

# JUDGES AND CLIMATE CHANGE

– the Journey to  
Enlightenment?

LORD CARNWATH CVO  
(SINGAPORE NUS 2024)

# See also - “Environmental Law in a Global Society”

Lord Carnwath - Sultan Aslan Shah Lecture  
Kuala Lumpur October 2014

<https://www.supremecourt.uk/docs/speech-141009.pdf>

# The earth from space

“In the middle of the 20th century, we saw our planet from space for the first time... a small and fragile ball dominated not by human activity and edifice but by a pattern of clouds, oceans, greenery, and soils... Humanity's inability to fit its activities into that pattern is changing planetary systems, fundamentally... This new reality... must be recognized - and managed.”

*Our Common Future*, Bruntland Commission 1987



# Towards a common law of the environment

22/04/2024

Stockholm Conference on the Human Environment (1972))

Establishment of UNEP (1972)

Rio Declaration (1992)

Johannesburg (2002) – Global Judges Symposium

Paris Agreement on Climate Change (2015)

UN Recognition of Right to Healthy Environment (2022)

# Rio Declaration (1992) – a global framework

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## Principle 1

Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.

## Principle 7

States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem. In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities.

# Constitutional principles in S Asian courts (1994-2024)

- ▶ Constitutional “right to life” interpreted as including the right to a healthy environment, with “all such amenities and facilities which a person born in a free country is entitled to enjoy with dignity, legally and constitutionally....” (*Zia v WAPDA pld 1994 SC 693 Pakistan Supreme Court*)
- ▶ “States owe a duty of care to citizens to prevent harm and to ensure overall well-being. .. States are compelled to take effective measures to mitigate climate change and ensure that all individuals have the necessary capacity to adapt to the climate crisis.” *Ranjitsinh v Union of India* (SC 21/3/24)

# Johannesburg Principles on role of judges(2002)

- ▶ The judges affirm -
  - ▶ adherence to the (Rio) principles which lay down the basic principles of sustainable development,
  - ▶ that an independent Judiciary and judicial process is vital for the implementation, development and enforcement of environmental law,
  - ▶ that members of the Judiciary... are crucial partners for promoting compliance with, and the implementation and enforcement of, international and national environmental law,

# Climate Change – Key Pre-Paris Judgments

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- ▶ *EPA v Massachusetts* (US SC 2007)
- ▶ *Leghari v Pakistan* (Lahore HC 2015)
- ▶ *Urgenda Foundation v. State of the Netherlands* (Hague DC 2015)



# *Environment Protection Agency v Massachusetts (US 2007)*

- ▶ Supreme Court holds (5-4) that EPA duties to regulate “air-pollutants” under Clean Air Act include greenhouse gases, such as CO2 emissions from motor vehicles
- ▶ Global warming “the most pressing environmental challenge of our time”. EPA’s failure to take action “arbitrary and capricious” and therefore unlawful.

That judgment paved the way for a radical change in the approach of the EPA, and in due course for the ambitious programme of President Obama, without which there would probably have been no Paris agreement.

# *Leghari v Pakistan* (Lahore HC 2015)

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- ▶ Farmer complains for damage by flooding, attributable to government failure to implement its own National Climate Change Policy
- ▶ Jurisdiction based on constitutional right to life
- ▶ The court orders the establishment of Climate Change Commission under court control to oversee implementation of policy

# *Urgenda v Netherlands* (2015 Hague District Court)

The court ordered the Dutch state to limit GHG emissions to 25% below 1990 levels by 2020, finding its current policies insufficient to meet its commitments under UN commitments.

The court relied on duties under domestic Dutch law, but the decision was later upheld by the Supreme Court by reference to rights under the European Convention on Human Rights.

# The Paris Agreement (December 2015)

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- ▶ Overriding aim of “holding the increase in the global average temperature to well below 2 °C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5 °C above pre-industrial levels” (art 2(1))
- ▶ Key obligations lie in the “nationally determined contributions” (NDCs), which each party is legally required to prepare and maintain.

- ▶ The NDC is to be achieved through “domestic mitigation measures” (art 4.2).
- ▶ Progressive improvement, so that each successive NDC is to “represent a progression”, and reflects the state’s “highest possible ambition” (art 4.3);
- ▶ 5-yearly “global stocktake” under article 14

# Post –Paris cases – Domestic law

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- ▶ Seeking orders against states – eg *Future Generations* case (Columbia)
- ▶ Challenging planning decisions– eg *Gloucester Resources* case (New South Wales)
- ▶ Seeking orders against fossil fuel companies – eg *Milieudefensie et al v Royal Dutch Shell* (Netherlands)
- ▶ Seeking compensation for past damage – eg *Luciano Lliuya v RWE AG* (Germany)

# Future Generations case

- ▶ 25 young claimants complained that the Colombian State was in breach of constitutional duties to protect the environment, in particular through deforestation in the Amazon.
- ▶ The Supreme Court agreed, and ordered the President to create an “intergenerational pact for the life of the Colombian Amazon,” with the participation of the plaintiffs, affected communities, and scientific organizations.

*Demanda Generaciones Futuras v. Minambiente*  
STC 4360-2018

# Gloucester Resources

- ▶ The NSW Land and Environment Court (Judge Preston) upheld the refusal of permission for an open cut coal mine (the Rocky Hill Coal Project) to produce 21 million tonnes of coal over 16 years.
- ▶ The judge took account of the climate change consequences of the development, including consequential emissions by users, rejecting arguments based on the project's relatively small contribution to the global total of GHG emissions.

*Gloucester Resources Limited v Minister for Planning*  
[2019] NSWLEC 7



# Milieudefensie v Shell

- ▶ The claimants alleged that Royal Dutch Shell had violated its duty of care under Dutch law by emitting GHG emissions that contributed to climate change.
- ▶ The Hague District Court agreed and ordered that Shell must reduce its GHG emissions by 45% by 2030 compared to 2010 levels, and to zero by 2050 in line with the Paris Agreement. (Subject to appeal/)

# Lluya v RWE

- ▶ In 2015 Mr Lluya, a Peruvian farmer, began an action in Germany against RWE, Germany's largest electricity producer, seeking compensation for RWE's share (assessed at 0.47%) of damage caused by the melting of mountain glaciers in the Andes as a result of GHG emissions.
- ▶ In 2017 the German appeal court allowed the claim to proceed to the evidentiary stage.
- ▶ In 2022 judges, experts and lawyers made a site visit in Peru to assess the nature of the damage and its causes.
- ▶ The case continues... (?)

# International law

Current request by Small States to ITLOS for Advisory Opinion on obligations of states under UN Convention on the Law of the Sea:

- ▶ (a) to prevent, reduce and control pollution of the marine environment in relation to the deleterious effects that result or are likely to result from climate change;;
- ▶ b) to protect and preserve the marine environment in relation to climate change impacts, including ocean warming and sea level rise, and ocean acidification.

# Breaking news - ECHR

- ▶ Article 8 of the Convention encompasses a right to effective protection by the State authorities from the serious adverse effects of climate change on lives, health, well-being and quality of life.
- ▶ Swiss Confederation had failed to comply with its duties (“positive obligations”) under the Convention concerning climate change. Critical gaps in the the relevant domestic regulatory framework.

VEREIN KLIMASENIORINNEN SCHWEIZ AND OTHERS  
v. SWITZERLAND (9/4/24)

# Dissenting judgment of UK judge (Tim Eicke)

- ▶ The court has “created a new right.. to “effective protection by the State authorities from serious adverse effects... caused by climate change”...
- ▶ and imposed a new “primary duty” on Contracting Parties “to adopt, and to effectively apply in practice, regulations and measures capable of mitigating the existing and potentially irreversible, future effects of climate change”;
- ▶ none of which have any basis in Article 8 or any other provision of or Protocol to the Convention.



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What next?  
Watch this space