights are widely recognised in international frameworks and regional declarations, but are limited in national laws and policies. The absence of national laws for gender quotas, as well as the absence of gender mainstreaming in environmental law and public participation processes, means that women’s essential contributions to family well-being and environmental sustainability receive relatively little recognition in ASEAN countries. Enabling the participation of women and vulnerable and marginalised groups in EIA processes can—in combination with other strategies—lead to more comprehensive assessments of the impacts of development on the environment, people, and communities.
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VI Lessons for ASEAN from the Aarhus Convention and Ezcasú Agreement

Dyah Paramita

Main messages

• ASEAN has the opportunity to learn from a variety of legal and institutional advances to further develop its regional instruments and institutions in line with international standards and the progressive interpretation of human rights. These instruments include: the Espoo Convention, which addresses environmental impact assessment (EIA) in a transboundary context, its associated Kyiv Protocol on Strategic Environmental Assessment, the Aarhus Convention, and the regional Ezcasú Agreement in Latin America and the Caribbean (LAC) region.

• Existing ASEAN instruments are relatively weaker than these instruments. There is less clarity as to who can access information, in what context public participation should take place, and how decisions made in national court systems can be enforced and implemented in the region.

• A regional agreement on access to information, public participation and access to justice in Southeast Asia would require establishing a standalone regional review mechanism for compliance or expanding the role and mandate of the ASEAN Intergovernmental Commission on Human Rights (AICHR) to carry out this function, led by independent experts appointed to the AICHR by ASEAN Member States.

• Such an agreement should support ASEAN Member States’ domestic and regional efforts to ensure the safety of environmental human rights defenders, promote the rights of women and girls, and engage the business sector and civil society in making the right to a healthy environment a reality for everyone.

Background

Men, women, indigenous people, and those in vulnerable situations need access to environmental information to be able to participate in environmental decision making in Southeast Asia. They need access to justice to defend their right to a healthy environment. Various regional instruments support these needs, and are relevant to the right to a healthy environment.

The Convention on Environmental Impact Assessment in a Transboundary Context, known as the Espoo Convention, entered into force in 1997. The convention sets out obligations of parties to conduct EIAs at an early phase of project planning for activities that could cause significant adverse environmental impacts across borders.424 Its associated Protocol on Strategic Environmental Assessment (SEA), known as the Kyiv Protocol, complements the convention. It entered into force on 11 July 2010.425 Amendments, which entered into force in 2014, open the protocol to accession by any UN Member States that are not members of the UN Economic Commission for Europe (UNECE) upon approval by a Meeting of the Parties.426

The 2001 Convention on Access to Information, Public Participation in Decision Making, and Access to Justice in Environmental Matters, known as the Aarhus Convention,427 and the 2018 Agreement on Access to Information, Participation and Justice in Environmental Matters in Latin America and the Caribbean, known as the Ezcasú Agreement,428 both stem from Principle 10 of the 1992 Rio Declaration. Principle 10 sets out three fundamental rights: access to information, access to public participation and access to justice, as key pillars of sound environmental governance.429 The convention and the agreement elaborate on these rights. Both agreements are key milestones marking the gradual convergence between human rights and environmental protection and, in turn, the development of the right to a healthy environment.

424. UNECE website, ‘Espoo Convention’
425. UNECE website, ‘About the SEA Protocol’
427. Aarhus Convention
428. Ezcasú Agreement
429. Rio Declaration, Principle 10
IN LATIN AMERICA AND THE CARIBBEAN, THE WATER, SOIL, FORESTS AND ANIMALS ARE UNDER CONSTANT ATTACK.

The Outlook is bleak - but we can change it.

THE ESCAZÚ AGREEMENT MEANS EVERYONE WILL BE ABLE TO:

1. Access information on the state of the environment and how a particular project might affect it.
2. Be consulted and participate in decisions that could affect our environment.
3. Seek reparations in the courts if our environment is adversely affected or if our views are not taken into account.

The agreement also obliges states to protect the people and groups that defend the environment.

To make this a reality, we must get more than 11 states in the region to sign the agreement and make it national law.

Governments can start signing from 27 September 2018. Let's demand they sign!

Campaign poster to promote signing of the Escazu Agreement, 2018
Aarhus Convention: The Aarhus Convention recognises the basic right of individuals and future generations to a healthy environment.\(^{430}\) Article 1 refers explicitly to women in a statement about the right of every person ‘... to live in an environment adequate to his or her health and well-being.’ The convention views procedural rights as the prerequisite for realising substantive environmental rights.\(^{431}\) It contains a review procedure to promote parties’ compliance. The convention was formulated under the auspices of the UNECE, and entered into force in October 2009. Forty-seven of 56 UNECE Member States were parties to the convention by 2017.\(^{432}\)

Several countries in Central Asia, including Kazakhstan, Kyrgyzstan, Tajikistan and Turkmenistan, are also parties to the convention. In 2017, Guinea Bissau expressed interest in becoming a party.\(^{433}\)

Escazú Agreement: With the support of the UN Economic Commission for Latin America and the Caribbean (ECLAC), the Escazú Agreement was adopted on 4 March 2018. The adoption by 24 ECLAC Member States followed negotiations that began in 2012. The agreement is open for signature. At least 11 of the 33 Member States must ratify the agreement before it can enter into force. The agreement is the first regional treaty to emerge from the 2015 UN Conference on Sustainable Development (‘Rio+20’) process, and the first treaty to address specific protections for environmental defenders. The agreement shares the same concerns as the Aarhus Convention,\(^{434}\) but addresses issues specific to the Latin American and Caribbean regions. For example, it seeks to reduce barriers faced by vulnerable communities in accessing justice, by providing for the use of interpretation or translation of languages other than the official languages, when necessary.\(^{435}\)

ASEAN Human Rights Declaration (AHRD): As discussed in Chapter 4, the AHRD recognises the right to a safe, clean and sustainable environment under Article 28(f). While there is no specific regional treaty to guarantee procedural rights in Southeast Asia, ASEAN has developed some relevant mechanisms, agreements and human rights instruments, and there is increasing concern regarding the importance of procedural human rights obligations among ASEAN Member States.

This chapter discusses similarities and differences between the Aarhus Convention and various ASEAN instruments, and draws lessons from the convention and the Escazú Agreement to examine the development of an ASEAN regional framework for implementing the right to a safe, clean and sustainable environment.

### Similarities and differences between the Aarhus Convention and ASEAN instruments

#### Access to Environmental Information

**Aarhus Convention:** Article 2(3) defines environmental information broadly to include any information regarding the state of the environment, factors affecting or likely to affect the environment, measures affecting or likely to affect such elements, and reports on the implementation of environmental legislation. The convention promotes the proactive disclosure of environmental information, based on Article 5(6) and 5(7).

The convention defines ‘the public’ and ‘the public concerned.’ The first term refers to natural or legal persons, associations, organisations or groups.\(^{436}\) While the convention does not explicitly specify women, girls and marginalised groups, they are nevertheless included in the interpretation of ‘natural persons’.\(^{437}\)
The second term refers to persons affected or likely to be affected by the state of the environment, or who have an interest in environmental decision making.\textsuperscript{438} Non-governmental organisations (NGOs) concerned with environmental protection, and that are recognised under national laws, are considered to be in this second category. The text of the convention is not explicit as to whether these categories include ‘future generations’, referred to in the preamble and Article 1 but not in the operative paragraphs. This is open to the interpretation of the parties and a compliance committee.

Article 2(2) mandates the disclosure of environmental information by the public authority, and provides clear definitions of the public authority. Procedures to provide access to information and the time frame for doing so are contained in Articles 4(2) and (5). The convention explicitly rules out any requirement for applicants to state the intention of their request, under Article 4(1)(a). The right to access information under Article 4 applies to non-citizens and non-residents, as well as citizens and residents.\textsuperscript{439}

Article 4(8) allows public authorities to charge applicants a reasonable fee to cover the service of providing information. Public authorities are required to post a schedule of charges and to provide fee waivers, where appropriate. The convention does not provide detailed conditions regarding fee waivers, leaving it to countries to establish the conditions under which waivers would apply. To ensure that every person can obtain information without cost being a barrier, fee requirements are often waived for NGOs and individuals.\textsuperscript{440} This policy promotes the principles of equality and non-discrimination regarding participation and inclusion, as individuals and NGOs often have limited funds. Such a policy has been adopted by the Scottish Natural Heritage, a public advisory body for nature protection that does not charge for providing environmental information.\textsuperscript{441}

**ASEAN instruments: The right to information is recognised under Article 23 of the AHRD, which is itself a form of soft law.**\textsuperscript{442} The AHRD guarantees the right to receive and impart oral and written information through any medium of a person’s choice. The article does not mention environmental information but provides in general for the basic right of persons to have access to information.

The ASEAN Political-Security Community (APSC) Blueprint 2025 refers to the promotion and protection of human rights, and to the AHRD. The fifth strategic measure of the blueprint includes the promotion and protection of human rights so that ASEAN people can live with peace, harmony, and prosperity.\textsuperscript{443} This measure requests ASEAN Member States to exchange information to improve human rights and fundamental freedoms among members, based on the ASEAN Charter, the AHRD, and various international human rights declarations and instruments to which ASEAN Member States are parties.\textsuperscript{444} The blueprint does not specifically refer to the right to environmental information.

The 2002 ASEAN Agreement on Transboundary Haze Pollution (AATHP) is an example of a hard law that addresses access to environmental information. All ASEAN Member States signed the agreement in 2002 and it entered into force in 2013.\textsuperscript{445} Article 4(1) of the AATHP states that the exchange of information and technology is an obligation of parties. In addition, Article 4(2) obliges parties to provide a prompt response to a request for relevant information or consultation sought by states that may be affected by transboundary haze pollution. The AATHP does not explicitly specify that the people of ASEAN Member States are parties to the agreement.

**Discussion:** The Aarhus Convention and the ASEAN instruments described above acknowledge the importance of access to environmental information. Article 3(9) of the convention states that any legal persons, associations, organisations or groups, without discrimination as to citizenship, nationality, or domicile, are rights-holders. In comparison, the ASEAN frameworks do not clearly define rights-holders. Article 23 of the AHRD addresses the basic right to information but there is no further guidance as to how this article should be implemented in practice. Several ASEAN

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\textsuperscript{438} Aarhus Convention
\textsuperscript{440} ibid 94
\textsuperscript{441} Scottish Natural Heritage website, ‘Freedom of Information requests’
\textsuperscript{442} Access to environmental information in ASEAN is addressed through both soft and hard laws. Soft law is a quasi-legal instrument that is not legally binding, whereas hard law creates legal obligations and is binding on parties. Soft law is found in the form of declarations, action plans, guidelines, blueprints and other policy documents. The ASEAN regional legal framework, on the other hand, comprises legal instruments representing hard law.
\textsuperscript{443} ASEAN Secretariat, ‘ASEAN Political-Security Community Blueprint 2025’.
\textsuperscript{444} ibid
\textsuperscript{445} AATHP
Member States, including Indonesia, the Philippines and Thailand, apply different interpretations under their freedom of information (FOI) acts. In Thailand, any person, including Thai nationals and aliens (defined as non-Thai nationals and those who are not residents of Thailand) have the right to access information. The right of aliens to information is specifically regulated under a ministerial regulation. In Indonesia, the right to access information applies only to Indonesian legal persons, defined as Indonesian citizens and Indonesian associations, organisations, and groups. The Philippines Government guarantees access to information only to citizens of the Philippines.

As a hard-law instrument, the AATHP has a strong mandate. However, its implementation is still highly dependent on domestic mechanisms and internal policies of ASEAN Member States. Article 4 recognises the obligation of states to provide each other with access to information. Yet, AATHP does not explicitly recognise the right of the public to access information, and leaves it up to Member States to decide whether or not, and under what conditions, information acquired through AATHP provisions should be disclosed to the public.

The AATHP has faced obstacles to implementation. For example, during the Fifteenth Meeting of the Sub-Regional Ministerial Steering Committee (MSC) on Transboundary Haze Pollution in Kuala Lumpur, Malaysia, in 2013, haze conditions reached a peak. Singapore requested information from Indonesia in the form of maps and lists of concession holders of oil palm plantations, arguing that such information could help accurately show the locations of fires and identify the companies that controlled the land, thus enabling Singapore to take action against any such entities linked with Singapore. Indonesia declined, citing legal constraints on the sharing of such maps.

The Indonesian Minister for Environment argued that the information was exempted from disclosure under Article 17(e) of Indonesia’s FOI Act, as the data could reveal the country’s natural resource wealth. Malaysia expressed the same concern. The Malaysian Minister for Natural Resources and Environment stated that land affairs came under the authority of the states, and that the federal government might lack the authority to publish concession maps.

The adoption of AATHP has not helped Indonesian citizens gain access to concession maps and information about oil palm plantations. From 2013 to 2018, Indonesian citizens and environmental NGOs made at least 11 complaints following their FOI requests for concession data held by the Ministry of Agrarian Affairs and Spatial Planning. The Indonesian Commission of Information, followed by the appellate levels (Administrative Court and continuing to the Supreme Court), ruled that the concession data was public information. In March 2019, the Indonesian Ombudsman urged the ministry to disclose the data and to comply with the Supreme Court decision. At the time of writing, the ministry had not disclosed the information and a coalition of environmental NGOs was planning to report the minister to the police and pursue a criminal case.

ASEAN does not define what counts as environmental information. The various types of environmental information defined under Aarhus Convention Article 2(3) are often referred to simply as ‘information’ in the ASEAN context. Whereas the Aarhus Convention provides standards for responding to information requests, there is no consistent standard or mechanism for the public to access environmental information in ASEAN Member States. The ability of the public to access information varies in different countries, depending on national mechanisms, the provisions made in existing laws, such as FOI or environmental laws, and their interpretations. Indonesia, the Philippines and Thailand apply minimum standards for processing information requests under their FOI acts. In Indonesia, a written notification or response is to be given within a maximum of ten working days after an information request is registered. The public authority can extend the response time up to seven additional days.

446. Thailand Official Information Act 1997, ss 4,9.21
448. Philippines Executive Order No. 2, 2016, Official Gazette of the Republic of the Philippines, ss 3, 9
450. ibid, 3
452. Jin Tan (n 28) p 4
454. ibid
455. Hussain, Z, ibid
In the Philippines, the public authority has to respond to the request as soon as possible within 15 working days. The public authority can extend the response time frame up to a maximum of 20 working days. In Thailand, information requests must be responded to without delay, at least within 15 working days from the time the request is received. Other ASEAN Member States do not have FOI laws or policies, so it is likely that the public will face difficulties in exercising the right to access information on environmental matters.

The ASEAN instruments mentioned above do not include a review procedure, whereas the Aarhus Convention does. Article 15 of the convention aims to ensure compliance of parties with the provisions of the convention. This has been applied, for example, in the case of Romania in relation to information requests made at an early phase of decision making on gold-mining activities (see box).

Public participation in environmental decision making

The right of public participation is one of the core principles of the Aarhus Convention, and is set out in Articles 6, 7 and 8. The right of women and girls to take part in public decision making is covered in the 1979 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) under Articles 7, 8, and 14, and in the Beijing Declaration and Platform for Action 1995, in Paragraphs 13, 16, 19, 20, and 34. Under the Aarhus Convention, the right of women and girls to be involved in public participation is implied in its references to the public, the public concerned, and natural or legal persons.

Aarhus Convention:

Under the general provisions of the Aarhus Convention, in Article 3(8) affirms the right of the public to participate in environmental matters without being penalised, persecuted or harassed in any way for their involvement.

Provisions for public participation in the convention fall into three main categories:

- Public participation in decisions on specific activities: Article 6 addresses public participation in decisions on specific activities as listed in Annex I, or other activities that are likely to have a significant environmental impact. Article 6(2) requires the parties to make public any such plans, including information about the proposed activity,

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References:

457. UNECE, Compilation of Findings of the Aarhus Convention Compliance Committee Adopted 18 February 2005 to Date’, 99
458. ibid
459. ibid 96-102
461. Executive Order No 2, s 2016, Philippines, s 9
462. Thailand Official Information Act 1997 s 11, ‘Result of the Request’
463. UNECE, ibid, 96-97
464. WECF, ibid
the draft decision in which the activity is proposed, and any activities that are subject to a national or transboundary EIA procedure. Article 6(4) states that the aim of early notification in the environmental decision-making procedure is to enable the public to participate. Article 6(6) states that the public concerned must have access to all information relevant to decision making. The public participation process, based on Article 6(7), requires written or oral comments to be submitted by the public at a public hearing or inquiry. The meaning of ‘public’ is defined in Article 2(5) of the convention.

- **Public participation concerning plans, programmes and policies:** While Article 6 relates to programmes that are ‘likely to have a significant environmental impact’, Article 7 applies more broadly to plans and programmes ‘relating to the environment’, which are subject to SEAs. The provisions of Article 7 apply to the general public rather than to the ‘public concerned’, as defined in Article 2 of the convention.

- **Public participation in the preparation of executive orders and/or legally binding instruments:** Article 8 provides guidelines for effective public participation in the preparation of environmental policies and legally binding instruments. To enable effective public participation, there must be: a fixed time frame; draft rules for the public; the opportunity for the public to give comments, either directly or through a representative; and the inclusion of public concerns in drafting policies.

AHRD, in Article 23, guarantees freedom of opinion and expression, including the freedom to hold opinions ‘without interference.’ Article 24 guarantees the right to freedom and peaceful assembly. It can be argued that these articles lay the basic foundation for every person to participate in environmental decision making in the ASEAN region. Freedoms of opinion and expression are fundamental rights for the full development of individuals, and the foundation for a free and democratic society. States have the responsibility not only to protect freedom of expression and association but also to protect the life, liberty and safety of individuals exercising these rights. The government should not limit these rights unjustifiably.

ASCC Blueprint 2025 states that, in the development and implementation of ASEAN policies and programmes, regional platforms to promote fair opportunities, participation and effective engagement of vulnerable

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465. Bende Toth, ’Public Participation and Democracy in Practice - Aarhus Convention Principles as Democratic Institution Building in the Developing World’ 30 Environmental Law 36
466. Ebbesson, Gaugitsch et al, 122
467. ibid 183-185
groups should be improved. All ASEAN Member States are signatories to CEDAW. CEDAW requires parties to eliminate discrimination against women in rural areas, so as to ensure that women can participate in and benefit from all levels of rural planning and development, including environmental action.

AICHR organised a regional consultation on shared EIA concerns in ASEAN Member States in Yangon, Myanmar from 2-3 October 2019. The meeting was expected to develop concrete measures towards developing a regional EIA agreement. At the meeting, Myanmar diplomat Hla Myint stated that ‘Human rights promotion and environmental sustainability are closely intertwined, and are believed to be at the core of sustainable development. Through a rights-based framework for EIA, the environment can be protected and sustained, and sustainable development can be achieved.

For an EIA to be an effective instrument to promote environmental protection and human rights, EIA processes should ensure access to information, public participation, and access to justice.

APSC Blueprint 2025 promotes a people-oriented, people-centred ASEAN, in which everyone, regardless of gender, race, social or cultural background, is encouraged to participate in the integration and community-building process of ASEAN.

Article 9 of AATHP states that one of the measures that should be taken to prevent land or forest fires and haze pollution is by strengthening community participation in fire management. The agreement does not mention the importance of public participation in planning activities.

Article 1(9) of the ASEAN Charter states that its purpose is ‘to promote sustainable development so as to ensure the protection of the region’s environment, the sustainability of its natural resources, the preservation of its cultural heritage and the high quality of life of its peoples.’ It can be suggested that in order to achieve the ASEAN vision of sustainable development, EIA can be used to promote social inclusion, environmental protection and economic growth. Article 1(13) of the ASEAN Charter underscores the association’s purpose to promote a people-oriented ASEAN in which all sectors of society are encouraged to participate in, and benefit from, the process of ASEAN integration and community building. However, it does not guarantee public participation to the extent of the Aarhus Convention Articles 6, 7 and 8.

Article 16 of the ASEAN Charter provides for the engagement of ASEAN with entities that support the charter. A document, titled ‘Rules of Procedure and Criteria for Engagement for Entities Associated with ASEAN’, was adopted at the fifth meeting of the 19th ASEAN Standing Committee in June 1986. It was revised in 2006 and the current version was adopted in 2012. The document includes criteria defining entities associated with ASEAN, and for the accreditation of civil society organisations (CSOs).

**Discussion:** The Aarhus Convention guarantees public participation in environmental decision making and a safe and enabling environment for the public to exercise their right under the convention.

In Southeast Asia, the AHRD and ASCC Blueprint 2025 set out basic principles for public participation, but do not guarantee protection for the public to exercise their rights, as in Article 3(8) of the Aarhus Convention.

Most ASEAN instruments do not explicitly guarantee the public’s right to participate in environmental decision making. For example, on the substantive...
matter of addressing haze problems, the AATHP does not provide for public participation in policy making or transboundary EIAs. Where civil society engagement is provided for, under Article 16 of the ASEAN Charter, the accompanying rules of procedure have been viewed as hampering CSO participation in ASEAN processes, by preventing them from challenging ASEAN policies and proposing alternatives. ASEAN Member States are aware of the possibilities for public participation in EIAs: most have national regulations on EIAs, as discussed in Chapter 3. The AICHR has conducted a series of consultations on the development of an EIA agreement, mentioned above, which would include the rights to information and participation.

Lessons learned from the Aarhus Convention provide an important foundation and insights for the development of an ASEAN framework on public participation and EIAs, which is currently being discussed in the region. Overall, the practice of public participation in ASEAN is still very limited. There is no detailed definition of who constitutes ‘the public’ and no explanation regarding procedures for public participation under the ASEAN instruments discussed in this chapter. Public participation is limited to the involvement of stakeholders or communities in implementing projects or programmes. A regional EIA agreement is needed to effectively promote public participation and bring a broader variety of perspectives to bear on the rapid developments taking place in ASEAN Member States.

Both EIA and SEA processes play important roles in facilitating public participation. However, public participation, as described in Articles 6 and 7 of the Aarhus Convention, goes beyond participation in EIA and SEA procedures. The right to public participation, based on this convention, is broader than the scope of environmental assessment, and includes many other kinds of engagement between the public and the state. Under Slovenia’s Environment Protection Act, for example, ministries and relevant authorities must make draft regulations available to the wider public and enable the public to express opinions and comment on each draft regulation. Beyond requiring EIAs and SEAs, the ASEAN Member States could foster public participation in the process of formulating environmental policies at the national and regional levels (for example, in ASEAN treaties), in keeping with the terms of the Aarhus Convention.

Access to Justice

Aarhus Convention: Article 9 of the convention guarantees access to justice in three contexts:

- **When information requests have not been fulfilled:** Under Article 4, persons whose requests have been ignored or not properly responded to have the right to a review procedure in court or by an independent and impartial public authority, within the framework of a country’s national institutions.

- **When procedures for public participation in projects are unsatisfactory:** Persons have the right to seek a review in connection with decision making on projects or activities, under Article 6. The review may address either the substantive or the procedural legality of a decision, or both.

- **When national environmental laws are violated:** Parties to the convention are required to provide access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities.

ASEAN instruments and processes:

ASEAN Chief Justice Roundtables on the Environment took place in 2011, 2013, 2014 and 2016, in which chief justices and the senior judiciary of ASEAN countries agreed on a common vision of

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481. ibid, 184
482. Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters’ (n 7). For example, Art 4 para 1 states each party shall ensure that, subject to the following paragraphs of this article, public authorities, in response to a request for environmental information, make such information available to the public, within the framework of national legislation, including, where requested and subject to subparagraph (b) below, copies of the actual documentation containing or comprising such information [a] without an interest having to be stated [b] in the form requested unless [i] it is reasonable for the public authority to make it available in another form, in which case reasons shall be given for making it available in that form or [ii] the information is already publicly available in another form.
485. ibid
the role of the judiciary in responding to environmental challenges such as deforestation, illegal logging, and the violation of environmental laws. The roundtables discussed the importance of environment courts or ‘green benches’ in settling environmental cases and strengthening access to justice.

Article 5 of the AHRD includes ‘the right to an effective and enforceable remedy, to be determined by a court or other competent authorities, for acts violating the rights granted to that person by the constitution or by law.’

As discussed in Chapter 4, the AICHR is the most relevant regional body to advance the right to a healthy environment in Southeast Asia. The AICHR is the core human rights body within the ASEAN structure, with a mandate to ‘promote and protect human rights’ through various functions. In practice, AICHR has mainly undertaken promotion-related activities involving human rights education, awareness raising, and capacity building, while overlooking its protection mandate in the form of investigating violations, accessing victims, receiving complaints and providing remedies. The AICHR’s emphasis on human rights promotion and its corresponding neglect of human rights protection can be attributed to the ‘ASEAN Way’ that pervades every ASEAN institution. The ‘ASEAN Way’ can be characterised as the prioritisation of stable relations in line with three norms:

- non-interference or non-intervention by ASEAN Member States in each other’s internal affairs;
- use of consensus and cooperative approaches; and
- reliance on national measures for implementation, rather than on strong regional mechanisms.

The ‘ASEAN Way’ and the AICHR’s limited mandate and institutional shortcomings prevent the commission from reaching its full potential as a strong and independent regional human rights accountability mechanism to advance and protect people’s access to justice and effective remedy in relation to environmental matters.

**National instruments:** In terms of domestic human rights accountability mechanisms, including judiciary and national human rights institutions (NHRIs), ASEAN Member States have adopted disparate approaches. In the Philippines, for example, the Supreme Court drafted rules of procedure for environmental cases, which empower the courts to issue environmental-protection orders. The rules enshrine the principle of intergenerational responsibility for the environment, and contain provisions addressing citizen lawsuits, protection of environmental defenders, implementation of the precautionary principle, and measures to prevent strategic lawsuits against public participation. Such lawsuits are intended to censor or intimidate critics, and measures against them are referred to by the acronym ‘anti-SLAPP’. These principles have not been cited or codified in ASEAN documents, nor have they been leveraged to guide judges across Southeast Asia in ensuring access to justice and effective remedy with respect to environmental harm.

As noted in Chapter 3, several ASEAN Member States have established NHRIs. As of 2019, however, only the NHRLs of Indonesia, Malaysia and the Philippines have received an ‘A’ accreditation from the Global Alliance of NHRIs, based on their compliance with the Paris Principles, a set of standards adopted by the UN General Assembly in 1993 to assess the credibility and legitimacy of NHRIs.

**Discussion:** Access to justice under Article 9 of the Aarhus Convention refers to the ability of the public to seek and obtain remedy through review procedures in court or through another independent and impartial body. An independent and impartial body does not have to be a court, but must be at least quasi-judicial, having safeguards to secure due process, and being independent from any influence by governments or private entities.

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486. AJNE.Org | Asian Judges Network on Environment
487. ibid
493. Ebbesson et al, 191
ASEAN is reliant on domestic courts to interpret and apply the right to a healthy environment, paving the way for diverging interpretations. As discussed in Chapter 4, a regional judicial mechanism, which is currently lacking in ASEAN, is vital to offer consistent interpretations and judicial decisions that ensure the coherent application of this right to the varying situations and contexts across ASEAN. A regional court could also help uphold the right to a safe, clean, and sustainable environment in light of present-day conditions and Member States’ understanding of this concept. Furthermore, a regional enforcement body or judicial court can offer avenues for victims to access justice and effective remedy for violations in states where domestic remedies are unavailable.494

Access to justice has not been explicitly mentioned in ASEAN instruments. The AHRD uses the term ‘remedy’ for responses to the violation of rights, rather than ‘access to justice’. Under Article 5 of the AHRD, a remedy is ‘to be determined by a court or other competent authorities’ rather than by the ‘court or independent/impartial body’ referred to in the Aarhus Convention.

Legal integration among ASEAN Member States has not yet occurred, nor are there current efforts to coordinate national legal systems, beyond promoting NHRIs.495 By comparison, in the European Union, laws on politics, security, and social policy have evolved to be harmonised among Member States.496 The Aarhus Convention enables the interaction of human rights and environmental concerns in Europe. Access to justice can be challenged not only in national courts but also at the Aarhus Compliance Committee (ACC), the Court of Justice of the European Union (CJEU), and the European Court of Human Rights (ECHR).497

The ‘ASEAN Way’ influences methods of dispute settlement among ASEAN Member States and the AICHR. Rather than providing options to settle disputes through international or regional adjudication procedures (for example, through the International Court of Justice or by establishing an ASEAN Court of Justice), disputes are settled through amicable consultation and negotiation. The ‘ASEAN Way’ also influences the mechanism whereby the public can seek effective and enforceable redress, as it limits the review procedure to being conducted by national courts or NHRIs.498

Compliance and review mechanisms

**Aarhus Convention:** Compliance issues are handled under the convention’s compliance mechanism, based on Article 15. The Aarhus Convention Compliance Committee (ACCC) is responsible to review compliance of parties with the convention. The ACCC has certain unique characteristics:

- NGOs, not only state parties, are allowed to nominate independent experts for possible election to the ACCC.499
- Committee members serve as independent experts rather than as representatives of European Union Member States.500 They are expected to apply high ethical standards, be competent in their fields, and have legal expertise.
- Members of the public and any NGOs have the right to file a ‘communication’ with the committee alleging a party’s non-compliance.501 The ACCC also accepts submissions from parties and referrals from its secretariat about non-compliance. Communications can be submitted in writing or in electronic form, and must be supported with valid information.502
- The principles of public participation and transparency are invoked: national reports of the parties are to be prepared through transparent processes, and with public participation.

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498. AHRD, art 5
500. ibid, 12
501. ibid
502. ibid, 18
• Transparency of the compliance procedure is highly valued. Transparency is understood as: public availability of compliance committee documents (most are available online), and open meetings of the committee.\textsuperscript{503}

• The ACCC provides recommendations to Meetings of the Parties to the convention for punitive measures to be taken, where appropriate. Parties are encouraged to comply with recommendations before stronger measures are taken.\textsuperscript{504}

**AICHR:** The AICHR is a consultative body rather than a judicial institution. The AICHR assembles at least twice a year at the ASEAN Secretariat headquarters in Jakarta, or in the capital city of the country that is chairing ASEAN at the time. The AICHR reports to the annual ASEAN Foreign Ministers’ Meeting, and performs tasks assigned by the meeting.\textsuperscript{505} As discussed, the AICHR has limited mandates,\textsuperscript{506} which include

• developing strategies for the promotion and protection of human rights and fundamental freedoms;\textsuperscript{507}

• providing advisory services and technical assistance on human rights matters to ASEAN sectoral bodies upon request;\textsuperscript{508}

• engaging in dialogue and consultation with other ASEAN bodies and entities associated with ASEAN, including CSOs and other stakeholders;\textsuperscript{509}

• consulting, as may be appropriate, with other national, regional and international institutions and entities concerned with the promotion and protection of human rights;\textsuperscript{510}

• preparing studies on thematic issues of human rights in ASEAN;\textsuperscript{511} and

• obtaining information from ASEAN Member States on their promotion and protection of human rights.\textsuperscript{512}

In contrast to the ACCC, characteristics of the AICHR are that:

• it is an intergovernmental commission comprising representatives who are appointed by the Member States;\textsuperscript{513} as a consultative body, it therefore does not possess the same degree of autonomy as an independent compliance-review mechanism;

• as a consultative body, its decisions are based on consultation and consensus, which are common diplomatic practices in ASEAN,\textsuperscript{514} and Member States are not obligated to implement decisions;\textsuperscript{515}

• each Member State has an effective veto regarding AICHR decisions, even when the decisions pertain to a state’s wrongdoing;\textsuperscript{516}

• it is not able to receive and take action on direct complaints from individual victims,\textsuperscript{517} hear cases, or initiate independent investigations of alleged abuses;\textsuperscript{518} and

• AICHR members are selected by ASEAN Member States and represent the countries that appointed them.

**Discussion:** If ASEAN Member States negotiate a regional agreement on access to information, participation and justice in environmental matters, the

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\textsuperscript{503} ibid, 24
\textsuperscript{504} ibid
\textsuperscript{505} ASEAN Secretariat, ‘ASEAN Intergovernmental Commission on Human Rights: Term of Reference’
\textsuperscript{506} Wâhyuningrum (2014)
\textsuperscript{507} ASEAN Secretariat, ‘ASEAN Intergovernmental Commission on Human Rights’ (n 83) para 4.1
\textsuperscript{508} ibid, para 4.7
\textsuperscript{509} ibid, para 4.8
\textsuperscript{510} ibid, para 4.9
\textsuperscript{511} ibid, para 4.12
\textsuperscript{512} ibid, para 4.10
\textsuperscript{514} ibid
\textsuperscript{516} Hsien-Li Tan, The ASEAN Intergovernmental Commission on Human Rights (Cambridge University Press, 2011)
\textsuperscript{517} Ciorciari (2012)
\textsuperscript{518} ibid
review mechanism of the Aarhus Convention could be a suitable model, as its approach is non-confrontational, non-judicial, and consultative in nature.\(^{519}\) Such an agreement could set up an independent compliance committee. Alternatively, ASEAN could mandate the AICHR to perform the duty of a compliance committee. AICHR members could be assisted by national or regional experts acting as a task force to review countries’ compliance. Establishing such a committee would require amending AICHR’s mandate and scope through revised terms of reference. A reformed AICHR could objectively and independently review ASEAN-commissioned projects and programmes, as well as monitor Member States’ compliance with their human rights obligations in relation to the environment.

Voluntary acceptance of a proposed regional agreement by ASEAN countries and strengthening of the AICHR’s role to interpret and apply such an agreement to manage disputes would not be against Member States’ long-held principle of non-interference.\(^{520}\) The ASEAN principle of non-interference would still be respected, especially if compliance committee members are nominated by Member States\(^{521}\) to serve in an independent capacity as experts.

**Lessons for ASEAN regarding the protection of environmental human rights defenders under the Escazú Agreement**

The Escazú Agreement is an important instrument for environmental rights defenders and civil society in Latin America and the Caribbean. Civil society participation was influential in the process of the drafting the agreement.\(^{522}\) Article 9 guarantees protections for environmental human rights defenders.\(^{523}\)

Environmental human rights defenders in Latin America and the Caribbean face similar risks as their counterparts in Southeast Asia as a result of their defence of land, environment and indigenous peoples’ rights in the context of illegal logging, hydropower dams and mining. Journalists and human rights defenders often face serious consequences for exposing these issues, including physical and legal attacks, involuntary ‘disappearances’ and murder.\(^{524}\) In 2015, the Philippines had the second-highest rate of killings of environmental human rights defenders in the world, after Brazil. Indonesia was ranked 11th and Myanmar 13th, followed by Cambodia and Thailand.\(^{525}\)

At present, there are no ASEAN agreements that specifically elaborate on the obligation of states to create a safe environment for environmental human rights defenders to exercise their rights. Their protection under the Escazú Agreement demonstrates for ASEAN that providing this guarantee at a regional level is possible.

**Conclusion: Prospects for an ASEAN regional mechanism on procedural rights**

In ASEAN, the right to a safe, clean, and sustainable environment is recognised as a basic human right. However, public access to information, participation and justice in environmental matters, which are key elements of this right, still depend very much on national mechanisms. Member States apply different standards and interpretations in implementing this right. A regional instrument and mechanism could provide clear definitions and set standards for the ASEAN Member States to respect, protect and fulfill the right to a healthy environment.

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519. Aarhus Convention art 15
520. OHCHR Regional Office for Southeast Asia, Report of Expert Dialogue with Civil Society and NHRIs on Regional Human Rights Mechanisms in Africa, the Americas and Europe, Jakarta, 4-5 May 2009
521. ibid
522. Civicus, ‘Escazú: The work of civil society made a huge difference’, (Civicus, 12 February 2019)
523. ibid
524. Putsata Reang, Freedom of Expression and Right to Information in ASEAN Countries: A Regional Analysis of Challenges, Threats and Opportunities. Baseline Study (Internews Europe, 2014), 7, 17
525. Knox (2017) 4
Building on the development of the ASEAN instruments on human rights and environment and the concern of environmental human rights defenders and CSOs, the formulation of a regional agreement that reflects the principles of the Aarhus Convention and the Escazú Agreement could be considered.

Discussion of the proposal could seek a paradigm shift and transformation of the ‘ASEAN Way’ to include greater engagement with non-state actors and regionally focused action. At present, there is very limited involvement of civil society in the drafting processes of ASEAN legal instruments. The rules of engagement of civil society entities, under Article 16 of the ASEAN Charter, could be clarified, developed and improved. In this regard, the process of public participation in drafting the Escazú Agreement presents a good example for civil society to take part in drafting a similar ASEAN agreement.

Finally, there is a need to strengthen AICHR’s role, as well as public participation in ASEAN, so action towards a safe, clean healthy and sustainable environment can be enriched by a diversity of views and perspectives.
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Main messages

• To respond to the challenges of the Anthropocene, collective and strategic action is needed at every level of governance. At the global level, ASEAN Member States are encouraged to become parties to the Aarhus Convention. Countries can also use their engagement in various multilateral environmental agreements (MEAs) and human rights conventions to further strengthen international action and support global recognition of the right to a healthy environment.

• At the regional level, ASEAN Member States could negotiate a legal instrument tailored to the needs of the region. This could take the form of a convention on access to information, public participation in decision making and access to justice in environmental matters, or could be a broader agreement setting out both procedural and substantive aspects of the right to a healthy environment.

• To support compliance, ASEAN Member States could establish a regional review mechanism on the right to a healthy environment or could grant the ASEAN Intergovernmental Commission on Human Rights (AICHR) the power to review cases of non-compliance with new or existing agreements.

• At the national level, a combination of laws, judicial decisions, and policies are needed to effectively implement the right to a healthy environment. Countries that do not yet have specialised environment courts (‘green benches’) could consider establishing them. They could build the capacity of their national human rights institutions (NHRIs) or establish NHRIs if they have not yet done so. They could also strengthen leadership by women to leverage the benefits of gender equality in implementing the right to a healthy environment.

Background

The dawning of the Anthropocene has brought social-ecological challenges that need to be addressed at every level — national, regional, and global. For the first time in human history, people collectively have the power to modify the Earth on a global scale. Shared problems in Southeast Asia, such as aquatic plastic waste, transboundary air pollution, and hazardous waste in waterways and coastal zones, are affecting human health and livelihoods. Effective mechanisms for the enjoyment of the human right to a healthy environment are vital in the context of these interconnected challenges.

This report maps the human rights obligations of Southeast Asian countries in relation to the right to a healthy environment. As noted in the introduction, the concept of the right to a healthy environment is used as an overarching category, while recognising that...
terminology varies across countries, and that ASEAN, in the ASEAN Human Rights Declaration (AHRD), refers to ‘the right to a safe, clean and sustainable environment.’ Good practices are identified whereby countries have made progress through national constitutions, laws, and jurisprudence, and where ASEAN as a region has put in place joint arrangements for tackling common social-ecological challenges.

Drawing on this research, this closing chapter recommends strategies for action at the national and regional levels, and in relation to global commitments. The overall aim is to increase sustainability and prosperity in Southeast Asia. Being both ‘green’ and prosperous means that everyone, without discrimination, is able to have a good quality of life derived from nature’s contributions to people (NCP), and can contribute to safeguarding a healthy environment for present and future generations.

### National action

#### Laws

Indonesia, the Philippines, Thailand, and Viet Nam explicitly recognise the right to a healthy environment in their national constitutions, the highest-level legal instrument in a country. Malaysia implicitly recognises this right, as judges have elaborated on the content of the right to life as referred to in Article 5 of the Federal Constitution of Malaysia, reasoning that this provision includes the right to live in a reasonably healthy and pollution-free environment. Brunei, Cambodia, Lao PDR, Myanmar and Singapore have not provided constitutional recognition of this right. To a certain extent, however, they recognise the substantive and procedural dimensions of this right in their domestic laws and court decisions.

Countries have recognised the substantive elements of the right to a healthy environment in Southeast Asia, such as those referring to clean air and associated procedural elements in the Philippines. The right to a safe climate is recognised, for example, in the Constitution of the Kingdom of Thailand. There are also constitutional provisions and laws that refer to more than one element of the right to a healthy environment. For example, the 2017 Thai constitution refers to safe water and adequate sanitation and also to a safe climate.

Other examples of connections between elements of the right to a healthy environment, such as between safe water and sanitation and the right to live, work, study and play in non-toxic environments, can be found in Singapore’s Water Pollution Control and Drainage Act, and its Pollution Control Act.

In terms of healthy ecosystems and biodiversity, the 2013 Constitution of the Socialist Republic of Viet Nam enshrines state obligations to protect nature and biodiversity. Biodiversity includes agricultural diversity generated by a dynamic interaction between people and nature, and is vital for another element of the right to a healthy environment, namely healthy and sustainably-produced food. The agriculture sector is the foundation for food security in developing countries, and food security cannot be achieved without women’s contributions at household, community and other interacting levels of governance. Thus, a cross-cutting dimension of the right to a healthy environment is gender equality and the role of women in ecosystem services to provide healthy and nutritious food. In addition to recognising the substantive elements of the right to a healthy environment, several

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526. See Chapter 2, p 42
528. Constitution of Thailand 2017, s 258
529. ibid
532. See Chapters 1 and 5 in this report
ASEAN Member States have taken steps to recognise procedural elements under their national laws. Chapter 3 describes national provisions to ensure access to information, public participation, and access to justice and effective remedies for environmental harm.

Chapters 2, 3 and 4 provide evidence that ASEAN Member States, similar to other countries and regions, have experienced the advantages of constitutional recognition of the right to a healthy environment. Such recognition provides a basis for enacting environmental laws that integrate human rights, and for court decisions that defend this right from violation. When countries recognise the right to a healthy environment through national laws, they generate clarity regarding the duties of the state and other duty-bearers, such as businesses. Recognising this right also helps create an enabling environment for other legislation, such as environmental protection laws. Chapters 2, 3 and 6 expand on how lawmakers of the various ASEAN Member States have expressed the content of this right.

**Judicial recognition**

For everyone to enjoy the right to a healthy environment, laws alone are not sufficient. An independent judiciary and empowered rights-holders are equally important. When rights-holders turn to the court system, judges can use their rulings as opportunities to restate and progressively interpret key principles to specify the substantive content of the right to a healthy environment. For example, the Philippines Constitutional Court has recognised intergenerational rights and responsibilities. In Malaysia, the judiciary has helped in implicitly recognising the constitutional right to a healthy environment in the case of *Tan Teck Seng v Suruhanjaya Perkhidmatan Pendidikan & Another*.

The role of the judiciary, while important, is also at times constrained. As seen in the case of Indonesia’s Supreme Court ruling that state-held information about oil palm concessions should be released, government agencies might fail to execute decisions of the judiciary.

**Policies and executive decisions**

Besides highlighting the dynamic interaction between duty-bearers and rights-holders, this report has shown how lawmaking and policy processes are connected. A policy may be a means to implement countries’ obligations with respect to MEAs, such as the Paris Agreement on climate change or the Convention on Biological Diversity (CBD), which are relevant to a healthy environment. All of the 10 Southeast Asian countries submitted their Intended Nationally Determined Contributions (INDCs) by 2015, as part of the procedural obligations under the UN Framework Convention on Climate Change (UNFCCC). There is thus a ‘virtuous cycle’ of mutually reinforcing actions, as national laws contribute to detailed policies, and the implementation of these policies fulfils countries’ commitments under various MEAs.

Policies are not useful until they are implemented. Rights-holders in Southeast Asia have sometimes invoked the elements of the right to a healthy environment by turning to the executive branches of government to promote decisions in the public interest. For example, the right to information has been invoked by civil society organisations (CSOs) in Viet Nam with regard to the protection of biodiversity-rich marine areas that support peoples’ livelihoods.

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534. *Oposa v Factoran* Supreme Court of the Philippines G.R. No. 101083 (1993)
536. See more at https://unfccc.int/
This report has shown that community voices must also be strong enough for people to enjoy the right to a healthy environment. Community organising around specific environmental objectives can unite local voices and encourage the participation of local residents in decision making on developments that affect them. Local rights-holders can also network with national, regional and international organisations to understand and act upon legal and scientific developments that have a bearing on their right to a healthy environment.

Role of women

To bring about much-needed transformative change, a new narrative of the role of women is required. Chapter 5 elaborates on the many ways in which women are playing important roles in protecting the environment and creating shared value for households, local communities, and countries, yet their contribution is often not sufficiently recognised or publicly acknowledged.

The chapter highlights women’s participation in the media sector as an example of good practice, as women environmental journalists and media providers promote access to information for all. Women in the media can act as role models, help broaden the perspective and knowledge of others, and empower women’s participation in public decision making on issues concerning the right to a healthy environment. Malaysia and Viet Nam are countries with relatively greater participation of women in the media sector. These countries could potentially share lessons learned with others, such as Cambodia and Indonesia, where women are significantly under-represented in the media.

In the section below, recommendations are proposed for national, regional and international levels of governance, while acknowledging that the impacts of action at different geographic scales are interconnected.

National-level recommendations

- **Legal advances**: The legislatures of ASEAN Member States should continue to elaborate on the content of the right to a healthy environment, in line with human rights and international environmental standards. Countries that have not yet recognised this right should do so without delay, as they will benefit from constitutional recognition of the right to a healthy environment. Lawmakers from ASEAN Member States could exchange lessons learned on the ways in which such recognition can provide a basis for enacting environmental laws that integrate human rights, and for court decisions that safeguard the right to a healthy environment. When countries recognise the right to a healthy environment through national laws, they generate clarity regarding the duties of the state. Recognising this right also helps create an enabling environment for other laws, such as those applying to environmental protection.

- **Access to information**: State officials should ensure that the right to timely, direct, indirect and broad access to environmental information and freedom of expression is guaranteed by laws and supported by policies.

- **Access to justice and specialised environment courts (‘green benches’)**: Malaysia, the Philippines and Thailand are the only countries in Southeast Asia with environment courts or tribunals. Other countries could draw lessons from these countries’ experiences and consider the options for establishing their own ‘green benches’. Such bodies can help improve the efficiency of court systems, increase visibility and access to environmental justice, and offer higher quality and standardised expertise on environmental law. Judges from ASEAN Member States could discuss challenges and opportunities to make access to justice and remedy a reality in their countries. Such a dialogue can help ensure that judges in environmental cases have the expertise to interpret in a consistent manner human rights and environmental principles, exercise innovation in interpreting existing laws, and make wise judgments that respond to current environmental challenges in the interests of people and nature.

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540. ibid
Leadership development: Duty-bearers and rights-holders should work with women and youth to empower the leaders of the next generation, as part of a long-term approach to ensuring that the environmental rule of law is respected and supports the implementation of the human right to a healthy environment, leaving no one behind.

NHRIs: ASEAN Member States that have established NHRIs should engage in continuous improvements to their capacity to apply human rights to environmental issues. NHRIs should also continue to elaborate on the substantive elements of the right to a healthy environment: safe water and adequate sanitation, clean air, a safe climate, healthy and sustainably produced food, healthy biodiversity and ecosystems, and non-toxic environments in which to work, study and play. NHRIs should also recommend and promote new ways to advocate for the right to a healthy environment, including the procedural dimensions of this right. In states where the right to a healthy environment has not yet been recognised, NHRIs have a catalytic role to play in its recognition while also fostering the ‘greening’ of other environment-related human rights. Countries that still lack an NHRI accredited by the Global Alliance of National Human Rights Institutions are encouraged to establish one, in line with the Paris Principles on international NHRI standards, adopted by the UN General Assembly in 1993. NHRIs in Southeast Asia could collaborate on issues concerning the right to a healthy environment through the Asia Pacific Forum, a coalition of national human rights institutions in the region, where the interconnected challenges and opportunities of acting regionally and internationally can be discussed.

Regional action

Agreements

In ASEAN, a healthy environment is acknowledged as a basic human right. However, the recognition of substantive elements of the right to a healthy environment varies considerably among countries. Likewise, the procedural elements of the right to a healthy environment—access to information, public participation and access to justice and remedy in environmental matters—still depend very much on national mechanisms, as countries apply different standards and interpretations to implementation.

Adoption of an ASEAN-driven legal framework could draw on the region’s experience, assets, capacities, and shared values to further develop the right to a healthy environment in line with international standards. Such a regional framework could serve to inform other legally-binding agreements, strategies, policies, and action plans concerning the right to a healthy environment and could promote its recognition in line with other fundamental rights. It would also complement current work toward an ASEAN agreement on transboundary environment impact assessment. Furthermore, it would contribute to the evolution of the ‘ASEAN Way’, from divergent approaches undertaken by each country, to strategies by ASEAN Member States that are both nationally driven and regionally owned, recognising their shared environmental challenges and their international human rights and environmental obligations.

A regional agreement could provide a strategic means for ASEAN Member States to collectively respect, protect, and fulfil the right to a healthy environment. The findings of the complementary chapters of this thematic report show several different approaches that could strengthen the recognition of this right. These approaches are not mutually exclusive, and could become mutually reinforcing. Approaches could include the following:

1. ASEAN Member States could individually become parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (the Aarhus Convention), which is open to all countries.

2. Countries could develop a new ASEAN regional agreement that focuses on procedural elements of the right to a healthy environment, drawing on lessons learned from the Aarhus Convention and the Escazú Agreement (see Chapter 6). The agreement could reflect basic principles that protect:

- the rights of present and future generations to a safe, clean and healthy environment;

- the public, by providing a safe and enabling environment for people to exercise their rights;

- the right to access environmental information, public participation, and access to justice in environmental matters; and

- the rights of women, girls, indigenous peoples and people in vulnerable situations, considering heightened obligations towards these groups.

The proposed agreement could also include:

- states’ obligation to take appropriate measures to prevent, investigate and punish intimidation or attacks that environmental human rights defenders may suffer while exercising their rights;
• the obligation of public authorities and parties to MEAs and UN human rights conventions to collect and disseminate environmental information;

• the responsibilities of companies to respect human rights, reflecting the UN Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises; and

• an arrangement for improving the implementation of such a regional agreement, such as a mechanism for compliance and review.

3. Countries could negotiate a specific ASEAN instrument that sets out both the substantive and procedural elements of the right to a healthy environment. Such an instrument would provide clear guidance for ASEAN Member States on their human obligations concerning this right, in line with international standards. In addition to the procedural elements outlined above, the agreement could also elaborate on the substantive elements of the right to a healthy environment, as expressed by the UN Special Rapporteur on human rights and the environment, namely:

- clean air;
- a safe climate;
- access to safe water and adequate sanitation;
- healthy and sustainably produced food;
- non-toxic environments in which to work, study and play; and
- healthy biodiversity and ecosystems.

Institutional arrangements

A regional-level legal framework that recognises the right to a healthy environment should be complemented by institutional arrangements to enable proactive and cross-sectoral action to promote understanding and implementation, as discussed in Chapter 4. Such arrangements could include the following:

1. ASEAN could set up a review mechanism tasked with researching and monitoring specific issues related to the right to a healthy environment, including undertaking studies, organising conferences, disseminating information, making field visits, and formulating and elaborating on principles and guidelines. Such a mechanism could enhance the understanding of human rights among environmental bodies and policy centres, such as the ASEAN Centre for Biodiversity, the ASEAN Centre for Energy, and the ASEAN Institute for Green Economy. It could also develop practical and empirically-grounded tools and policy recommendations that enhance implementation and assessment of compliance. This would complement the work of the AICHR and the ASEAN Commission on the Promotion and Protection of the Rights of Women and Children (ACWC).

2. ASEAN should revise the AICHR's terms of reference to strengthen its protection mandate and put into practice the comprehensive list of human rights stipulated in the AHRD, including the right to a safe, clean and sustainable environment. To ensure people's access to effective remedy, AICHR or the above-mentioned review committee on the right to a healthy environment should:

- establish a robust complaint mechanism whereby victims can file their complaints;
- respond to human rights crises and violations by requesting Member States to provide information, issue statements, and consult with human rights bodies;
- engage with CSOs and environmental rights defenders when implementing its activities and decision-making processes;
- create an open and transparent selection system of AICHR commissioners wherein both states and civil society organisations can propose qualified candidates; and
- ensure that selected AICHR commissioners are mandated to act as independent experts, and not representatives of their countries.

3. ASEAN Member States that have established their own NHRIs should collaborate with those that have not yet done so to promote the establishment of NHRIs in every ASEAN country. Countries should undertake continuous improvement of their practices, through sharing of knowledge and experience with other ASEAN Member States.

541. Desi Hanara, ‘A Decade in Review: Assessing the Performance of The AICHR to Uphold the Protection Mandate’ (ForumAsia, 2019) 5-6

Capacity building and public engagement

Enacting laws and setting up new subsidiary institutions must go hand-in-hand with reinforcing the capacities of existing ASEAN bodies. Innovations that have emerged in the region include the ASEAN Chief Justice Roundtables on the Environment that have engaged in dialogues on how to respond to environmental challenges such as deforestation, illegal logging, and the violation of environmental laws.543 The roundtables have also discussed the importance of environment courts or ‘green benches’ in settling environmental cases and strengthening access to justice.544

Addressing and guarding against environmental or human rights violations will require the full engagement of regional and national law and policymakers, civil servants, courts, companies, investor organisations, civil society organisations (CSOs), local community groups, environmental managers, NHRIs, trade unions, academia, and the mass media. While existing policy frameworks on the right to a healthy environment identify states as the main duty-bearers, ASEAN should also move beyond a state-centric approach to engage with a wider group of actors, including those involved in environmental protection and human rights, such as environmental human rights defenders.

Business enterprises, corporations and regional development organisations are duty-bearers, and need to know their responsibilities with regard to the right to a healthy environment. They may require capacity building to understand the content of these responsibilities, avenues for implementation, and the consequences of non-compliance. Accordingly, ASEAN should facilitate new platforms for duty-bearers and rights-holders to share and promote expertise and knowledge of their responsibilities concerning the right to a healthy environment and the implementation of the UN Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises.

Strategies with regard to MEAs

ASEAN Member States are individually parties to a number of MEAs that are relevant to the right to a healthy environment. As such, state officials and other groups attend Conferences of Parties (CoPs) established by the various MEAs, which meet regularly to ensure that such agreements are implemented. These conferences play an important role in the international legal system and have significant implications for states’ international legal obligations.545 They contribute to international legal obligations by ‘thickening’ the obligations of parties to treaties.546 The engagement of ASEAN Member States in such CoPs will be relevant in illuminating ways forward for the implementation of their obligations at regional and national levels.

544. ibid
546. ibid

Signing of memorandum of cooperation between the CBD and the ASEAN Centre for Biodiversity in 2018
All ASEAN Member States are signatories to the following MEAs that are further developing the substantive content of the right to a healthy environment:

- the UNFCCC, which elaborates on actions for a safe climate;
- the CBD and the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), which are relevant to maintaining healthy ecosystems and biodiversity; and
- the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, which addresses the right to live in a non-toxic environment.

Additionally, all ASEAN Member States are parties to the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Convention on the Rights of the Child and the Convention on the Rights of Persons with Disabilities. These conventions elaborate on the substantive and procedural elements of the right to a healthy environment, either in the convention or in ‘general comments’ from human rights treaty bodies, which provide a comprehensive interpretation of provisions. Becoming a party to these international conventions is itself a good practice for promoting the right to a healthy environment—and is reinforced as countries transform their international obligations into national laws and policies.

ASEAN’s engagement in international lawmaking processes can bring ASEAN Member States together and help weave together environmental and human rights obligations. Strategies for further developing ASEAN’s role and commitment to implementing the right to a healthy environment through MEA commitments include the following:

1. ASEAN could continue to issue joint statements at conferences of parties. This approach that has been taken by ASEAN in the past. For example, Member States issued the ASEAN Joint Statement on Climate Change to UNFCCC COP-24 and the ASEAN Joint Statement on Biodiversity Conservation to CBD COP-14. The joint statements were adopted by country leaders at the 2018 ASEAN Summit.

2. ASEAN could help coordinate implementation of MEA commitments by countries in the region, similar to the role it played in coordinating humanitarian action after Cyclone Nargis. After the devastating impact of the cyclone in Myanmar in 2008, ASEAN successfully mediated between the government and international aid donors to reduce Myanmar’s fears of political intervention and enable access to humanitarian aid for post-cyclone recovery. ASEAN effectively worked around the sensitivities to external interference by emphasising the cooperative character of the non-traditional security agenda, in which countries’ sovereignty is not superseded but rather pooled.

Within the UN human rights system, the Universal Periodic Review (UPR) process provides for the participation of all relevant stakeholders, including non-governmental organisations, NHRIs and regional mechanisms in monitoring progress and promoting accountability for prior commitments. The UN recognises the significant role played by regional and sub-regional human rights arrangements in the promotion and protection of human rights; regional groups like ASEAN can thus submit collective UPRs, in addition to Member States’ country submissions. Doing so could be an opportunity for ASEAN Member States to jointly monitor progress on the right to a healthy environment in the region, and to provide support to each other in meeting commitments. They may also benefit from technical and coordination support from the Office of the High Commissioner for Human Rights (OHCHR) for the promotion and protection of human rights.

3. ASEAN Member States could champion the recognition of the right to a healthy environment in the international arena by supporting current calls to recognise this right through a UN General Assembly resolution. This could be further complemented by submitting joint statements at various international forums, and by drafting and supporting UN General Assembly resolutions that advance the various procedural and substantive elements of the right to a healthy environment.

547. ASEAN Secretariat, *ASEAN Cooperation on Environment – At A Glance* (2019)
548. ibid
549. Henning Borchers ‘ASEAN’s environmental challenges and non-traditional security cooperation: Towards a regional peacekeeping force?’ (2014) *ASEAN Journal of South-East Asian Studies*, 7(1), 5-20
550. ibid
551. For more information on UPR, see https://www.ohchr.org/en/hrbodies/upr/pages/uprmain.aspx
552. For more information on the OHCHR, see https://www.ohchr.org/EN/pages/home.aspx
**Conclusion**

At the global level, UN Special Rapporteurs and others have highlighted possibilities for the world to make firm commitments to recognising the right to a healthy environment through a UN General Assembly resolution and other measures. To date, more than 150 UN Member States have recognised the human right to a healthy environment in their national systems.

The experience of ASEAN Member States in recent years has been that existing legal and institutional frameworks are insufficient for the environmental challenges that we now face. Problems such as aquatic plastic waste, transboundary air pollution, and soil contamination from overuse of agricultural pesticides are beyond the ability of any single country to solve, and represent common threats not only to the environment but also to people’s health and well-being. While national efforts rightly underpin the collective responses that are needed, they are unlikely to succeed on their own.

The current diverse set of good practices are commendable, but are not nearly enough. Transforming today’s unjust and unsustainable society towards a healthy Earth where human rights are universally respected, protected and fulfilled will require significantly more action at various scales. Legal innovation to support and enable sustainability and justice is indeed possible, and is happening across the world.

Unexpected shocks, such as the COVID-19 pandemic, show us that global collective action for transformative change is needed more than ever. Instead of continuing to reinforce patterns that destroy nature and a safe climate, there is currently an opportunity to learn from this turbulent period. Legal systems that support resilience and a good quality of life for people living today and also for tomorrow’s children, youth and other living beings should be at the core of this transformative change.

In the quest for a clean, green, and prosperous future, the ASEAN Community will need to provide greater levels of coordination and support to its Member States. Ensuring the rights of people and local communities to the right to a healthy environment in the Anthropocene will safeguard the collective well-being of both people and nature in Southeast Asia, and ensure that ‘the future we want’, envisaged in the 2030 Agenda for Sustainable Development, can become a reality for everyone.
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Annex 1: Guiding Questions on Gender

This list of guiding questions has been developed to help identify gender-responsive or mainstreaming measures relevant to the right to a healthy environment. The checklist covers the substantive and procedural elements. The list is not exhaustive, as it does not cover the right to healthy ecosystems and biodiversity, and the right to a non-toxic environment. Nevertheless, application of the checklist can highlight opportunities to integrate or further extend gender-responsive or mainstreaming measures in national policies and frameworks. The items on this checklist relate to possible action by the legislative, executive and judicial branches of government. While they have different roles, all are important for fostering gender equality.

Substantive elements of the right to a healthy environment

Clean air

• Is there explicit reference to gender equality or gender inequality with regard to air quality in the national constitution and/or legislation?

• Are gender issues in relation to air quality standards clearly identified and/or addressed in national policies and/or programmes and/or institutional arrangements?

  ◆ If yes, to what extent have gender issues been applied? Provide examples of jurisprudence or impacts of programs or projects. Are there explicit references to the right to a healthy environment?

  ◆ If no, what are the opportunities to integrate gender mainstreaming or gender-responsive measures into existing or new national laws?

Clean water and adequate sanitation

• Is there explicit reference to gender, clean water and adequate sanitation in national constitutions or legislation?

• Are gender issues in relation to water resource management clearly identified and/or addressed in current policies, programmes and institutional arrangements?

  ◆ If yes, to what extent have gender issues been addressed? Provide an example of jurisprudence or the impacts of a program or project. Are there explicit references to the right to a healthy environment?

  ◆ If no, what are the opportunities to integrate gender mainstreaming or gender-responsive measures into existing or new national laws and frameworks?

Safe climate

• Are there explicit provisions in national constitutions or legislation on gender and climate change?

• Are gender issues in relation to climate change or disaster risk reduction clearly identified or addressed in national policies, programmes, and/or institutional arrangements?
• Are gender considerations incorporated into disaster and emergency management processes to protect the right to water, sanitation, food, etc in times of emergencies in the design and management of shelters, facilities and services?

  ☞ If yes, to what extent have gender issues been identified? Provide an example of jurisprudence or impact of a programme or project. Are there explicit references to the right to a healthy environment?

  ☞ If no, what are the opportunities to integrate gender mainstreaming or gender responsiveness into existing or new national policies or frameworks?

Healthy and sustainably produced food

• Are there explicit provisions in the national constitution or legislation on the right to food?

• Are gender issues in relation to food security clearly identified and addressed in current policies, programmes and institutional arrangements? Is there a strategic plan of action on food security? Are there explicit references to the right to a healthy environment?

• Do food security policies, including any policies on the right to food, address gender inclusiveness in the food system?

  ☞ If yes, to what extent have gender issues been addressed in the food policies or frameworks?

  ☞ If no, what are the opportunities to incorporate gender mainstreaming or gender responsiveness into existing or new national policies and frameworks?

Procedural elements of the right to a healthy environment

Public participation

• Is gender mainstreaming addressed in public participation and consultation policies with regard to environmental decision-making processes?

• Are there explicit guidelines for women’s involvement in public participation?

  ☞ If no, what are the opportunities to mainstream gender or incorporate the gender dimension in frameworks and guidelines? To what extent should this be incorporated?

Access to information

• Are there specific mechanisms enabling women to access information in environmental decision-making processes?

• Are gender considerations included in the legislative framework?

Access to justice and remedies

• Are there laws, policies, or practices that provide legal standing to organisations and/or individuals in environment-related cases?

• Is there a specific mechanism for the protection of women and Earth rights/environmental human rights defenders, including those from vulnerable groups?

• What are the opportunities to incorporate the gender dimension in the existing legal mechanism or new legal mechanisms?
Women’s participation in EIA processes

• Is gender mainstreamed in the EIA process? If yes, to what stage?
  ❍ Screening
  ❍ Scoping
  ❍ EIA report
  ❍ Evaluation
  ❍ Approval
  ❍ Monitoring
  ❍ Implementation process by affected people

• How do national policies and frameworks enable women’s participation in EIA?

• To what stage should gender mainstreaming be included in the EIA process?
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Notes:
Figures are indicated with (f) and tables with (t).

2030 Agenda for Sustainable Development, 26, 89, 91, 138

A
Aarhus Convention
access to environmental information, 112–15
access to justice, 118, 119
compliance mechanisms in, 120–22
as a model, 16, 134
public participation in, 115–18
access to effective remedies. See remedies, access to effective
access to information. See information, access to
access to justice. See justice, access to
accountability
and environmental rule of law, 56–58
laws and policies supporting, 15, 57(t), 58
mechanisms for, 119
of state and non-state actors, 16
strengthening through good governance, 61, 63
Universal Periodic Review (UPR), 137

agriculture
agrarian land reform, 56
Department of Agrarian Reform (Philippines), 62
farmers, 70
growth in economic sector of, 73
land rights, 62
Ministry of Agrarian Affairs and Spatial Planning (Indonesia), 114
resources, 37
unsustainable practices in, 68
women in, 86, 87, 93, 95–96

air, clean. See also transboundary haze
in AATHP, 70
Air Quality Management Fund (Philippines), 44
air quality standards, 45
Clean Air Act (Philippines), 44
Clean Air Act (Singapore), 41
Clean Air Act, pending (Viet Nam), 45
Government Regulation No 41 1999 on Air Pollution Control (Indonesia), 45
Sub-Decree on the Control of Air Pollution and Noise Disturbance 2000 (Cambodia), 45
as substantive element of right to a healthy environment, 14, 18, 36, 73, 131
ancestral lands, 15, 56, 62
Anthropocene, 14, 21, 29, 130, 138
aquaculture production, 37, 58, 73
ASEAN. See Association of Southeast Asian Nations (ASEAN)
ASEAN Agreement on Access to Biological and Genetic Resources 2000, Draft Framework, 70–71, 75–76
ASEAN Agreement on the Conservation of Nature and Natural Resources (AACNNR), 8, 49, 69–70, 75
ASEAN Agreement on Transboundary Haze Pollution (AATHP), 27, 70, 75, 113, 114, 118
ASEAN Centre for Biodiversity, 74, 135
ASEAN Charter, 25(t), 26, 71, 76, 117
ASEAN Chief Justice Roundtables on the Environment, 118–19, 136
ASEAN Commission for the Promotion and Protection of the Rights of Women and Children (ACWC), 8, 25(f),
26, 88, 89, 135
ASEAN Community Blueprint 2025, 15, 68, 76–77
ASEAN Community Vision 2025, 27, 89
ASEAN Economic Community (AEC) Blueprint, 72–73, 76
ASEAN Human Rights Declaration (AHRD)
access to justice in, 120
Article 5, 119
Article 23, 113
Article 28(f), 18, 26, 38, 71, 112
impact of, 77–78
legal context, 25(f)
public participation, 76, 116
recommendations for implementation, 135
right to a healthy environment, 15, 68, 131
scope, 71–72, 80
women's rights, 88
ASEAN Intergovernmental Commission on Human Rights (AICHR)
challenges, 78–79, 89
as compliance committee, 122, 130
on environmental impact assessments, 117
influenced by ASEAN Way, 120
legal context, 25(f), 26
mandate, 68, 119, 121
recommendations, 15, 16, 110, 123, 135
ASEAN Political-Security Community (APSC) Blueprint, 72, 76, 113, 117
ASEAN Social Network Consortium, 116–17
ASEAN Socio-Cultural Community (ASCC) Blueprint, 73–75, 76–77, 88, 116–17
ASEAN Way, 78, 119, 120, 123, 136
Association of Southeast Asian Nations (ASEAN)
challenges in legal and policy frameworks, 77–78
diversity of, 26
institutional challenges of, 78–80
recognition of women's contributions and roles, 100
regional instruments for procedural elements, 75–77
regional instruments for substantive elements, 69–74
right to a healthy environment, 14, 68

B
Bakun Dam case, 98
Bangkok Declaration 1967, 69
Bangkok Mass Transit Authority, 40
Beijing Declaration and Platform for Action, 87, 89, 92, 115
biodiversity
Aichi Targets, 74
ASEAN Joint Statement on Biodiversity, 137
Biodiversity Law 2008 (Viet Nam), 48
challenge of protecting, 20
Conservation of Biodiversity and Natural Areas Law 2018 (Myanmar), 48
Convention International Trade Endangered Species of Wild Fauna and Flora (CITES), 137
Convention on Biological Diversity (CBD), 47, 48, 70, 76, 137
definition, 47
global crisis, 22, 24, 48
Intergovernmental Science-Policy Platform Biodiversity & Ecosystem Services, 22, 23(f)
MEAs for maintaining, 137
National Biodiversity Strategy and Action Plan 2015-2020 (Myanmar), 49
as natural asset in conceptual framework, 23(f)
Protection of Wildlife and Conservation of Natural Areas Law 1994 (Myanmar), 48
Strategic Plan for Biodiversity 2011-2020, 74
as substantive element, 14–15, 18, 47–49, 74, 131
in Sustainable Development Goals, 26(f)
threats to, 36
biomass burning, 44, 94
Brunei Darussalam
  air quality standards and laws, 45
  environmental impact assessment laws, 60
  Environmental Protection and Management Order 2015, 41
  human rights treaties, 25(t)
  Nagoya Protocol, 76
  NBSAP submission, 48
  ratification of AACNNR, 49
  recognition of right to a healthy environment, 27(f), 38, 41, 131
  transboundary haze, 79
business sector
  access to information, 59
  accountability, 16, 57
  environmental permits, 58
  human rights violations, 61
  policies for right to a healthy environment, 56, 110
  tools for responsibility, 80, 136
  transboundary haze, 70
C
Cambodia
  air quality and legislation, 44–45
  biomass burning in, 94
  climate change legislation, 92
  Climate Change Strategic Plan 2014-2023, 46
  constitution, 42, 46, 92
  Department of Ethnic Minorities’ Development, 48
  environmental human rights defenders, 122
  environmental impact assessment laws, 60, 97
  environmental rule of law, 57(t)
  Environment and Natural Resources Code, 42
  Human Development Index (HDI), 26
  human rights treaties, 25(t)
  Law on Environmental Protection and Natural Resources Management, 42
  Ministry of Environment, 45
  National Policy on Green Growth 2013, 93
  NBSAP submission, 48
  non-discrimination, 91
  ratification of AACNNR, 49
  recognition of right to a healthy environment, 27(f), 38, 42–43, 131
  water quality legislation, 46
  women in environmental legislation, 93, 97
capacity development and training, 61, 74, 78, 87, 92, 93, 136
children, 28, 29, 47, 62, 76, 96
Civil Procedure Code 2015 (Viet Nam), 61
civil society actors, 15, 56, 61, 123
civil society organisations, 61, 62, 117, 123, 132, 135
class action cases, 62, 97
clim ate and climate change
Action Plan for Adaptation to Climate Change 2008-2020 (Viet Nam), 47
adaptation, 87, 96
amplifying environmental hazards, 68
in ASCC Blueprint, 74
ASEAN Joint Statement on Climate Change, 137
challenge of protecting, 20, 22, 29
Climate Change Act, pending (Malaysia), 46
Climate Change Act 2009 (Philippines), 47
Climate Change Commission (Philippines), 47
Climate Change Master Plan 2018-2030 (Myanmar), 47
Climate Change Policy 2019 (Myanmar), 93
Climate Change Strategy and Action Plan 2016-2030 (Myanmar), 47, 93
court cases in Thailand, 39
gender equality, 47
impacts of for Southeast Asia, 37, 46
impacts on water resources, 23, 90
National Action Plan on Climate Change Adaptation 2012 (Indonesia), 46
National Climate Change Action Plan 2011-2028 (Philippines), 92
National Climate Change Committee (Cambodia), 46
National Climate Change Strategy 2011-2020 (Viet Nam), 47
National Policy on Climate Change 2009 (Malaysia), 46
National Strategy on Climate Change 2008 (Thailand), 47
National Strategy on Climate Change 2018-2030 (Malaysia), 46
ocean warming and acidification, 22
Paris Agreement, 87
role of women in mitigating, 94, 96
as substantive element of right to a healthy environment, 14, 18, 36, 46–47, 73, 131
women’s vulnerabilities to, 99
collaboration, 14, 20, 26, 29, 135. See also cooperation
collective action on environmental impacts, 19, 123, 138
community engagement, 74, 77
compensation, 40, 70, 97
compliance mechanisms, 69, 110, 115, 120–22, 130, 135
Concerned Residents of Manila Bay, 43–44
consensus-based decision making, 78, 79, 119, 121
Convention on Environmental Impact Assessment in a Transboundary Context. See Espoo Convention
Convention on the Elimination of Discrimination Against Women (CEDAW)
ASEAN signatories to, 24, 86, 117, 137
collective action on, 37
equal employment and, 92
public participation, 115
rural women, 87, 89
collaboration, 57, 63, 68, 74, 77. See also collaboration
court decisions, 15, 36, 40, 49, 131, 133
COVID-19, 14, 21–22, 37, 138

D
dam construction, 37, 38, 122
deforestation, 119, 136
duty-bearers, 29, 57, 132, 134, 136

E
ecological processes, balanced, 58, 69, 92. See also biodiversity
economic growth, 36, 41, 72–73
ecosystem goods and services. See nature’s contributions to people (NCP)
ecosystem restoration, 36, 40, 96
enforcement, 78, 80, 110, 120
environmental human rights defenders
on climate change, 74
protections for, 112, 119, 122, 134
recommendations for engagement with, 135
rights of, 28
safety of, 16, 28–29, 99, 110
environmental impact assessments (EIA)
in ASEAN instruments, 118
in ASEAN Member States, 78
in Brunei Darussalam, 41
in Cambodia, 42
case study, 115
in conceptual framework, 23(f)
human rights basis of, 117
in Myanmar, 43
process outlined, 60(t)
public participation in, 15, 56, 59–60, 116
in Singapore, 41
in Thailand, 39
in transboundary contexts, 16, 110
women's participation, 97, 100
environments, non-toxic, right of, 15, 18, 44, 74, 131, 137
equality, principle of, 113
Escazú Agreement, 16, 110, 112, 122, 123
Espoo Convention, 16, 110
extractive industries. See mining

F
farmers. See agriculture
fisheries, 22
floods, 37, 96
food. See also agriculture
healthy and sustainably produced, right to, 14, 18, 36, 73, 88, 95, 131
impacts from climate change, 37
production systems, 23
security, 37, 71, 92, 95, 131
as Sustainable Development Goal 2, 26(f)
Food and Agriculture Organization of the UN (FAO), 37, 91
forests
deforestation, 48, 70, 94, 122
tires, 38, 75
Forest Law (Myanmar), 43
National Forestry Program 2010-2029 (Cambodia), 93
National Forest Strategy 1995 (Philippines), 92
non-timber products, 48, 95
protection, 61, 70
right to forest tenure, 23
sustainable management, 73, 92
tropical, 36
women in community-based forest management, 92, 93
freedom of information laws, 114, 115
freedom of opinion and expression, right to, 29, 63, 116
future generations
climate justice for, 28
protected in recommended ASEAN agreement, 134
representation of in court, 43–44
rights of, 15, 21, 56, 72
sustainable development for, 71, 77, 131

G
gender equality
AACNNR, 69
climatic change, 47
closing resource gaps, 89
Committee for the Promotion of Gender Equality (Thailand), 92
costs of inequality, 87
Declaration on Gender Responsive Implementation of ASEAN Community Vision, 27, 89
employment opportunities, 92
environmental protection, 43, 89
Gender and Climate Change Strategy 2013 (Cambodia), 93
gender-disaggregated data, 89, 92, 99
Gender Equality Act 2015 (Thailand), 92
gender mainstreaming, 89, 93, 100
gender responsive approach in AHRD, 72, 76
increasing women’s representation, 99
Plan for Gender-Responsive Development 1995-2025 (Philippines), 92
quotas, 100
and right to a healthy environment, 86, 131
Sustainable Development Goal 5, 26(f), 91
in Viet Nam law, 59
women and girls as agents of change, 28, 29, 37, 86, 91, 94
genetic resources, 69–71, 75
Global Alliance of NHRIs, 119, 134
good practices, 19–20, 29, 56, 59, 96, 131
governance, environmental, 16, 18, 19, 23(f)
green courts, 43, 119, 130, 133, 136
greenhouse gas emissions, 46, 68, 73–74, 94

H
hard law, 113, 114
hazardous waste, 36, 74, 90, 130
haze, transboundary, 38, 70, 77, 79, 113, 114, 118
health, human, 24, 28, 37, 38, 40, 46, 48, 90
health, public, 22, 42, 45
healthcare systems, 24, 74
human rights
anti-SLAPP, 119
and ASEAN countries, 16, 69, 72
environmental protection links, 19, 22, 49, 77, 110, 117
Framework Principles on Human Rights and the Environment, 24
Human Rights Commission of Malaysia, 57
mainstreaming of, 14
National Human Rights Commission of Indonesia, 57
National Human Rights Commission of Thailand, 57
obligations to, 18, 25(f)
principles, 21–22
regional mechanisms for, 75–78
South East Asia National Human Rights Institution Forum, 57
violations, 61, 78, 80, 135, 136
implementation
  challenges of, 26, 68, 114
  of court decisions, 110
  gender-responsive, 89, 91–93, 97
  of international agreements, 74
  of MEA commitments, 137
  of policies, 132
  recommendations for, 78
independent experts vs representatives, 120, 121, 135
indigenous and local communities
  genetic resources, 70–71
  informed consent, 43, 75
  land tenure, 15
  need for ASEAN agreement on, 134
  rights, 48, 56, 58
  as victims of environmental violations, 38, 61
Indonesia
  air quality and transboundary haze, 44, 45, 79
  biomass burning, 94
  capture fisheries, 22
  climate change, 46
  constitution, 38
  Court of Information, 114
  environmental impact assessment laws, 60
  environmental rule of law, 57(t)
  freedom of information acts, 114
  gender-empowerment provisions in environmental laws, 92
  human rights defenders’ safety, 99, 122
  human rights treaties, 25(t)
  Law No. 32/2009 on Environmental Protection and Management, 99
  Law No. 39/1999, 92
  Law on Environmental Protection, 38
  NBSAP submission, 48
  oil palm plantations, 38
  ratification of AACNNR, 49
  recognition of right to a healthy environment, 27(t), 38, 131
  Supreme Court of, 132
  women in media, 97
inequality, 14, 16, 26(t), 29
information, access to
  Aarhus Convention compared to ASEAN instruments, 112–15
  in ASEAN instruments, 16, 75–77, 110
  ASEAN Judiciaries Portal, 61
  in Cambodia, 42
  electronic access to government agencies, 61
  electronic in Viet Nam, 15, 56
  national recommendations for, 133
  need for ASEAN regional agreement on, 121–22, 134
  as procedural element, 15, 18, 56, 58–59, 63
  steps for ASEAN to take on, 123
  women’s participation in, 96
information, environmental
  defined in Aarhus Convention, 112–13
  exchange processes, 75, 99
  government obligations to share, 70
lacking ASEAN definitions of, 114
recommendation for in ASEAN agreement, 135
requests by citizens, 61, 99, 114–15, 118
in right to a healthy environment, 58–59
women and, 96, 97, 99
informed consent, 43, 71, 75–76
Intended Nationally Determined Contributions, 46, 132
intergenerational equity, 43, 69. See also future generations
intergenerational responsibility, 62, 119, 132
internet, 59, 61, 99

J
judicial recognition and interpretation, 43–44, 68
justice, access to
in Aarhus Convention, 118
in AATHP, 70
in Agreement on Access to Biological and Genetic Resources, 76
in ASEAN regional instruments, 110, 118–20
national instruments for, 119–20
national recommendations for, 133, 136
need for regional ASEAN agreement on, 121–22, 134
as procedural element, 18, 56, 61–62, 63
varying in ASEAN Member States, 78
for women, 97–99
justice, environmental, 62, 133
justice, generational, 28. See also future generations; intergenerational equity
justice, social, 20, 76

K
Klity Creek lead contamination, 40
Kyiv Protocol on Strategic Environmental Assessment, 16, 110

L
land
clearing, 38, 75
degradation, 68, 74
distribution, 23
Land Traffic Act (Thailand), 40
land-use plans, 58, 93
Land Use Policy 2016 (Myanmar), 93
rights, 62
tenure, 15, 56
Lao PDR
access to information, 59
air quality standards, 45
biomass burning, 94
constitution, 43, 57(t)
environmental impact assessment laws, 60
Environmental Protection Law, 45, 57(t)
environmental rule of law, 57(t)
human rights treaties, 25(t)
NBSAP submission, 48
non-discrimination, 91
ratification of AACNNR, 49
recognition of right to a healthy environment, 27(t), 38, 43, 131
rural women and forest products, 95
legal empowerment of local actors, 61–62, 76, 98
locus standi, 97, 98

M
Mae Moh Power Plant, 40
mainstreaming human rights in sustainability, 18, 26, 27, 29
mainstreaming sustainability in human rights, 18, 26, 29
Malaysia
access to civil litigation, 98
air quality legislation, 45
climate change legislation, 46
constitution, 40, 98
court interpretation of right to a healthy environment, 41, 132
environmental impact assessment laws in, 60
Environmental Quality Act 1974, 45
Environmental Quality (Clean Air) Regulation 2014, 45
human rights treaties, 25(t)
NBSAP submission, 48
ratification of AACNNR, 49
recognition of right to a healthy environment, 27(t), 38, 40–41, 131
transboundary haze and, 77, 79
vulnerability to climate change, 46
women in media, 96, 133
Manila Bay, 43–44
marine areas, biodiversity-rich, 15, 56, 72
methodology, report, 19–20
mining, 23(f), 37, 40, 59, 115, 122
monitoring environmental impacts, 56, 70, 89, 137
multilateral environmental agreements, 16, 19, 26, 130, 132, 135–37
Myanmar
access to information, 59
air quality standards, 45
biodiversity protection, 48
biomass burning, 94
climatic change, 46, 47
constitution 2008, 43, 57(t)
Environmental Conservation Law 2012, 43, 45, 57(t)
environmental human rights defenders, 122
environmental impact assessment laws, 60, 97
environmental legislation and women, 92–93
human rights treaties, 25(t)
Ministry of Environment, 43
Ministry of Environmental Conservation and Forestry, 60
National Environmental Policy, 93
National Human Rights Commission, 57
NBSAP submission, 48
non-discrimination in constitution, 91
ratification of AACNNR, 49
recognition of right to a healthy environment, 27(t), 38, 43, 131
transboundary haze, 77

N
national human rights institutions, 15, 56, 57, 119, 130, 134, 137
national legal systems, 56, 119, 122–23, 133–34
national level action, 130–34
Nationally Determined Contributions, 46
nature’s contributions to people, 19, 23–24, 23(f), 48, 94, 131
negligence, 43–44
non-binding declarations, 18, 74
non-compliance, 70, 75, 78, 120
non-discrimination, principle of, 91–92, 113
non-governmental organisations, 70, 113, 114, 120, 137
non-interference, 78, 119, 122
non-toxic environments, 15, 18, 44, 74, 131, 137

O
obligations of states to human rights
ASEAN Member States, 18–19, 24, 26, 68, 77–78, 80, 112, 130
biodiversity and, 48
court decisions on, 43
monitoring compliance of, 122
recommendations, 134
OECD Guidelines for Multinational Enterprises, 80, 135, 136
oil palm plantations, 38, 114, 132
Oposa v Factoran, 37, 62

P
pandemic, 14, 21–22, 37, 138
parens patriae, 39
Paris Principles, 119, 134
peer-to-peer learning, 18, 136
people-oriented programmes, 73, 88
Philippines
access to justice, 99
agrarian land reform, 15, 56, 62
air quality of, 44–45
capture fisheries in, 22
climate change, 46, 47, 96
Commission on Human Rights, 57
constitution, 38–39, 44, 57(t), 62, 92
Constitutional Court, 132
court decisions, 15, 36
Department of Environment and Natural Resources, 62
environmental human rights defenders, 122
environmental impact assessment laws in, 60
environmental rule of law, 57(t)
freedom of information acts, 114
green courts, 43–44
information request responses in, 115
Local Government Code, 58
NBSAP submission, 48
Oposa v Factoran, 62
public interest litigation in, 98
ratification of AACNNR, 49
recognition of right to a healthy environment, 25(t), 27(t), 38, 131
Supreme Court of the, 39, 43, 119
women’s rights, 92
Phnom Penh Statement, 78
pollution
air, 44, 94, 130
coastal, 22, 23, 130
effects from in court, 98
plastic, 20, 23, 130
point and non-point source, 42
Pollution Control Act (Singapore), 41, 131
Prevention of Pollution of the Sea Order 2005 (Brunei Darussalam), 41
river, 68
soil, 68, 90
solid waste management, 94
toxic waste, 28
water, 90
poverty, 24, 72, 88, 91
power, 29, 63
precautionary action, 42, 119, 136
procedural elements of right to a healthy environment
in ASEAN regional instruments, 56–63, 75–77
introduction, 15, 16, 18
in the Philippines, 44
prevention of harmful activities through, 115
recommendation for ASEAN instrument, 122–23, 135
public participation, right to
in ASEAN instruments, 16, 75–77, 110, 118, 123
in Constitution of Cambodia, 42
in environmental impact assessment process, 59–60
in environmental protection in Cambodia, 42
as principle of Aarhus Convention, 115, 120
as procedural element, 15, 18, 22, 56, 58–59, 63
procedures for projects, 118
recommendations, 121–22, 130, 134, 136
R
recommendations
for ASEAN action, 133
on MEA commitments, 137
for national action, 133–34
for regional action agreements, 134–35
for regional capacity building and public engagement, 136
for regional institutional arrangements, 135
for regional judicial mechanisms, 120
for regional strategies for MEAs, 136–37
regional instruments, ASEAN, 26–27, 69–78, 110, 130, 135
remediation for environmental damage, 18, 40, 56, 78, 97
remedies, access to effective
in Agreement on Conservation of Nature and Natural Resources, 69
in Agreement to Access to Biological and Genetic Resources, 75
in ASEAN Human Rights Declaration, 76
in Cambodia, 42
as procedural element, 56, 61–63
for women, 97–99
review mechanisms
in Aarhus Convention, 115, 119, 120–22
needed in ASEAN agreement, 16, 68, 80, 110, 135
right of access to information. See information, access to
rights-holders
definitions of, 113
inclusion in decision-making processes, 59
judicial recognition of, 132
platforms for information, 58, 136
protection for in AATHP, 70, 75
working with women and girls, 133–34
rights of future generations. See future generations
rights of indigenous peoples. See indigenous and local communities
rights of women. See women’s rights
right to a healthy environment
   development of, 19, 56–57, 110
   functions of, 18
   introduction, 14
   recognition of, 27(t), 36
   recommendations, 16, 133–34, 138
   role of ASEAN in, 68–80
   terms for, 38
   women and gender, 29, 86–99
right to clean air. See air, clean
right to development, 57
right to forest tenure, 23
Rio Declaration, Principle 10, 110
rule of law, environmental, 56–58, 61, 63
S
sanitation. See water, clean and sanitation
Singapore
   air quality, 44
   Human Development Index (HDI), 26
   human rights treaties, 25(t)
   Ministry of Environment, 41
   Nagoya Protocol, 76
   NBSAP submission, 48
   ratification of AACNNR, 49
   recognition of right to healthy environment, 27(t), 38, 41, 131
   transboundary haze and, 77, 79
   social-ecological crises, 14, 18, 19, 20, 68, 130, 138
social media, 58, 59
soft law, 77, 113
soil, 15, 38, 68, 90
stakeholders, 60, 61, 70
state actors, 16, 68
Stockholm Declaration, 22
strategic environmental assessments, 116, 118
Sub-Decree on the Control of Air Pollution and Noise Disturbance 2000 (Cambodia), 45
Sub-Decree on Water Pollution Control 1999 (Cambodia), 46
substantive elements of right to a healthy environment
   in ASEAN regional instruments, 69–75
   in detail, 44–49
   interconnected with procedural elements, 39
   introduction, 14–15, 16, 18
   recommendations, 131, 135
substantive rights. See substantive elements of right to healthy environment
sustainability science, 20, 73
sustainable development, 14, 42, 71, 72–73, 75, 77, 117
Sustainable Development Goals, 26(f), 27, 29
Tan Teck Seng v Suruhanjaya Perkhidmatan Pendidikan & Another, 41, 132

Thailand

Administrative Court, 39, 40
air pollution, 38, 44
climate change, 46, 47
constitution, 39–40, 45, 47, 57, 57(t)
court decisions, 15, 36, 39
Division of Environmental Investigation, 39
Enhancement and Conservation of the National Environmental Quality Act 2018, 39
environmental human rights defenders, 122
environmental impact assessment laws, 60
environmental rule of law, 57(t)
freedom of information, 114, 115
freedom-of-speech provisions, 63
human rights, 25(t), 57
Minerals Act, 57, 59
Nagoya Protocol, 76
NBSAP submission, 48
non-discrimination, 91
ratification of AACNNR, 49
recognition of right to a healthy environment, 27(t), 38, 131
transboundary haze, 77, 79
traditional knowledge holders, 75, 96
transboundary environmental impacts, 74, 116, 137, 138
transboundary haze, 38, 70, 77, 80
transformative change, 18, 29, 133, 138
transparency, 61, 120–21, 135

UN
UN Conference on Environment and Development 1992 (Rio de Janeiro), 41
UN Conference on Sustainable Development 2015 (Rio+20), 112
UN Framework Convention on Climate Change, 46, 132, 137
UN General Assembly, 22, 44, 119, 134, 137, 138
UN Guiding Principles on Business and Human Rights, 80, 135, 136
UN Human Rights Council, 18, 22
universal periodic reviews, 16, 137
unpaid work of women, 28, 96
UN Special Rapporteurs, 18, 21–22, 36, 45, 135, 138

Viet Nam
vehicle emissions, 44, 45
air quality, 44–45
biodiversity conservation, 48, 131
climate change, 46, 47
constitution, 40, 48, 57(t), 61
electronic access to information in, 15, 56
environmental impact assessment laws, 60
environmental litigation, 98
environmental rule of law, 57(t)
freedom-of-speech provisions, 63
gender-empowerment in environmental laws, 92
human rights treaties, 25(t)
Law on Access to Information 2018, 58
Law on Environmental Protection, 47, 61
Law on Environmental Protection 2014, 40, 57(t), 92, 98
Law on Gender Equality 2006, 59, 92
Law on Water Resources 2012, 46
Ministry of Natural Resources and the Environment, 58
NBSAP submission, 48
ratification of AACNNR, 49
right of access to information, 58
right to a healthy environment, 27(t), 38, 131
Supreme People's Court of, 61
transboundary haze and, 79
water quality legislation, 46
women in, 95–97, 133

Vinh Tan 1 Thermal Power Plant, 58

violations of environmental law, 61, 75, 118, 119

vulnerable groups
barriers to justice for, 112
inclusion of for environmental goals, 91, 100
need for ASEAN agreement for, 134
in Oposa v. Factoran case, 62
power dynamics and, 29
rights, 28, 88
right to healthy environment, 16, 22, 24, 47

W

water, clean and sanitation
in ASEAN Human Rights Declaration, 88
resources, 37, 68, 90
Sub-Decree on Water Pollution Control 1999 (Cambodia), 46
as a substantive element, 14–15, 18, 23(f), 36, 45–46, 73–74, 131
as Sustainable Development Goal 6, 26(f), 89, 90
Water Pollution Control and Drainage Act (Singapore), 41, 131
well-being, 15, 19, 23(f), 26, 71, 138

women
access to land and forests, 23, 93
as agents of change, 28, 29, 37, 86, 91, 94, 133
ASEAN Women Entrepreneurs Network, 117
ASEAN Women's Partnership for Environmental Sustainability, 89
climate change impacts, 37, 47, 99
in leadership roles, 96, 130
National Strategic Plan for the Advancement of Women 2013-2022 (Myanmar), 92–93
in Paris Agreement, 87
participation of, 15, 59–60, 89, 92, 93, 96–97, 133
water resources and, 90, 95

women, rights of
Aarhus Convention, 115
in ASEAN instruments, 73, 74, 76, 110, 134
leadership in government, 59
legal provisions for, 15
links to a healthy environment, 87
national laws and policies, 100
in rural areas, 24

women's contributions and roles
challenges and opportunities to, 99
environmental conservation and management, 94–96
food security, 131
in nature's contributions to people, 23, 86, 89, 91, 100