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A Comparative Study on the International and Islamic Law: Focusing on the Transboundary Liability and Trespass for Better Living Environment in Urban Region

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Abstract: The International Law principle on transboundary liability and Islamic Law on trespass play essential role in transforming better living environment in urban region. The used of the International Law principle on transboundary liability and Islamic Law on trespass in urban region for better living environment is largely in respond to the inevitability of every individual to protect his/ her rights on living environment in urban region from being polluted. Therefore, this study examines the used of the International Law principle on transboundary liability and Islamic Law on trespass in transforming better living environment in urban region from the legal scientific approach by identifying actions and cases which deal with human habitat and environmental protection in urban region. This study is also identifying the relation between the International Law principle on transboundary liability and Islamic Law on trespass in order to acheive sustainable development as means to transform better living environment in urban region.

Key words: International Environmental Law, Governance International Law, transboundary liability, Islamic Law on trespass, Malaysia

INTRODUCTION

The International Law principle on transboundary liability and Islamic Law on trespass play essential role in transforming better living environment in urban region. The used of the International Law principle on transboundary liability and Islamic Law on trespass in urban region for better living environment is largely in respond to the inevitability of every individual to protect his/her rights on living environment in urban region from being polluted. Urban region growth is the phenomena that have increasingly received policy makers' attention since the trend and urbanization pattern have big implication on pollution which includes transboundary pollution and trespass activities that cause pollution. Therefore, urban region demands careful developmental planning policy. Without a proper planning; urban region will not be able to fulfill its residents' needs. As a result, this will ruin the urban region's society's quality of life.

THE INTERNATIONAL LAW PRINCIPLE ON TRANSBOUNDARY LIABILITY

The Rio Declaration has also laid down essential obligations and responsibilities, which contribute to the growth and development of environmental management and law in accordance with the concept of sustainable development and the protection of the environment and for better living environment which include the urban region (Jamaluddin, 2001; Razman, 2002).

One of the essential obligations is on the subject which emphasises that all states in the world are required to ensure that they do not cause environmental harm to other states. This obligation has been mentioned under 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 environment 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.

The before mentioned obligation is clearly a sign of recognition of the transboundary liability principle (Sands, 1995). The transboundary liability principle is

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resulted 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). This transboundary liability principle has been applied in the case of United States v Canada [1941] 3 RIAA 1905, famous as the Trail Smelter Case. In this case the transboundary liability principle was subsequently based upon and further clarified by the Arbitral Tribunal (Hughes, 1992).

The fact of the case: At a place called Trail situated in Canada which is about 10 miles from the border between United States of America (USA) 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 in the surrounding urban region. These fumes that contained sulfur dioxide had contributed to the damage to the 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 USA for the amount US$ 350,000.00 as compensation. After that the above mentioned smelting company continued to run the operations and activities as usual. USA had made complaints on further damage suffered. Only in the year 1935, the USA and Canada agreed to form an arbitral tribunal on the above mentioned matter. Later, both countries signed up a convention where both countries referred the above mentioned dispute to the Arbitral Tribunal (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 her 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 USA, where the above mentioned smelter company was mandatory required to make sure that the company activities shall not cause fumes into the territory of the USA. The above mentioned decision has established the development of the transboundary liability principle. The transboundary liability principle has been re-affirmed by the following international cases:

- New Zealand v France; [1974] ICJ 457 (the Nuclear Tests Case)
- Australia v France; ICJ 253 [1974] (the Nuclear Tests Case)
- Spain v France; [1957] 24 I.L.R. 101, (the Lac Lanoux Case)
- United Kingdom v Albania; [1949] ICJ 4 (the Corfu Channel Case)

Based on the discussion by the above-said cases, it is clearly that the transboundary liability principle has promoted two important obligations and responsibilities Obligations and Responsibilities According to the Transboundary Liability Principle are as (Sands, 1995, 2003):

- State responsibility to ensure sustainable development for better living environment
- International co-operation and good neighbourliness for better living environment

STATE RESPONSIBILITY TO ENSURE SUSTAINABLE DEVELOPMENT FOR BETTER LIVING ENVIRONMENT

The international law does not allow states in the world to run operations and activities within their jurisdiction without taking care of the environment (Wolf and White, 1995; Razman and Jahi, 2002). This is also for better living environment especially in urban region where having heavy development. International law also requires all states around the globe to take adequate and reasonable measures to regulate and control sources of serious environmental pollution especially in urban region and maintain the sustainable development 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 referring to the Trail Smelter Case, as one of example on heavy development in urban region. According to the Trail Smelter Case the Arbitral Tribunal indicated that no state has the right to use or allow to use of her territory in such a manner as to cause injury by fumes in or to the territory of another the properties or persons, present or future therein, which clearly shown that it is of all states' responsibility to prevent, reduce and control environmental pollution in that region and maintain the sustainable development 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 ...present or future"

(Harris, 1991; Birnie and Boyle, 1994). Moreover in the case of Spain v France (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). 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 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 global treaties and United Nation General Assemblies. The examples for the global treaties which support the obligation on the matter, state responsibility to ensure sustainable development for better living environment especially on urban region are as (Sands, 1995, 2003):

- Protocol on liability and compensation for damage resulting from transboundary movements of hazardous wastes and their disposal, Basel (1999)
- Protocol to the 1979 convention on long-range transboundary air pollution to abate acidification, eutrophication and ground level ozone, Gothenburg (1999)
- Protocol on water and health to the 1992 convention on the protection and use of transboundary watercourses and international lakes, London (1999)
- Cartagena protocol on biosafety to the convention on biological diversity, Montreal (2000)
- Stockholm convention on persistent organic pollutants, Stockholm (2001)

On the other hand, the examples of the United Nation General Assemblies which support the obligation on the matter state responsibility to ensure sustainable development for better living environment especially on urban region which are as Razman and Jahi, 2002):

- United Nation Assembly (Resolution 1629), 1961- "… to avoid harmful biological consequences of other states, by increasing levels of radioactive fallout"
- United Nation Assembly (Resolution 2849), 1972- "… to avoid producing harmful effects on other countries"
- United Nation Assembly (Resolution 3281), 1974- States to ensure not to causeenvironmental damage to other state or beyond national limit

INTERNATIONAL CO-OPERATION AND GOOD NEIGHBOURLINESS FOR BETTER LIVING ENVIRONMENT

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 for the environmental and atmospheric protection (Sands, 1995). Therefore, there are many international environmental treaties, other international acts, international agreements and international declarations which reflect the international co-operation and good neighbourliness for the environmental and better living environment especially on urban region that derived from the transboundary liability principle (Birnie and Boyle, 1994) such as (Sands, 1995, 2003):

- 1972 the Stockholm Declaration
- 1992 the Industrial Accident Convention
- 1992 the Rio Declaration

As for the Rio Declaration is concerned the Declaration has clearly shown an attempt to ensure the international co-operation and good neigbourliness on the matter to protect environment against pollution in order to achieve the sustainable development (Ball and Bell, 1995). The above 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 and atmospheric matters of bilateral, regional applications and global instruments. The examples of the bilateral and regional applications: (a) Article 12 (2) London Convention 1933 and (b) Article 2 (1) Alpine Convention 1991 (Razman and Jahi, 2002).

On the other hand, as for the global instruments' examples as follows: (a) Article 2 (2) Vienna Convention 1985 and (b) Article 5 Biodiversity Convention 1992 (Razman and Jahi, 2002). The obligation may be in the manner of specific provisions under a treaty such as Article 4 (1) (e) Climate Change Convention 1992 and

Article 14 Lome Convention 1989 or in the manner of general provisions which in connection with the implementation of the treaty's objectives such as Article XVI (1) African Conservation Convention 1968 and Article 5 Biodiversity Convention 1992 (Razman and Jahi, 2002).

In the dispute over the Gabcikovo Dam for an example 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). 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).

Therefore, from the above mentioned dispute clearly indicated that the States practice to apply this obligation of international co-operation and good neighbourliness on the matter to protect environment against environmental harm and to maintain sustainable development. This means that the principle also apply to the issues on matter of the protection on the atmosphere.

TRANSBOUNDARY POLLUTION IN URBAN REGION

Basically, there were two major disasters in the middle 1980's which involved transboundary pollution in urban region and the violation on the concept of sustainable development. One incidence happened in Soviet Union and the other occurred in Switzerland.

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 in urban region 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 incident 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 for the present and future safety of the mankind. This disaster is known as Chernobyl Explosion (Norsulfa, 1997; Razman and Jahi, 2002). This disaster clearly shown that the absence of the compliance with the concept of sustainable development which emphasises that all development that meets the needs of the present generation without compromising the ability of the future generations to meet their own needs. The second incidence and disaster happened when a company's warehouse which 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 things and creatures in the Rhine River and surrounding urban region. Switzerland authority only informed the neighbouring countries, 24 h after the disaster. Immediately, after the notification, France government shut down all the water supply along the said river. As the result of this disaster, Sandoz Corporation had paid a lot of claims privately. Nevertheless, none of the neighbouring countries brought the action against Switzerland for the present and future safety of the mankind. This incidence and disaster is known as Sandoz Spill (Norsulfa, 1997; Razman and Jahi, 2002). The second disaster also highlighted the violation on the concept of sustainable development which failed to ensure the safety of present and also future generations.

POST SANDOZ SPILL AND CHERNOBYL EXPLOSION

International environmental legal perspectives: Based on the discussion, both countries, Switzerland and Soviet Union free from the liability. There was no action has been taken against these two countries in the year which the said incidents and disasters occurred. This due to insufficiently articulated any international obligations concerning to state obligation in the situation of transboundary environmental disasters.

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 famous international legal documents that try to address the above mentioned matter (Table 1).

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

Table 1: International legal documents on the transboundary environmental disasters

Years	Articles/principles	International legal documents
1994	Article 27	The International Law Commission's Draft
	Article 28	Articles on the Non-Navigational Uses of International Watercourses Law
1992	Principle 18	The Rio Declaration
	Principle 19	

Modification from Razman and Jahi, 2002

(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). These two international legal documents expressly laid down the obligations of all states throughout the globe on transboundary environmental harms and to ensure to the safety of the present and future generations. This clearly shown the growth and the development of the principle of transboundary liability and environmental protection and the concept of sustainable development.

ISLAMIC LAW ON TRESPASS FOCUSING ON LIABILITY FOR DEFECTIVE PREMISES

Parties who suffered losses and injuries due to the dangerous position of premises generally may take legal actions towards owners of the said premises. These parties are entitled to proceed on legal action based on Islamic Law on Trespass focusing on liability for defective premises. Based on Islamic Law on Trespass-defective premises may be classified into two groups (Moharnad, 2006). The first group known as an original defect in the premises and the second group known as an unexpected defect in the premises (Moharnad, 2006).

An original defect in the premises: It is a consensus among the Muslim scholars that anyone who erect a wall on his property and creates it lean or overhang the public road or the property of a fellow citizen at the initial time of construction shall be liable for any damage that its fall may cause to others (Moharnad, 2006). His action can be considered as trespass since his conduct obstructs the public road and cause to be dangerous to the passer-by and the adjoining premises (Moharnad, 2006). The Muslim scholars decided that he action as a trespasser (mulct addin) in capable of prejudicing other individual's rights with defective premises at the initial time of construction (Moharnad, 2006).

An unexpected de pefect at premises: In the case of a properly constructed wall or premise in vertical equilibrium at the initial time of construction which later leans and slants onto the public road or another individual property (Moharnad, 2006) the Muslim scholars have a different opinion as to whether the owner of the wall or premise is to be held liable for any damage that emerges from its collapsing after he has been warned by the community to demolish it but nevertheless the owner refuse to accept the said warning (Moharnad, 2006). The Muslim scholars' opinions can be classified into three groups.

Based on the first opinion, the owner is absolutely liable by all means whether he was requested to demolish it or not when it started to lean (Moharnad, 2006), the owner of the premise is required to take necessary action to avoid trespass to other individual property or onto the public road (Moharnad, 2006). This is the opinion of some of the Shafici jurists, Ashhab, Ibn Abi Layla, Abu lshaq and some of the Hanbali jurists (Moharnad, 2006).

Meanwhile, the second opinion in the view that the owner of the premise or wall will not be liable at all (Moharnad, 2006). This is due to the reason that the owner of that premise built it on his own property which he has the right into it while the collapse down of the building or wall is not by his act, whether he has been requested to demolish it or not (Moharnad, 2006). This opinion is attributed to the Shafici School (according to the most correct opinion) the Zahiri School the Hanafi School in accordance with analogy (qiyas) and it is a view of the Hanbali School according to the popular opinion (Moharnad, 2006).

They substantiate their opinion by reason that the owner is not considered as transgressor (al-nattdaddi) (Moharnad, 2006). He built it on his own property in vertical equilibrium and its tottering or the wind shaking it was not his acts. They also consider this case as if resulting from an act of God (Moharnad, 2006).

Finally, the third opinion, basically looking at if the owner had previously been warned to knock down his wall as it is likely to collapse and sufficient time has elapsed for the wall to be knocked down (Moharnad, 2006), later the owner is required to pay compensation to

any of the injured parties if the wall collapses and causes damage onto the public road or another individual property. This third group disagrees with emphasis that the right to the public road belongs to the public and as such the public has the right to request him to demolish his leaning wall before it could cause any damage (Moharnad, 2006). Failure to comply with the request; unfortunately will make him liable (Moharnad, 2006). In the event if the public keep silent about their right to request demolition, the owner will not be held liable (Moharnad, 2006). This group seems to emphasize the need for the owner to have had a previous request made to him. In the same manner where a man finds a garment of another and its owner demands it of the man, if the man refuses to deliver it, he is guilty of a trespass (al-nattdaddi) (Moharnad, 2006).

CONCLUSION

The International Law principle on transboundary liability and Islamic Law on trespass imposed liability towards a country for the adverse activities and operations within the said state jurisdiction that caused environmental harm to the other state which include surrounding urban region. On regards with this International Law on principle transboundary liability and Islamic Law on Trespass towards environmental protection for better living environment in urban region.

The opportunity to enhance the growth of this transboundary liability principle and the environmental protection for better living environment in urban regio, through state practice following the transboundary disaster Chernobyl Explosion was lost due to the decision by the injured countries not to take international legal action for causing environmental pollution and violation on the concept of sustainable developmen even though the injured countries have their right to do so (Sands, 1995; Razman and Jahi, 2002).

The support made by the countries around the world 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 the acceptance and the growth of this principle of transboundary liability in protecting human habitat and environment especially in urban region towards better living environment (Sands, 1995; Razman and Jahi, 2002).

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