Editorial

Carbon emissions trading, compensation for soil pollution, legal rights for rivers, protection of biodiversity in forests, Islamic environmental law

1 *APJEL* IN THE ASIA-PACIFIC REGION

This second issue of *APJEL* in the 2020 volume features articles on environmental issues relevant to particular Asia states and to the Asia-Pacific region generally. The five articles in this issue – bringing the total in the 2020 volume to eight – follow the thirteen in the 2019 volume, which concerned Australia, Australia and China, Bangladesh, Bangladesh and China, Indonesia, the Maldives, New Zealand, Papua New Guinea, the South China Sea region, and Thailand as well as a jurisprudential article relevant to the region. The first issue in the 2020 volume contained an article on anthropogenic noise levels and how these affect cetaceans; an article on environmental governance in the public interest in China; and an article on biopiracy in South-East Asia.

It is clear that there is increasing scholarly interest in environmental law and policy in the Asian Pacific region. Our 2018 volume included articles on Australia, China, Fiji, India, Indonesia, Japan, Solomon Islands, and Thailand. Before that, our 2017 volume included articles on aspects of environmental law in Australia, China, India, Japan, and Rep. of Korea as well as on general issues affecting environmental governance in the Asia-Pacific region.

Our firm beliefs are that *APJEL* is making a strong contribution toward advanced scholarship in the region; and that there is growing interest in publishing in this region.

We welcome both submissions of general environmental relevance and submissions on specific, focused issues, as long as both are of relevance to Asian Pacific scholarship. *APJEL*'s goal remains to publish analytical research on a broad range of environmental law issues across the Asia Pacific. The real core of quality scholarship is to be found in deep analysis of specific environmental law developments in specific jurisdictions, and the articles we seek to publish will always demonstrate this.

2 OUR FUTURE PLANS

APJEL continues to publish rigorous scholarship in environmental law in the Asia-Pacific region and the five articles in the second issue of the 2020 volume will, we believe, make a valuable contribution toward research and enhanced understanding. We invite further contributions toward future volumes – in 2021 and for many future years.

2.1 Themes for 2021: Ramsar's 50th birthday

On 2 February 1971, the *Convention on Wetlands of International Importance, especially as Waterfowl Habitat*¹ was adopted in Ramsar, Iran. The 2 February 2021 will therefore mark the 50th 'birthday' of one of the world's most significant environmental instruments of global scope.² The Convention has been described as 'the only global treaty to focus on a single ecosystem'.³

Oceania has 83 Ramsar sites which is a fairly large number, but since 66 of these are in Australia the region as a whole seems underrepresented.⁴ Sadly, as a region, Asia in particular seems to be badly underrepresented in respect of Ramsar sites, with only 363 listed in 34 countries⁵ – of 2,409 Ramsar sites worldwide.⁶ The 50th birthday of the treaty would seem an appropriate occasion both to take stock of its achievements and to consider its weaknesses – including possible reasons why Asian states have not embraced it as wholeheartedly as they might have done.

We will therefore be inviting the submission of scholarly contributions on this theme for both issues of our 2021 volume.

2.2 Themes for 2021: the Aichi Biodiversity Targets at Ten

In 2002 the Parties to the Convention on Biological Diversity, 1992⁷ adopted a Strategic Plan which would achieve, by 2010, 'a significant reduction in the current rate of biodiversity loss at the global, regional, and national level as a contribution to poverty alleviation and to the benefit of all life on Earth'.⁸

Unfortunately, however, in 2010 it was concluded that neither this target, nor any of its accompanying sub-targets, had been met; and that, instead, all components of biodiversity are continuing to decline, and the principal drivers of biodiversity loss

1. Convention on Wetlands of International Importance especially as Waterfowl Habitat. Ramsar (Iran), 2 February 1971, UNTS 14583 (entered into force 21 December 1975).

2. See, generally, www.ramsar.org.

3. Ramsar.org, 'The Ramsar Convention: What's it all about?' The Ramsar Convention Secretariat (2015) available at <www.ramsar.org/sites/default/files/fs_6-ramsar_convention.pdf> accessed 27 September 2020.

4. Australia: 66; Fiji: 2; Kiribati: 1; Marshall Islands: 2; New Zealand: 7; Palau: 1; Papua New Guinea: 2; Samoa: 2. Ramsar.org, 'Country Profiles' available at <www.ramsar.org/country-profiles>; <https://rsis.ramsar.org/ris-search/?f%5B0%5D=regionCountry_en_ss%3AAsia&f%5B1%5D=regionCountry_en_ss%3AOceania> accessed 19 October 2020.

5. Bahrain: 2; Bangladesh: 2; Bhutan: 3; Cambodia: 5; China PR: 64; DPR Korea: 2; India: 39; Indonesia: 7; Iran: 25; Iraq: 4; Japan: 52; Jordan: 2; Kazakhstan: 10; Kuwait: 1; Kyrgyzstan: 3; Lao PDR: 2; Lebanon: 4; Malaysia: 7; Mongolia: 11; Myanmar: 6; Nepal: 10; Oman: 2; Pakistan: 19; Philippines: 7; Rep. of Korea: 23; Sri Lanka: 6; Syrian Arab Republic: 1; Tajikistan: 5; Thailand: 15; Turkmenistan: 1; United Arab Emirates: 10; Uzbekistan: 3; Viet Nam: 9; Yemen: 1. Ramsar.org, 'Country Profiles' available at <www.ramsar.org/country-profiles>; <https://rsis.ramsar.org/ris-search/?f%5B0%5D=regionCountry_en_ss%3AAsia> accessed 19 October 2020.

6. Ramsar.org, homepage, <www.ramsar.org> accessed 27 September 2020.

7. Convention on Biological Diversity, 5 June 1992, 1760 UNTS 142 (entered into force 29 December 1993).

8. CBD, 'Strategic Plan 2002–2010' available at <www.cbd.int/sp/2010/> accessed 27 September 2020.

(climate change, habitat change, invasive alien species, overexploitation, and pollution) have remained constant or increased in intensity.⁹

The Strategic Plan having failed, the obvious solution was to adopt a new strategic plan – and in 2010 this took the form of the Strategic Plan 2011–2020 intended to ensure that by 2020 ‘ecosystems are resilient and continue to provide essential services, thereby securing the planet’s variety of life, and contributing to human well-being, and poverty eradication’.¹⁰ The Plan identifies five strategic goals and 20 targets (known as the Aichi Biodiversity Targets) which it was hoped would be achieved by 2020.¹¹

While a retrospective consideration of the successes and failures of the Strategic Plan 2011–2020 and the Aichi Biodiversity Targets will still need to be undertaken, at present it seems likely that the results will largely be disappointing. Lessons can always be learned, however, and the end of the ten-year Plan presents an opportunity for introspection – and for scholarly research.

We will therefore welcome the submission of scholarly contributions on this theme for both issues of our 2021 volume.

3 THE ARTICLES IN THIS ISSUE

3.1 China and carbon emission trading

As the manuscript for this issue was being concluded, China’s President Xi Jinping delivered a speech to a (virtual) meeting of the United Nations General Assembly and said that China’s ‘aim [is] to have CO² emissions peak before 2030 and [to] achieve carbon neutrality before 2060’.¹² This highly significant committal to a long-term aim has the potential to be a ‘game changer’ in understanding what efforts can be made to combat dangerous anthropogenic climate change.

The first article in this issue,¹³ by **Mingde Cao**, deals with the operation of China’s carbon emission trading system (ETS) to date. It is explained that China officially launched seven state pilot ETS programs starting in 2013 and initiated a national ETS in 2017 respectively. The experience of these pilot programs provides much-needed data on the importance of setting realistic targets balancing the needs for carbon reductions with those of economic growth and pollution control and the need for legislation specifying the actions to be taken, provisions for disclosure, allowance allocations, offsets, infrastructure building, monitoring reporting and verification, and adoption of a compliance mechanism.

The article evaluates deficiencies in the pilot programs, such as those derived from lack of a national legal basis and unified rules for the carbon market, an excess of free

9. See, generally, CBD, Global Biodiversity Outlook 3 (2010) available at <www.cbd.int/doc/publications/gbo/gbo3-final-en.pdf> accessed 17 September 2020.

10. CBD, ‘Strategic Plan for Biodiversity 2011–2020, including Aichi Biodiversity Targets’ (2010) available at <www.cbd.int/sp/> accessed 27 September 2020.

11. CBD, ‘Aichi Biodiversity Targets’ (2010) available at <www.cbd.int/sp/targets/> accessed 27 September 2020.

12. Matt McGrath, *BBC News* (22 September 2020) available at <www.bbc.com/news/science-environment-54256826> accessed on 27 September 2020.

13. ‘A case study on China’s carbon emission trading system: experiences and recommendations’.

allocation of allowances, a lack of liquidity within the market, lenient punishment for non-compliance, and absence of a sound monitoring and regulatory mechanism. Various recommendations are the made.

3.2 China's new Soil Pollution Law

In China, soil pollution is a significant environmental problem.¹⁴ It has been recorded that the problem stems from agricultural activities, including fertilizer and animal manure use and disposal; industrial activities; metal mining and smelting; power generation; transportation; waste disposal activities; and urbanization.¹⁵

In the second article,¹⁶ **Mengxing Lu** and **Michael Faure** explain that deteriorating soil quality has become an urgent environmental issue on China's policy agenda. The authors then identify that enactment of the first national law for addressing soil pollution in 2018 has been regarded as a major legislative and regulatory development of China's environmental law, since it arguably fills a legal void on soil protection. However, they note that to date China's Soil Pollution Law has received relatively little attention. The article presents, from legal and theoretical perspectives, an analysis of the liability regime for soil pollution created by this newly adopted law.

The article suggests that two historical shifts have been achieved through the law: first, it represents an important change in adopting an integrated regulatory framework for combatting soil contamination instead of a scattering of provisions and rules; and, second, it represents a significant shift towards an administrative liability regime, distinct from the environmental liability regimes for other types of environmental damage. It is argued also in the article that several unsettled issues within this liability regime may pose challenges to improving soil quality.

3.3 Legal rights for rivers – the Turag River in Bangladesh

There is growing interest worldwide – in regions as disparate as Latin America, the sub-continent of Asia, and Oceania, in providing inherent legal rights for natural, living things. Some of these efforts have involved constitutional reform (Ecuador), some statute law (New Zealand), and some court cases (India). Rivers in particular have been the 'recipients' of such rights – with varying statuses where this has happened. In the State of Victoria in Australia, the Yarra River was 'recognised as a living entity' in 2017, although without rights to legal personality as yet;¹⁷ also in 2017,

14. The Economist, 'The most neglected threat to public health in China is toxic soil: And fixing it will be hard and costly' (8 June 2017) available at <www.economist.com/briefing/2017/06/08/the-most-neglected-threat-to-public-health-in-china-is-toxic-soil> accessed 11 October 2020.

15. Yiming Sun, Hong Li, Guanlin Guo, Kirk T Semple and Kevin C Jones, 'Soil contamination in China: Current priorities, defining background levels and standards for heavy metals' (2019) 251(1) *Journal of Environmental Management* 1–7, 2.

16. 'Shifts in compensation for environmental damage: reflections on China's new Soil Pollution Law'.

17. Melbourne Law School, 'Should Rivers Have Legal Rights?' (30 July 2020) available at <<https://law.unimelb.edu.au/news/MLS/should-rivers-have-legal-rights>> accessed 27 September 2020.

the Atrato River was awarded legal rights by the Colombian Constitutional Court;¹⁸ and, again in 2017, the Whanganui River in New Zealand is considered a legal person.¹⁹

In the third article,²⁰ by **Mohammad Sohidul Islam** and **Erin O'Donnell**, it is explained that in 2019 Bangladesh joined the increasing number of countries which have recognized rivers as being living entities with legal rights. The article explores the relationship between executive and judiciary in Bangladesh, and the ongoing role the judiciary has played in water law reform. The article considers a recent judgment of the High Court Division of the Supreme Court.²¹ The authors argue that the Court based its decision on a novel reading of the *Bangladesh Constitution*, linking the legal rights of the river to both the doctrine of public trust and the human right to a healthy environment. This foundation is, it is suggested, potentially controversial, and it is explained that the new legal status of the rivers may pit their interests against those of people who rely upon their waters. Through comparisons between the judgement and similar decisions of courts in India and Colombia, the judgment is located in its place in the transnational movement toward granting legal rights to rivers.

3.4 Forest biodiversity in Indonesia

Forests, despite being amongst the most important of all repositories of, and refuges for, biodiversity, are woefully underserved by international law. The world has no dedicated binding international forestry instrument of global scope.²² In absence of such, international and domestic policy-makers must wrestle without international guidance crafting their law and policy responses to conserve forests and at the same time regulate the sustainable use of forests.²³ Without a holistic international binding forestry instrument, the legislative process of providing for the management of forests and the protection of biodiversity necessarily involves pulling together elements from a diverse range of international and regional substantive contexts²⁴ – sadly, most of these do not seem to be proving effective.

In the fourth article,²⁵ by **Laely Nurhidayah** and **Shawkat Alam**, it is explained that forests are a critical component of biodiversity and essential for many ecosystem services; but that there is a rapid and alarming decline of biodiversity worldwide.

18. Nick Mount, 'Can a river have legal rights?' *The Conversation* (7 October 2017) available at <<https://theconversation.com/can-a-river-have-legal-rights-i-visited-the-jungles-of-colombia-to-find-out-84878>> accessed 27 September 2020.

19. Kennedy Warne, 'A voice for nature' *National Geographic* (April 2019) available at <www.nationalgeographic.com/culture/2019/04/maori-river-in-new-zealand-is-a-legal-person/> accessed 27 September 2020.

20. 'Legal rights for the Turag: rivers as living entities in Bangladesh'.

21. *Human Rights and Peace for Bangladesh v Government of Bangladesh and others* [2016] HCD (Writ Petition No. 13989 of 2016, judgment declared on 3 February 2019).

22. Ed Couzens, Alexander Paterson and Sophie Riley, 'Legal Aspects of the Protection of Forest and Marine Biodiversity: Understanding the Context' in Ed Couzens, Alexander Paterson, Sophie Riley and Yanti Fristikawati (eds), *Protecting Forest and Marine Biodiversity: The Role of Law* (Edward Elgar Publishing, 2017) 3–24, at 15–16.

23. *Ibid.*, 17.

24. *Ibid.*

25. 'The forest and its biodiversity: assessing the adequacy of biodiversity protection laws in Indonesia'.

Indonesian biodiversity, in particular, it is explained, is coming under increasing threat of environmental degradation; largely because of criminal activities such as deforestation, forest fires, the illegal wildlife trade, and poaching. Deforestation in Indonesia is occurring mostly because of two factors: forest conversion into oil palm plantation; and wood fiber plantation.

The article considers the adequacy of Indonesia's environmental law in addressing biodiversity loss, concluding that the effectiveness of legislation related to biodiversity conservation is hindered by top-down approaches and the political and economic structural legacies of previous governments which tended to favour economic development. It is argued that Indonesia needs to strengthen its biodiversity-related legislation, and also to address other factors that hinder effective protection of biodiversity.

3.5 Islamic environmental law in Singapore, Malaysia, and Indonesia

It has been suggested by the United Nations Environment Programme (UNEP)²⁶ that 'the world, not just the UN, is waking up to the power of faith-based organizations'.²⁷

In the fifth and final article in this issue,²⁸ by **Shazny Ramlan**, it is suggested that religious codes possess social control effects that can potentially change the behaviour of their adherents towards becoming more pro-environment than they are currently. In the case of Islam, it is explained that Muslim-majority states have since the time of the Prophet Muhammad implemented Islamic environmental laws; but that accounts of this are, in today's legal literature, scant. It is argued that fresh insights which consider the application of Islamic law in modern states is urgently needed.

It is argued further that implementation of Islamic environmental law today can be seen as taking two 'forms': first, implementation through constitutions; and, second, implementation through non-binding religio-legal instruments. Focusing on the second form, application in Singapore, Malaysia, and Indonesia is analysed and evaluated. In these three South-East Asian states non-binding religious rulings (*fatwa*) and mosque sermons (*khutbah*) have been used to implement Islamic environmental law.

4 COMMENT

As always, the editorial team would like to note that we depend heavily on the goodwill of the anonymous reviewers from whose expertise we draw for the review process. While we cannot thank these people in print by name, we would like to acknowledge that their input strengthens considerably the scholarship contained in the articles that we publish, and we are very grateful – we believe that every article

26. Now UN Environment.

27. UNEnvironment.org, 'How Islam can represent a model for environmental stewardship' *UNEP News and Stories* (21 June 2018) available at <www.unenvironment.org/news-and-stories/story/how-islam-can-represent-model-environmental-stewardship> accessed 27 September 2020.

28. 'Implementing Islamic law to protect the environment: insights from Singapore, Malaysia, and Indonesia'.

we publish represents a little appreciated collaborative relationship between authors, anonymous reviewers, editors, and publishers.

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