



The Bar Council

Law Reform and Climate Change
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Looking back

After Inger Andersen's stirring call to action, I want to spend my time looking how the law has in fact responded to the challenges of climate change, both before and after the Paris agreement.

In September 2015, ahead of the COP 21 summit in Paris, I co-hosted an international judicial conference in London on Climate Change and the Law.¹ We looked at the potential role of the law, international and domestic, in combatting climate change. There had by then been some important judicial interventions in different parts of the world. We could look back to the great case of *Massachusetts v EPA* (2007)² in the US Supreme Court, in which the majority decided that the EPA's powers under the Clean Air Act extended to greenhouse gas emissions, such as CO₂ emissions from motor vehicles, and that the agency's failure to take any action was "arbitrary and capricious" and therefore unlawful. In due course, following a change of administration, that decision provided the legal basis for the radical climate change policies developed by President Obama, to the crucial U.S.-China Joint Announcement on Climate Change in November 2014, and to his leadership of the global efforts to achieve agreement in Paris.

In the months before our conference, there were two other important judicial developments from very different legal systems - the *Urgenda* case in the Hague District Court in the Netherlands³ and the *Leghari* case from the Lahore High Court in Pakistan⁴. In both cases, the national courts upheld challenges to their governments' failures to implement effective policies to counter climate change. The Hague judgment was of enormous symbolic

¹ It was organised by the Supreme Court jointly with the government Foreign Office and Kings College, London, and, and attended by judges, practitioners and academics from different parts of the world. <https://www.kcl.ac.uk/archive/news/law/climate-courts/index>

² *Massachusetts v. Environmental Protection Agency*, 549 U.S. 497

³ *Urgenda Foundation v. The Netherlands* [2015] HAZA C/09/00456689

⁴ *Leghari v Federation of Pakistan* (2015) W.P. No. 25501/201

importance as the first successful case of its kind, although at that stage it turned on what seemed a rather esoteric point of Dutch tort law. It later acquired more general significance when it was affirmed in the Court of Appeal and Supreme Court by reference to articles 2 and 8 of the European Convention on Human Rights.

The *Leghari* decision was of broader legal significance, being based on the constitutional protection of the right to life, such as is found in many legal systems. At our conference the Judge, Mansoor Ali Shah (now in the Pakistan Supreme Court), told us how he had devised a new form of order to deal with the problem that the government simply was not implementing its own climate change policies. He ordered the setting up of an independent Climate Change Commission, chaired by a senior lawyer,⁵ bringing together all the interests involved including NGOs, government officials, and independent experts, reporting regularly to the court. It was key to the success of this approach that the court was not imposing solutions on the executive, but giving practical effect to the executive's own policies.

The Paris Agreement of December 2015 was a truly monumental achievement, bringing together almost all the countries of the world in recognition of the threat of climate change, and in a programme for joint action to combat it.

As is well known, the key obligations lie in the “nationally determined contributions” (NDCs), which each party is legally required (“shall”) to prepare, communicate and maintain. The NDC is to be achieved through “domestic mitigation measures” (art 4.2). Although the content of the NDCs is left to the individual states, there is to be progressive improvement, so that each successive NDC is to “represent a progression”, and reflects the state’s “highest possible ambition” (art 4.3); and accompanied by “the information necessary for clarity, transparency and understanding” (4.8). Article 13 fills in the detail of what is described as “an enhanced transparency framework”, designed to feed into the five-yearly “global stocktake” under article 14, the first stocktake to be in 2023.

From a legal perspective a distinctive feature is that, while the Paris Agreement is an agreement under international law, it depends principally on

⁵ As the Chairman, Dr Parviz Hassan, explained in a paper the following year (20th APCEL Anniversary Conference Round Table on Climate Change Adaptation and Resilience in Asia Pacific: Opportunities and Barriers, at the National University of Singapore, Singapore, on 10 November 2016), six Implementation Committees were established on different aspects of the framework: Water Resource Management; Agriculture; Forestry, Biodiversity, and Wildlife; Coastal and Marine Areas; Disaster Risk Management; and Energy. On the basis of their reports the Commission made 16 recommendations. Its final report to the court was presented in 2018.

domestic measures to give it practical and enforceable effect. However, the agreement says nothing about what legal form those domestic measures should take, or what role the courts should have in their enforcement.

Action in the courts since Paris

Since then there have been many attempts in different jurisdictions round the world to establish a legal duty on governments to take action to combat climate change. In November 2016 came the ground-breaking decision of Judge Aiken in the US District Court of Oregon in *Juliana v USA*,⁶ refusing to strike out the claim by a group of young citizens against the government for failing to protect them against the consequences of climate change. Citing authorities from round the world she held that the right to a climate system capable of sustaining human life is fundamental to a free and ordered society, and thus protected by the Due Process clause of the Constitution, and by the Public Trust doctrine. That case was begun during the Obama Presidency. It continued under President Trump but became embroiled in procedural wranglings which found their way to the Supreme Court, and eventually came back to the Court of Appeals for the 9th Circuit, leading to a decision in early 2020⁷. Although the claim was dismissed by the majority on procedural grounds, there was no disagreement as to the factual basis of the claim. The majority judgment of Judge Hurwitz was in strong terms:

“A substantial evidentiary record documents that the federal government has long promoted fossil fuel use despite knowing that it can cause catastrophic climate change, and that failure to change existing policy may hasten an environmental apocalypse...”

It is notable that, whatever the personal views of the then President, his lawyers had not apparently attempted to challenge that factual assessment. The reasons for refusing relief were about practicality and the limits of the court's constitutional role. Although the decision was a serious setback for the climate litigants in the USA, it was important in affirming the reality of climate change and its consequences, and of the USA's responsibility.

It may not have helped that the USA, unlike the great majority of states, does not have environmental protection built into its constitution⁸. It is fair to

⁶ *Juliana v United States* Case No. 6:15-cv-01517-TC

⁷ *Juliana v United States* No. 18-36082 D.C. No. 6:15-cv-01517- AA

⁸ Gross in Kahl/Weller, *Climate Change Litigation*, 2021 p 83 notes that the constitutions of 150 states include clauses on the protection of the environment.

observe, however, that the response of the court was not so different from that of the Norwegian Supreme Court last year,⁹ in the context of a specific duty under the Constitution to protect the environment. The case was a challenge to the government's decision to allow oil exploration on the Norwegian Continental Shelf, under article 112 of the Constitution, which confers a right to "an environment that is conducive to health", and imposes on the state authorities duty to implement it¹⁰. The challenge was rejected. The Court upheld the lower court's ruling that the constitution protects citizens from environmental harms, including climate harms created by burning exported oil. However, it was said (in language similar to that of the *Juliana* court) that -

"... decisions in cases regarding fundamental environmental issues often involve political balancing and broader prioritisation. Democratic considerations therefore support such decisions being taken by popularly-elected bodies, and not by the courts."

Article 112 was accordingly to be read as "a safety valve" allowing the courts to set aside a legislative decision, only if the legislator had not addressed a particular environmental issue, or the duties under the article had been "grossly disregarded", the threshold being "very high."¹¹

On the other side, an important victory for campaigners was the 2018 judgment of the Colombia Supreme Court in the *Future Generations* case.¹² 25 young claimants complained that the Colombian State had failed to guarantee their constitutional rights to life and protection of the environment, in particular through deforestation in the Amazon. The Supreme Court agreed, relying *inter alia* on the right to a healthy environment, enshrined in the Colombian Constitution.¹³ The Court issued an order to the President and the relevant ministries to create an "intergenerational pact for the life of the

⁹ The Norwegian Supreme Court judgment of 22 December 2020, HR-2020-2472-P. Unofficial translation: https://www.klimasøksmål.no/wp-content/uploads/2021/01/judgement_translated.pdf

¹⁰ Article 112 of the Constitution provides: "Every person has the right to an environment that is conducive to health and to a natural environment whereby productivity and diversity are maintained. Natural resources shall be managed on the basis of comprehensive long-term considerations, which will safeguard this right for future generations as well. In order to safeguard their right in accordance with the foregoing paragraph, citizens are entitled to information on the state of the natural environment and on the effects of any encroachment on nature that is planned or carried out.

The authorities of the state shall take measures for the implementation of these principles."

¹¹ Judgment paras 140-1

¹² *Demanda Generaciones Futuras v. Minambiente* STC 4360-2018. See: <https://www.dejusticia.org/en/climate-change-and-future-generations-lawsuit-in-colombia-key-excerpts-from-the-supreme-courts-decision/>

¹³ Colombian Constitution 1991: right to life (arts 11, 1, 2), right to health (arts 44 and 49), right to nutrition (art 44), right to a healthy environment (art 71)

Colombian Amazon,” with the participation of the plaintiffs, affected communities, and scientific organizations. It was an important success for the claimants, although the wide-ranging nature of the order has been criticised as creating problems, by cutting across the established government and social structures.¹⁴

Three recent cases at the highest level in European national courts show how judges can give force to the Paris commitments where a suitable legal peg is available within domestic legislation. The *Grande-Synthe* case in the French Conseil d’État last year¹⁵ concerned a request to the French government to take the necessary measures to limit emissions to comply with the commitments under (inter alia) the Paris agreement. A legal peg was provided by the relevant EU regulation¹⁶ and the implementing domestic laws. The Paris Agreement was regarded as relevant to their interpretation. The court accepted that the municipality of Grande-Synthe had a sufficient interest because of its level of exposure to the risks from climate change, and that the court had jurisdiction to consider whether the government’s current proposals would achieve its national and international commitment (40% reductions by 2030 and carbon neutrality by 2050). At a further hearing in July 2021 the court ordered the government to take all the measures necessary by the end of March 2022 to ensure the achievement of those goals.

A case in the Irish Supreme Court concerned a challenge by Friends of the Irish Environment to the National Mitigation Plan, required by section 4 of the Climate Action and Low Carbon Development Act 2015. As the court noted, the “overriding requirement” of a national mitigation plan under the section was that it must “specify” the manner in which it is proposed to achieve the national transition objective (NTO), defined by the Act as requiring transition to a low carbon economy by 2050. The court held that the current plan fell “a long way short of the sort of specificity which the statute requires”, since it would not enable the reasonable observer to know, in any sufficient detail, “how it really is intended, under current government policy, to achieve the NTO by 2050...”¹⁷

¹⁴ Alvarado and Rivas-Ramirez *A Milestone in Environmental and Future Generations’ Rights Protection: Recent Legal Developments before the Colombian Supreme Court* 30 *Journal of Environmental Law* (2018) pp 519–526 The authors observe that the judgment has had “serious implications on the territorial autonomy of local communities.. and (obliging) all local authorities... to reformulate their local policies in order to address this judicial order...”

¹⁵ *Commune de Grande Synthe v France* (2020) Conseil d’Etat No. 427301

<http://climatecasechart.com/non-us-case/commune-de-grande-synthe-v-france/>

¹⁶ EU Regulation 2018/842

¹⁷ *Friends of the Irish Environment CLG v Government of Ireland* [2020] IESC 49 [6.46].

The third case comes from the German Constitutional Court.¹⁸ The Climate Protection Act had been passed in December 2019, but a group of young adults instituted proceedings arguing that it insufficiently protected them from climate change. Under the Act Germany had committed itself to emission goals (minus 55 per cent by 2030, and climate neutrality by 2050) and had laid out measures for achieving these goals up to 2030, but left open the steps to be taken beyond that. This uncertainty was held to violate the fundamental rights of future generations and therefore unconstitutional. The Court relied on Art. 20a of the Basic Law, which requires that the state to have regard to its responsibility towards future generations. As they explained:

“..., one generation must not be allowed to consume large portions of the CO2 budget while bearing a relatively minor share of the reduction effort if this would involve leaving subsequent generations with a drastic reduction burden and expose their lives to comprehensive losses of freedom....”

It is noteworthy that in all these cases the decisions turned on specific domestic legislation, rather than on more general human rights arguments, such as had succeeded in the *Urgenda* case in the Dutch Supreme Court. In the Conseil d’État, the judge rapporteur (Stéphane Hoyneck) had examined the relevant case-law under the Convention, including the *Urgenda* judgment, but shared the view of commentators that -

“these convention-based rules were not enacted to restrict the margin of appreciation of States by imposing judge-made standards of conduct. This is all the more true when, as is the case here, the State has responded to the issue at stake.”¹⁹

It remains to be seen how the Strasbourg court itself will deal with climate change issues in the case brought last year by a young Portuguese group against 32 European states.²⁰ They complain of failure by the respondent states to comply with their positive obligations under Articles 2 and 8 ECHR, read in the light of the commitments made under the 2015 Paris Agreement.

¹⁸ *Neubauer, et al. v Germany* 29 April 2021 (for an unofficial translation, see <http://climatecasechart.com/climate-change-litigation/non-us-case/neubauer-et-al-v-germany/>)

¹⁹ *Commune de Grande Synthe v France* (2020) Conseil d’Etat No. 427301 – Opinion of Mr Stephen Hoyneck (Public Rapporteur) 7.

²⁰ *Duarte Agostinho et al v Portugal and 32 other States* no. 39371/20

Until recently such cases had been directed principally at governments rather than companies. However, in 2019, a group of seven Dutch NGOs and more than 17,000 individual claimants (under the title *Milieudefensie* and others) filed a case in the Hague District Court against Royal Dutch Shell seeking a declaration that the annual CO2 emissions of the global Shell group constituted an unlawful act against the claimants, and that the group must reduce the Shell group's CO2 emissions by 45% by 2030 relative to 2019 levels. Earlier this year, the Hague Court following its dramatic intervention in the *Urgenda* case 6 years before, made the order requested, holding that the company had a relevant duty of care under Dutch law to the claimants. It remains to be seen how that decision will fare on appeal, or whether it will be followed in other jurisdictions.

Climate change litigation can claim more success when it is aimed at specific targets, such as individual fossil fuel projects²¹. One of the most important judgments in recent years was that of Judge Preston in the New South Wales Land and Environment Court in the 2019 *Gloucester Resources* case.²² The court upheld the refusal of permission for an open cut coal mine (the Rocky Hill Coal Project), planned to produce 21 million tonnes of coal over 16 years. The judgment is particularly valuable, not only because of the expertise of the judge, but also because he was sitting in a court with full legal and merits jurisdiction. It is perhaps the most comprehensive judicial discussion available anywhere of the technical and legal issues raised by such a project.

Another route to the same end may be through company law²³. This was used successfully by ClientEarth to stop a proposed coal-fired power plant in Poland. It bought shares in the developer, the Polish utility company ENEA, and began a share-holder action claiming that the consent resolution for construction of the power plant harmed the economic interests of the company due to climate-related financial risks. They were said to include: rising carbon prices, increased competition from cheaper renewables, and the impact of EU energy reforms on state subsidies for coal power. The Court held the

²¹ See for example *EarthLife Africa Johannesburg v Minister of Environmental Affairs* Unreported Case No 65662/16 (Gauteng High Court Pretoria, 8 March 2017) (a successful challenge to a coal-fired power station); discussed by Tracy-Lynn Humby *The Thabametsi Case*: Journal of Environmental Law, Volume 30, Issue 1, March 2018, Pages 145–155

²² *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7
https://elaw.org/system/files/attachments/publicresource/AU_GloucesterResources_8Feb2019.pdf

²³ *ClientEarth v ENEA* Current Report No. 57/2018 See Handbook p 180

authorisation for the plant was invalid. The project has apparently been dropped by the companies.

It seems likely that more climate litigation in the future will be led by investors or share-holders, directed at the responsibilities of companies and their directors.²⁴ There is increased recognition by the global legal community that climate-related risks would be viewed by courts as reasonably foreseeable and directors who fail to respond appropriately could be found to have breached their duty of care and diligence.²⁵

The need for a legislative framework

My own view is that, while the courts can fill some of the gaps, there is no satisfactory alternative to specialised legislation.

Our own Climate Change Act 2008 remains a world leader, notably in setting a mandatory target for reduction of emissions by 2050, now set at net-zero by 2050.²⁶ The Act contains detailed machinery for successive five-year carbon budgets, to be set on the advice of a highly respected, independent Climate Change Committee, and reported to Parliament. In April this year the government, following the recommendations of the Committee, adopted the 6th carbon budget taking us up to the end of 2037. The press release hailed it as the world's most ambitious climate change target, cutting emissions by 78% by 2035 compared to 1990 levels, and for the first time incorporating the UK's share of international aviation and shipping emissions.

Earlier this year the World Bank has published a Reference Guide to Climate Change Framework Legislation,²⁷ based on the work of the Grantham Research Institute at LSE, which maintains a database of such legislation. It surveyed the state of climate legislation round the world, and gave a number

²⁴ See Handbook p 466ff *Investor led action for climate change and business sustainability*. Preston op cit Pt 2 p 15ff

²⁵ Preston op cit Pt 2 p 16 citing a "landmark" legal opinion, two Australian barristers, Noel Hutley SC and Sebastian Hartford Davis, accepted as legally sound by the Australian Securities and Investments Commission (ASIC). This subject is examined in reports of the Commonwealth Climate and Law Initiative: <https://ccli.ouce.ox.ac.uk/>

²⁶ Section 1 provides: "It is the duty of the Secretary of State to ensure that the net UK carbon account for the year 2050 is at least 100% lower than the 1990 baseline." The 1990 baseline is defined as the "the aggregate amount of (a) net UK emissions of carbon dioxide for that year, and (b) net UK emissions of each of the other targeted greenhouse gases for the year that is the base year for that gas."

²⁷ <https://openknowledge.worldbank.org/bitstream/handle/10986/34972/World-Bank-Reference-Guide-to-Climate-Change-Framework-Legislation.pdf?sequence=5> It draws on the work of my Grantham colleague Alina Averchenkova, and the Grantham Climate Change Laws of the World database.

of examples of 2050 net zero targets included in climate laws or executive acts in different countries round the world. That list is growing steadily.

More recently, the European Union has adopted²⁸ the European Climate Law. It sets a legally binding target of net zero greenhouse gas emissions by 2050, and requires the EU Institutions and Member States to take the necessary measures at EU and national level to meet the target. It also sets a new target for 2030 of reducing net greenhouse gas emissions by at least 55% compared to levels in 1990, and includes a process for setting a 2040 climate target.

Conclusion

I have attempted in this brief survey to give an idea of the different ways in which the law has responded to the problems of climate change round the world. The story owes much to the persistence and ingenuity of campaigning groups in different jurisdictions. It is not easy to find many common themes. What has emerged is a patchwork of legal responses, rather than a coherent framework for the enforcement of climate obligations. I had hoped that the government might have used the Glasgow conference as a platform to examine this issue in more depth. As has been seen, this country has a good story to tell. In the event Climate Change and the Law formed the subject of a number of side events in Glasgow, but unfortunately not centre stage. It is now for the global legal community to take up the challenge

²⁸ The European Climate Law was published in the Official Journal on 9 July 2021 and entered into force on 29 July 2021.