

## Editorial

### Governance and development in the Asia Pacific region

#### 1 *APJEL* IN THE ASIA PACIFIC REGION

This is the second issue of *APJEL* for 2018, and features a range of articles covering issues of development and environmental law and governance in China, Fiji, India, Indonesia, Solomon Islands and Thailand. The number and breadth of Asian Pacific jurisdictions that have attracted the attention of articles in *APJEL* over the past two years evidences the extensive scholarly interest in environmental law and policy in the region. Our 2017 issues included articles on aspects of environmental law in Australia, China, India, Japan and South Korea as well as on general issues affecting environmental governance in the Asia Pacific region. Recent issues of *APJEL* continue the journal's rich tradition of high quality research on a broad range of environmental law issues across the Asia Pacific, which befits a region of its diversity and global significance and which allows lessons to be drawn from comparisons and contrasts of countries facing similar realities, constraints and opportunities. At the same time, it is through in-depth analysis of particular environmental law developments in specific jurisdictions that true comparative understanding can be developed and enriched, and the articles in the present issue illustrate ways in which environmental protection can be enhanced by considering quite particular problems.

#### 2 THE ARTICLES IN THIS ISSUE

The opening article, by Emily Long, concerns marine protected areas in Fiji and provides a critical assessment of 'Community Fisheries Management and Development Plans' as a mechanism for formalizing customary marine protected areas. The second contribution, by Carol Warren and Agung Wardana, concerns environmental impact assessment and overdevelopment in Bali. The third article, by Wanida Phromlah, considers how public participation can be enhanced within the environmental impact assessment system in Thailand. The fourth article, by Stephanie Price, considers opportunities and challenges for conservation presented by a World Heritage Site in Solomon Islands, and the site's relationship with protected areas-related legislation. The fifth article, by Fan Yang, Ting Zhang and Hao Zhang, concerns the adjudication of environmental tort-based cases in China. The sixth and final article, by Nupur Chowdhury and Nidhi Srivastava, considers the jurisdiction and jurisprudence of the National Green Tribunal in India.

Evidence is strong, worldwide, that establishing marine protected areas is a sound method of protecting environments and engaging in successful conservation. However, the simple establishment of such areas is not sufficient—effective enforcement is needed, with this underpinned by carefully crafted legislation.

Emily Long explains that Fiji is in the process of reforming its marine law, and argues that this presents an opportunity for the country to develop statutory

mechanisms for establishing and regulating marine protected areas (MPAs). Her article focuses on MPAs within Fiji's coastal waters—an area where particular challenges are posed for regulators by the intersection of statutory and customary law. 'Customary MPAs' already do exist within Fiji's coastal environments, these taking the form of *tabu* areas and 'Locally Managed Marine Areas' (LMMAs) with both of these being important mechanisms which, she argues, should be incorporated into, and strengthened by, any new statutory framework. A draft Inshore Fisheries Decree (draft Inshore Decree) was prepared in 2010 and this may yet progress, although at present the process appears to have stalled. Alternatively, Long argues, some of the measures within it could be incorporated into another law. Her article assesses a mechanism included in the draft Inshore Decree that could be used to formalize customary MPAs—Community Fisheries Management and Development Plans (CFMDPs). Her finding is that CFMDPs demonstrate a number of strengths, in particular by supporting legal recognition of existing marine management measures—but that there are also weaknesses within CFMDPs. Finally, she suggests refinements to CFMDPs that could improve their usefulness as tools for regulating Fiji's coastal MPAs.

Environmental impact assessment (EIA) has long been regarded as the best means yet discovered to reconcile clashes between economic, environmental and social considerations when developments are proposed. The EIA process is by no means perfect, however, and is susceptible to manipulation by strong vested interests.

Carol Warren and Agung Wardana examine the serious environmental crises which Bali currently faces, especially those which arise from overdevelopment of the tourism and real estate industries—including water shortages, rapid conversions of agricultural land, pollution and displacement (both economic and cultural). Their article traces both continuities and discontinuities in the role of Indonesian environmental impact assessment during and since the authoritarian 'New Order' period. They explain that, following the fall of the Suharto regime in 1998, the 'Reform Era' brought dramatic changes, with Indonesia's governing institutions being both democratized and decentralized. Through a focus on case studies of resort development projects in Bali from the 1990s to the present, the article examines the issue of ongoing capture of legal processes by vested interests at the expense of prospects for sustainable development. Two particularly controversial projects in Benoa Bay arguably enable instructive comparison, being proposed in the different historical and structural settings of the two eras—these projects being the Bali Turtle Island Development at Serangan Island in the Suharto era; and the Tirta Wahana Bali Internasional proposal for the other side of Benoa in the 'Reform Era'. The authors argue, in conclusion, that despite significant changes to the environmental law regime the EIA process may still be used by powerful interests as a tool to maintain control of decision-making and to sideline popular opposition forces.

If the EIA process is to be successful, one of the most important safeguards within it is that provisions for public participation be meaningful and effective.

Wanida Phromlah's article considers environmental impact assessment in another country in the Asia Pacific region. She explains that in Thailand, proposed development projects require that an EIA be completed as part of the approval process. After explaining why effective public participation in the process of developing an EIA helps to ensure fairness and equity for the EIA system, enabling stakeholders to share information and exchange views concerning the complex issues and likely impacts of the proposed development project, she identifies legislation that aims to enable public participation for EIA processes within Thailand. However, she argues that

implementation of public participation provisions is not currently optimal. Her article explores how the law concerning public participation might be improved to enable better implementation of the EIA system in Thailand; proposing improvements to methods for employing effective public participation to support the implementation of EIAs.

The inscription of a World Heritage Site (WHS) is almost always seen as a great distinction for a country to achieve and may carry many positive conservation outcomes. However, inscription does not always have this result and the 1998 inscription of the southern third of Rennell Island in the Solomons (East Rennell) as a WHS provides an example of this. Only five years after inscription, the site was placed on the List of World Heritage in Danger.

Stephanie Price explains that the inscription of East Rennell in Solomon Islands on the World Heritage List was a landmark in the implementation of the World Heritage Convention; but that the site is threatened by resource development, invasive species, climate change and the over-harvesting of certain animals. Her article examines the scope for the Protected Areas Act of 2010 to be used to safeguard the site, and the challenges that may be encountered if the Act is implemented there. She explains that the Act provides direct protection against some (but not all) of the threats to East Rennell. Furthermore, she argues, the approach to conservation facilitated by the Act is appropriate for Solomon Islands, where most land is under customary tenure, many people rely on natural resources to support their subsistence lifestyles and the government's capacity to enforce legislation is limited. The article argues that the relationship between legislation and custom must be considered when designing the landowner consent process, the preparation of the site's management plan, and the selection of its management committee. Additionally, she concludes, the protected area should aim to improve the livelihoods of the East Rennellese, as well as safeguarding the WHS's heritage values.

In recent years, China has probably done more to lift its population out of poverty than any other government has ever managed to do so rapidly, and has achieved this largely through rapid development of its manufacturing industries. Unfortunately, the inevitable concomitant of a system geared toward rapid economic development has been widespread environmental degradation. Fortunately, increased attention is now being brought to bear on ways to improve environmental protection—including in the legal sphere. Part of this new focus is an apparent awareness that environmental protection can be improved significantly by giving 'victim-plaintiffs' increased powers to bring legal cases and increased assistance to them within the legal process.

Fan Yang, Ting Zhang and Hao Zhang write, in their article in this issue, that developing countries and countries with economies in transition have varying experiences in enforcing their national environmental law. They explain that China's judicial interpretations of, and legislation on, environmental protection have established the rules that shift the burden of proof for causation within environmental tort litigation. However, they explain that their study of 513 court decisions from the people's courts at different levels in China shows that, although the court decisions usually refer to or quote the rules that shift the burden of proof, in most cases victim-plaintiffs still bear the liability of proving that a causal relationship exists between the pollution and the harm. The article suggests also that Chinese courts defer significantly to the results of evaluation reports when considering whether causation has been proved or not. The article makes the finding that the court practice in adjudicating environmental tort cases in China tends to place more value on the factual causation of a pollution incident than on provisions stipulated by relevant laws regarding proof of causation. The contribution concludes that such judicial practices hinder the effectiveness of judicial remedies for pollution victims in China, and that further improvement of the system is needed.

An initiative often mooted as having the potential to improve environmental protection through legal systems is the introduction of dedicated environmental courts and tribunals. Much has been written on examples of apparent success, in countries such as Australia and the Philippines which have introduced or designated environmental courts with significant powers, but there remain concerns—and often countries which introduce either environmental courts or tribunals will find themselves wrestling with difficult constitutional questions concerning separations of powers and overlaps of jurisdiction.

Nupur Chowdhury and Nidhi Srivastava ask whether dedicated environmental tribunals can ever ‘deliver justice’. In considering this question, their article attempts to contextualize the introduction of the tribunal system of adjudication in India. Some of the tribunals India has introduced have, they argue, been able to evolve into mechanisms that have overcome their ‘birth infirmities’. The Supreme Court, they explain, has intervened and supported strengthening of these tribunals and their evolution into entities more independent of the executive than they previously were. Their article explores these questions through a case study of the National Green Tribunal (the NGT)—focusing on the subject of jurisdiction. The NGT is the newest of the tribunals that have been established since the constitutional amendment was passed allowing for them; and its jurisdiction, although statutorily limited, has evolved in the light of the Supreme Court’s jurisprudence on the powers of tribunals. Further, the authors explain, the nature of environmental disputes are such that the NGT has had expansively to interpret both procedural mechanisms, such as limitation periods for allowing more disputes to be brought to the bench, and by entering into substantive areas such as climate change.

### 3 COMMENT

*APJEL* continues to reflect exciting developments in environmental law in the Asia Pacific region and the nine articles published in the two issues of Volume 21 (2018) do, we hope, meet our goal of reflecting the breadth of environmental law developments in the region. Our next issue—the first of 2019—will have a thematic focus on lessons which can be learned from considering differences between ‘North’ and ‘South’ and, as always, we look forward to submissions which contribute toward understanding both regional dynamics and particular country experiences.

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