

## A Comparative Study on Local Criminal Law and the International Principle of Transboundary Liability Towards Human Habitat Sustainability

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**Abstract:** Local criminal law as well as international principle of transboundary liability play important role in human habitat sustainability. The used of the criminal law as well as international principle of transboundary liability in human habitat sustainability is largely in respond to the inevitability of every human to protect human habitat from being polluted in their surrounding habitat. Therefore, this study examines the used of the local criminal law as well as international principle of transboundary liability with relation to the human habitat sustainability from the legal approach by identifying actions and cases which deal with human habitat sustainability. This study is also identifying the relation between the local criminal law as well as international principle of transboundary liability and the human habitat sustainability as a means to achieve sustainable development.

**Key words:** Criminal law, international principle of transboundary liability, Penal Code, human habitat, relation, Malaysia

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### INTRODUCTION

Crime is an act or omission of any act against the public. Party has done the act or omission is to be write to the court by the state through the public prosecutor following the criminal procedure. Criminal conviction, the person will be punished in accordance with the provisions of the criminal law statutes (Hussin, 1988; Koh *et al.*, 1989).

Statute that provides for the substantive law of criminal law in Malaysia is the Penal Code (Act 574). In the Penal Code, it is divided into 23 parts. Only two parts of the Penal Code (under the part XIV and XVII of the Penal Code) having provisions relating to the control of environmental pollution.

Part XIV of the Penal Code relating to criminal offences involving public health, public safety, public convenience, decency and morality. There are 27 sections that subjected to this part XIV of the Penal Code starting from section 268 until section 294 of the Penal Code. Meanwhile, under part XVII of the Penal Code is focusing on criminal offenses against property. Sections involved under part XVII of the Penal Code are section 378 until Section 462.

### THE BURDEN OF PROOF

There is an expression from legal maxim on criminal law that is *actus non fecit reum nisi menssit rea* which means any act committed by an act shall not be convicted unless there is intention of the character of evil intent (Hussin, 1988). Thus, the prosecution must prove to the court two important things, first the existence of the act or omission of acts which are considered under the Penal Code of *actus reus* and the second is the existence of faith-based elements of crimes of *mens rea* (Razman and Syahirah, 2001). When the prosecution can prove the two items mentioned above, the court will pass sentence on the accused accordingly on the basis of provisions in the Penal Code.

The burden of proof is typically referred to prove a fact or facts (Aun, 1987). According to section 101 (a) Evidence Act, 1950 (Act 56) provides that anyone who wants to give the court any decision of any rights or obligations of law, depending on the existence of the facts that had been claim must prove that the facts that exist. While section 101 (2) Evidence Act, 1950 (Act 56) is also provided when a person is bound to prove the existence of the facts, it is intended that the burden of proof is to

the persons who bring in the facts. In the trial relating to criminal law, the prosecution is responsible for bringing the facts or the facts that prove the accused committed the act or omission of acts which are considered under the Penal Code of actus reus and are characterized by the evil intentions of mens rea.

Accordingly, the burden of proof in criminal law relating to environmental pollution control is based on the shoulders of the prosecution. The prosecution must prove two important things that the actus reus and mens rea in addressing issues of environmental pollution. Regarding the actus reus, it is not a problem for the prosecution to prove to the court that the accused had violated the provisions of relevant legislative control of environmental pollution with the facts or the facts show the accused had failed to comply with set standards to prevent pollution environment (Ball and Bell, 1995). As for proof of mens rea is quite controversial and problematic issue. Given under criminal law, the prosecution must prove the accused guilty of environmental pollution with the intention of the nature of evil. In other words, the accused must be aware that the act of polluting the environment is an offense that would endanger the public but most cases of pollution caused by negligence, lack of knowledge, lack of capacity, lack of observation or lack of competence by the accused in an action (Wolf and White, 1995; Webb, 1997).

These conditions clearly complicate the prosecution in cases of environmental pollution under the criminal law. Accordingly, the court had taken a resolution that all prosecutions in cases of environmental pollution under the criminal law, elements of proof of mens rea that is proof against the accused is guilty of environmental pollution with the intention of the evil nature, no longer needed. Given the cases of environmental pollution under the criminal law is now regarded as a liability where the elements of hard evidence mens rea is not necessary. This is clear in the case of *Alphacell vs. Woodward* in 1972, AC 824 where Lord Wilberforce has pointed out that the cases of environmental pollution under the criminal law which assumed strong element of proof mens rea is no longer required.

#### **THE CASE OF WROTHWELL LTD. VS. YORKSHIRE WATER AUTHORITY in 1984 AND HUMAN HABITAT SUSTAINABILITY**

In addition, refer to the case *Wrothwell Ltd., vs. Yorkshire Water Authority* in 1984, Crim LR 43. Facts of the case states that the accused has discharged waste herbicide to the drain. The management company that accused the impression that the waste discharged into the

drains will flow into a public sewage. Instead, the waste is discharged into the drains were flowing into the rivers. Argument of the accused; in the prosecution of criminal law, the prosecution must prove to the court that the two key elements, i.e., the actus reus and mens rea should exist.

The accused asserted that the prosecution could only prove actus reus in view; the accused has discharged waste herbicide to the drain. While the second element of mens rea is as the prosecution failed to prove that the accused company management of the view that the waste is discharged into the drains will flow into a public sewage into the river instead. Therefore, the accused has no intentions of evil nature. Argument the prosecution referred to the decision made by Lord Wilberforce in the case of *Alphacell vs. Woodward* in 1972, AC 824 where he stressed that cases of environmental pollution under the criminal law which assumed strong element of proof mens rea is no longer required. The court decided in favour to the prosecution's arguments, in which the actions made by the accused had caused pollution to the environment even though the accused has no intention to do so.

This case is clearly shown that criminal law as an important tool in protecting human habitat and environment. Based on the above case, the case has highlighted the ability of criminal law to achieve sustainability. The concept of sustainability focus on the development that meets the needs of the present generation without compromising the ability of the future generations to meet their own needs. Therefore, the above-mentioned case has protrait the support with a view to bring an immediate improvement in the living conditions of their populations and to safeguarding those of future generations.

#### **SUSTAINABLE DEVELOPMENT**

The concept of sustainable development has been defined by the World Commission on Environment and Development as development that meets the needs of the present generation without compromising the ability of the future generations to meet their own needs. The above-said concept covers two essential scopes, i.e. environment and social aspects. This concept of sustainable development has been highlighted in the 1992 United Nations Conference on Sustainable Development in Rio de Janeiro, as the results, Agenda 21 and Rio Declaration has been established. According to Sands (1995), Agenda 21 emphasises the following matters which include sustainable human settlement, population, consumption pattern, poverty and human

health (Sulaiman and Razman, 2010; Zainal *et al.*, 2011). On the other hand, Mensah (1996) stated that the Rio Declaration addresses on mankind entitlements and rights which include health and productive life (Sulaiman *et al.*, 2011; Zainal *et al.*, 2011).

Basically, this concept of sustainable development has been an element in the international legal framework since early as 1893. According to the case of United States of America vs. Great Britain in 1893, 1 Moore's Int. Arb. Awards 755, well known as Pacific Fur Seals Arbitration where in this case the United States of America has stated that a right to make sure the appropriate and lawful use of seals and to protect them for the benefit of human beings from meaningless destruction (Razman *et al.*, 2009a; Emrizal and Razman, 2010; Emrizal *et al.*, 2011).

Sands (1995, 2003) indicated that this concept of sustainable development is perhaps the greatest contemporary expression of environmental policy, commanding support and presented as a fundamental at the Rio Summit, Rio Declaration on Environment and Development in year, 1992.

According to Article 33 of the Lome Convention, 1989 states that in the framework of this convention, the protection and the enhancement of the environment and natural resources, the halting of deterioration of land and forests, the restoration of ecological balances, the preservation of natural resources and their rational exploitation are basic objectives that the African-Caribbean-Pacific (ACP) states concerned shall strive to achieve with Community support with a view to bring an immediate improvement in the living conditions of their populations and to safeguarding those of future generations (Razman *et al.*, 2009b; Emrizal and Razman, 2010; Emrizal *et al.*, 2011). The Article 33 introduces into legal framework the concept of sustainable development with one of the approach under the Principle of Transboundary Liability.

### **THE PRINCIPLE OF TRANSBOUNDARY LIABILITY**

Rio Declaration has laid down essential obligations which contribute the growth and the development of the environmental management and environmental law (Razman and Jahi, 2002). One of the essential obligations is on the matter that all states in the world are required to ensure not to cause environmental harm to other states. This obligation has been laid down under the Principle 2 of the Rio Declaration which states that:

States have, in accordance with the Charter of the United Nations and the principles of the international law, the sovereign right to exploit their own resources pursuant to their on environmental and development policies and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction

This obligation is clearly reflect recognition of the principle of transboundary liability (Sands, 1995; Razman and Jahi, 2002). The principle of transboundary liability is derived and based on the legal maxim of *sic utere tuo, et alienum non laedas* which means one should use his own property in such a manner as not to injure of another (Norsulfa, 1997; Razman and Jahi, 2002). This principle of transboundary liability has been adopted in the case of United States vs. Canada in 1941, 3 RIAA 1905, well known as Trail Smelter Case. In this case, the principle of transboundary liability was subsequently relied upon and further explained by the Arbitral Tribunal (Hughes, 1992; Razman and Jahi, 2002).

**The fact of the case:** At a place called Trail situated in Canada which about 10 miles from the border between United States of America and Canada where the Canadian Consolidated Mining and Smelting Company had run activities that concerned about smelting zinc and lead. These activities had caused the emission of fumes. These fumes that contained sulfur dioxide had contributed to the damage to the plantations and land in the territory of the United States of America. In the year 1931, the United States of America-Canada International Joint Commission which was formed under the Boundary Waters Treaty, 1909 had made decision and required Canada to pay United States of America for the amount US\$350,000 as for the compensation. After that, the above-mentioned smelting company continued to run the operations and activities as usual. United States of America had made complaints on further damage suffered. Only in the year 1935, the United States of America and Canada agreed to form an Arbitral Tribunal on the above-mentioned matter. Later, both countries signed up a convention where both countries submitting the above-mentioned dispute to the Arbitral Tribunal (Sands, 1995; Razman and Jahi, 2002). The Arbitral Tribunal held that:

...under the...international law...no state has the right to use or allow to use of it's territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein when the case is of serious consequence and the injury is established by clear and convincing evidence

Therefore, the Arbitral Tribunal gave the decision in favour to the United States of America where the above-mentioned smelter company required ensuring that the company operations and activities shall not cause fumes into the territory of the United States of America (Sands, 1995; Razman and Jahi, 2002).

The decision has made the establishment of the growth of the principle of transboundary liability and environmental protection. The principle of transboundary liability has been re-affirmed by the International Court of Justice in the year, 1949. This is based on the case of United Kingdom vs. Albania in 1949, ICJ 4, well known as Corfu Channel Case. In this case where the International Court of Justice held that under the international law, the Albania is found guilty and held responsible towards the explosions which caused loss of life and damage. The said explosions occurred in Albanian waters on 22nd October, 1946. The above decision is based on the application of the principle of transboundary liability from the case of Trail Smelter Case with an additional input where every state is required to inform and notify other states of any harm and danger. If a state failed to notify another state of the said matter, the International Court of Justice shall imposed award to the injured state on the liability for failure to disclose information of the said matter that could have reduced danger and harm toward the other state (Sands, 1995; Razman and Jahi, 2002). Based on the above discussion by the above-said cases, it is clearly that the principle of transboundary liability has promoted two important obligations. There are:

- International co-operation and good neighbourliness
- State responsibility not to cause environmental harm and damage (Sands, 1995; Razman and Jahi, 2002)

**International co-operation and good neighbourliness:** The obligation of international co-operation and good neighbourliness has been laid down based on Article 75 of the United Nation Charter in connection with commercial, social and economic subjects which has been defined into the development and application of rules promoting international environmental protection co-operation (Sands, 1995; Razman and Jahi, 2002). Therefore, there are many international environmental treaties, other international acts, international agreements and international declarations which reflect the international co-operation and good neighbourliness that derived from the principle of transboundary liability (Birnie and Boyle, 1994; Razman and Jahi, 2002) such as the Stockholm Declaration, 1972, the World Charter for Nature, 1982, the ILC Draft Articles on International Liability and the Rio Declaration, 1992 (Sands, 1995;

Razman and Jahi, 2002). As for the Rio Declaration is concerned, the declaration has clearly shown an attempt to ensure the international co-operation and good neighbourliness on the matter to protect environment against pollution in order to achieve the sustainable development (Ball and Bell, 1995; Razman and Jahi, 2002). The earlier mentioned objective is set out in the Principle 27 of the Rio Declaration which provides that:

States and people shall co-operate in good faith and in spirit of partnership in the fulfillment of the principles embodied in this Declaration and in further development of international law in the field of sustainable development

According to Sands (1995) this obligation has been accepted in reality of all international agreements on environmental matters of bilateral, regional applications and global instruments as been highlighted in Table 1. The obligation may be in the manner of specific provisions under a treaty or in the manner of general provisions which in connection with the implementation of the treaty's objectives (Razman and Jahi, 2002) (Table 2). State practice applying this obligation of international co-operation and good neighbourliness on the matter to protect environment against environmental harm and damage is reflected in awards and decisions in Arbitral Tribunals and also in international courts of justice (Harris, 1991; Razman and Jahi, 2002). An example, in the dispute over the Gabcikovo dam and the proposed diversion of the Danube river where the dispute was between Hungary and Slovakia. In this dispute, clearly, the obligation of international co-operation and good neighbourliness has been the central issue (Sands, 1995; Razman and Jahi, 2002).

Table 1: Examples of the international environmental agreements and instruments on the obligation of international co-operation and good neighbourliness

Bilateral agreements and regional applications	Global instruments
Article 2 (1)	Article 5
Alpine Convention 1991	Biodiversity Convention 1992
Article 12 (2)	Article 2 (2)
London Convention 1933	Vienna Convention 1985
Sands (1995) and Razman and Jahi (2002)	

Table 2: Examples of the obligation may be in the manner of specific provisions under a treaty or in the manner of general provisions which in connection with the implementation of the treaty's objectives

Specific provisions	General provisions
Article 4 (1) (e)	Article 5
Climate Change Convention 1992	Biodiversity Convention 1992
Article 14	Article XVI (1)
Lome Convention 1989	African Conservation Convention 1968
Sands (1995) and Razman and Jahi (2002)	

Here, Hungary laid down claimed against Slovakia on the ground that Slovakia implement of principles affecting transboundary resources which inconsistent with the obligation of international co-operation and good neighbourliness (Sands, 1995; Razman and Jahi, 2002).

**State responsibility not to cause environmental harm and damage:** International law does not permit states around the globe to run operations and activities within their jurisdiction without concern for the protection of world environment (Wolf and White, 1995). International law also requires states to take adequate and reasonable measures to regulate and control sources of serious environmental harm and pollution within their jurisdiction. This obligation has been imposed to all states around the globe to prevent, reduce and control environmental harm and pollution within their jurisdiction. This has been supported and reflected in awards and decisions in arbitral tribunals and also in international courts of justice (Birnie and Boyle, 1994; Razman and Jahi, 2002).

In the Trail Smelter Case, the Arbitral Tribunal indicated that no state has the right to use or allow to use of its territory in such a manner as to cause injury by fumes in or to the territory of another which clearly shown that it is of all states' responsibility to prevent, reduce and control environmental harm and pollution within their jurisdiction.

In addition, in the Corfu Channel Case support the similar obligation where the International Court of Justice had concluded every state's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other states (Birnie and Boyle, 1994; Razman and Jahi, 2002).

Moreover, in the case of Spain vs. France in 1957, 24 I.L.R. 101, well known as Lac Lanoux Case where in this case, concerned about the proposed diversion of the international river by France. The Arbitral Tribunal certified that a state has an obligation not to exercise its rights to the extent of ignoring the rights of other state (Harris, 1991; Razman and Jahi, 2002). The Arbitral Tribunal further explained:

France is entitled to exercise her rights; she cannot ignore the Spanish interest. Spain is entitled to demand that her rights be respected and that her interests be taken into consideration

This second obligation is not only being supported by awards and decisions in Arbitral Tribunals and also in international courts of justice which have been discussed as above but also is being affirmed in virtually by United Nation General Assemblies and global treaties (Razman and Jahi, 2002).

## **TRANSBOUNDARY POLLUTION**

There are two major disasters in the middle 1980's which involved transboundary pollution. One incidence happened in Schweizerhale, Switzerland and the other occurred in Chernobyl, Soviet Union. The first disaster happened in Chernobyl, Soviet Union where a nuclear reactor exploded on 26th April 1986. A huge amount of radioactive emitted to the atmosphere, especially European atmosphere. A number of people outside Soviet Union were affected by the disaster. Soviet Union authority informed public only after 15 days after the disaster took place. At the time of the notification made by Soviet Union authority, number of people in the European Continent had already affected. Unfortunately, there was no action taken against the Soviet Union. This disaster is known as Chernobyl Explosion (Norsulfa, 1997; Razman and Jahi, 2002).

The second incidence and disaster happened when a company's warehouse that was Sandoz Corporation's warehouse in Schweizerhale, Switzerland caught fire on 1st November, 1986. The chemical from the said warehouse had polluted Rhine river by seeping through the Sandoz Corporation's Sewer System. This had caused the formation of toxic which harmful to the living creatures in the Rhine river. Switzerland authority only informed the neighbouring countries, 24 h after the incidence. Immediately after the notification, France government shut down all the water supply along the said river. As the result of this incidence, Sandoz Corporation had paid a lot of claims privately. Nevertheless none of the neighbouring countries brought the action against Switzerland. This incidence is known as Sandoz Spill (Norsulfa, 1997; Razman and Jahi, 2002).

## **POST SANDOZ SPILL AND CHERNOBYL EXPLOSION: INTERNATIONAL ENVIRONMENTAL LEGAL PERSPECTIVES**

Based on the discussion both countries, Switzerland and Soviet Union free from the above-mentioned liability. There was no action has been taken against these two countries in the year which the said disasters occurred. This due to insufficiently articulated any international obligations concerning to state obligation in the situation of transboundary environmental disasters (Razman and Jahi, 2002).

These two disasters Sandoz Spill and Chernobyl Explosion have caused the growth of the international community awareness on the importance of the principle of transboundary liability on the transboundary

environmental disasters. Therefore, there are two well-known international legal documents that try to address the above-mentioned matter:

- Principle 18 and 19 of the Rio Declaration, 1992
- Article 27 and 28 of the International Law Commission's Draft Articles on the Non-Navigational Uses of International Watercourses Law, 1994 (Norsulfa, 1997; Razman and Jahi, 2002)

According to the Article 18 of the Rio Declaration, 1992 stated that states are required to take immediately action to notify other states of any natural disasters or other emergencies that are likely to produce sudden harmful effects on the environment of the other states. As for the Article 19 of the Rio Declaration, 1992 mentioned states shall provide prior and timely notification and relevant information to potentially affected states on activities that may have significant adverse transboundary environmental effect and shall consult with those states at early state and in good faith (Sands, 1995; Razman and Jahi, 2002).

In the Article 27 of the International Law Commission's Draft Articles on the Non-Navigational Uses of International Watercourses Law, 1994 laid down States are required to mitigate or prevent conditions of any disasters which might affect any other state. As for the Article 28 of the International Law Commission's Draft Articles on the Non-Navigational Uses of International Watercourses Law, 1994 required States to notify other states of an emergency originating within its jurisdiction, to mitigate, prevent and eliminate any harmful effects of the emergency and to develop contingency plans for responsibility to the emergency (Norsulfa, 1997; Razman and Jahi, 2002).

The International Law Commission's Draft Articles on the Non-Navigational Uses of International Watercourses Law, 1994 is the complementing to the Rio Declaration, 1992 (Norsulfa, 1997; Razman and Jahi, 2002). These two international legal documents expressly laid down the obligations of all states throughout the globe on transboundary environmental harms and disasters. This clearly shown the growth and the development of the principle of transboundary liability and environmental protection.

Criminal law is one of public law that has been used to protect human habitat and environment. When criminal cases have been brought to the court, the traditional basic principles of actus reus and mens rea will be prevailed. However, court cases related to the protection on human habitat and environment under criminal law, the court has taken a resolution that all prosecutions in cases of

environmental pollution under the criminal law, elements of proof of mens rea that is proof against the accused guilty of environmental pollution with the intention of the evil nature, no longer needed. Given the cases of environmental pollution under the criminal law is now regarded as a liability where the elements of hard evidence mens rea is not necessary. This is clear in the case of *Alphacell vs. Woodward* in 1972, AC 824 where Lord Wilberforce has pointed out that the cases of environmental pollution under the criminal law which assumed strong element of proof mens rea is no longer required.

## CONCLUSION

In the study, the discussion has laid down the support with a view to bring an immediate improvement in the living conditions of their populations and to safeguarding those of future generations in order to achieve sustainability in human habitat.

On the other hand, the international principle of transboundary liability imposed liability towards a state for the adverse activities and operations within the said state jurisdiction that caused harm to the other state. In dealing with this principle of transboundary liability and the environmental protection, however this principle is still evolving and required of further development and growth. The opportunity to enhance the growth of this principle of transboundary liability and the protection on the environment, through state practice following the two transboundary environmental disasters Sandoz Spill and Chernobyl Explosion were lost due to the decision by the injured states not to take international legal action for causing environmental pollution even though the injured states have their right to do so (Sands, 1995; Razman and Jahi, 2002). The support made by the states around the globe on the International Law Commission's Draft Articles on the Non-Navigational Uses of International Watercourses Law, 1994 and the Rio Declaration, 1992 are clearly reflected the acceptance and the growth of this principle of transboundary liability and bring an immediate improvement in the living conditions of their populations and to safeguarding those of future generations in order to achieve sustainability in human habitat as well as presented by the local criminal law.

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