

ASIA PACIFIC JUDICIAL COLLOQUIUM ON CLIMATE CHANGE

USING CONSTITUTIONS TO ADVANCE ENVIRONMENTAL RIGHTS AND ACHIEVE CLIMATE JUSTICE



Meeting report and Materials

26 - 27 February 2018
Lahore, Pakistan

LAHORE HIGH COURT



Widener University
Delaware Law School



World Commission
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- the Asian Development Bank (ADB) - Irum Ahsan, Gregorio Rafael Bueta, Briony Eales, Maria Cecilia T. Sicangco,
- the United Nations Environment Programme (UN Environment) – Elizabeth Mrema, Andy Raine, Saranya Rojananuangnit, Angela Kariuki and Emeline Pluchon,
- the Raoul Wallenberg Institute (RWI) with the support of Sweden – Helena Olsson and Yoke Sudarbo,
- Widener University Delaware Law School – Erin Daly and James R. May,
- the World Commission on Environmental Law (WCEL),
- the Global Judicial Institute on the Environment (GJIE),
- the UN Special Rapporteur on Human Rights and the Environment, Professor John H. Knox.

The success of the colloquium has been also possible thanks to the enthusiastic and active participation of the moderators of the breakout sessions, and all local and international participants.





PREFACE

On 26 and 27 February 2018, the 'Asia Pacific Judicial Colloquium on Climate Change: Using Constitutions to advance Environmental Rights and Achieve Climate Justice' was held in Lahore, Pakistan. The central objective of the colloquium was to assist and build capacity of judiciaries and legal stakeholders in Asia Pacific to implement constitutionally-entrenched environmental rights. It was also to provide materials to contribute to and be used in national judicial training institutes or organizations, and facilitate dialogue on good practices in implementing environmental constitutionalism and advancing climate justice. The agenda for the colloquium is in Annex A.

The colloquium was attended by more than 300 participants, including senior justices and other legal stakeholders from more than 15 countries across Asia Pacific and globally. The colloquium also brought together a sizeable number of young judges and lawyers from Pakistan. The list of international participants is in Annex B.

The event took place at the Pearl Continental Hotel. Over two days, participants engaged in substantive discussions. Day one consisted of a plenary session. Day two featured a panel discussion and two breakout sessions where up to 100 selected participants took an active part in the debates. Topics that were discussed included:

- Trends in global environmental constitutionalism and climate litigation;
- The link between constitutionalism, climate change and human rights;
- The role of judges in recognizing environmental rights and advancing climate justice, considering such issues as separation of powers, standing to sue, environmental rule of law, and the relationship between environmental and other rights;
- The role of citizens, the public, and NGOs in bringing cases to the courts;
- The issues of access to justice: costs, standing, statutes of limitations, burdens of proof, interim relief, strategic lawsuits against public participation, access to justice by vulnerable groups and alternative dispute resolutions mechanisms;



- Interpretation and application of environmental rights provisions in international, regional, and constitutional law, with attention to how the various layers interrelate with and complement one another; and
- Remedies and enforcement including, inter alia, the judicial role in coordinating with other branches of government.

The colloquium generated exchanges regarding the role of judges in advancing environmental constitutionalism and climate justice, and identified concrete measures that can be taken by judges, judicial training academies, organizations and other stakeholders to increase the role and impact of judges in advancing climate justice. Four main outcomes can be highlighted:

- The participants agreed that a ‘Lahore Action Plan’ be developed as a regional roadmap of action for participating judiciaries and partner organizations regarding strengthening judiciaries with sustainable capacity to adjudicate environment and climate change cases. The present report includes this roadmap.
- Advocates in the Lahore High Court decided to create Pakistan’s first ever environmental law bar association, the Pakistan Environmental Law Bar Association.
- The capacity of judges and legal stakeholders in Asia Pacific in applying environmental constitutionalism was enhanced during the colloquium.
- The partnerships between partner organizations were strengthened during the colloquium.

The meeting was part of a larger programme under the leadership of the UN Special Rapporteur on Human Rights and the Environment, Professor John H. Knox, and supported by UN Environment to enhance judicial capacity in environmental constitutionalism, identify gaps and opportunities, and support judges worldwide. It also took place within the framework of ongoing technical assistance by the Asian Development Bank on supporting judges in Asia-Pacific, under the Asian Judges Network on Environment (AJNE), to develop judicial capacity for adjudicating climate change and sustainable development issues. Additionally, the colloquium was an innovative collaboration initiated by partners at Widener University Delaware Law



School (USA) and North-West University (South Africa) in conjunction with the New Frontiers in Environmental Constitutionalism conference held in South Africa in 2016, and further developed by the IUCN World Commission on Environmental Law and the Global Judicial Institute for the Environment at the Colloquium on Human Rights and the Environment in Brazil in 2017.

The meeting was hosted by the Lahore High Court and organized in partnership with the Punjab Judicial Academy, UN Environment, ADB, the Raoul Wallenberg Institute (RWI) with support from the Government of Sweden, the World Commission on Environmental Law (WCEL), the Global Judicial Institute on the Environment (GJIE), the UN Special Rapporteur on Human Rights and the Environment, and Widener University Delaware Law School.

The objective of this report is to give an overview of the colloquium and to provide training materials to help judges navigate through complex issues to achieve environmental, climate and social justice. The report includes the Lahore Action Plan, summaries of some speaker presentations, and provides a synopsis of environmental constitutionalism and selected landmark judicial decisions.





CONTRIBUTORS & SPEAKERS

Hon. Mr. Justice Syed Mansoor Ali Shah, Justice of the Supreme Court of Pakistan, was elevated as a Judge of the Lahore High Court in 2009 and served as the Chief Justice of the Court from June, 2016 to February, 2018. He authored several judgments on constitutional law, human rights, administrative law, climate justice and environmental sustainability. He took keen interest in judicial and administrative reforms and spearheaded Alternate Dispute Resolution Centers (ADR), Criminal and Civil Model Courts, case management and court automation systems at the Lahore High Court and in the District Judiciary in Punjab. He helped re-engineer Punjab Judicial Academy in order to improve judicial training and capacity building for the judiciary and the ministerial staff. He lays special emphasis on research and played a foundational role in setting up the Lahore High Court Research Centre (LHCRC). Justice Shah has a Masters in Law from University of Cambridge, UK and a Masters in Economics from the University of the Punjab, Pakistan. He is an accredited mediator from CEDR, London. He was elevated as Judge, Supreme Court of Pakistan on 7th February 2018.

Hon. Mr. Justice Yawar Ali Khan, Chief Justice of the Lahore High Court, was elevated to the Bench on 17 February 2010. He lectured at the Punjab University Law College, Lahore, as a Visiting Lecturer during earlier years of practice. Conducted several cases of public importance before the High Court, the Supreme Appellate Court and the Supreme Court of Pakistan, while representing various clients including WAPDA, PIA, Pakistan Railways, National Bank of Pakistan, Muslim Commercial Bank Limited and the Federal Government as its counsel. Prior to joining the Judiciary, Chief Justice Ali served as Federal Counsel for Government of Pakistan, Additional Advocate General for Government of the Punjab (26.03.1995 to 01.08.1997) and Deputy Attorney General for Pakistan (01.08.1997 to 07.06.2006 and again 10.08.2007 to 11.02.2008). His reported cases prior to being elevated. PLD 1996 S.C 152. PLD 1996 S.C 274. 1996 MLD 01. 1996 PLC (CS) 678. PLD 1995 SC 546, 1996 SCMR 1510, 1999 SCMR 2744. 2005 SCMR 445. 2008 SCMR 1377. Chief Justice Ali graduated with BA from the University of the Punjab, and LL.B (Honours) from Leeds University in the United Kingdom.

Hon. Mr. Justice Tassaduq Jilani, Former Chief Justice of the Supreme Court of Pakistan, is currently Judge ad hoc at the International Court of Justice, The Hague, and previously served as the 21st Chief Justice of Pakistan (2013 – 2014). He was instrumental in encouraging Pakistan to accede to the Hague Convention and has written extensively



on child abduction and custody issues. He conducts many seminars and is called by the Ministry of Law to help with their decisions and implementation processes.

Justice Ali Baqir Najafi, Judge of the Lahore High Court. He completed basic qualification from Govt. Muslim Model High School, Urdu Bazar, Lahore, did his B.Sc. from the Government College, Lahore. He joined the Punjab University Law College Lahore and obtained LL.B Degree in 1989. Joined the legal profession in the same year at Lahore and after completion of apprenticeship joined his father, Late Ali Huzoor Najafi, Advocate Supreme Court, enrolled as an Advocate of High Courts in 1990 and subsequently as an Advocate of Supreme Court of Pakistan. He taught in Punjab University Law College Lahore for 12 years and other Private Law Colleges for 18 years and remained as Internal & External Examiner Punjab University Lahore for a long time. During this time he taught Constitutional Law, International Law, Islamic Law, Land Laws and Minor Acts. He remained as Editor of Law Page, The News and also contributed legal & other law related articles in Magazines and Newspapers.

During the course of legal profession career conducted a large number of cases before the Lower Courts, Federal Shariat Court, High Court and Honorable Supreme Court of Pakistan. He conducted more than 1000 cases including some reported judgments during 20 years standing in profession at Bar, on the sides of Constitution, Civil, Criminal, Corporate, Banking, Customs, Narcotics, Anti-Corruption, Labour, Immigration, and Islamic Laws including Private International Law. Also conducted the cases of public interest litigation and human rights. He has participated and represented in many Law Conferences, Peace Conferences, Seminars and read research papers.

Justice Muhammad Anawaarul Haq, Judge of the Lahore High Court. Justice Muhammad Anawaarul Haq was elevated as Judge of the Lahore High Court on 19 February 2010. He started his professional career in Lahore in 1980. After constitution of Rawalpindi Bench of Lahore High Court shifted to High Court, Rawalpindi Bench and simultaneously started practice in District Courts Jhelum. He remained unopposed Member Punjab Bar Council from 2004 to 2009. Remained Legal Advisor (Panel Advocate) District Council Jhelum, Habib Bank Limited, Allied Bank Limited, WAPDA, Pakistan Post Office, Alliance Textile Mills, Municipal Committee Pind Dadan Khan, Pakistan Tele Communication Authority and U Mobile Phone Company. Remained Special District Government Pleader and Special District Public Prosecutor from 1986-1992. He delivered part time lectures in Urdu Law College and Jinnah Law College, Jhelum. Justice Haq joined the Human Rights Commission of Pakistan (HRCP) and remained its National Council Member (1992-1997).

He attended Hague Forum Training on International Criminal Law 17.04.2012 to 27.04.2012 in Hague, Netherlands.

Justice Haq's current roles include: Inspection Judge Sargodha, Sialkot, Jhelum, D.G. Khan and Faisalabad Districts; Administrative Judge for securities of Lahore High Court and



subordinate Courts in Punjab; Incharge Judge of Planning and Development Lahore High Court; and Member Syndicate King Edward Medical University, Lahore.

Justice Ayesha A. Malik, Judge of the Lahore High Court. Justice Ayesha A. Malik studied law at the Pakistan College of Law and did her LLM from Harvard Law School. Elevated as Judge Lahore High Court, Lahore on 26.03.2012, she has worked on case management as head of the committee on Case Management at the Lahore High Court which oversees the pace of litigation and the use of technology for effective and speedy dispensation of cases. She has been a supervisor in the use of information technology in the courts, working on automation at the Lahore High Court and within the District Judiciary of Punjab. She has been a member of the Board of the Punjab Judicial Academy overseeing the academic developments at the Academy. She is also the Inspection Judge for the Environment Tribunals in Punjab and sits on the Green Bench of the Lahore High Court.

Justice Jawad Hassan, Judge of the Lahore High Court, is adjudicating mostly constitutional cases including environmental matters as the Green Judge by delivering some important landmark judgments and also regularly teaching the environmental law to the Judicial Officers at the Federal as well as the Provincial Judicial Academies. Before his elevation to the Bench, Justice Hassan after obtaining LL.M in environmental law from Pace University, School of Law, New York has extensively worked in environmental law by drafting the laws, being the lead counsel & amicus curiae, authoring books and articles, speaking at international conferences and introducing/teaching the subject at various educational institutions in Pakistan.

Irum Ahsan, Senior Counsel, Law and Policy Reform, Asian Development Bank, completed her legal education at the London School of Economics and Political Science. Before joining the Asian Development Bank (ADB), she practiced corporate law (both contentious and non-contentious matters) in Pakistan. In addition, Irum taught law at various prestigious institutions. At ADB, she is working in the Office of the General Counsel where, over the last 10 years, she has been advising on multi-sector projects for inclusive growth including several corporate finance transactions. Irum is currently leading the law and policy reform (LPR) program. Her LPR work mainly focuses on areas such as environmental and climate change adjudication and enforcement, legal literacy for women, and corporate governance. ADB's LPR work is based on the premise that a functioning legal system – anchored on the Rule of Law is an essential element of sustainable development. Her work led to the establishment of 5 green courts/benches in different countries, the Asian Judges Network on Environment, the first such network in the world, and Asia's first court for gender-based violence cases in Pakistan. Irum has also organized several symposiums for Chief justices on environmental and climate change laws and presented her work at numerous international forums. She is a committee member of ADB's governance



and gender thematic groups. Irum is an active advocate for gender consciousness and for women's rights and passionately steers the gender discussions in ADB.

Professor Denise Antolini, Associate Dean for Academic Affairs, The William S. Richardson School of Law, University of Hawaii and Deputy Chair of the World Commission on Environmental Law. She has served as the Associate Dean for Academic Affairs since 2011. She joined the Law School faculty in 1996 and directed the nationally recognized Environmental Law Program for several years. Since 2006, she has spearheaded the Law School Building Excellence Project. She serves on the State Water Commission Nominating Committee (2013), was the inaugural Chair of the Honolulu City Council's Clean Water and Natural Lands Commission, and is past Chair of the State Environmental Council. Her courses have included torts, environmental law, environmental litigation, domestic ocean and coastal law, and legal writing. She received the 2006 University of Hawai'i Board of Regents' Excellence in Teaching Medal. She served as Chair of the American Association of Law School's Environmental Law Section and, from 2005 until 2008, was on the ABA's Standing Committee on Environmental Law. Dean Antolini is past chair of the Hawai'i State Bar Association's Natural Resources Section and was selected by Hawai'i Women Lawyers as the 2002 recipient of the Distinguished Community Service Award.

She graduated from Princeton University in 1982; obtained a Masters in Public Policy at UC Berkeley (1985) and concurrently a J.D. from Boalt Hall School of Law, UC Berkeley in 1986, where she was editor-in-chief of Ecology Law Quarterly. After a two-year federal district court clerkship in Washington, D.C., she spent eight years practicing public interest law with the Sierra Club Legal Defense Fund (now Earthjustice) in Seattle and Honolulu, serving as Managing Attorney of the Honolulu office from 1994 until 1996. Dean Antolini litigated several major citizen suit environmental cases involving coastal pollution, water rights, endangered species, environmental impact statements, and Native Hawaiian rights. She served on the legal team that represented the plaintiffs in the PASH (traditional and customary Native Hawaiian rights) decision and was lead counsel on the legal team for the Windward parties in the early stages of the Waiāhole Water case (1993-1995).

Sumudu Atapattu, Director of Research Centers and Senior Lecturer at the University of Wisconsin Law School, is affiliated with UW-Madison's Nelson Institute for Environmental Studies and the Center for South Asia and is the Executive Director of the campus-wide interdisciplinary Human Rights Program. She serves as the Lead Counsel for Human Rights at the Center for International Sustainable Development Law based in Montreal, Canada, and serves as affiliated faculty at the Raoul Wallenberg Institute for Human Rights and Humanitarian Law, Sweden.

Justice Antonio Benjamin, Justice of the High Court of Brazil, is the Secretary General of the UN Environment International Advisory Council on Environmental Justice



since 2012. Appointed Justice of the National High Court of Brazil in 2006 by President Luiz Inácio Lula da Silva, Professor Antonio Benjamin was a career Assistant Attorney General of the State of São Paulo for over twenty years, where he headed the Environmental Protection Division for four years. Professor Benjamin was the founding President of both the Brazilian Consumer Law and Policy Institute and the Law for a Green Planet Institute. He is a former President of the Brazilian Fulbright Alumni Association, a member of the UN Secretary General Legal Expert Groups on Crimes against the Environment, and for many years a member of the Brazilian Environmental Council (CONAMA), first appointed by President Fernando Henrique Cardoso and later re-appointed by President Luiz Inácio Lula da Silva. At the international level, he served as co-president of the International Network for Environmental Compliance and Enforcement (INECE). Currently, he is the chair of the Brazil-US Law Society and the IUCN World Commission on Environmental Law.

Justice Benjamin is a professor at the Catholic University of Brasília School of Law and a visiting professor of the University of Texas, School of Law at Austin since 1994. He received his LL.B. from the Federal University of Rio de Janeiro, his LL.M. from the University of Illinois and his PhD from the Federal University of Rio Grande do Sul. He is the founding President and emeritus editor-in-chief of the Brazilian Consumer Law Review and the Brazilian Environmental Law Review. He has co-drafted several major Brazilian statutes, including the 1990 Consumer Protection Code, the 1992 Anti-Corruption Act, the 1994 Competition Act, the 1998 Crimes Against the Environment Act, the 2012 Forest Code, the 2006 Forest Concession Act and the 2006 Atlantic Forest Act. Professor Benjamin has published over thirty books and articles in Brazil and abroad. During the 2012 Rio+20 Conference, he served as Secretary-General of the UN Environment World Congress on Justice, Governance and Law for Environmental Sustainability.

Professor Ben Boer, Emeritus Professor of the University of Sydney and National Distinguished Professor at Wuhan University Law School. Ben Boer was appointed Emeritus Professor of the University of Sydney in 2008. In 2011 he was appointed as National Distinguished Professor at Wuhan University Law School in Hubei Province China, in its Research Institute of Environmental Law. He now spends some 3 months per year in Wuhan. Between 2006 and 2008, he was the international Co-Director of the IUCN (International Union for the Conservation of Nature) Academy of Environmental Law and Visiting Professor based at the University of Ottawa. Formerly, Ben was Professor in Environmental Law, University of Sydney (1997 -2008) and the Corrs Chambers Westgarth Professor of Environmental Law, University of Sydney (1992-1996). Prior to that, at Macquarie University, he was Lecturer, Senior Lecturer and Associate Professor, School of Law (1979-1991) and part-time Lecturer in the Graduate School of the Environment, and Lecturer, Department of Legal Studies, La Trobe University (1974-1979). He was appointed as Deputy Chair of the IUCN World Commission on Environmental Law in 2012, a position he held until 2016. He became a member of the Australian Academy of Law in 2016. He continues to be a member



of the International Council of Environmental Law, based in Geneva.

Rt. Hon. Lord Carnwath of Notting Hill, Justice of the Supreme Court of the United Kingdom, has been a Justice of the UK Supreme Court since April 2012, having been a judge of the High Court and Court of Appeal since 1994. He had previously practised as a barrister specialising in planning and environmental law, including a period as Attorney-General to HRH the Prince of Wales (for which he was made a Companion of the Victorian Order). From 1999 to 2002 he was Chairman of the Law Commission for England and Wales, and from 2004 to 2012 he was the first Senior President of Tribunals, responsible for reform of the specialist tribunal system. Since 2004 he has worked as an adviser to the United Nations Environment Programme (UNEP) on judicial training, and is currently a member of their International Advisory Council on Environmental Justice.

Professor Erin Daly, Professor of Law at Widener University Delaware Law School and Director of the Global Network for Human Rights and the Environment (GNHRE). She is the author of *Dignity Rights: Constitutions, Courts, and the Worth of the Human Person* and co-author of *Reconciliation in Divided Societies: Finding Common Ground*. With Professor James R. May, she has co-authored or co-edited numerous books and articles on environmental constitutionalism including *Global Environmental Constitutionalism* and *New Frontiers in Environmental Constitutionalism*. She and Professor May co-direct the Dignity Rights Project at Delaware Law School.

Briony Eales is an Australian lawyer specializing in environmental and climate change law. Briony is currently a consultant with ADB's Law and Policy Reform (LPR) program, where she is developing a benchbook on climate change litigation for Asian judges. Briony is also advising ADB and Lao PDR on development of a climate change law. On previous ADB projects, Briony advised on matters such as environmental prosecution, adjudication, dispute resolution, compliance, governance, and enforcement in ADB's Southeast Asian developing member countries. In her private sector work, Briony has advised on environmental and social compliance, resettlement, and indigenous peoples' engagement on a large infrastructure project in the Philippines. In Australia, Briony worked as a legal counsel in private law firms and specialized in insurance and employment litigation. She also acted on behalf of the Australian government in administrative law matters while working for the Australian Government Solicitor in Canberra and Sydney.

Saima A. Khawaja, Partner at Progressive Advocates & Legal Consultants. She is a practicing lawyer and partner at Progressive Advocates & Legal Consultants. Environmental Law is one of her main areas of interest and she has been involved in analysing and drafting EIA Regulations, Administrative Penalty Rules and Water Conservation Law (for SAARC countries). She has done number of litigations challenging environmental issues in Pakistan.



She is also involved in development and policy work along with academia presently faculty member at the Punjab Judicial Academy.

Judge Fleur Kingham, President of the Land Court of Queensland, was appointed the President of the Land Court of Queensland in August 2016, after serving 10 years as a Judge of the District, Children's and Planning and Environment Courts of Queensland. Prior to those appointments, she served 6 years as Deputy President of the Land and Resources Tribunal. Before her judicial career, she was a commercial litigation and environmental lawyer; advised governments on environmental and resources law and was the Director of the Masters of Environmental Management at the University of Queensland. She mediated complex disputes, including indigenous land and governance issues. In 2009, Judge Kingham was appointed the inaugural Deputy President of the Queensland Civil and Administrative Tribunal. In 2011, she was awarded the Queensland Law Society Agnes McWhinney Award for her contribution to making justice more accessible to the community and bridging the gap between land and resources issues and Indigenous communities. In July 2016, she was awarded an Honorary Doctorate by Griffith University.

Professor John Knox, UN Special Rapporteur on Human Rights and the Environment. John H. Knox is the first United Nations Special Rapporteur on human rights and the environment, and the Henry C. Lauerman Professor of International Law at Wake Forest University in the United States. As the Special Rapporteur, he conducts consultations around the world and publishes reports on the relationship between human rights and environmental protection. Information about the mandate is available at the website of the Office of the United Nations High Commissioner for Human Rights, www.ohchr.org, and at his personal website, www.srenvironment.org.

Professor James R. May, Distinguished Professor of Law at Widener University Delaware Law School. James R. May is a member of the Global Network for Human Rights and the Environment and the American College of Environmental Lawyers. May is the author of *Principles of Constitutional Environmental Law* (2013), and co-editor of *Shale Gas and the Future of Energy* (2016), and *Standards of Environmental Constitutionalism* (forthcoming), and, along with Erin Daly, is the co-founder of the Dignity Rights Project, co-director of the Environmental Rights Institute, and co-author or co-editor of *Judicial Handbook on Environmental Constitutionalism* (2nd Ed. 2018), *New Frontiers in Global Environmental Constitutionalism* (2017), *Global Environmental Constitutionalism* (Cambridge, 2015), and *Environmental Constitutionalism* (2014).

Sunil Mitra, Deputy Country Director, Pakistan Resident Mission, Asian Development Bank. He is a civil engineer from Singapore and have worked in various capacities on infrastructure projects in Singapore, Australia and the central west region. He has worked



on transport projects in Pakistan from 2009. In his new capacity as Deputy Country Director of the Pakistan Resident Mission of ADB, Mr Mitra looks after programming of projects for all sectors ranging from infrastructure projects to health projects.

Elizabeth Mrema, Director, Law Division, UN Environment. Elizabeth has worked with the United Nations Environment Programme (UN Environment) for almost two decades. Until June 2014, she was the Deputy Director and Coordinator, Operations and Programme Delivery Branch in the Division of Environmental Policy Implementation (DEPI). Prior to which, she was the Executive Secretary of the UNEP/Secretariat of the Convention on the Conservation of Migratory Species of Wild Animals (CMS), Acting Executive Secretary of the UNEP/ASCOBANS and Interim Executive Secretary of the UNEP/Gorilla Agreement all based in Bonn, Germany from January 2013 till July 2009. A lawyer and career diplomat with LLB (Hons) from the University of Dar-es-Salaam, Tanzania, LLM from Dalhousie University, Canada and Postgraduate Diploma in International Relations and Diplomacy (Summa Cum Laude) from the Centre of Foreign Relations and Diplomacy in Dar-es-Salaam, Tanzania. She has published several articles related to international environmental law, compliance and enforcement of conventions and developed, among others, a number of multilateral environmental agreements negotiation tools, handbooks and guidelines currently used by UNEP in its capacity building programmes. Elizabeth is a member of the World Commission on Environmental Law.

Dr. Parvez Hassan, President of the Pakistan Environmental Law Association, President Emeritus of the IUCN World Commission on Environmental Law, and Senior Advocate, Supreme Court of Pakistan.

Marlene Oliver, Environment Commissioner of Environment Court of New-Zealand (retired). Marlene Oliver is from New Zealand and has a background of more than 40 years working as an environmental management professional. She served for 12 years as a full-time Environment Commissioner on the specialist Environment Court of New Zealand. She is a qualified mediator with extensive experience in environmental mediation and facilitation. Most recently she was Professor Environmental Management at Royal Thimphu College, Royal University of Bhutan, in Bhutan.

Atty. Antonio Oposa Jr., Environmental Lawyer. He is one of Asia's leading voices in the global arena of Environmental Law. His work is internationally known for the case where children, acting on behalf of future generations, took legal action to preserve the remaining old growth forests of the Philippines (1993). It is the case that illustrates the principle of intergenerational responsibility, now often known as the "Oposa Doctrine". In 2008, after a ten-year legal battle against twelve Philippine government agencies, he won an unprecedented case to compel these agencies to clean up Manila Bay. As an ordinary



citizen, but working with elite enforcement operatives, Tony has led and organized some of the most daring enforcement operations against environmental crime syndicates.

He is a lawyer (University of the Philippines) who holds a Master of Laws from the Harvard Law School, where he was the commencement speaker of his graduating class. He was given the Outstanding Young Man (TOYM) of the Philippines award (1993) and the highest United Nations award in the field of the Environment -- the UNEP Global Roll of Honor (1997). He is the only Asian to receive the International Environmental Law Award from the Washington DC-based Center for International Environmental Law (CIEL).

In 2009, he received the Ramon Magsaysay Award, Asia's highset award for public service. He was cited "for his path-breaking and passionate crusade to engage Filipinos in acts of enlightened citizenship that maximize the power of the Law to nurture the environment, for themselves, their children, and for generations yet unborn.

He is a swimmer, scuba diver, sailor, tennis player, edible gardener, vocalist, painter, poet, storyteller, and a loving husband and father.

Justice Brian Preston, Chief Judge of the Land and Environment Court of New South Wales, Australia. He has authored over 100 publications on environmental law, administrative and criminal law. Justice Preston is an Adjunct Professor at the University of Sydney and at Western Sydney University having lectured in post-graduate environmental law for over 26 years.

Justice Ya Tan Sri Dato' Sri Azahar bin Mohamed, Judge of the Federal Court of Malaysia. Justice Azahar bin Mohamed obtained his LLB degree from University of Malaya in 1980 and LLM from London School of Economics in 1987. Justice Azahar has had a long career with the Judicial and Legal services since 1980. His Lordship has held several positions, amongst them are Senior Assistant Registrar, High Court; Deputy Public Prosecutor; Senior Federal Counsel, Anti-Corruption Agency; Legal Adviser, Royal Customs and Excise Department Malaysia; Deputy Registrar of Companies; Head of Prosecution, Attorney General's Chambers and Head of Civil Division, Attorney General's Chambers.

On 1st August 2004, Justice Azahar Mohamed was appointed as a Judicial Commissioner and served the High Court at Johor Bahru. On 27th July 2006, His Lordship was elevated as a High Court Judge of Malaya. On 11th May 2011, His Lordship was elevated as a Judge, Court of Appeal. On 12th September 2014, His Lordship was elevated as a Federal Court Judge. On 9th October – 31st December 2015, His Lordship attended Inns of Court Fellowship at the Institute Advanced Legal Studies, University of London under the auspices of IALS, Middle Temple, Inner Temple, Gray's Inn and Lincoln's Inn.

Professor Tianbao Qin, Director of the Research Institute of Environmental Law and Associate Dean for the School of Law of Wuhan University. Professor Quin Tianbao is a National Changjiang Scholar and Luoigia Professor of Law, and serves as the Director of the



Research Institute of Environmental Law (RIEL) and the Associate Dean for the School of Law, Deputy Director of the Research Center of the Supreme Court of China on Environmental-related Cases, Wuhan University; Editor-in-Chief of the Chinese Journal of Environmental Law; Member of the Compliance Committee of the Nagoya Protocol on ABS.

Andy Raine, Regional Coordinator for Environmental Law and Governance, United Nations Environment Programme (UN Environment). Andy is UN Environment's Regional Coordinator for Environmental Law and Governance, and is based in Bangkok. In this role he works with governments and legal stakeholders across the Asia Pacific region on a wide range of environmental law and governance issues. He has worked in legal roles with the United Nations for the last ten years, based in both New York and Bangkok. Prior to his positions in the UN, Andy worked as an environmental lawyer in leading international law firms in both London (at Linklaters) and Melbourne (at Freehills), advising governments, banks and corporates around the world on a wide range of environmental law issues and transactions. Andy has a Master of Laws (Environmental Law and Policy) with Distinction from University College London, as well as a Bachelor of Laws (Hons) and a Bachelor of Business (Management) from the University of Queensland. He is a member of the World Commission on Environmental Law, and has published numerous articles on environmental law and governance. Andy is married with two children that keep him very busy.

Nils Henrick Rolf Ring, Deputy Director Head of the Department for Administration and Finance of the Raoul Wallenberg Institute. Prior to joining the Institute, he worked as a Project Co-ordinator for the Swedish Red Cross and served as an assistant to the Chair in International Law at the Faculty of Law, Lund University. He has experiences from designing, managing and monitoring international programmes as well as evaluations. Rolf holds a LL.M. from Lund University.



Synopsis of environmental constitutionalism and climate justice

Professors James R. May and Erin Daly

Environmental constitutionalism is a relatively recent phenomenon at the confluence of constitutional law, international law, human rights, and environmental law. It embodies the recognition that the environment is a proper subject for protection in constitutional texts and for vindication by courts worldwide. It also reflects innovative constitutional mechanisms for advancing environmental and human rights, and achieving climate justice.

Climate justice promotes policies, practices and jurisprudence that do not disproportionately burden the world's most vulnerable people. Climate justice falls at the vertex of international, regional, national and the common law, basic notions of human and environmental rights, and human dignity. Environmental constitutionalism can help to advance climate justice in at least two ways. First, a handful of countries address climate change expressly into their constitutions, such as the Dominican Republic, Ecuador and Tunisia. Second, a growing contingent of courts – such as those in Pakistan, the Netherlands, and the United States – have recognized that governmental action or failure to act on climate change can abridge a right to a healthy climate as implied by an express constitutional right to life, dignity or due process, or an emerging right to a healthy environment.

Constitutional recognition of environmental rights and principles offers one way to engage environmental and climate challenges that can be more effective than other juridical approaches. It can engage multiple interdependent types and generations of rights indivisibly and synergistically, including rights to life and to dignity, as well as rights to health, food, water, shelter, and the right to a quality environment. Moreover, it can encompass civic rights including rights of expression, association, petition, information, and participation -- all of which can find explicit constitutional protection in a single harmonious charter. It can protect local concerns -- such as food security, access to clean water, air pollution, and deforestation -- and global concerns like biodiversity and climate change. Environmental constitutionalism



encompasses elements of both human rights and environmental protection in ways that are inter-related, interdependent, and indivisible.

Countries that have adopted environmental constitutionalism have been shown to have smaller per capita ecological footprints and higher performance on several indicators of environmental indicators, and be more likely to ratify international environmental agreements. There is also some evidence that environmental constitutionalism promotes domestic environmental laws, regulations and norms, although these often reflect the culmination of domestic, regional and international environmental measures.

Environmental Protection in Constitutional Texts

As with every other aspect of constitutional rule of law, each country adopts a unique approach to environmental protection. Some countries incorporate the full panoply of environmental constitutional provisions, while others eschew it entirely. Most fall somewhere in between. The variety of provisions, aiming to protect different aspects of the environment with a range of scaffolding and enforcement mechanisms, attests to the growth of environmental constitutionalism throughout the world in number and prominence.

Environmental constitutionalism is variable and broad, containing within it substantive rights, procedural rights, directive policies, reciprocal duties, or combinations of these and other attributes. About one-half of the countries of the world expressly or impliedly recognize a substantive constitutional right to a quality environment. About the same number impart a corresponding duty on individuals to protect the environment. Some provisions are quite specific, such as those that provide for rights of nature or rights to potable water or other natural resources. Some are more ephemeral, recognizing trust responsibilities over natural resources or toward future generations, or addressing related subjects like sustainability or climate change. Some recognize environmental stewardship as a matter of national policy. A few incorporate numerical outcomes, such as maintaining a percentage of prescribed tree cover, such as in Bhutan (60 percent) and Kenya (10 percent).

There is also an uptick in provisions that are designed to afford special process



rights in environmental matters. Environmental procedural rights normally involve requirements for environmental assessment, access to information, or rights to petition or participate. Such rights help to keep countervailing substantive rights vital: a constitutional guarantee to a beneficial environment is more likely to take root when stakeholders have the right to receive free and timely information, to participate in deliberations, and to challenge environmental decision making in courts and tribunals. Procedural environmental constitutionalism is also important in its own right, and can be as or more efficacious than substantive environmental rights, particularly where judicial approaches are more open to procedural remedies.

Environmental constitutionalism is growing at the subnational level too, filling gaps in federal systems. Most prominently in states in the Americas in general and in Brazil in particular, subnational governments around the globe have constitutionalized substantive and procedural environmental rights, environmental duties, and sustainable development for present and future generations, often with much more specificity and potential enforceability than what is provided in national constitutions. Subnational constitutional environmental rights can be especially effective in countries that have yet to recognize environmental rights at the federal level.

The Role of Judges in Enforcing Environmental Constitutionalism

Judges are increasingly finding themselves on the front lines of environmental constitutionalism, faced with difficult decisions often of first impression and often implicating several layers of legal regimes and multiple interrelated claims. Issues invoking environmental constitutionalism can be among the more complex that judges engage. Even so, judges around the world are issuing consequential decisions to advance environmental, climate, and social justice claims with more frequency, and sometimes in ways that are truly breathtaking in breadth and depth. This correlates to a worldwide growth in courts with jurisdiction to hear constitutional questions and to protect constitutional rights.

With more courts engaging in constitutional review and issuing more opinions, the import of comparative constitutionalism grows. For instance, while France, South Africa, and Colombia have radically different histories, each has constitutional



courts addressing the multivariate challenges of balancing public and private power, of interpreting entrenched constitutional texts, and of maintaining institutional legitimacy while ensuring the progressive development of environmental rights.

And, indeed, judges are becoming increasingly aware of their critical role in protecting the environment and those who live in it, including especially those most vulnerable to climate change. As Justice Syed Mansoor Ali Shah wrote in a climate justice case earlier this year, “[A] judge today must be conscious and alive to the beauty and magnificence of nature, the interconnectedness of life systems on this planet and the interdependence of ecosystems.” With similar fervor, Judge Ann Aiken of the District Court of Oregon wrote in another climate justice case (quoting another American judge): “The current state of affairs ... reveals a wholesale failure of the legal system to protect humanity from the collapse of finite natural resources by the uncontrolled pursuit of short-term profits [T]he modern judiciary has enfeebled itself to the point that law enforcement can rarely be accomplished by taking environmental predators to court. ... The third branch can, and should, take another long and careful look at the barriers to litigation created by modern doctrines of subject-matter jurisdiction and deference to the legislative and administrative branches of government.” Likewise, the Supreme Tribunal of Justice of Argentina has also recognized how changing environmental conditions have expanded the proper scope of judicial authority: “Thus, the responsibility of the judge and the judiciary has evolved, as the concept of harm has become more ample, to include, for example, what are called “generational harms” -- that is, those harms that, due to their magnitude, cannot be repaired within a single generation, but whose effects will impact generations of the future.” Judges around the world are taking seriously their authority -- and their corresponding obligations -- to act in the face of irreversible climate and environmental degradation and the social injustice that such changes are sure to bring.

Implementation Challenges

Adjudicating environmental constitutionalism can be complex and ridden with obstacles. Most provisions require significant judicial interpretation, the most momentous of which is providing a principled definition of ‘environment,’ which is not always defined. Does it include all soil, water, and air? All flora and fauna? Or is



it more limited? Does it include the built environment? And orbiting around these questions are others that courts must determine: how much protection is required? Who can protect it? What constitutes a violation? And who is responsible for making things better – among other things. Indeed, ‘environment’ can be virtually limitless, affecting human lives, dignity, health, housing, access to food and water, and livelihood, and so on.

The adjectival examination is just as daunting. While there may be daylight between an environment that is “beneficial,” or “adequate,” or “healthful,” or “quality,” jurists are often at pains to describe it. Nor is the scope of the right delimited or defined. Consequently, it is usually left to the courts to determine what it means for the environment to achieve these ends and by whose perspective and how those qualities should be measured.

Identifying appropriate constitutional parties is another challenge. As is so often the case, people who are already vulnerable to human rights abuses are made even more vulnerable by environmental degradation: those who are less likely to be politically protected and who have fewer resources to protect themselves – including women, poor people, ethnic minorities, and children – are most likely to be subject to this panoply of environmentally-generated human rights abuses. They have fewer options to avoid the effects of climate change, and fewer means with which to combat them. When land erodes or ceases to be fertile, they move to cities, where their communities are diminished and where they may or may not find employment, shelter, and services and where they are more likely to find themselves physically and psychologically in danger. If they have no cities to move to, like the former residents of the Cataret Islands, they become ‘climate refugees’, sometimes for generations. The challenges for indigenous populations can be especially daunting, particularly insofar as their values and cultural practices may be ill-recognized and undervalued by the dominant cultures. People experience environmental degradation and climate change in kaleidoscopic ways that inter-relate, overlap, compound the burdens, and constantly mutate with changing conditions.

As courts follow the terms of the constitutional text and structure, they must stay attuned to the particular ways in which claimants are affected by environmental



harms. In some countries, standing is limited, in others it deliberately extends to any person (whether individually aggrieved or not), while in others still, the constitution is silent or ambiguous as to the proper scope of the right to claim constitutional rights. In a few -- but a growing number of countries -- the right extends to nature itself. On the other side, the question of identifying proper defendants may turn on the proper definition of the right but this is further complicated because it implicates questions of sovereignty, immunity, extra-territoriality, and the horizontal application of constitutional rights.

Identifying the appropriate constitutional remedy can be problematic, too. Remedying constitutional violations involving environmental matters, however, invariably presents difficult and far-reaching policy choices that resist judicial resolution because simply financial compensation cannot repair the damage. Environmental cases can be multi-faceted with many inter-dependent and often moving parts, and with both short- and long-term consequences for the environment and for the humans who live, or will live, in it. In a rare environmental case, damages can be an effective remedy but in most cases even damages can be hard to quantify – do they include medical care and if so for whom and for how long? In most cases, however, the payment of money will not remedy the environmental despoliation or the loss of biodiversity, and the task of returning the environmental conditions to their prior state – to make the environment “whole” as it were – is nearly impossible to define and implement. Courts are increasingly requiring administrative agencies to take responsibility, but this too requires ongoing judicial oversight and management. Moreover, courts need to be sensitive to the unintended consequences of environmental amelioration, such as when the setting aside of land for environmental purposes results in the removal of the local population, or when the closure of a polluting industry reduces employment opportunities and the local economy suffers.

Adjudicating environmental constitutionalism can also invert the normal expectations relating to the roles of public and private parties. Whereas traditional constitutional rights litigation pits the private individual against the public authority, environmental litigation often pits members of the public against a private entity (thus invoking the principle of the horizontal application of constitutional rights and obligations). Moreover, in many of these cases, private individuals are asserting



public rights, whereas the government (through lenient regulation and licensing) is facilitating private gain.

In addition, once plaintiffs have effectively invoked judicial authority, the burdens of enforcement can be enormous. Courts are keenly aware of the limitations of their own power—of the fact —namely, that courts have no particular resource other than their own legitimacy to ensure respect for or compliance with judicial orders. Eloquent exposition alone cannot change a societal structure that does not recognize the rule of law, for example, or that values development and economic progress at least as much as environmental protection. And yet, remarkably and courageously, courts have chosen to engage because they realize that, through coordination with other parts of government and in dialogue with both the public and private sectors, they can play a pivotal role in securing environmental rights.

The breadth of these provisions, which is typical for environmental rights generally, leaves wide berth for the spectrum of judicial engagement, ranging from vindication and management to indecision, abstention, and even cynicism. The complexities are not simply matters of definition. Rather, they inhere in the nature of environmental rights, especially at the constitutional level. Vindicating environmental rights presents even more fundamental questions of policy choices. The problem is one of proportion requiring careful balancing. The judgment of how to balance the competing claims is one that may typically be done politically and not judicially. But of course, staying out of the fray has substantive consequences that sustain the continued deterioration of the environment: as judges are increasingly recognizing, where there is no judicial resolution, the harm may be irremediable.

Using a Global Comparative Perspective

While comparative constitutionalism is an effective means for evaluating the emergence of global environmental constitutionalism, it is not without its limitations. First, because the jurisprudence is global, describing and respecting the integrity of localization can be challenging. Although most countries adhere to international declarations and conventions affirming their commitment to environmental protection, one country might do so by treating environmental protection as a public good, while another might prefer to use the revenues



produced from private exploitation of natural resources for education or social security. Localization of environmental protection is particularly important for several additional reasons, too. It is undoubtedly true that although some environmental problems transcend national borders, most are rooted in local spaces, whether a bay, a forest, or a particular part of a mountaintop. And the manifestations of environmental degradation are experienced by the local residents, as loss of access to nature, deterioration of health, food and water insecurity, and so on. Moreover, the particular political, historical and ethnological challenges are locally unique. Likewise, the solutions are most likely to be implemented locally. Actors who are politically accountable should take responsibility for choices made.

The ability to implement environmental values in a local context also helps to avoid some of the most contentious charges made against international environmental law. Judiciaries in countries that resist the global environmental ethos can move more slowly or not at all, while others can push the boundaries of international law into new and uncharted territories, as, for instance, Ecuador and Bolivia have done in protecting the rights of nature, and as countries in Southeast Asia have done in explicitly encouraging environmental rights litigation and in tying environmental protection to the protection of life and human dignity. These are complex policy choices that are best made at the national level by institutions that are operating within the local society, familiar with local conditions, and accountable within the local political climate. And courts, more than the tribunals and commissions that operate regionally and internationally, are more accessible to the local population and more able to effectively enforce their orders against local officials.

And yet, it seems critical to take advantage of the shared experiences of those who face the similar challenges in other countries. These materials are therefore designed to illustrate the breadth of environmental constitutionalism and to make available to all the learning and experience of others, while allowing judges in each local jurisdiction to choose what will be most useful to them.



Lahore Action Plan: priorities and actions to strengthen judiciaries in Asia and the Pacific with sustainable capacity to advance environmental rights and climate justice

The colloquium affirmed the crucial role that the judiciary plays in enhancing environmental rights and climate justice, through the interpretation, application, further development, and enforcement of the law. The following key priorities and actions to strengthen the capacity of judiciaries in Asia and the Pacific to adjudicate environmental and climate change cases to advance environmental rights and climate justice were actively explored and discussed. These priorities and actions serve as an informal roadmap to guide and inform future activities by judiciaries and partner organizations in this area.

1. **Opening access to courts to vulnerable and marginalized people.** Many judicial systems throughout the region have developed mechanisms to open rules of standing and encourage legal action to vindicate environmental rights and environmental human rights. These mechanisms include innovative litigation techniques such as allowing strategic lawsuits against public participation as an affirmative defense, which is then resolved through summary hearings. These approaches should be widely shared within jurisdictions to increase public awareness, and among jurisdictions to facilitate adaptation to specific judicial contexts. Particular focus should be given to vulnerable classes of people (such as women and children, indigenous peoples, the poor, the elderly, and persons with disabilities) and those displaced by the impacts of climate change.
2. **Sharing knowledge and experience to advance environmental and climate rights and justice.** There is by now a large reservoir of case law on environmental and climate rights developed by courts in Asia and around the world relating to both substantive and procedural rights. These examples of effective judicial decision-making constitute a valuable resource for judiciaries that are just



beginning to turn to environmental rule of law, environmental constitutionalism, environmental human rights, and related issues. Exchanges of information, regional and subregional gatherings of judges and other legal stakeholders, and international and national capacity building programs should be continued and expanded, with ample support from partner organizations.

3. **Developing appropriate judicial solutions to current environmental challenges.** In adjudicating constitutional and non-constitutional claims addressing environmental and climate change issues, judges should have access to a widening array of judicial remedies to protect environmental rights and to advance environmental and climate justice. These solutions include orders to establish national commissions, maintaining continuing jurisdiction to ensure ongoing compliance with judicial orders, orders requiring name and shame proceedings, orders requiring environmental audits, etc. Judiciaries will benefit from sharing these solutions and actively exploring how best to apply such remedies in their own jurisdictions.
4. **Continuing need for raising awareness of core environmental and climate change issues.** Although environmental consciousness has grown in recent years, there is a continuing need for activities and training programs to further raise awareness of judges and other legal stakeholders in the region (particularly law students as the next generation of judges) on topics including environmental law, climate change law, the gender implications of environmental changes, the impact of environmental changes on human rights (with particular emphasis on vulnerable groups), the core nexus between human rights law and environmental law, and environmental constitutionalism. Awareness on these issues is uneven and remains low in most jurisdictions. An integrated approach that leverages on national economies of scope should be explored, such as internationally trained environmental law professors themselves training first level judges.
5. **Ensuring sustainable judicial capacity building on environmental law and climate change law.** To build sustainable capacity it is necessary for national and subnational judicial training institutes to incorporate well-designed and taught programs on environmental law and climate change law into relevant judicial training curricula. Partner organizations should assist by supporting



the development or updating of nationally appropriate training materials (e.g. judicial bench-books, subject handbooks, innovations and good practice compilation guides, technical guidelines, model orders, etc.) and by providing targeted support to relevant institutions, training programs, and activities.

6. **Continuing need for regional and subregional networking opportunities for judges and legal stakeholders, with increased and inclusive participation.**

Judicial networks such as the Asian Judges Network on Environment and the Global Judicial Institute on the Environment are important platforms to bring together judges from across the region to share experiences and build collective capacity. More efforts should be taken to engage less represented judiciaries, such as those in the Pacific and other developing countries in the region. Champion “green” judges, who can initiate and implement appropriate reform initiatives in their respective jurisdictions, should be identified at all levels of the judiciary. Furthermore, efforts should be taken to ensure increased participation in these networks by young judges, judges from across the judiciary at all levels (including, e.g., magistrates, district court judges, etc.), female judges, civil society, the academe, and law students.

7. **Enhancing participation by women in judiciaries.** Many judiciaries in Asia and the Pacific have very low numbers of female judges, hampering gender equality efforts and creating a risk of male gender bias in judicial decision-making. This situation may compromise adjudication of environmental and climate change cases, especially as they relate to the disproportionate impacts of environmental harm and climate change on vulnerable groups such as women and girls. As international law considers substantive equality to have been achieved only when there is equality of opportunity, equality of access, and equality of results or outcomes, judiciaries and governments need to increase the number of female judges in all judiciaries at all levels. They should further ensure equitable access by women judges to professional development opportunities. Partner organizations should promote and facilitate these efforts where possible.

8. **Engaging judges in international environmental and climate change governance processes.** As judges play a critical role in protecting environmental rights and advancing environmental rule of law and climate justice, judges



should be more formally and substantively engaged in processes of the decision-making bodies of multilateral environmental agreements and the UN Framework Convention on Climate Change. Partner organizations like UN Environment should actively explore opportunities to facilitate the inclusion of judges in bodies such as the Conference of the Parties (COP), the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement (CMA), and the Adaptation Committee.



PART 1

Evolution and Innovations in Environmental Constitutionalism and Rights





Environmental Constitutionalism: The role of Constitutional Courts in Rendering Environmental Justice

Justice Ayesha Malik



“The fate of the Creation is the fate of the humanity”

E.O. Wilson

- Environmental issues are persistent, pervasive and pernicious.
- The Constitution of Pakistan is not inert but a living document which evolves and grows with time.
- Constitutional Courts have a central role to play in tackling environmental issues while enforcing and interpreting the fundamental rights enshrined in the Constitution.
- Constitutionalization of environmental rights means looking at fundamental rights as enshrined in the Constitution through the environmental lens.
- Post Burbhan Declaration 2012 (The Conference declared a “Common Vision on Environment for the South Asian Judiciaries”), Lahore High Court established the Green Benches.
 - A Green single bench and Green division bench at the principal seat.
 - A senior most judge at the benches to grace the court as Green single bench and two senior most judges at the benches to grace the court as Green division bench.
- **Judicial Activism in Developing Environmental Jurisprudence**
 - The most significant feature in the environmental landscape of Pakistan is the judicial activism that has responded to public interest environmental



litigation.

- This has been facilitated by Article 199 of the Constitution of Pakistan which confers writ jurisdiction on the High Courts to enforce Fundamental Rights and Article 184 (3) which confers jurisdiction on the Supreme Court to enforce Fundamental Rights of “public importance”.
- These Article have been frequently invoked for the suo moto jurisdiction of the Supreme Court and the High Courts (the “superior courts”).
- The superior courts have been liberally responsive to environmental issues and complaints, including on the jurisdictional issue to locus standi, the main body of environmental jurisprudence in Pakistan has been laid down by the Supreme Court and the High Courts.

- **Landmark Green Precedents.**

- In the landmark decision in **Shehla Zia vs. WAPDA**¹, the Supreme Court of Pakistan held that the right to a clean and healthy environment was part of the Fundamental Right to dignity provided in Article 14. In this case Supreme Court also introduced the precautionary principle of environmental law, with specific reference to its inclusion in the Rio Declaration on Environment and Development into Pakistani jurisprudence.
- In the **Khewra Mine Case**² the petitioners sought enforcement to the right of the residents to have clean and unpolluted water against coal mining activities in an upstream area. The Supreme Court affirmed its expansive approach to Article 184(3) and stated that ‘the right to have unpolluted water is the right every person wherever he lives.
- In dealing with noise pollution, the Supreme Court in **‘Islamuddin case’**³, restrained the defendants from creating public nuisance in their workshops, stating that even noise made in carrying on a lawful trade, if injurious to the comfort of the community, is a public nuisance.

1 PLD 1994 Supreme Court 693

2 1994 SCMR 2061

3 PLD 2004 SC 633



- The Supreme Court took **Suo Motu**⁴ action in Islamabad Chalets and Pir Sohawa Valley Villas, restraining the construction of chalets and villas situated at a distance of two kilometres of the Margalla Hills, where the housing scheme was launched. The housing scheme in question would have had a direct bearing on the eco-system of the Margalla Hills.
- The Supreme Court also took suo motu action in the **New Murree Project**⁵ which posed grave environmental hazard as its initiation would have destroyed 5,000 acres of forest. The project was ultimately disbanded and the court reiterated the global environmental law principles of intergenerational equity as well as sustainable development in order to achieve goal of healthy environment, not only for present population but also for future generations.
- In the **IMAX Cinema Case**⁶ the Supreme Court opined that conversion of a public park into a shopping mall and setting up of the IMAX cinema without observing the codal formalities of the legal framework in particular non filing of the initial environmental examination was grossly illegal and was an offence under the Act.
- Recently in the **Canal Road Expansion case**⁷, the question before the Supreme Court was the environmental impact of widening the 14 km road along the banks of the canal that runs through Lahore. It was contended that not merely would the scheme devastate the green belt along both sides of the canal, but would even fail to achieve its stated objective of improving traffic flow in order to reduce traffic congestion in the city. The Court while holding that green belt around both sides of the canal was a public trust resource and hence could not be converted into private or any other use also observed that widening of the road was in fact a public purpose and as minimum area was being affected and project conformed with the Act thus

4 Suo Motu case No.13 of 2005, Report 2005-2006, SC of Pakistan, Golden Jubilee Edition, 106

5 2010 SCMR 361

6 2006 SCMR 1202

7 2011 SCMR 1743



the Doctrine of Public Trust, in circumstances, could not be said to have been compromised.

– **SUO MOTU CASE NO.13 OF 2010: In the matter of Contaminated Water to Rawalpindi from Rawal Dam Supreme Court of Pakistan 2013 S C M R 591**

- Right to clean drinking water.
- Discharge of solid waste and liquid into Rawal Lake.
- Government directed to take immediate steps for installation of water treatment plant.

– **Syed Mansoor Ali Shah v. Government of Punjab Lahore High Court PLD 2007 Lahore 403**

- Air pollution caused by vehicular emissions.
 - Court constituted a Commission to study and analyse the increasing problem of vehicular air pollution and formulate a solution.
 - Perseverance and protection of dignity of man was fundamental right of citizens which was guaranteed under Art.14 of the Constitution.
 - State functionaries were bound by contractual obligations under International Treaties to take effective measures for elimination of vehicular pollution.
 - Measures and recommendations for control and maintenance of vehicles, air quality and fuel standards, capacity building and monitoring/ inspection stations were enumerated.
- In the recent **Signal Free Corridor Case**⁸, a project which would have converted a stretch of 7 km of road into a signal free high speed expressway, a full bench of Lahore High Court declared the same as illegal and stopped the authority from starting any such new development project. The court

8. PLD 2015 Lahore 522. P.S. Judgment was appealed against and was partly allowed by Supreme Court in the case reported as 2015 SCMR 1739



while examining the integrality of environmental justice to fundamental rights opined that the corpus of environmental laws have a singular purpose of protecting life and nature including the international Environmental Principles of sustainable development, inter and intra- generational equity and public trust doctrine.

– **Muhammad Ayayz v. Government of Punjab Lahore High Court 2017 CLD 772**

- Case relating to Noise Pollution
- Application of Precautionary Principle
- The state and its officers must employ measures to achieve environmental justice and preserve the environment

– **Muhammad Shahid v. Punjab Environmental Tribunal (Poultry Farm Case) Lahore High Court WP No.74381 of 2017 Decided 18.01.2018**

- Water Justice
- Adverse Impact on the Environment, first question to be asked

– **Maple Leaf Cement Factory Case, Lahore High Court, Case No: W. P. No.115949/2017 Decided: December, 2017**

- Sustainable Development creates a balance between development and environmental protection and conservation.
- The central theme of sustainable development is, the best interpretative tool for the actualization of the Environmental laws.
- Precautionary Principle
- Principle of “In Dubio Pro Nautra”

– **What do these Green Decisions Indicate?**

- The Constitutional Courts in Pakistan have taken a broad and expansive



view of their jurisdiction in relation to environmental issues.

- Courts have recognized that there can be multiple stresses on the environment and there is sometimes a dynamic tension involved, which may mean that it may not be possible to redress one without to a certain extent leaving others unaddressed.
- The aim is not necessarily a perfect environment but a balanced one and the above referred judgments show that in such cases, the judicial approach has been appropriately nuanced
- Courts have not held any environmental issue to be beyond their jurisdiction, and in displaying a ready willingness to take up all sorts of matters, have steadily pushed ahead along the path opened up in Shehla Zia case.
- Challenges to the environment do not end with drafting appropriate laws, policies and judgments. In fact, they begin with these. To transform these laws and policies into effective implementation requires a massive commitment to the capacity building of the courts rendering environmental justice especially the tribunals.
- Without this, any effort will have little chance of success. The support of the courts, media and civil society organizations should also be encouraged in the region.

– **Gender and Environment**

- “Advancing gender equality may be one of the best ways of saving the environment, and countering the dangers of overcrowding and other adversities associated with population pressure. The voice of women is critically important for the world’s future – not just for women’s future.”
— Amartya Sen
- “The gender dimension of climate change and its impacts are likely to affect men and women differently.” 14th Conference of the Parties in



Poznan, Poland UNFCCC's Secretariat, December, 2008

- The secretariat urged formulation of “gender inclusive policy measures to address climate change” and stressed that women are important actors” and “agents of change” in coping and adaptation.
- The Beijing Declaration and Platform for Action identified three strategic objectives in the critical area of women and the environment:
 - › Involve women actively in environmental decision-making at all levels.
 - › Integrate gender concerns and perspectives in policies and programmes for sustainable development.
 - › Strengthen or establish mechanisms at the national, regional and international levels to assess the impact of development and environmental policies on women.

– **“Climate change litigation: a fairly new phenomenon.**

- The existing environmental jurisprudence has to be fashioned to meet the needs of something more urgent and overpowering i.e. Climate Change.
- From Environmental justice we need to move to Climate Change Justice
- Need to ensure that issues of climate change are dealt with in a more proactive and robust manner.
- Climate Change is a defining challenge of our time and has led to dramatic alterations in our planet's climate system. For Pakistan, these climatic variations have primarily resulted in heavy floods and droughts, landslides and glacial lake outbursts severely affecting these most vulnerable and resource poor communities.
- One a legal and constitutional plan this is a clarion call for the protection of fundamental rights of the citizens of Pakistan, in particular, the vulnerable and weak segments of the society.
- Pakistan ranks 22nd in the Climate Change Vulnerability Index 2016 (CCVI).
- The main objectives of Pakistan's Climate Change Policy 2012 include:
 - › To pursue sustained economic growth by appropriately addressing



the challenge of climate change;

- › To integrate climate change policy with other interrelated national policies;
- › To focus on pro-poor gender sensitive adaptation while also promoting mitigation to the extent possible in a cost-effective manner;
- › To ensure water security, food security and energy security of the country in the face of the challenges posed by climate change;
- › To minimize the risks arising from the expected increase in frequency and intensity of extreme weather events such as floods, droughts and tropical storms;
- › To strengthen inter-ministerial decision making and coordination mechanisms on climate change;
- › To facilitate effective use of the opportunities, particularly financial, available both nationally and internationally;
- › To foster the development of appropriate economic incentive to encourage public and private sector investment in adaptation measures;
- › To enhance the awareness, skill and institutional capacity of relevant stakeholders;
- › To promote conservation of national resources and long term sustainability.

– **Judicial Innovation and Climate Justice, “The Asghar Leghari Case”, Lahore High Court**

- PIL petition by a farmer against Governmental inaction regarding Climate Change
- Judicial Leadership: Climate Change Orders (CCOs)
- Catalyst to mobilize government machinery regarding Climate Change.
- Major Developments made through CCOs:
 - › Climate Change Focal Persons
 - › Climate Change Commission (CCC)
- CCC identified priority Adaptation Measures to be implemented in short



span of time

- Public Awareness and Sensitization regarding Climate Change
- Capacity building of relevant personnel of Government
- Funding Related Issues
- National Water Policy and Provincial Water Policy





Judicial Commissions and Climate Justice in Pakistan

Dr. Parvez Hassan



Pakistan has a remarkable story in its efforts for environmental protection, sustainable development and climate justice. Beyond the stellar leadership provided by Pakistan as Chair of G77 at the Earth Summit in Rio de Janeiro, Brazil in 1992¹, its superior judiciary has been the centre-piece for providing direction and a national compass. The judiciary did this with innovative interpretation and totally undeterred by the lack of the right to the environment as a fundamental right in the country's Constitution. It has progressed from an ownership of the precautionary principle in the Shehla Zia case in 1994² to a bold declaration of environmental justice and climate justice in the Asghar Leghari case in 2018³. It has done so with the support of judicial commissions and implementation bodies that it now routinely appoints in complex environmental issues. I have been involved to head twelve (12) of these – ranging from examining the degradation of water quality by coal-mining activities, to solid waste management, clean air, smog, heritage public park, hospital waste, Islamabad's environment, climate change, houbara bustard and child care. My presentation here today is the telling of that remarkable story.

A. Constitutional Foundations of Fundamental Rights

The Constitution of the Islamic Republic of Pakistan, 1973 (the “Constitution”), includes a catalogue of “Fundamental Rights” for the enjoyment and protection of

1 See, generally, Parvez Hassan, (1) U.N Summit on Environment: The Rio Declaration, *The Nation*, 15 May 1992, (2) Rio '92 – Prospects and Challenges, *The Nation*, 9 June 1992, (3) Environment: Time for Action, *The Dawn*, 24 August 1992, and (4) The Rio Summit: An Assessment, *The Nation*, 25 August 1992.

2 PLD 1994 Supreme Court 693.

3 Lahore High Court Writ Petition 25501 of 2015.



which any person can directly approach the High Courts under its Article 199. The Constitution affirms that this justiciable character of fundamental rights “shall not be abridged” (Article 199(2)). The fundamental rights include Article 9 which deals with the right to life and Article 14 that provides for the dignity of man:

9. Security of person. No person shall be deprived of life or liberty save in accordance with law.

14. Inviolability of dignity of man etc. (1) The dignity of man and, subject to law, the privacy of home, shall be inviolable....

Article 184(3) of the Constitution even empowers the Supreme Court of Pakistan to directly take up matters involving the enforcement of any of the fundamental rights if it considers that such enforcement involves a question of public importance.

There is no Article in the Constitution that frames the “right to the environment” as a fundamental right. The reference to “environmental pollution and ecology” in Item 24 of the Concurrent Legislative List enabled both federal and provincial legislative competence. But the Concurrent List was deleted under the 18th Constitutional Amendment in 2010 leaving environmental matters almost solely within provincial domains.

B. Growing Practice of Appointing Commissions in Public Interest Environmental Litigation

The Pakistani judiciary has, in the past over twenty five (25) years, developed a dense jurisprudence of public interest environmental litigation (“PIEL”) to enforce the constitutionally protected Fundamental Rights of the public⁴.

The need, rationale and justification for developing the PIEL jurisdiction has been

4 For a detailed survey of public interest litigation in Pakistan, see Werner Menski, Ahmad Rafay Alam and Mehreen Raza Kasuri, *Public Interest Litigation in Pakistan* (Pakistan Law House, Karachi, 2000), Mansoor Hassan Khan, *The Concept of Public Interest Litigation and its Meaning in Pakistan*, PLD 1992 Journal 84, and Parvez Hassan, “Judiciary Leading the Way” (1998) 15(1) *The Environmental Forum* 48. For a general review of trends, in respect of public interest litigation, in the region, see Dr. Parvez Hassan and Azim Azfar “Securing Environmental Rights Through Public Interest Litigation in South Asia” (2004) 22 *Virginia Environmental Law Journal* 215. Jona Razzaque, *Public Interest Environmental Litigation in India, Pakistan and Bangladesh* (Kluwer 2004) provides a seminal over-view of this subject.



explained by Mr. Justice Tassaduq Hussain Jilani in State vs. M.D. WASA:

The rationale behind public interest litigation in developing countries like Pakistan and India is the social and educational backwardness of its people, the dwarfed development of law of tort, lack of developed institutions to attend to the matters of public concern, the general inefficacy and corruption at various levels. In such a socio-economic and political milieu, the non-intervention by Court in complaints of matters of public concern will amount to abdication of judicial authority⁵.

In the landmark PIEL decision in Shehla Zia vs. WAPDA⁶, the Supreme Court of Pakistan held that the right to a clean and healthy environment was part of the Fundamental Right to Life guaranteed by Article 9 and the Right to Dignity guaranteed by Article 14 of the Constitution. In this case, the Supreme Court also introduced the Precautionary Principle of environmental law, included in the Rio Declaration⁷, into Pakistani jurisprudence.

Over the years in dealing with environmental cases, the superior courts of Pakistan have adopted a unique and innovative approach of appointing Commissions to investigate the issues and to make recommendations. This pioneering corpus of practice has come mostly from the vision of Justices Saleem Akhtar and Tassaduq Hussain Jilani (we environmental lawyers call them “green” Judges). In 2011, the Chief Justice of Pakistan, Mr. Justice Iftikhar Muhammad Chaudhry, led a bench of the Supreme Court to endorse the practice of looking to Commissions/Committees for mediating environmental disputes. And, in a yet more recent case, in 2015, Mr. Justice Mansoor Ali Shah, the then Green Judge of the Lahore High Court, got international attention when he appointed a Climate Change Commission to facilitate the implementation of the National Climate Change Policy. He followed by appointing the Houbara Bustard Commission, the Smog Commission and the Child Care Commission.

I have had the privilege of being associated with most of the important environmental cases in which judicial commissions and implementation bodies were appointed in

⁵ 2000 CLC 471 (Lahore).

⁶ Supra note 2.

⁷ The Rio Declaration on Environment and Development was adopted at the 1992 United Nations Conference on Environment and Development.



Pakistan. The eloquent story of PIEL in Pakistan, from 1991 to date, has unfolded to the following details:

1. The Asphalt Plants Case (1991)

The first appointment of a Commission in the field of environment in the country in a public interest litigation was most probably in United Welfare Association, Lahore vs. Lahore Development Authority (Writ Petition No. 9297 of 1991) before Mr. Justice Khalil-ur-Rahman Khan of the Lahore High Court. The intervention of the court was sought for getting certain asphalt plants removed from the Petitioners' sites in Lahore on account of serious health hazards the plants were posing for the residents. Dr. Justice Nasim Hasan Shah comments on this case:

The anxiety felt by the Court on hearing this complaint is manifest from the order it passed on 15 October 1991. Herein after noticing the contention of the petitioner it not only called upon the Lahore Development Authority to answer the allegations contained in the petition but also requested a renowned environmentalist namely Dr. Parvez Hassan, Advocate to visit the area "to verify the complaint made and then suggest to the Court the measures to be adopted"⁸.

I visited the area, with scientific support from Pakistan Council of Scientific and Industrial Research (PCSIR), and reported to the Lahore High Court that:

The air-borne pollutants, from the operational activity of the plant, are dispersed over a large area. ... [and that these pollutants were emitting] toxic substances like sulphur dioxide, nitrogen oxides, hetrocyclic compounds and hydrocarbons besides colossal quantities of air-borne fine dust emitted through the crush unloading at the site and during its processing at the plant.

I recommended to the Court that:

The continued operation of these plants is inconsistent with the rights of the adjoining residential areas to a clean and healthy environment. The residents are continually exposed to the obnoxious fumes and the potential health hazards unleashed by

⁸ Environment and the Role of the Judiciary, PLD 1992 Journal 21, at 27.



these asphalt plants. These should be removed from the site and relocated in areas where there is no danger to the environment. Even at the reallocated sites, the activities of the plants should be monitored with a view to minimize the impact of their environmental degradation.

As a result of this report, the Director General, Lahore Development Authority, passed orders for the shifting of the asphalt plants.

2. The Shehla Zia Case (1994)

In the Shehla Zia case, in which I was counsel to the petitioner, the Supreme Court was presented a unique petition when some residents of a residential area of Islamabad approached the Court regarding the construction of a high voltage grid station by the Water and Power Development Authority (WAPDA). The residents, led by Ms. Shehla Zia, apprehended that the electro-magnetic radiation of the grid station could be harmful for their health.

In adjudicating this case, the Supreme Court pioneered the use of judicial commissions in Pakistan to tackle complex environmental issue and to present suitable options. In its order, the Supreme Court gave significant relief to the petitioners by staying the construction of the grid station until further studies were done to establish the nature and extent of the threat posed by electro-magnetic radiation emitted by power plants. Drawing on the experiences of the Indian courts, the Supreme Court set up a commission of experts to study the technical dimensions and to submit a report in this respect:

16. In the problem at hand the likelihood of any hazard to life by magnetic field effect cannot be ignored. At the same time the need for constructing grid stations, which are necessary for industrial and economic development, cannot be lost sight of. From the material produced by the parties it seems that while planning and deciding to construct the grid station WAPDA and the Government Department acted in a routine manner without taking into consideration the latest research and planning in the field nor any thought seems to have been given to the hazards it may cause to human health. In these circumstances, before passing any final order, with the consent of both the parties we appoint NESPAK as Commissioner to examine



and study the scheme, planning, device and technique employed by WAPDA and report whether there is any likelihood of any hazard or adverse effect on health of the residents of the locality... as suggested above (emphasis added)⁹.

The public utility concerned was also directed to make a public-friendly administrative approach a norm in its future work. The Shehla Zia case unleashed a new paradigm in public interest litigation on environmental issues in Pakistan as the superior courts grew more receptive to appointing Commissions to progress environmental rights¹⁰.

3. The Salt Miners Case (1994)

In 1995, the Supreme Court appointed a Commission, with me as the Chairman, in General Secretary, West Pakistan Salt Mines Labour Union (CBA) Khewra, Jhelum vs. Director, Industries and Mineral Development, Punjab, Lahore¹¹, to visit the site of extensive mining activity and to recommend remedial measures. The Commission was given powers to inspect, record evidence and examine witnesses under the Civil Procedure Code.

The Commission visited the site in Khewra, Jhelum, held public meetings and made several recommendations which were adopted by the Commission by consensus to their acceptance by the Supreme Court¹².

As counsel of the petitioners in the Shehla Zia case, and the Chairman of the Commission appointed in the Salt Miners case, I had a hand in shaping the orientation of the Pakistani courts to the use of judicial commissions in public interest environmental litigation. The basic approach that was followed was to recommend to the court how commissions, in other countries, have helped provide science/technology-based solutions which lie outside the expertise of the Courts.

⁹ Supra note 2, at 715.

¹⁰ See generally Parvez Hassan, "Shehla Zia vs. WAPDA: Ten Years Later", PLD 2005 Journal 48, also published in International Environmental Law Committee Newsletter of the American Bar Association's Section on Environment, Energy and Resources 13-19 (May 2005).

¹¹ 1994 SCMR 2061.

¹² Order of the Supreme Court dated 8 July 2002 in HRC No. 120 of 1993 included the direction that: . recommendations of the Commission shall be complied with in letter and spirit by the lease holder of the mines and no violations shall take place on the respective sites. In April 2015, the Supreme Court, through its order dated 7 April 2015 in HRC No. 120 of 1993, appointed another Commission to verify the implementation of the recommendations of the earlier 1994

Commission.



Apart from providing the court expert guidance, the other limb of this approach was to highlight the importance of a non-adversarial, public-private partnership model for handling the most intractable civic problems.

The pattern of appointing court-empowered expert commissions with broad participation of the stakeholders and involving site visits and public hearings and “consensus” recommendations adopted in this case was to imprint on the future environmental commissions in the country.

4. The Solid Waste Management Commission (2003)

In 2003, in an intra-court appeal, City District Government vs. Muhammad Yousaf,¹³ challenging the use of a site for dumping solid wastes, a Division Bench of the Lahore High Court appointed the Solid Waste Management Commission to review the suitability of Mahmood Booti as a site for solid waste disposal. The Court also directed the Commission to advise on the optimal environmentally appropriate manner for the disposal of solid wastes in Lahore as well as to recommend other sites for the disposal of solid wastes as per Lahore’s requirements.

I was appointed the Chairman of the Commission comprising, on my recommendation, a broad section of representatives from both the public and private sectors. This roundtable included government officials and city administrators including the District Nazim (the Mayor of Lahore), the District Co-ordination Officer, the Director, Solid Waste Management, Government of Punjab, Director General, EPA, Punjab, Secretary, Health, Punjab, academics and scientists, parliamentarians, specialists, environmentalists, and members of civil society (representatives of IUCN Pakistan and WWF-Pakistan). The Commission set up a sub-committee for hospital waste disposal under the Provincial Secretary, Health, who is in charge of all the public sector hospitals. It is also a reflection of the public-private sector partnership and harmonious working of the Commission that it persuaded the City District Government Lahore to arrange and finance the Environmental Impact Assessment (“EIA”) of Mahmood Booti by NESPAK, a consultancy firm chosen by the Commission.

As in the Salt Miners case, the Commission was successful in orchestrating a

13 I.C.A No. 798 of 2002 filed before the Lahore High Court.



consensus of the members of the Commission in their final recommendations which were accepted by the High Court¹⁴.

On 23 March 2005, Lahore inaugurated the construction of its first integrated compost and landfill plant at Mahmood Booti and the plant was commissioned one (1) year later with private sector participation on a build, operate and transfer basis. According to The News, “Lahore’s first compost plan will transform around 20 percent of the city’s solid waste into 250 tonnes of organic fertilizer on a daily basis”¹⁵. The Solid Waste Management Commission moved with dedication and resolve to provide a model environmentally appropriate solid waste disposal regime for Lahore, hopefully to be replicated in other parts of the country¹⁶.

5. The Lahore Clean Air Commission (2003)

In Syed Mansoor Ali Shah vs. Government of Punjab¹⁷, The Lahore High Court appointed, in July 2003, a Lahore Clean Air Commission, also chaired by me and co-chaired by the Advocate General, Punjab, to recommend measures for the improvement of Lahore air quality. This Commission, on my request, similarly included representatives from both the private and public sectors including the City District Government Lahore. It set up sub-committees with respect to (1) clean fuel, (2) rickshaws, (3) public transport and (4) coordination with local councils. The Rickshaws sub-committee, for example, worked under the chairmanship of the Provincial Secretary, Environment, and the Clean Fuel sub-committee worked under the chairmanship of the District Coordination Officer, Lahore. Syed Mansoor Ali Shah, the coordinator of both this and the Mahmood Booti Commission, chaired the sub-committee on public transport and held public hearings at the City Government conference room. All the oil companies were invited by the Clean Fuel sub-committee to assist the work of the Commission.

The Lahore Clean Air Commission similarly finalized its Report on 21 May 2005 with a developed consensus of all stakeholders including the manufacturers and

14 Order of the Lahore High Court dated 25 January 2005 in I.C.A No. 798 of 2002.

15 Aoun Sahi, The News on Sunday (9 April 2006).

16 It was a measure of the gratitude of the city of Lahore for the work and role of the Solid Waste Management Commission that the speakers at the commissioning of the Plant acknowledged the pivotal role of the Commission in forging a science-based consensus on an acrimonious issue and thereby avoiding long years of litigation and appeals.

17 Writ Petition No. 6927 of 1997 filed before the Lahore High Court.



users of public transport and rickshaws. These recommendations, including of four stroke engines for rickshaws and CNG use, were filed in the Lahore High Court. In 2006, the Secretary, Transport, Government of Punjab, joined in supporting the recommendations of the Commission before the Lahore High Court.

The Lahore High Court adopted the recommendations of the Commission. It went further. In order to ensure the implementation of the recommendations of the Commission, Mr. Justice Hamid Ali Shah directed the establishment of a Standing Body of the Commission, with me as Chair, to remain operational till the implementation of the recommendations of the Commission¹⁸. In this manner, the Court also provided a means for ensuring compliance and enforcement of PIEL judgments.

6. The Lahore Canal Road Mediation Committee (2011)

In May 2006, the Traffic Engineering and Planning Agency (“TEPA”) of the Lahore Development Agency began preparations to cut down trees along the Lahore Canal Road in order to widen it for the purposes of reducing congestion. The move was resisted by a civil society organization by the name of the Lahore Bachao Tehreek (“LBT”). LBT’s activism secured an EIA of the road widening project. The LBT challenged the approval given to the EIA by the EPA, Punjab but the case remained pending in the Lahore High Court. In 2009, when the provincial government sought to proceed with the road widening project, the Supreme Court took suo motu notice¹⁹ of the environmental harm that would result in the felling of trees. On 14 February 2011, the Supreme Court appointed me as the mediator between the LBT and the Government of Punjab with powers to associate others for the purposes of the mediation.

By now, I had developed a successfully-experienced criteria for the appointment of Commissions. One, it must include the highest level Governmental functionaries who will ultimately be responsible for the implementation of the proposals of the Commission. Two, a member of the Provincial or National Assembly elected from the area under consideration by the Commission adds to the focus of the Commission. Three, experts must be included from Universities or with well-recognized

¹⁸ PLD 2007 Lahore 403, at 422.

¹⁹ Suo Motu Case No. 25 of 2009.



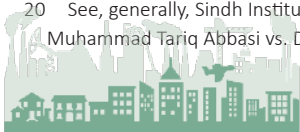
specializations. Four, representation from civil society organizations active in the field helps the work of the Commission in their respective fields. I have always included IUCN Pakistan, WWF-Pakistan, Sustainable Development Policy Institute (SDPI) and LEAD Pakistan in most Commissions that I head. I have held leadership positions in each of these organizations in the past and receive utmost co-operation and support from them. Five, a well-regarded member of the media helps in disseminating the work of the Commission. But above all is the consideration that each member of the Commission must bring unchallenged integrity to his work in the Commission. I used this criteria to request eight (8) eminent citizens, elected representatives and government officials, representing the cross-section of stakeholders to participate as a Committee.

The Committee held its four (4) meetings in an open and informal manner at the Beaconhouse National University (“BNU”) and the Lahore University of Management Sciences (“LUMS”) in Lahore to enable their students and faculty to participate in a dispute resolution effort impacting on the city of Lahore. Resultantly, the participants at these meetings included students and faculty members not only from LUMS and BNU, but also from Kinnaird College, Lahore and the Lahore School of Economics. Comments from the public were also invited. Mian Amer Mahmood, a former Nazim (Mayor) of Lahore, participated in the public hearings. Moreover, the Committee made a site visit which extended from Jallo Mor on the Canal to Thokar Niaz Beg so as to give the Committee members an opportunity to view and appreciate the entire stretch of the Canal.

The Commission also involved eight (8) experts in its work. The experts helped the Committee, among others, in developing the understanding of the botanical and horticultural characteristics of the natural environment along the canal as well as the international standards of road safety.

The Report of the Committee was finalized on 14 May 2011. The Committee approached its mandate with a view to protecting and sustaining the heritage of the Lahore Canal. The Committee felt responsible for preserving this heritage for future generations. It was mindful of the jurisprudence of the superior courts wherein the Doctrine of Public Trust²⁰ has been applied to public spaces and was inspired by

²⁰ See, generally, Sindh Institute of Urology and Transplantation vs. Nestle Milkpak Limited, 2005 CLC 424 (Karachi) and Muhammad Tariq Abbasi vs. Defence Housing Authority, 2007 CLC 1358 (Karachi).



the experiences of protecting public spaces in other jurisdictions. The Committee held up the common man as the centrepiece of its concerns and attention in order to promote social equity. The “consensus” Report included eighteen (18) recommendations, the most important of which included the declaration of the Lahore Canal area as a Heritage Urban Park, re-engineering of the junctions along the Canal Road, ecosystem preservation and people-centric planning. The Committee also proposed a draft of the Lahore Canal (Heritage Urban Park) Act, 2011. The Supreme Court accepted the entire recommendations of the Committee²¹. And, pursuant to the recommendations of the Committee, the Lahore Canal Heritage Park Act, 2013, was passed by the Punjab Assembly on 7 January 2013.

7. Islamabad Environmental Commission (2015)

In 2011, several writ petitions were filed before the Islamabad High Court in respect of the environment in Islamabad in which grievances relating to the inaction and non-performance of the statutory duties by the federal EP Agency and the Capital Development Authority (the “CDA”) were raised. It was contended in the petitions that certain actions and omissions of the federal EP Agency and the CDA had adversely affected the environment of Islamabad.

On 20 February 2015, the Islamabad High Court constituted the Islamabad Environmental Commission, and appointed me as the Chair of this Commission to investigate the grievances raised in the petitions and make recommendations to prevent the further “destruction” and “degradation” of the environment of Islamabad.²² I was also given powers to associate others in the Commission. Accordingly, the government officials, representing the cross-section of stakeholders, civil society organizations, public representatives, representatives from the media and the academic/scientific community were requested to become a part of the thirteen (13) members Commission.

The Commission held six (6) meetings. It formed six (6) sub-committees to look at the various environmental and regulatory issues, including air and water pollution, encroachments, solid waste management and legal and regulatory framework.

21 See, Cutting of Trees for Canal Widening Project, Lahore (Sou Moto Case No. 25 of 2009), 2011 SCMR 1743. See also, Lahore Bachao Tehrik vs. Dr. Iqbal Muhammad Chauhan, 2015 SCMR 1520.

22 By its order dated 20 February 2015 in Shiraz Shakeel vs. CDA, Writ Petition No. 1276 of 2011.



The sub-committees were enabled to co-opt members from in and outside the Commission.

Inasmuch as the major complaints related to changes in the Master Plan of Islamabad, the Commission turned to the expert guidance of the nationally prominent urban planner, Mr. Arif Hasan, and requested his presence as a “special invitee” at one of the meetings of Commission. On the aspect of the major issue of hospital waste, the Commission benefited from the guidance of another “special invitee”, Dr. Javed Akram, Vice Chancellor, Pakistan Institute of Medical Sciences (“PIMS”), the largest hospital in Islamabad.

The Commission also requested the comments of the public. A public hearing was also held by the Commission which was attended by over 150 persons.

Along with some members of the Commission, I also met with the representatives of several hospitals, including Dr. Javed Akram, Vice Chancellor, PIMS, in Islamabad on 6 October 2015 at the Ministry of Climate Change. Valuable feedback was received during this meeting which helped in the formulation of recommendations, particularly regarding hospital waste management in Islamabad.

The Report of the Islamabad Environmental Commission was finalized on 19 October 2015. The Report contained as many as twenty-three (23) recommendations but with the developed consensus of all the members and stakeholders. These recommendations, including safeguarding the Master Plan of Islamabad, solid and hospital waste management, and better co-ordination of environmental agencies, were filed in the Islamabad High Court on 20 October 2015.

The Islamabad High Court directed the appointment of an Implementation Committee to implement the recommendations of the Islamabad Environmental Commission. The appointment of the Implementation Committee has been notified.

8. Climate Change Commission (2015-2018)

In Asghar Leghari vs. Federation of Pakistan²³, the Lahore High Court was approached



by the petitioner for the enforcement of his fundamental rights under Articles 9 and 14 of the Constitution. The petition contended that the increased heat trapping of carbon dioxide (CO₂) and other greenhouse gases in the atmosphere is increasing the global temperature which, in turn, is adversely affecting the climate of Pakistan. The petition further submitted that to combat the threat of climate change in Pakistan, the Government of Pakistan, through the Ministry of Climate Change, had introduced the National Climate Change Policy, 2012 (the “Policy”) and the Framework for Implementation of Climate Change Policy (2014-2030) (the “Framework”), but that no implementation of the Policy and the Framework has taken place.

On 14 September 2015, the Lahore High Court constituted the Climate Change Commission and appointed me as the Chair of this Commission with powers to associate others and to facilitate the effective implementation of the Policy and Framework. As the Lahore High Court enabled the Commission to co-opt other members, the Commission exercised this power to draw from governmental Ministries, Departments and Agencies, civil society organizations, representatives from the media and the academic/scientific community.

Accordingly, the thirty (30) member Commission comprised me as the Chair, Mr. Arif Ahmed Khan, Secretary, Climate Change (Vice Chair), and several Federal Secretaries (including of Finance, Water and Power, National Food, & Research and Planning, Development and Reform) and Secretaries, Government of Punjab (including of Irrigation, Agriculture, Food, Forest, Health, and Environment Protection), civil society organizations, Universities and media representatives.

The Commission held twelve (12) meetings during 2015-2018. The Framework specifies strategies for the implementation of the Policy which are time-bound as follows:

- Priority Actions (within 2 years);
- Short term (within 5 years);
- Medium term (within 10 years); and
- Long term (within 20 years).

I proposed, at the outset, that the best course of action for the Commission would



be to focus on the Priority Actions because if these are implemented in their entirety, a substantial part of the Framework would have been implemented and will also serve to form the foundation of the other Short Term/Medium Term/Long Term Actions.

During its second meeting on 17 October 2015, the Commission appointed six (6) Implementation Committees to review the implementation of the Priority Actions under the Framework. These were (1) Water Resources Management, (2) Agriculture, (3) Forestry, Biodiversity, and Wildlife, (4) Coastal and Marine Areas, (5) Disaster Risk Management, (6) Energy. The Chair of each of the Implementation Committees was enabled to co-opt other members from within or outside the Commission.

The Climate Change Commission, largely facilitated by the work of its Implementation Committees, submitted a Report on 16 January 2016. The Report contained sixteen (16) recommendations which had the consensus and backing of all the stakeholders. These recommendations, among others, included climate change awareness and monitoring, financial allocation, food security and protection of ecologically sensitive habitats and species. Also, a proposal to set up a Climate Change Authority was discussed in the Commission. This was later included in the Climate Change Act, 2017.

The Lahore High Court accepted all the recommendations of the Commission and to ensure the effective implementation of these recommendations, Mr. Justice Syed Mansoor Ali Shah, on 18 January 2016, directed that:

3. I have gone through the Findings and Recommendations of the Commission. The Commission has done wonderful work and each member of the Commission has meaningfully contributed under the able leadership of the Chairman. It is clear that the Policy, as well as, the Framework were almost untouched till the Commission was constituted by this Court, resulting in mobilizing the government machinery. Since then there has been modest progress in achieving the objectives and goals laid down under the Policy and the Framework. The Report submitted by the Commission deals with priority actions under the Framework and reveals that the priority actions which were to be achieved by 31st December, 2015, have not yet



been fully achieved.

4. The Commission shall ensure that the priority items under the Framework, as far as the Province of Punjab is concerned, are achieved latest by June, 2016. The Commission is additionally tasked to look into the short term actions under the Framework and come up with a workable and achievable timetable for the same²⁴.

In its Report dated 16 January 2016 to the Lahore High Court, the Commission had reported on the progress in the implementation of the Priority Areas (PAs) upto 31 December 2015. On the review of this Report, the Lahore High Court ordered, on 18 January 2016, that the “Commission is additionally tasked to look into the short term actions under the Framework and come up with a workable and achievable timetable for the same.”

The Supplemental Report dated 24 February 2017 responded to the order of the Lahore High Court dated 18 January 2016. It included the Reports of six (6) Implementation Committees, giving an update on their actions on the Priority Actions. Overall, of the 242 Priority Areas given in the Framework, the six (6) Implementation Committees reported progress on 144 PAs and that is about 60 percent of the total Priority Areas. The progress on 144 PAs is uneven and at various stages of progress, and many will need more time and resources for completion.

The recommendations of the Commission in the Supplemental Report were adopted, on 28 February 2017, by (now) Mr. Chief Justice Syed Mansoor Ali Shah:

CLIMATE CHANGE ORDER-19.

Chairman, Climate Change Commission (“Commission”) has tendered appearance and placed on record Supplemental Report dated 24.02.2017 making the following recommendations:-

Recommendations

“The Commission recommends that the Secretary P&DD should submit plans

24 Order of the Lahore High Court dated 18 January 2016 in Writ Petition No. 25501 of 2015.



for initiation of remaining about 100 PAs and also compile a quarterly report on completion of work on ongoing 144 PAs.

Priority Projects in ADP 2016-2017: Since the last submission, the Commission has helped some GOPb departments prioritize 15 'climate smart' projects of which 13 were finally approved by P&DD for inclusion in the ADP 2016-2017. The Commission learnt that the financial value of these projects was relatively miniscule in percentage terms of the total development budget of the province.

The Commission recommends that in the next FY, this number should ramp up substantially and that this allocation should include specific budget lines for social and softer components – and not just the infrastructural investments. The Commission, if requested by the Departments will be pleased to review and guide on selected projects....

1. The Framework for Developing and Assessing Climate-Smart Projects under Annual Development Plans be used/piloted by each GOPb department to develop their requests for ADB allocations. The preparations for the next ADP have just begun and the timing is perfect. If requested, the Commission can assist with capacity building of the concerned officers in the province.
2. Each GOPb Departments should develop its plans of action, giving a list of priority projects/areas of investment. The Commission can assist them in developing their plans of action and determine their strategic priorities for the next 2-3 year's ADPs.
3. P&DD needs to develop a template/criteria that could guide the decisions on the requests from the departments. The Commission can work with the officers at the P&DD develop such a template and operationalize for the next years' ADP."

Considering that these recommendations are an outcome of the deliberations of the Commission, which includes members of the Government, therefore, I make these recommendations part of this order and direct the concerned Ministries/Departments of Federal, as well as, Provincial Governments to implement the same



(emphasis added).

The Chair of the Commission with the Secretary of the Commission and the Chairs of the Implementation Committees met with the Chairman, Planning and Development, Government of Punjab, on 17 April 2017, to facilitate the mainstreaming of climate change in the policies and upcoming budget of the Government of Punjab. The Chair of the Commission, in this meeting, made many suggestions including the following:

1. The Framework approved by the Commission can help the process of mainstreaming climate compatible development. The Commission recommends that the Framework should be used for designing and developing projects for upcoming ADP, at least for some projects by select departments. We recommend that each department should be advised to apply the framework and 2-3 projects from each department should be selected for their application the Framework.
2. Each GoPb department should develop an action plan, outlining a list of priority projects/areas of investment for mainstreaming climate considerations. The Commission can provide assistance in this regard.
3. P&DD should develop a template/criteria that could guide the decisions on the requests of departments (and not restricting decisions only to the financial or other such considerations). Again, the Commission can work with officers of P&DD to develop such a template and operationalize for next years.

The Chairman, P&D, GoPb, responded well to the work and suggestions of the Chair of the Commission and this highlighted the growing impact of the judiciary-backed contribution of the Commission to the climate change agenda in Punjab in particular and the country in general. This presents an exciting first of a direct interface between the consultative processes of Commissions appointed by the Court with the highest decision-making body in the Government.

The Commission and this case continued before the Lahore High Court for over



two (2) years. The work and effectiveness of the Commission was immeasurably enhanced by the regular listing of this case before the Lahore High Court with the full attendance of concerned governmental functionaries, both federal and provincial, and the numbered Climate Change Orders passed at each hearing. These Orders were promptly put on the website of the Court.

The Commission held its final meeting on 20 January 2018 and submitted its Final Report to the Lahore High Court on 25 January 2018. The Chief Justice of the Lahore High Court, Syed Mansoor Ali Shah, just before his elevation to the Supreme Court, passed judgment in the case in February 2018.²⁵ The Court appreciated the work of the Commission to supporting 66% implementation of the Priority Actions of the National Climate Change Policy, and, on dissolving the Commission, the High Court set up a Sanding Committee on Climate Change with me as the Chair and five (5) members, including Governmental representatives, to facilitate the future work on climate change. The judgment moved the jurisprudence of the superior courts well beyond Shehla Zia to a robust formulation of environmental justice and climate justice. Equally important, the Lahore High Court took an important initiative in the implementation of the National Climate Change Policy.

9. Houbara Bustard Commission (2017-2018)

Pakistan has, over the past several decades, developed a practice of issuing permits to Arab dignitaries (including from the U.A.E., Saudi Arabia, and Qatar) to hunt the Houbara Bustard in areas allocated to these dignitaries. This migratory bird winters in several areas of Pakistan and the Arab Shaikhs falcon-hunt it, every year, in specific areas allocated by the Government to these hunters. The hunting permits are handled by the Ministry of Foreign Affairs highlighting their importance in the country's relations with the Arab dignitaries. A typical permit includes important conditions of hunting in terms of the timing and bag limits. It is noted that the permits allow hunting only through falconry. Guns and use of firearms are not allowed.

Owing to the “vulnerable” status of the Houbara Bustard, the Courts of Pakistan have been repeatedly drawn to protect them against the grant of these permits

²⁵ sys.lhc.gov.pk/appjudgments/2018LHC132.pdf



and illegal hunting²⁶. This public interest litigation has involved the High Courts of Sindh, Balochistan and the Punjab and even the Supreme Court of Pakistan. Some judgments have moved to ban the issuance of the hunting permits to others that require regulation over such hunting. None of these judgments required or used population Surveys to determine whether the hunting was sustainable. They relied generally, instead, on the status of the Houbara Bustard under the Convention on International Trade of Endangered Species of Wild Fauna and Flora (CITES), Convention on the Conservation of Migratory Species of Wild Animals (CMS), other international declarations and national laws.

The Chief Justice of the Lahore High Court, in Naeem Sadiq vs. Government of Pakistan (Writ Petition No. 32 of 2014), appointed the Houbara Bustard Commission with me as its Chair. The terms of reference included “field Surveys to assess whether hunting of the Houbara Bustard is a sustainable activity in Punjab” and “to assess whether the said hunting is beneficial to the local community”. The Commission, including my recommendees, comprised eleven (11) members.

The Houbara Bustard Commission held its first meeting in my office on 15 July 2017 and recommended, as a first and preliminary measure, the conduct of a survey in four (4) districts frequented by the migratory Houbara Bustard. This was approved by the Lahore High Court to be held between the second week of December 2017 till the second week of January 2018. The Commission developed a methodology for the surveys in consultation with the expertise available in and outside Pakistan. The Commission also facilitated the capacity-building of the staff and officers of the survey teams.

The Houbara Bustard Commission conducted population Surveys of the Houbara Bustard through three (3) separate teams in December 2017 in the Districts of Rahim Yar Khan, Rajanpur and Bhakkar in the Punjab. The Report of the Commission, based on the Survey Reports of these teams, was unanimously approved by the Houbara Bustard Commission at its meeting on 23 January 2018 and submitted to the Lahore High Court in the same month.

26 See, e.g., *Province of Sindh vs. Lal Khan Chandio*, 2016 SCMR 48; *Government of Punjab vs. Aamir Zahoor-ul-Haq*, PLD 2016 SC 421; *Tanvir Arif vs. Federation of Pakistan*, 1999 CLC 981 (Karachi); *M.D. Tahir, Advocate vs. Provincial Government*, 1995 CLC 1730 (Lahore); *Society for Conservation and Protection of Environment (Scope) Karachi vs. Federation of Pakistan*, 1993 MLD 230 (Karachi).



10. Smog Commission (2017-_____)

By his Order dated 19 December 2017 in Walid Iqbal vs. Federation of Pakistan, Writ Petition No. 34789 of 2016, the Chief Justice of the Lahore High Court has appointed a Smog Commission, among others, to “formulate a holistic Smog Policy for Punjab which identifies the root causes and prescribes a plan to protect and safeguard the life and health of the people of Punjab”. The author has been appointed Chairman of the Smog Commission which is to include the Secretaries, Government of Punjab, of (a) Environment, and (b) Health, and leading civic and professional leaders. The Commission has so far held two (2) meetings and set up specialized sub-Committees.

11. Child Care Commission (2017-_____)

On 22 December 2017, the Chief Justice of the Lahore High Court, in Syed Miqdad Mehdi vs. Government of Punjab, Writ Petition 107273/2017, constituted the Child Care Commission with the author as the Chairman and with detailed terms of reference including the “shifting from a segregated system of education for special needs children to a system of inclusive education, designed to meet Pakistan’s commitments under the Convention on the Rights of Persons with Disabilities, 2006 and the Convention on the Rights of the Child, 1989”, and to address several enumerated requirements of “special needs children”. The membership of the Child Care Commission includes the Secretaries, Government of Punjab, of (a) Special Education, (b) School Education, and (c) Health, as well as prominent lawyers and recognized experts. The Commission has held only one (1) meeting so far.

C. My Experience as Chair of Commissions

It is likely that no person has had the privilege and pleasure to head as many Commissions constituted by the superior courts of Pakistan as I have. I am humbled by this opportunity to make a small contribution to environmental protection in Pakistan, a mission that I singly started in my country in the 1970s. It has been a remarkable journey since then and the opportunities offered in shaping and progressing judicial environmental commissions have been immensely gratifying.



So is the fact that the full recommendations of each Commission were adopted by the Courts without any exception. This success was enhanced by some Courts even appointing Implementation Committees/Standing Bodies to implement the recommendations of the Commissions (Lahore Clean Air Commission, Islamabad Environmental Commission and the Climate Change Commission). The Courts, additionally, facilitated the interim recommendations of the Climate Change Commission and the Houbara Bustard Commission.

With the commissioning of the Compost Plant in Lahore, it was remarkable that the public and private sector partnership reflected in the membership of the Solid Waste Management Committee facilitated this success and demonstrated the value to civil society of avoiding protracted, contentious, divisive and adversarial proceedings before the courts of Pakistan. The model, instead, was to resolve complex issues by the use of science, technology and dispassionate technical advice with the willing co-operation and support of the City Government. Each metropolis is unique but it is hoped that the experience of the Solid Waste Management Committee in Lahore may provide some useful lessons for urban environmental management in Pakistan. Equally useful would be a consensus-building approach of the Lahore Clean Air Commission, the Lahore Canal Road Committee, the Islamabad Environmental Commission, and the Houbara Bustard Commission.

The use of court-appointed Commissions to resolve complex environmental issues in Pakistan has already shown promise. Moving away from an adversarial ethos of a court room to a more informal round-table of a Commission by itself promotes a dialogue and discussion between the stakeholders. Moreover, when care is taken toward an all-inclusive process of enabling all the stakeholders from both the public and private sectors to be represented in the Commission, the credibility of its work and success is significantly assured. It is particularly important to include in the Commission those Departments or Ministries of the Government that would ultimately be responsible for the implementation of the recommendations of the Commission. Eminent scientists and experts drawn from Universities and academia can anchor the work of the Commission by providing “neutral” and state-of-the-art technical and science-based advice on the complex issues before the Commission.

For a Chairman, the biggest challenge is in picking the members of the Commission.



If they are to be from the most effective decision-makers in the Government, from civil society, from academia, from the legislatures and the media, each of them would be pre-occupied with his/her other commitments and may not readily find time for the Commission.

On appointing me as the Chairman of the Commission, the Court always offered that it could include in its Order any membership that I suggested to it. But I found it more effective, before hand, to reach out personally to each person that I thought could bring value to the work of the Commission. I would typically request about 60 hours of the person's time for the work of the Commission in the next 4-6 months and would recommend to the Court the inclusion of that person in the Commission only if I got that commitment. The larger appeal for the person was the possibility of contributing to a cause of the community or the city or the nation that the Commission was expected to serve. In many cases, the person was already familiar with my work in the environment and invariably agreed to my request to join the Commission. This brings me to my grateful and proud statement that nobody ever refused my request to join a Commission headed by me.

Selecting members for the Commission becomes all the more challenging when the Chair insists on handling all the work, as I invariably did, on a pro bono basis. No member of any Commission that I headed received any remuneration and yet I am grateful for the prolific support that each member gave for the work and result of the Commission. The Commissions improvised their own methods of financing their work requirements. In the Solid Waste Commission, for example, the District Nazim (Mayor), Lahore, a member of that Commission, undertook to finance the costs of an EIA directed by the Commission. Similarly, in the Islamabad Environmental Commission, IUCN Pakistan, a member of that Commission, on the request of the Chair, paid the travel costs of Mr. Arif Hasan, urban planner in Karachi, to attend a meeting as a special invitee of the Commission in Islamabad.

In the hearings of the Commissions, we also included those stakeholders that may be adversely affected by our recommendations. Thus, vehicular traffic was an important consideration in the Lahore Clean Air Commission. When we considered proposals for the improvement of air quality through improved vehicular traffic, we specifically reached out to Qingqi, the motor cycle rickshaw company that is



an important player in this field, and tried to carry it in our recommendations. We similarly reached out to the car and motor cycle manufactures and assemblers.

The role of the Chairman can also be important in the impartiality and fairness with which he conducts the proceedings of the Commission and enables public participation and hearings to factor different points of view. The success of the Chairman lies ultimately in persuading the members of the Commission and other participants to move away from the narrower mindset and language of “I” “you” “mine” and “yours” to a more appropriate “we” “us” and “ours”. Only when this central aspect of a common ground for the needs of a city or civil society is recognized and realized can a Commission succeed in the important tasks entrusted it by the Courts.

But the use of judicial commissions is by no means a panacea as the technique can only work effectively where expert opinion is not divided²⁷ and there is a fair chance that a consensus can emerge amongst the diverse group of stakeholders. The greatest strength that a Commission can have is the unanimity or consensus on its recommendations. I have been particularly fortunate in developing a consensus in each Commission that I have headed. The Courts see the quality of the membership of the Commission and the unanimous/consensus voice with which the Commission speaks following an open, inclusive and participative process of public hearings and site visits to fully endorse the recommendations of the Commission.

With the high level/status membership of the Commissions, many Judges expressed surprise at the regular attendance of the members of the meetings of the Commission. The response has been a very good fortune in the leadership I provide to each Commission. It has to do with my involving the members in the work of the Commission, in shaping the process of our work, in developing their ownership of what we did, and in fixing the meetings of the Commission to the convenience of the maximum members. In one case, the appointing Court had directed the

27 In the Indian dam case, *Tehri Bandh Virodhi Sangarsh Samiti v. State of U.P* (1992) Supp 1 SCC 44, the Supreme Court held that it did “not possess the requisite expertise to render any final opinion on the rival contentions of the experts. In our opinion the Court can only investigate and adjudicate the question as to whether the Government was conscious to the inherent danger as pointed out by the petitioners and applied its mind to the safety of the dam. We have already given facts in detail, which show that the Government has considered the question on several occasions in the light of the opinions expressed by the experts. The Government was satisfied with the report of the experts and only thereafter clearance has been given to the project.”



attendance of the members at the meetings of the Commission. But I requested the Court that it is not necessary to coercively (through orders of the Court) secure the attendance of the Commission members and that, instead, I would rather have them do so voluntarily out of their own commitment to their responsibilities on the Commission and to the respect that they may have for its leadership. This proved a far more effective means of building the team work and a sense of ownership in the Commission members.

It may reflect on the measure of the success of Commissions appointed by the Courts in environmental matters that the Government of Punjab has, through its Secretary, Environment, appointed, on 11 December 2017, an Advisory Committee with broad-ranging terms of reference including for the “protection of environment and ecological stability of the Environmentally Sensitive Areas of Murree, Kotli Sattian and Kahuta”. The author has been appointed the Chairman of the Committee with Secretaries, Government of Punjab, of (a) Environment, (b) Forest, Wildlife and Fisheries, and (c) Law and Parliamentary Affairs, as members. Also included as members of the Committee are Commissioner, Rawalpindi, prominent academics, and representatives of civil society and professional organizations.

D. Limitations in Work of Judicial Commissions

Even though the advent of public interest litigation and innovative procedural pathways such as judicial commissions threaten to obliterate the law/policy divide, the successes of the new approach in India and Pakistan have been welcomed by a public that has long been used to an apathetic legislature and a weak executive²⁸. As long as environmental protection remains a low priority item for the political establishment and the state machinery, courts in Pakistan will increasingly be called upon to give practical significance to the fundamental rights guaranteed under the Constitution. However, it should be borne in mind that the activism of the courts is not a substitute for proper policy making and implementation as judicial intervention is by its very nature reactive and hemmed in by the procedural pathways that are peculiar to the legal process. The countries of South Asia are still in the early stages

28 See Ashok Desai and S. Muralidhar, “Public Interest Litigation: Potential and Problems” in B.N. Kirpal et al., (ed.) *Supreme But Not Infallible: Essays in Honour of the Supreme Court of India*, Oxford (2000) 159, on the appeal of public interest litigation in India despite the lingering questions about its constitutional legitimacy. For the Pakistan over-view, see generally Parvez Hassan and Azim Azfar, *supra* note 1 at 216-217.

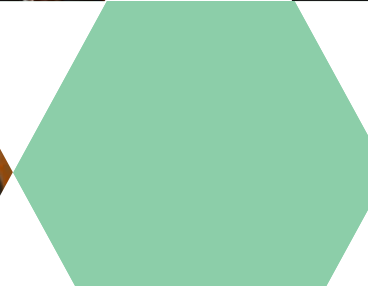
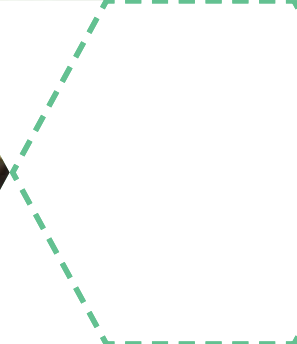
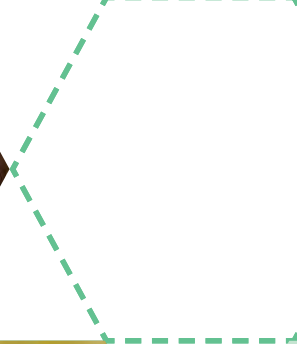
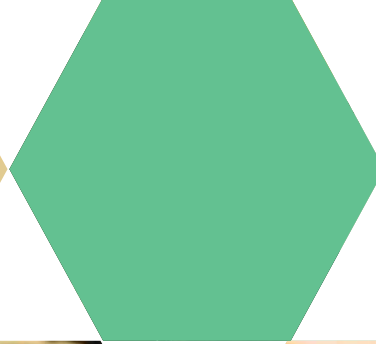


of environmental consciousness²⁹ and although public awareness of environmental issues is improving with each passing year, prioritizing environmental concerns in national planning and steady implementation of laws and policies is of paramount importance.



29 The dissemination and easy availability of information is crucial to any public attempt to improve environmental consciousness and activity. Jona Razzaque notes that “in India, Pakistan and Bangladesh, there is no right to environmental information or right of public participation in decisions-making...There should be a specific Act or guidelines to deal with the availability of environmental information, outlining which information is available and how to go about asking for it from the government, from private individuals and companies”. See Jona Razzaque “Human Rights and the Environment – National Experience” (2002) 32 Environmental Policy and Law 99, at 107. On this and other requirements for good environmental governance, see generally, Parvez Hassan, “Elements of Good Environmental Governance” (2001) 6 (1) Asia Pacific Journal of Environmental Law 1, also in Donna G. Craig, Nicholas A. Robinson and Koh Kheng-Lian, Capacity Building for Environmental Law in the Asian and Pacific Region – Approaches and Resources, Volume II, at 985.





PART 2

Global and Regional Developments in Climate Justice





Climate Justice and the Global Pact

Rt. Hon. Lord Carnwath of Notting Hill



It is a great pleasure to find myself in this beautiful and historic city for the first time. It is a particular honour to be sharing the stage with such heroes of the story of environmental law, as Parvez Hassan and Tony Oposa.

I can perhaps claim a modest degree of continuity with their work. Dr Hassan spoke of the pivotal role of Pakistan as chair of the G77 group which produced the seminal Rio Declaration of 1992, leading in due course to the Global Judges' Symposium in Johannesburg 2002, and the first acknowledgement of the importance of the judiciary in the interpretation and enforcement of environmental law. It was following that Symposium that my own judicial involvement with the story really began.

I was invited by our then Lord Chief Justice, Lord Woolf, to represent the UK on the judicial taskforce set up by the UN Environment Programme (UNEP), to help the development of regional programmes for the training of judges in environmental law. Among our first tasks were the judicial oversight of the production in 2004 of a UNEP Judges' Handbook on Environmental Law;¹ and, in Europe, the setting up of the EU Forum of Judges for the Environment (EUFJE)². My work with UNEP has continued in one form or another ever since, more recently under the guise of the UNEP International Advisory Council on Environmental Justice, and now as part of the founding team of the new Global Judges' Institute for the Environment, of which Judge Antonio Benjamin spoke in his video presentation earlier today.

Against that background I was intrigued early last year to receive an invitation

1 Co-authored by Diana Shelton and Alexandre Kiss. https://www.elaw.org/system/files/UNEP_judicial.handbook.enviro.law_.pdf

2 <https://www.eufje.org>



to Paris from Laurent Fabius, President of the Conseil Constitutionnel. Eighteen months had passed since his masterly chairmanship of the negotiations which led to the successful conclusion of the Paris Agreement on Climate Change. Now he was leading a new complementary project, for a Global Pact for the Environment. I was one of a group of judges, lawyers and academics from round the world, asked to spend a day reviewing a detailed draft. It had been prepared under the auspices of the Environment Commission of the Club des Juristes, chaired by Professor Yann Aguila.

The completed text was launched the next day at a big event in the Sorbonne, addressed by such diverse figures as Ban ki-Moon, Mary Robinson, Arnold Schwarzenegger, and finally President Macron. He in turn presented it to the UN General Assembly in September 2017. He spoke of it as “a single universal framework – a framework that will establish rights, but also duties for mankind as regards nature and therefore as regards itself”.

It was said in the accompanying material to be a “collective work... following in the footsteps of many international precedents, upon which it is largely based” starting from the Rio Declaration of 1992.³ Its goals were ambitious, designed (it was said) to become the cornerstone of international environmental law” and to “supplement the legal framework of fundamental norms...”The new pact would follow the two international covenants of 1966, related one to civil and political rights, and the other to economic, social and cultural rights, and would establish “a third generation of fundamental rights, the rights related to environmental protection”.⁴

The Pact⁵ itself takes the form of a Preamble, followed by 20 articles setting out a list of rights and duties for the protection of the environment, and six articles largely concerned with implementation and supervision. The starting point in articles 1 and 2 is the balance of fundamental rights and duties:

“Article 1

Right to an ecologically sound environment

3 Global Pact White Paper, Foreword

4 <http://pactenvironment.org/aboutpactenvironment/les-raisons-du-pacte/>

5 For the full text, see: <https://www.iucn.org/sites/dev/files/content/documents/draft-project-of-the-global-pact-for-the-environment.pdf>



Every person has the right to live in an ecologically sound environment adequate for their health, well-being, dignity, culture and fulfilment.

Article 2

Duty to take care of the environment

Every State or international institution, every person, natural or legal, public or private, has the duty to take care of the environment. To this end, everyone contributes at their own levels to the conservation, protection and restoration of the integrity of the Earth's ecosystem."

The ensuing substantive provisions cover familiar subjects in concise form. They are headed: Article 3 Integration and sustainable development; Article 4 Intergenerational Equity; Article 5 Prevention; Article 6 Precaution; Article 7 Environmental Damages; Article 8 Polluter-Pays; Article 9 Access to information; Article 10 Public participation; Article 11 Access to environmental justice; Article 12 Education and training; Article 13 Research and innovation; ; Article 14 Role of non-State actors and subnational entities; Article 15; Effectiveness of environmental norms; Article 16 Resilience; Article 17 Non-regression; Article 18 Cooperation; Article 19 Armed conflicts; Article 20 Diversity of national situations.

Of course these principles are not new. As was acknowledged, most of the content was drawn from earlier codes, such as the Rio Declaration 1992, and others which followed. A more recent statement is the World Declaration on the Environmental Law, adopted by the IUCN World Environmental Law Congress in Rio in April 2016. The purpose of the Pact, as I understand it, is to express those principles in clear and succinct terms, and in a form which could ultimately form part of an international agreement, having binding effect, alongside the Paris Agreement on Climate Change, and the other international covenants already mentioned.

Not surprisingly it has sparked a lively debate, among lawyers, politicians, judges and academics, as to the content and legal form of such a Pact, and indeed whether it is needed at all, in view of the many existing documents arguably covering much the same ground. There is of course plenty of room to argue about the principles



to be included⁶ and the merits of different versions (as indeed we did at the 2017 meeting of experts in Paris).

I do not propose to enter into that discussion in this paper. The Rio Declaration has served us well, and will continue to do so. But 25 years on I can see the case for updating and refinement. Also, whatever the precise legal form of the Pact, I can also see the merits of a concise and authoritative statement of the now well-established principles of environment law, agreed at the highest international level – if you like, a Global Common Law of the Environment.

What I want to do in the remainder of this paper is to look at the ways in which such a Pact, whatever its precise status in international law, can be of practical use to us as judges in our everyday work in the domestic courts. It is indeed at national level, and in the national courts, that the Pact, like the Paris Agreement on Climate Change, may well have its main impact. The central feature of the Paris Agreement, and probably one of the reasons for its success, was its emphasis on nationally determined contributions enforced through domestic law (article 4.2), supported by international reporting obligations (the “enhanced transparency framework” - art 13). The Global Pact could build on the same model.

A striking example of how national judges might can play their part in implementing international obligations relating to climate change is the now famous case of *Leghari v Attorney-General*⁷, in the Lahore High Court. It is perhaps symbolic that the first judgment was given in August 2015, shortly before the Paris negotiations. The court was faced with a claim by a farmer whose land was suffering from the effects of climate change, and who charged the Government with failure to implement its own climate change policies. Justice Mansoor Ali Shah⁸, who presided and gave the leading judgment, has already told this conference of the court’s favourable response to the claim, relying on the constitutional guarantee of the right to life; and his setting up of a Climate Change Commission, with interested parties and experts (mostly working pro bono) to oversee the implementation of those policies. Dr Hassan, who chaired the Commission, has told us of its inclusive and systematic

6 One perhaps surprising omission is any equivalent of Rio Principle 17 on Environmental Impact Assessment, described by Justice Ali Shah as “nature’s first man-made check post - nothing adverse to the environment is allowed to pass through”: *Tiwana v Province of Punjab* (the “Signal Free Corridor” case W.P. No.7955/2015 para 35.

7 WP No 25501/2015

8 Recently elevated to the Pakistan Supreme Court.



working programme, leading to its recent final report following the successful completion of the main phases of its work.

In my own country, the UK, we are perhaps not so adventurous in terms of legal remedies. But we may be catching up. Only last week it was reported that Mr Justice Garnham might be making a step in the same direction. This is the case brought by the campaigning body ClientEarth challenging the government's failure to produce an effective plan to meet European air pollution targets. The case had been remitted by the Supreme Court⁹ with a mandatory order to the Secretary to State to prepare such a plan, with liberty to apply to the administrative court for further relief as needed. A month ago it came in front of Garnham J for the third time¹⁰, two earlier plans having been rejected by him as inadequate. Having found the third plan failing in certain respects, he invited submissions on whether the court should exercise "a more flexible jurisdiction... than is commonplace". This would take the form of "a continuing liberty to apply", so that the claimant could bring the matter back to court if there is evidence of the defendants falling short of compliance with the order of the court.¹¹

Coming back to the Global Pact, we can certainly look to it as a convenient source of well-settled principles which have provided the background for more specific national laws. I have already done so myself in a judgment of the Judicial Committee of the Privy Council¹², on an appeal from Trinidad and Tobago. This was an appeal by a local environmental group, the expressively named Fishermen and Friends of the Sea. It was about the application of the Polluter Pays principle as given effect in Trinidad Water Pollution law. I was looking for succinct statement of the principle, as a starting point for the discussion. I found it in article 8 of the Pact:

"Article 8 Polluter-Pays

Parties shall ensure that prevention, mitigation and remediation costs for pollution, and other environmental disruptions and degradation are, to the greatest possible extent, borne by their originator."

9 R(ClientEarth v Secretary of State [2015] UKSC 28.

10 Client Earth No3 [2018] EWHC 315 (Admin)

11 Ibid para 109

12 Fishermen and Friends of the Sea v Minister of Planning (Trinidad and Tobago) [2017] UKPC 37



That of course was not directly applicable law in Trinidad. But it was a useful starting-point for interpretation of the specific provisions designed to give it effect in domestic law.

For a stronger and more innovative approach we must turn again to the courts of Pakistan, this time invoking the precautionary principle. The principle is expressed by the Pact in these terms:

“Article 6 Precaution

Where there is a risk of serious or irreversible damage, lack of scientific certainty shall not be used as a reason for postponing the adoption of effective and proportionate measures to prevent environmental degradation.”

That is modelled on Principle 15 of the Rio Declaration:

“In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.”

In the great case of *Shehla Zia v WAPDA* in 1994¹³ the Supreme Court of Pakistan established that the right to life under Article 9 of the Constitution must be given a wide meaning. In the leading judgment, Saleem Akhtar J explained that the right to live -

“... it does not mean nor can it be restricted only to the vegetative or animal life or mere existence from conception to death. Life includes all such amenities and facilities which a person born in a free country is entitled to enjoy with dignity, legally and constitutionally.”

Dr Hassan, who was the successful advocate for the plaintiff, has reminded us that the case was argued soon after the signing of the Rio Declaration, described in the judgment “as a great binding force... to create discipline among the nations”. The court recorded, and in effect accepted, Dr Hassan’s submission that although the

Convention had not been ratified or enacted, Principle 15“ has its own sanctity and it should be implemented, if not in letter, at least in spirit”.¹⁴ Relying on the precautionary principle under that article, the court held that, given the uncertainty about the potential effects of electro-magnetic fields on human health, a project for high voltage grid station, planned to be sited in a residential area, should not continue, until further work had been done to investigate and limit the risks of harm, and so to “to strike balance between economic progress and prosperity and to minimise possible hazards”

More recently Justice Mansoor Ali Shah, now as Chief Justice of the Lahore High Court, went a step further. He invoked a similar principle, relying on the same constitutional underpinning of article 9, to delay an otherwise authorised quarrying project, pending the completion of detailed survey of mining projects in the area.¹⁵ He referred first to article 15 of the Rio Declaration, but then invoked the broader wording of the equivalent principle in the IUCN Declaration, principle 3 under the heading “In dubio pro natura”:

“In cases of doubt, matters shall be resolved in a way most likely to favour the protection and conservation of the environment. Preference shall be given to alternatives that are least harmful to the environment. Actions shall not be undertaken when their potential adverse impacts on the environment are disproportionate or excessive in relation to the benefits derived therefrom.”

The judge preferred this as “an emerging principle and perhaps more appropriate in this case”, which required the court to “favour nature and environmental protection”; it was also –

“... constitutionally compliant as the courts are there to protect the fundamental rights of the public, and in this case right to life and dignity of the community surrounding the project remains paramount till such time as the Agency is of the view that the project has no adverse environmental effects”.

14 Cf Teoh’s case (Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh (1995) 183 CLR 273, where an international treaty obligation (relating to the best interests of children) was treated as giving rise in domestic law to a “legitimate expectation... absent any statutory or executive indications to the contrary, that administrative decision-makers will act in conformity with the Convention...”

15 Maple Leaf Cement Factory v EPA WP No 115949/2017



That example shows how, with a degree of judicial imagination, and within a strongly interpreted Constitution, even the “soft law” of a non-binding international declaration can sometimes be given hard edges, and so provide practical remedies within the domestic courts.

The Global Pact is at an early stage and it is not for me to anticipate its likely progress through the UN system. However, I can see the advantage of bringing these now familiar principles into a clear, succinct and authoritative text, agreed at the highest international level. That could have great symbolic force whatever precise status it ultimately achieves under international law. It could also would provide a sound basis for national judges, even those less adventurous than in Pakistan, to develop and apply their own laws to the resolution of common environmental problems. Of course judges must reach their decisions on individual cases within the constraints of their own national legal systems and traditions. But the Pact could provide a strong and principled framework for the interpretation and development of those national laws within a shared global vision of the environmental rule of law.

RC February 2018



Recent Climate Litigation Concerning Environmental Rights

Hon. Justice Brian J. Preston



The first case expressly litigating climate change issues is generally considered to have been brought in 1994 in the Land and Environment Court of New South Wales. An environmental non-governmental organisation, Greenpeace Australia Ltd, appealed against the grant of development consent for the construction of a coal fired power station in the Hunter Valley on the ground of the adverse effect of the greenhouse gas emissions on climate change¹.

Since then, litigation raising climate change issues has increased in the number and types of cases and the countries and jurisdictions in which the litigation has been brought. An emerging feature of more recent litigation is the use of some type of environmental right as the basis of the claim. The environmental rights invoked include the right of the public under the public trust doctrine, constitutional rights, particularly the right to life and the right to a clean and healthy environment, and more generally, human rights. I will survey this litigation based on environmental rights.

Rights under public trust doctrine

Public rights to access and use common natural resources and the duty of governments to protect these common resources and public rights have formed the basis of several international cases on climate change, which have sought to enforce the doctrine of the public trust.

The public trust doctrine has its origins in Roman law, specifically in the property concept of *res communis*. These are things which, by their nature, are part of

1 Greenpeace Australia Ltd v Redbank Power Company Pty Ltd and Singleton Council (1994) 86 LGERA 143.



the commons that all humankind has a right in common to access and use, such as the air, running water, the sea and the shores of the sea, and that cannot be appropriated to private ownership. Ownership of these common natural resources is vested in the state as public trustee of a public trust for the benefit of the people. The state, as trustee, is under a fiduciary duty to deal with the trust property, being the communal natural resources, in a manner that is in the interests of the general public, who are the beneficiaries of the trust.² The source of this duty can be the common law, statute law or constitutional law.

Climate change litigants have sought to rely upon the public trust doctrine as a foundation for enforcing an obligation on governments and enterprises to mitigate greenhouse gas emissions. To do so, litigants have had to argue that the common natural resources held in trust on behalf of the public include the natural resource of the atmosphere.

Much of the atmospheric public trust litigation has been in the United States. The first was *Kanuk v State of Alaska*³. The plaintiffs, Alaskan children, claimed that the State of Alaska had violated the public trust doctrine under the Alaskan Constitution (Article VIII) by failing to take steps to protect the atmosphere from the effects of climate change. The Court upheld the plaintiffs' standing to bring the proceedings and the justiciability of the plaintiffs' claims for a declaratory judgment that the atmosphere was a public trust resource. However, the Court found these claims failed to present an actual controversy appropriate for judicial determination. The Court noted that "past application of public trust principles has been as a restraint on the State's ability to restrict public access to public resources, not as a theory for compelling regulation of those resources".⁴

In *Sanders-Reed v Martinez*⁵, the New Mexico Court of Appeal affirmed the trial court decision and ruled that courts could not require the State of New Mexico to regulate greenhouse gas emissions based on the public trust doctrine. The common law doctrine was not an available cause of action because a public trust obligation

2 See J L Sax, "The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention" (1970) 68 Michigan Law Review 471.

3 335 P 3d 1088 (Sup Ct Alaska, 2014).

4 *Kanuk v State of Alaska* 335 P 3d 1088 (Sup Ct Alaska, 2014) 1102; Sabin Center for Climate Change Law, "Kanuk v. Alaska" (Climate Change Litigation Database, 2014) < <http://climatecasechart.com/case/kanuk-v-alaska/>>.

5 *Sanders-Reed v Martinez* 350 P 3d 1221 (NM Ct App, 2015).



to protect natural resources, including the atmosphere, had been incorporated into the New Mexico Constitution (Article XX, Section 21) and the State Air Quality Control Act, and the common law must now yield to the governing statutes.

In *Chernaik v Brown*⁶, the youth plaintiffs argued that the public trust doctrine compelled the State of Oregon to take action to establish and enforce limitations on greenhouse gas emissions to reduce carbon dioxide in the atmosphere. The Oregon Circuit Court ruled that the State's public trust doctrine applied only to submerged and submersible lands and not the atmosphere. The Court questioned "whether the atmosphere is a 'natural resource' at all, much less one to which the public trust doctrine applies". The Court further declared that the State does not have a "fiduciary obligation to protect submerged and submersible lands from the impacts of climate change", but rather the public trust doctrine restricts the ability of the State to entirely alienate such lands. The plaintiffs appealed the decision. The appealed decision is still pending.

The breakthrough in atmosphere public trust litigation came in the case of *Juliana v USA*. The plaintiffs, including Juliana, were children organised by an environmental non-governmental organisation, Our Children's Trust. The plaintiffs sued the US government in the US District Court for the District of Oregon in 2015. The plaintiffs sought relief from government action and inaction in regulating carbon dioxide pollution, allegedly resulting in catastrophic climate change and causing harm to the plaintiffs. The action was founded upon the alleged violation of the plaintiffs' explicit and implicit constitutional rights and the public trust doctrine. The US government and various industry interveners sought to summarily dismiss the action on various grounds, including that the public trust doctrine "does not provide a cognizable federal cause of action" because the Supreme Court had foreclosed such actions against the Federal government. A magistrate judge in the District of Oregon recommended that the Court decline to dismiss the action. The magistrate judge found that given the Environment Protection Agency's duty to protect public health from airborne pollutants and the Federal government's deeply engrained public trust duties, there was a sufficient possibility that the public trust doctrine provided "some substantive due process protections for some plaintiffs within the navigable water areas of Oregon".⁷

⁶ (Or Cir Ct, 16-11-09273, 11 May 2015).

⁷ *Juliana v USA* (D Or, 6:15-cv-1517-TC, 8 April 2016).



On 10 November 2016, the District Court declined to summarily dismiss the action. In so doing, the Court adopted the findings and recommendation of the magistrate judge on 8 April 2016. The Court rejected the defendant's four arguments that the public trust doctrine was inapplicable. The Court held that:

- 1) it was unnecessary to determine whether the atmosphere is a public trust asset because the plaintiffs also alleged public trust violations in connection with the territorial sea;
- 2) the public trust doctrine is not limited to State governments, the Federal government also holds public assets in trust for the people;
- 3) public trust obligations cannot be legislated away; and
- 4) the plaintiffs' public trust rights both predate the Constitution and are secured by it (in particular, the Fifth Amendment provides the right of action).⁸

The federal defendants and the interveners both filed a motion for the Court to certify an interlocutory appeal of the order of 10 November 2016. The federal defendants also filed a motion to stay the litigation. The motions were denied on all of the six grounds of appeal.⁹ On the political question, the Court "emphatically rejected" the suggestion that the topic of climate change is a non-justiciable political question. On the breadth of claims and vast scope of relief sought, the Court held that this is hypothetical and ignores the trial court's ability to fashion reasonable remedies based on evidence. On due process, the Court held that any appeal would be premature, because the taking of evidence will flesh out the issues, and the case involves a mixed question of law and fact that mandates an opportunity to develop the record. On the public trust, the Court held that the federal public trust doctrine has not been extinguished (despite being relatively dormant since the 19th century). On standing, the Court held that the defendants admitted that anthropogenic climate change is harming the environment, making it increasingly less habitable and causing deleterious effects on physical and mental health. These are concrete, particularised, actual or imminent injuries to the plaintiffs and the fact that vast numbers of people will suffer these injuries does not negate standing. On the controlling question of law, the Court noted that this ground applies to purely legal questions. It does not apply in the present case where there is a mixed question of law and fact.

⁸ Juliana v USA 217 F Supp 3d 1224 (D Or, 2016).

⁹ Juliana v USA (D Or, 6:15-cv-1517-TC, 1 May 2017).



The District Court granted motions by three trade groups to withdraw from the lawsuit and set the trial to begin on 5 February 2018.¹⁰ This did not occur because of an appeal by the Federal government.

In June 2017, the Federal government petitioned the Ninth Circuit of the Court of Appeals for a writ of mandamus to review the District Court's denial of the motions to dismiss the plaintiffs' case. On 7 March 2018, the Court of Appeals denied the petition, finding: "The issues that the defendants raise on mandamus are better addressed through the ordinary course of litigation".¹¹ The Court rejected the defendants' argument that mandamus was their only means of obtaining relief from potentially burdensome discovery because there had not been any discovery orders or motions compelling discovery in the case thus far.¹² The Court also found that holding the trial would not threaten the separation of powers as it would not unreasonably burden President Trump or executive branch officials and agencies who were listed as parties to the proceeding.¹³ The District Court trial is set for hearing on 29 October 2018.¹⁴

Another case upholding the atmospheric public trust is *Foster v Washington Department of Ecology*.¹⁵ A group of eight children, including Foster, petitioned the Washington Department of Ecology to adopt a proposed rule mandating a particular State greenhouse gas emission cap that was consistent with current scientific assessments of the measures required to prevent global warming, on the basis that such a rule would better protect their rights to a healthy climate and atmosphere. The Department denied their petition and refused to change the way it made its decisions on greenhouse gas emission targets. The petitioners brought proceedings to judicially review the Department's denial of their petition.

In November 2015, the Washington Superior Court recognised that climate change is a threat to the survival of the children and future generations and that it is necessary to reduce the emission of greenhouse gases which contribute to global

10 Juliana v USA (D Or, 6:15-cv-1517-TC, 28 June 2017).

11 Juliana v USA (9th Cir No. 17-71692, 7 March 2018) 9-10.

12 Juliana v USA (9th Cir No. 17-71692, 7 March 2018) 10.

13 Juliana v USA (9th Cir No. 17-71692, 7 March 2018) 13.

14 Juliana v USA (D Or, 6:15-cv-1517, 12 April 2018).

15 (Wash Super Ct, 14-2-25295-1-SEA, 19 November 2015) 5.



warming.¹⁶ The Court reaffirmed that the Washington State Constitution imposes a “constitutional obligation to protect the public’s interest in natural resources held in trust for the common benefit of the people of the State”.¹⁷ The Court rejected the Department’s argument that the public trust doctrine was restricted to “navigable waters” and did not apply to the atmosphere. “The navigable waters and the atmosphere are intertwined and to argue a separation of the two...is nonsensical”.¹⁸ The Court recognised a right to the preservation of a healthful and pleasant atmosphere.¹⁹

Nevertheless, the Court held that the Department was fulfilling its public trust obligations because it was engaging in rulemaking to address greenhouse gas emissions. Because the Department had begun considering a cap on emissions, although after the suit was brought, the Court could not rule that the Department was failing to fulfil its duty to exercise the statutory authority to establish greenhouse gas emission standards. As its process of rulemaking in this respect was not arbitrary or capricious, it was beyond the Court’s judicial review power to assess the merits of the Department’s approach.²⁰ In particular, the Court could not order the Department to use the best science available.²¹ In February 2016, however, the Department withdrew its proposed rule for mitigating greenhouse gas emissions. The plaintiff relisted the matter before the Court. Given these “extraordinary circumstances”, the Court vacated parts of its earlier order and ordered the Department to both establish a greenhouse gas emission rule by the end of 2016 and recommend this rule to the legislature in 2017.²² The Court noted “the reason I’m doing this is because this is an urgent situation. This is not a situation that these children can wait on. Polar bears can’t wait, the people of Bangladesh can’t wait. I don’t have jurisdiction over their needs in this matter, but I do have jurisdiction in this court, and for that reason I’m taking this action”.²³

On 1 June 2016, the Department released a draft rule setting limits on greenhouse

16 Foster v Washington Department of Ecology (Wash Super Ct, 14-2-25295-1-SEA, 19 November 2015) 5.

17 Foster v Washington Department of Ecology (Wash Super Ct, 14-2-25295-1-SEA, 19 November 2015) 8.

18 Foster v Washington Department of Ecology (Wash Super Ct, 14-2-25295-1-SEA, 19 November 2015) 8.

19 Foster v Washington Department of Ecology (Wash Super Ct, 14-2-25295-1-SEA, 19 November 2015) 9.

20 Foster v Washington Department of Ecology (Wash Super Ct, 14-2-25295-1-SEA, 19 November 2015) 6, 9-10.

21 Foster v Washington Department of Ecology (Wash Super Ct, 14-2-25295-1-SEA, 19 November 2015) 4.

22 Foster v Washington Department of Ecology (Wash Super Ct, 14-2-25295-1, 29 April 2016) 19 and Foster v Washington Department of Ecology (Wash Super Ct, 14-2-25295-1, 16 May 2016) 2.

23 Foster v Washington Department of Ecology (Wash Super Ct, 14-2-25295-1, 29 April 2016) 20.



gas emissions. The applicants argued that the draft rule was contrary to the Court's order because it was based on old emissions data and did not require sufficient greenhouse gas emission reduction.

On 15 June 2016, the Department filed a notice of appeal.²⁴ On 5 September 2017, the Washington Court of Appeals upheld the Department's appeal. The Court of Appeals held that the Superior Court had abused its discretion in revising its own judgment and granting the applicants' motion for relief from the November 2015 judgment for three reasons. First, the "extraordinary circumstance" relied upon to do so, the Department's inaction on climate change, was already considered in the original judgment.²⁵ Second, the Court of Appeals held that the Superior Court had not found any violation by the Department of its statutory obligations to adopt rules establishing air quality standards.²⁶ Third, the Superior Court improperly applied the rule that provides the power to revise its previous judgment as the Court impermissibly granted affirmative relief in addition to the relief in the earlier order which is not allowed under the rule.²⁷

In *Funk v Wolf*²⁸, the youth plaintiffs challenged the alleged failure of the Commonwealth of Pennsylvania and its various departments and agencies to develop and implement a comprehensive plan to regulate greenhouse gas emissions consistent with its obligations under the Environmental Rights Amendment of the Pennsylvania Constitution (Article 1, Section 27). The plaintiffs alleged that the Commonwealth, as public trustee of Pennsylvania's public natural resources under the Environmental Rights Amendment, had failed in its fiduciary duty to conduct various studies, investigations and other analysis relating to "how the Commonwealth's obligations as trustee of the public trust are to be fulfilled in 'light of climate change and/or increasing concentration of CO₂ and GHGs in the atmosphere'".²⁹ The plaintiffs also alleged that the Commonwealth had failed to exercise its duty of promulgating regulations or issuing executive orders to limit greenhouse gas emissions in a comprehensive manner.

24 Sabin Center for Climate Change Law, "Washington Department of Ecology Said It Would Appeal Order Requiring Final Greenhouse Gas Rule by End of Year" (Climate Law Update No 89, 16 September 2017) <<http://blogs.law.columbia.edu/climatechange/2016/09/16/updates-to-the-climate-change-litigation-charts-august-and-september-2016/>>.

25 *Foster v Washington Department of Ecology* (Wash Ct Apps, 75374-6-1, 5 September 2017) 13.

26 *Foster v Washington Department of Ecology* (Wash Ct Apps, 75374-6-1, 5 September 2017) 9.

27 *Foster v Washington Department of Ecology* (Wash Ct Apps, 75374-6-1, 5 September 2017) 15.

28 144 A 3d 228 (Penn Comm Ct, 2016).

29 *Funk v Wolf* 144 A 3d 228, 237 (Penn Comm Ct, 2016).



The Pennsylvania Commonwealth Court found that the Environmental Rights Amendment does not disturb the legislative scheme and the actions requested by the plaintiffs had to be required by legislation. The plaintiffs did not identify any legislation or regulation that mandated the Commonwealth of Pennsylvania to perform the specific actions sought in the writ. The Court held that under the existing legislative scheme, there was no mandatory duty to conduct the requested studies, promulgate or implement the requested regulation or issue the requested executive orders. Instead, such decisions are either discretionary acts of government officials or a task for Parliament. Accordingly, mandamus did not lie to compel the Commonwealth to make those decisions.

There has also been some litigation based on the atmospheric public trust in other countries. In *Environment People Law v The Cabinet of Ministers of Ukraine*³⁰, administrative law proceedings were brought challenging the alleged failure of the Ukrainian government to adequately regulate greenhouse gas emissions. The applicant alleged that the government had failed to uphold its obligation to effectively regulate “air”, as a natural resource constitutionally recognised as being owned by the Ukrainian people, “on behalf of and for the people of Ukraine”. The Court partially upheld the applicant’s claim by directing the government to prepare and release information on its progress in realising Ukraine’s Kyoto Protocol obligations. However, the Court declined to grant the other relief sought by the applicant and this was confirmed on appeal.

In *Segovia v Climate Change Commission*³¹, amongst other causes of action, the applicants alleged that the government of the Philippines “violated” its obligation, as public trustee of “the life-source of land, air and water”, to the people of the Philippines by failing to adequately mitigate climate change and by “using [an] immodest amount of fossil fuel”. Key issues included whether or not the petitioners had standing and whether a writ of Kalikasan (a remedy available for the violation of the constitutional right to a balanced and healthy ecology) and/or continuing mandamus should be issued. The petition was dismissed. The Supreme Court held the petitioners had standing under the Rules of Procedure for Environmental Cases

³⁰ (District Administrative Court of Kyiv, 2011).

³¹ (GR No. 211010, 7 March 2017, Supreme Court of the Philippines).



as citizens and taxpayers, applying *Oposa v Factoran*³². However, the Court held that the petitioners had failed to demonstrate that the respondents unlawfully refused to implement or neglected relevant laws, executive or administrative orders. The petitioners also failed to demonstrate that there was a causal link between the alleged unlawful acts or omissions of the government and a violation of the constitutional right to a balanced and healthful ecology of the magnitude required by petitions of this nature.

In *Ali v Federation of Pakistan*³³, amongst other causes of action, the applicant alleges that the government of Pakistan has, in permitting the development of a particular coalfield and the consequent greenhouse gas emissions, violated the “doctrine of public trust”. The applicant argues that carbon dioxide pollution “not only harms and continuously threatens their [Pakistani children’s] mental and physical health, quality of life and wellbeing, but also infringes upon their constitutionally guaranteed ‘Right to Life’ and the inalienable ‘Fundamental Rights’” of future generations. Although the Registrar of the Supreme Court initially dismissed the petition, the Supreme Court overturned this decision and the decision on the substantive hearing of the petition is pending.

In *Pandey v India*³⁴, a nine year old applicant has petitioned the National Green Tribunal of India to order the Indian government to make directions on climate change. The applicant submits that “without action by governments around the world to immediately start reducing carbon dioxide (CO₂) emissions and other greenhouse gases (GHGs) that cause climate change, in line with achieving global climate stabilisation, children of today and the future will disproportionately suffer the dangers and catastrophic impacts of climate destabilisation and ocean acidification”.³⁵ The applicant argues that the Indian government was obliged to take greater action to mitigate the adverse effects of climate change pursuant to the public trust doctrine and India’s commitments under the Paris Agreement, and domestic environmental laws and climate change policies. The petition also cites principles of intergenerational equity, the precautionary principle and sustainable development. The applicant argues that while the Indian government

32 (1993) 296 Phil 694.

33 (Supreme Court of Pakistan, Constitutional petition filed 5 April 2016).

34 (National Green Tribunal of India, Original Application No. 187 of 2017, Petition filed 25 March 2017).

35 *Pandey v India* (National Green Tribunal of India, Original Application No. 187 of 2017, Petition filed 25 March 2017) page 2-3.



had announced several initiatives to combat climate change, no effective action has been taken. The petition has yet to be heard.

Constitutional environmental rights

Constitutions or statutes may provide for certain rights, such as a right to life or right to a clean and healthy environment. Such rights may provide a basis for climate change litigation.

Rights affected by climate change

A recent climate change litigation based on human rights was *Asghar Leghari v Federation of Pakistan*³⁶. Pakistan had adopted two climate related policies, the National Climate Change Policy 2012 and the Framework for Implementation of Climate Change Policy (2014-2030). However, the Pakistan government had not implemented those policies. The petitioner submitted to the Lahore High Court that the government's inaction offended his fundamental rights (the right to life, including the right to a healthy and clean environment, the right to human dignity, the right to property and the right to information), which are to be read with the constitutional principles of democracy, equality, social, economic and political justice, and the international environmental principles of sustainable development, the precautionary principle, environmental impact assessment, inter- and intra-generational equity and the public trust doctrine.

The Court upheld the petitioner's claim that the government's inaction in implementing the Policy and the Framework offended his fundamental human rights. By way of remedy, the Court ordered on 14 September 2015 the establishment of a Climate Change Commission to effectively implement the Policy and the Framework. The Court assigned 21 members to the Commission from various government Ministries and Departments and ordered that it file interim reports as and when directed by the Court. The Court said that: "For Pakistan, climate change is no longer a distant threat – we are already feeling and experiencing its impacts across the country and the region".

³⁶ (Lahore High Court, WP No 25501/2015, 4 September 2015) and *Asghar Leghari v Federation of Pakistan* (Lahore High Court, WP No 25501/2015, 14 September 2015).



The Commission submitted to the Court a report dated 16 January 2016, which included 14 findings and 16 major recommendations. In the orders of 18 January 2016, the Court commended the work of the Commission; observed that through the Commission's process of examining and reporting on the Policy and the Framework, "modest progress" had been made in achieving their objectives and goals³⁷; ordered that the "priority items under the Framework" be achieved by the Punjab government by June 2016³⁸; tasked the Commission with investigating further achievable "short term actions" under the Framework³⁹; directed the Punjab government to seriously investigate the funding requirements of climate change action and "allocate a budget for climate change in consultation with" the Commission⁴⁰; and directed the relevant media regulatory authority to consider "granting more prime time for the awareness and sensitisation on the issue of climate change".⁴¹

The Commission submitted a supplemental report on 24 February 2017, recommending various actions including priority actions, and a further supplemental report on 24 January 2018 on the implementation of priority actions. The Commission submitted that 66% of the priority items of the Framework had been completed due to the effort made by the Commission.⁴² The Commission recommended that, in this circumstance, responsibility for implementing the balance of the Framework could be left to the government. On 25 January 2018, the Lahore High Court agreed and dissolved the Climate Change Commission and instead constituted a Standing Committee on Climate Change to assist and ensure the continued implementation of the Policy and Framework.⁴³

In *Juliana v USA*, the atmospheric public trust litigation referred to earlier, the plaintiffs' also sought declaratory relief that government action and inaction in regulating carbon dioxide pollution is resulting in catastrophic climate change and violating the plaintiffs' constitutional rights to life and equal protection and the implicit constitutional right to a stable climate. The plaintiffs sought an order that

37 Asghar Leghari v Federation of Pakistan (Lahore High Court, WP No 25501/2015, 18 January 2016) [3].

38 Asghar Leghari v Federation of Pakistan (Lahore High Court, WP No 25501/2015, 18 January 2016) [4].

39 Asghar Leghari v Federation of Pakistan (Lahore High Court, WP No 25501/2015, 18 January 2016) [4].

40 Asghar Leghari v Federation of Pakistan (Lahore High Court, WP No 25501/2015, 18 January 2016) [5].

41 Asghar Leghari v Federation of Pakistan (Lahore High Court, WP No 25501/2015, 18 January 2016) [6].

42 Recorded in Asghar Leghari v Federation of Pakistan (Lahore High Court, WP No 25501/2015, 25 January 2018) [13]-[19].

43 Asghar Leghari v Federation of Pakistan (Lahore High Court, WP No 25501/2015, 25 January 2018) [24]-[26].



the government prepare and implement an enforceable national greenhouse gas emissions reduction plan. The US government and various industry interveners sought to summarily dismiss the action on the grounds that the action was non-justiciable and constituted an invalid constitutional claim. A magistrate judge recommended that the Court decline to dismiss the action, because it had not been shown that the issues in the proceedings raised non-justiciable political questions or that the constitutional grounds of challenge had insufficient basis in law or fact.⁴⁴

On 10 November 2016, the US District Court confirmed the magistrate judge's recommendation to decline to summarily dismiss the proceedings. In rejecting the defendants' argument that the proceedings raised non-justiciable issues, the Court held that the critical issue in the proceedings – whether the defendants have violated the plaintiffs' constitutional rights – was “squarely within the purview of the judiciary”.⁴⁵ The plaintiffs challenged affirmative government action, such as leasing land and issuing permits allowing fossil fuel development, under the due process clause of the Fifth Amendment to the US Constitution, which bars the Federal government from depriving a person of “life, liberty or property” without “due process” of law.

The Court noted that the applicable level of judicial scrutiny of affirmative government action under the due process clause depends on the right affected. “The default level of scrutiny is rational basis, which requires a reviewing court to uphold the challenged governmental action so long as it ‘implements a rational basis of achieving a legitimate governmental end’”.⁴⁶ Where however, the government infringes a “fundamental right” a reviewing court applies strict scrutiny. “Substantive due process ‘forbids the government to infringe certain “fundamental” liberty interests at all no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest’”.⁴⁷ The parties noted, and the Court agreed, that the government's affirmative actions would survive rational basis review. The plaintiffs' case therefore depended on whether the government's actions infringed a fundamental right. The Court noted that: “[f]undamental liberty rights include both rights enumerated elsewhere in the constitution and rights and

44 Juliana v USA (D Or, 6:15-cv-1517-TC, 8 April 2016) 14.

45 Juliana v USA 217 F Supp 3d 1224,1241 (D Or, 2016).

46 Juliana v USA 217 F Supp 3d 1224, 1248 (D Or, 2016).

47 Juliana v USA 217 F Supp 3d 1224, 1248-1259 applying *Reno v Flores* 507 US 292, 302 (1993).



liberties which are either (i) ‘deeply rooted in this Nation’s history and tradition’ or (2) ‘fundamental to our scheme of ordered liberty’.”⁴⁸

The Court found that: “the right to a climate system capable of sustaining human life is fundamental to a free and ordered society. Just as marriage is the ‘foundation of the family’, a stable climate system is quite literally the foundation ‘of society, without which there would be neither civilization nor progress’.”⁴⁹ Such a stable climate system is a necessary condition to exercising other rights to life, liberty and property.⁵⁰ The Court was cautious in how it framed the fundamental right. It was not a right to freedom from any pollution or any climate change. Rather, it is a right to a climate system capable of sustaining human life. The Court stated:

“In framing the fundamental right at issue as the right to a climate system capable of sustaining human life, I intend to strike a balance and to provide some protection against the constitutionalization of all environmental claims. On the one hand, the phrase ‘capable of sustaining human life’ should not be read to require a plaintiff to allege that governmental action will result in the extinction of humans as a species. On the other hand, acknowledgment of this fundamental right does not transform any minor or even moderate act that contributes to the warming of the planet into a constitutional violation. In this opinion, this Court simply holds that where a complaint alleges governmental action is affirmatively and substantially damaging the climate system in a way that will cause human deaths, shorten human lifespans, result in widespread damage to property, threaten human food sources, and dramatically alter the planet’s ecosystem, it states a claim for a due process violation. To hold otherwise would be to say that the Constitution affords no protection against a government’s knowing decision to poison the air its citizens breathe or the water its citizens drink. Plaintiffs have adequately alleged infringement of a fundamental right.”⁵¹

As noted earlier, on 7 March 2018, the Ninth Circuit Court of Appeals denied the defendants application for a writ of mandamus to review the District Court’s decision. The District Court will fix in April 2018 a date for the final hearing of the

48 Juliana v USA 217 F Supp 3d 1224, 1249 (D Or, 2016).

49 Juliana v USA 217 F Supp 3d 1224, 1250 (D Or, 2016) citing amongst others *Minors Oposa v Secretary of the Department of Environment and Natural Resources* 22 ILM 173, 187-188.

50 Juliana v USA 217 F Supp 3d 1224, 1250 (D Or, 2016).

51 Juliana v USA 217 F Supp 3d 1224, 1250 (D Or, 2016).



proceedings.

In *Re Application of Maui Electric Company*⁵², the Sierra Club challenged the Hawai'i Public Utilities Commission's decision to deny the organisation the right to participate in proceedings before the Commission on an application for a power purchase agreement between an electric utility company and an electricity provider. The agreement was with an energy producer that relied on the burning of coal and petroleum in its operations and has been charged with violations of the State's visible emissions standards.⁵³ Article XI, Section 9 of the Hawai'i Constitution guarantees "the right to a clean and healthful environment, as defined by laws relating to environmental quality". Article I, Section 5 of the Constitution states "[n]o person shall be deprived of life, liberty or property without due process of law". The Sierra Club submitted that under Article XI, Section 9 of the Constitution it had a protectable property interest in a clean and healthful environment, that the Commission's decision to approve the power purchase agreement affected this property interest and that, in accordance with Article I, Section 5 of the Constitution, it should have been afforded a due process hearing due to the risk of deprivation of this property interest.⁵⁴ The Intermediate Court of Appeals dismissed Sierra Club's petition for lack of jurisdiction. However, on appeal, the Supreme Court of Hawai'i (with two Judges dissenting) determined to grant the petitioners a writ of certiorari, remanding the case to the Intermediate Court for further proceedings.

The Court held that a protectable property interest, under the due process clause, is simply "a benefit to which the claimant is legitimately entitled",⁵⁵ or "a benefit – tangible or otherwise – to which a party has 'a legitimate claim of entitlement'".⁵⁶ The Court held that the right to a clean and healthful environment relied on by the Sierra Club is a substantive right guaranteed by Article XI, Section 9 of the Constitution. Article XI, Section 9 is "is self-executing, and it establishes the right to a clean and healthful environment 'as defined by laws relating to environmental quality'".⁵⁷

52 408 P 3d 1 (Haw Sup Ct, 2017).

53 *Re Application of Maui Electric Company* 408 P 3d 1, 17 (Haw Sup Ct, 2017).

54 *Re Application of Maui Electric Company* 408 P 3d 1, 5 (Haw Sup Ct, 2017).

55 *Re Application of Maui Electric Company* 408 P 3d 1, 12 (Haw Sup Ct, 2017), applying *Pele Def. Fund v Puna Geothermal Venture* 881 P 2d 1210, 1214 (1994).

56 *Re Application of Maui Electric Company* 408 P 3d 1, 12 (Haw Sup Ct, 2017), applying *Board of Regents of State Colleges v Roth* 408 US 564, 577 and *Sandy Beach Def. Fund v City Council of Honolulu* 773 P 2d 250, 260 (1989).

57 *Re Application of Maui Electric Company* 408 P 3d 1, 13 (Haw Sup Ct, 2017), applying *City of Hawai'i v Ala Loop Homeowners* 235 P 3d 1103, 1127 (2010).



The Court held “[t]his substantive right is a legitimate entitlement stemming from and shaped by independent sources of state law, and is thus a property interest protected by due process”.⁵⁸ The Court noted that the substantive right under Article XI, Section 9 “is defined by existing laws relating to environmental quality”. The Court considered that Chapter 269 of the Hawai’i Revised Statutes (HRS), which includes the duties and operations of the Commission in regulating public utilities, is a law relating to environmental quality within the meaning of Article XI, Section 9. The Court observed that HRS § 269-6b makes it mandatory for the Commission, when exercising its duties, to recognise the need to reduce reliance on fossil fuels and explicitly consider the levels and effect of greenhouse gas emissions. HRS § 269-27.2 concerns the utilisation of electricity generated from non-fossil fuels and Part V prescribes renewable portfolio standards. The Court found that “[t]hese regulations would appear to be precisely the type of ‘laws relating to environmental quality’ that article XI, section 9 references”.⁵⁹ The Court concluded: “[w]e therefore conclude that HRS Chapter 269 is a law relating to environmental quality that defines the right to a clean and healthful environment under article XI, section 9 by providing that express consideration be given to reduction of greenhouse gas emissions in the decision-making of the Commission. Accordingly, we hold that Sierra Club has established a legitimate claim of entitlement to a clean and healthful environment under article XI, section 9 and HRS Chapter 269”.⁶⁰

The Court then considered what procedures due process required the Commission to follow in determining whether to approve the power purchase agreement. The Court found the Commission’s approval of the power purchase agreement would adversely affect the Sierra Club’s member’s interest in a clean and healthful environment as defined by HRS Chapter 269.⁶¹ The Court disagreed that only those members adjacent to the fossil fuel plant would be able to demonstrate a protectable property interest: “those who are adversely affected by greenhouse gas emissions produced by the burning of fossil fuels may not necessarily be limited to those who live in the areas immediately adjacent to the source of the emissions”.⁶²

Accordingly, the Commission should have afforded the Sierra Club the opportunity

58 Re Application of Maui Electric Company 408 P 3d 1, 13 (Haw Sup Ct, 2017).

59 Re Application of Maui Electric Company 408 P 3d 1, 14-15 (Haw Sup Ct, 2017).

60 Re Application of Maui Electric Company 408 P 3d 1, 16 (Haw Sup Ct, 2017).

61 Re Application of Maui Electric Company 408 P 3d 1, 18 (Haw Sup Ct, 2017).

62 Re Application of Maui Electric Company 408 P 3d 1, 20 (Haw Sup Ct, 2017).



to participate by way of a contested case hearing by the Commission to consider the impacts of approving the power purchase agreement on the Sierra Club's member's right to a clean and healthful environment.⁶³

In *Greenpeace v Norwegian Ministry of Petroleum and Energy*⁶⁴, Greenpeace and Nature and Youth brought proceedings against the Norwegian government seeking review of the government's decision to grant oil drilling licences in the Arctic. The applicants argued that the grant of drilling licences was contrary to the government's obligations under the Paris Agreement and the right to a healthy and safe environment for future generations granted by the Norwegian Constitution. The Oslo District Court found that the right to a healthy environment is protected by the Norwegian Constitution, and that the government must protect that right. However, the Court found that the government had not breached the Constitution in granting the licences because it had fulfilled the necessary duties required before making its decision.⁶⁵ Greenpeace announced on 5 February 2018 that it is appealing the decision to the Supreme Court.⁶⁶

In *Friends of the Irish Environment CLG v Fingal County Council*,⁶⁷ an environmental non-governmental organisation challenged the Fingal County Council's decision to approve a five year extension to the planning permission it had granted to the Dublin Airport Authority to construct a new runway. The plaintiff argued that the runway would cause an increase in greenhouse gas emissions and hasten climate change. The High Court found that the plaintiff lacked standing to participate in the extension decision in order to bring the claim. However, the Court recognised the "personal constitutional right to an environment" under the Irish Constitution: "A right to an environment that is consistent with the human dignity and well-being of citizens at large is an essential condition for the fulfilment of all human rights. It

63 Re Application of Maui Electric Company 408 P 3d 1, 18, 21 (Haw Sup Ct, 2017).

64 (Oslo District Court, No. 16-166674TVI-OTIR/06, 4 January 2018); the judgment in Norwegian is available here: Greenpeace, "Decision made in case against Arctic Oil in Norway: Right to a healthy environment acknowledged" (Press Release, 4 January 2018) <<https://www.greenpeace.org/international/press/11705/decision-made-in-case-against-arctic-oil-in-norway-right-to-a-healthy-environment-acknowledged/>>;

65 A summary of the judgment in English is available here: Sabin Center for Climate Change Law, "Greenpeace Nordic Ass'n and Nature and Youth v. Ministry of Petroleum and Energy" (Climate Change Litigation Database, 2018) <<http://climatecasechart.com/non-us-case/greenpeace-nordic-assn-and-nature-youth-v-norway-ministry-of-petroleum-and-energy/>>

66 Greenpeace, "Greenpeace and Nature and Youth take the Norwegian Government to the Supreme Court" (Press Release, 5 February 2018) <<https://www.greenpeace.org/international/press/14527/greenpeace-and-nature-and-youth-take-the-norwegian-government-to-the-supreme-court/>>).

67 (High Court of Ireland, No 344 JR, 21 November 2017).



is an indispensable existential right that is enjoyed universally, yet which is vested personally as a right that presents and can be seen always to have presented, and to enjoy protection, under Article 40.3.1 of the Constitution. It is not so Utopian a right that it can never be enforced. Once concretised into specific duties and obligations, its enforcement is entirely practicable”.⁶⁸

The Court went on to say that although concrete duties and responsibilities were yet to be defined, the recognition of the right, as in this case, was the first step in its enforcement. Nevertheless, the Court found that the County Council did not breach the right to an environment by extending the planning permission.

In *Salas, Dino and others v Salta Province*⁶⁹, indigenous communities in Argentina challenged the issuing of logging permits for native forests on the basis that the decision to issue these permits contravened constitutional rights, including the right to a healthy and balanced environment (Article 41). In upholding the *amparo* action, the Argentinian Supreme Court of Justice held, inter alia, that the clearing of one million hectares of forest posed a threat of serious damage “because it may substantially change the climate of the entire region, thus affecting not only current inhabitants, but also future generations”.

On 29 January 2018, a group of 25 plaintiffs, between 7 and 26 years old, filed a tutela, a special action under the Colombian Constitution used to protect fundamental rights, before the Superior Tribunal of Bogota.⁷⁰ The plaintiffs come from 17 cities and municipalities in Colombia, all of which are significantly threatened by climate related impacts. The plaintiffs demanded that the relevant Colombian Ministries and Agencies protect their rights to a healthy environment, life, food and water. They claimed that rampant deforestation in the Colombian Amazon and climate change are threatening these rights. They sought orders that the government halt deforestation in the Colombian Amazon. The Colombian Amazon is the region with the highest deforestation rate in the country, which contributes to climate change by releasing carbon dioxide into the atmosphere. In 2016, deforestation in Colombia increased by 44%, 39% of which was concentrated in the Amazon. The

68 Friends of the Irish Environment CLG v Fingal County Council (High Court of Ireland, No 344 JR, 21 November 2017) [264].

69 (CSJN (Arg), S1144.XLIV, 26 March 2009).

70 Future Generations v Ministry of the Environment and others (Colom Sup Ct, 11001-22-03-000-2018-00319-01, 5 April 2018).



plaintiffs argued that all ecosystems are connected. For example, the Amazonian rainforest directly relates to the drinking water enjoyed by the 8 million inhabitants of Bogota because rainfall from the Amazon feeds the páramo, an alpine tundra ecosystem that provides most of Colombia's drinking water. The plaintiffs claimed that deforestation is threatening the fundamental human rights of the plaintiffs who are young today and who will face the impacts of climate change for the rest of their lives.⁷¹

On 12 February 2018, the Tribunal denied the plaintiffs' claim.⁷² The plaintiffs appealed this decision to the Supreme Court of Justice which, on 5 April 2018, upheld the appeal.⁷³ The Supreme Court held that deforestation in the Amazon poses an "imminent and serious" threat to current and future generations due to its impact on climate change.⁷⁴ The Court found that this impact attacks the plaintiffs' fundamental rights to life, water, clean air and a healthy environment as well as the human rights of future generations. The Court found that the Amazon is an entity "subject of rights" and that the Colombian government has a duty of "protection, conservation, maintenance and restoration" of the Amazon.⁷⁵ The Court made orders across three levels of government. The Court ordered the Federal government to propose a plan to reduce deforestation in the Colombian Amazon and to establish an "intergenerational pact for the life of the Colombian Amazon" with the plaintiffs, scientists and community members with the aim of reaching zero deforestation. The Court ordered municipal governments to update their Land Management Plans and to propose a plan for reaching zero deforestation.⁷⁶ The Court also ordered regional environmental authorities to put forward a plan for reducing deforestation.

71 Dejusticia, "Colombian Youth File the First Climate Change lawsuit in Latin America" (29 January 2018) <<https://www.dejusticia.org/en/colombian-youth-file-first-climate-change-lawsuit-latin-america/>>;

72 Dejusticia, "Colombian Youth File the First Climate Change lawsuit in Latin America" (29 January 2018) <<https://www.dejusticia.org/en/colombian-youth-file-first-climate-change-lawsuit-latin-america/>>; Superior Tribunal of Bogota, no. 11001-22-03-000-2018-00319-00.

73 Future Generations v Ministry of the Environment and others (Colom Sup Ct, 11001-22-03-000-2018-00319-01, 5 April 2018).

74 Future Generations v Ministry of the Environment and others (Colom Sup Ct, 11001-22-03-000-2018-00319-01, 5 April 2018) 34.

75 Future Generations v Ministry of the Environment and others (Colom Sup Ct, 11001-22-03-000-2018-00319-01, 5 April 2018) 45.

76 Future Generations v Ministry of the Environment and others (Colom Sup Ct, 11001-22-03-000-2018-00319-01, 5 April 2018) 45.



Rights affected by air pollution

Courts may order governments to take air pollution mitigation measures to remedy contraventions of environmental and public health related constitutional rights. Strong parallels can be drawn between the approach taken by courts in adjudicating constitutional law based air pollution proceedings and the role of courts in adjudicating climate change litigation. In particular, the history of court orders directing governments to implement air pollution mitigation measures may foreshadow similar court orders in future climate change litigation. Additionally, air pollution mitigation related court orders can have ancillary benefits for climate change mitigation: the action taken to reduce other air pollutants may also reduce greenhouse gases. It is instructive, therefore, to consider air pollution litigation based on violation of constitutional rights.

In *Farooque v Government of Bangladesh*,⁷⁷ a public interest lawyer claimed that, while the Bangladesh government had legislated to regulate industrial air pollution, there was no evidence to show “any” effective implementation of the legislation. The failure of the government to implement the law contravened the constitutional right to a “qualitative life among others, free from environment hazards”.⁷⁸ Consequently, the Bangladesh Supreme Court ordered the government to “adopt adequate and sufficient measures to control pollution”.⁷⁹ In a subsequent case, *Farooque v Government of Bangladesh*⁸⁰, the same petitioner challenged the failure of government to adequately regulate vehicle generated air pollution. While the government had both legislated and taken some policy action to control vehicular air pollution, the petitioner submitted that the government had failed to safeguard the “fundamental rights guaranteed under the Constitution”⁸¹ of citizens by allowing vehicular pollution to pose a “deadly threat... to city dwellers”.⁸² The Supreme Court ordered the government to undertake “urgent preventative measures” to control the “emission of hazardous black smoke” including phasing out “2 stroke 3 wheelers” and enforcing international petroleum standards.⁸³

77 (Supreme Court of Bangladesh, WP No 891 of 1994, 15 July 2001).

78 *Farooque v Government of Bangladesh* (Supreme Court of Bangladesh, WP No 891 of 1994, 15 July 2001) 17.

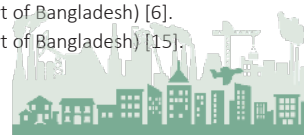
79 *Farooque v Government of Bangladesh* (Supreme Court of Bangladesh, WP No 891 of 1994, 15 July 2001) 19.

80 *Farooque v Government of Bangladesh* (2002) 22 BLD (HCD) 345 (Supreme Court of Bangladesh).

81 *Farooque v Government of Bangladesh* (2002) 22 BLD (HCD) 345 (Supreme Court of Bangladesh) [5].

82 *Farooque v Government of Bangladesh* (2002) 22 BLD (HCD) 345 (Supreme Court of Bangladesh) [6].

83 *Farooque v Government of Bangladesh* (2002) 22 BLD (HCD) 345 (Supreme Court of Bangladesh) [15].



In *Prakash Mani Sharma v HMG Cabinet Secretariat*⁸⁴, the Supreme Court of Nepal held that the Nepal government had a constitutional public health obligation to reduce vehicular air pollution. To remedy the inadequate implementation of air pollution reduction measures, the Court ordered the government to “enforce essential measures” within two years for the protection of public health from smoke emitting from buses, minibuses, tractors and trucks, including small tempos and taxis, in the Kathmandu Valley. In a later case brought by the same petitioner, *Prakash Mani Sharma v HMG Cabinet Secretariat*,⁸⁵ the Supreme Court of Nepal held that the government’s constitutional obligations to “protect the health of the people”⁸⁶ and work towards “a pollution-free environment”⁸⁷ required the government to address brick kiln generated air pollution. Thus, the Court directed the government to close brick kilns proximate to tourist areas and schools and ensure the installation of pollution controlling devices in kilns elsewhere.

In *Gbemre v Shell Petroleum Development Company Nigeria Limited*⁸⁸, the Nigerian Federal High Court ordered Shell to cease polluting by way of gas flaring on the basis that this gas flaring contravened the constitutional right to a “clean, poison-free, pollution-free healthy environment”.

In *Mansoor Ali Shah v Government of Punjab*⁸⁹, it was uncontested that the constitutional right to life required the Punjab government to protect citizens in Lahore from vehicular air pollution. The Punjab government submitted that it was, however, “making all efforts to cure air pollution”.⁹⁰ In earlier proceedings, the Lahore High Court had ordered the establishment of a commission to report on how to address vehicular pollution. The parties consented to the Court directing the government to implement a suite of air pollution reduction measures recommended by the Commission, including the phasing out of “dirty” buses and “Autocab Rickshaws”, the creation of bus lanes, the enforcement of the ban on registering “two stroke” rickshaws and the establishment of air quality and fuel standards.

84 Farooque v Government of Bangladesh (2002) 22 BLD (HCD) 345 (Supreme Court of Bangladesh) [5].

85 (Supreme Court of Nepal, WN No 3027/2059, 10 December 2007).

86 *Prakash Mani Sharma v HMG Cabinet Secretariat* (Supreme Court of Nepal, WN No 3027/2059, 10 December 2007) 10.

87 *Prakash Mani Sharma v HMG Cabinet Secretariat* (Supreme Court of Nepal, WN No 3027/2059, 10 December 2007) 7.

88 (2005) AHRLR 151 Federal High Court of Nigeria.

89 (2007) CLD 533 Lahore High Court.

90 *Mansoor Ali Shah v Government of Punjab* (2007) CLD 533 Lahore High Court [4].



In *Smoke Affected Residents Forum v Municipal Corporation of Greater Mumbai*⁹¹, in order to safeguard the constitutional right to health of the residents of Mumbai, the Bombay High Court ordered the City of Mumbai to implement air pollution mitigation measures “to protect future generations”, including phasing out, or converting, a particular taxi model and old three wheeler vehicles.

In *Vardhaman Kaushik v Union of India*⁹², the National Green Tribunal of India made many orders directing the Indian government to take particular actions to address air pollution. The Tribunal held that the orders were a necessary intervention to uphold the constitutional right of citizens to a decent and clean environment and to correct the “casual approach which all concerned stakeholders are dealing with the air pollution of Delhi”. The Tribunal stated that it “cannot permit” the people of Delhi to be exposed to air pollution that causes “serious environmental pollution and public health hazard”. The Tribunal, amongst other orders, directed the government to: “ensure free flow of traffic in Delhi”, “enhance public transport facilities”, “install air filters” in “public places”, prioritise bypass highways, install “catalytic convertors” in government vehicles, “increase the forest area” around Delhi, prohibit the burning of garbage and ensure that construction materials in trucks are covered. In making orders on 10 November 2016 to address unprecedented levels of air pollution in Delhi and surrounding areas, the National Green Tribunal observed that the level of air pollution “[v]iewed from any rational angle...is disastrous”.⁹³ To ensure the proper implementation of previous air pollution orders in these and related proceedings, the Tribunal ordered the constitution of a centralised committee (consisting of various departmental secretaries) and state level committees. The Tribunal charged these committees with preparing a “complete action plan for environmental emergency as well as prevention and control of air pollution” to implement previous air pollution judgments and orders of the Court.⁹⁴ Moreover, the Tribunal ordered that if air pollution reaches a certain “environmental emergency threshold”, the government must take seven emergency measures, including the measure of stopping all “construction, demolition activities and transportation of construction material”.

91 2003 (1) Bom CR 450 (Bombay High Court).

92 (National Green Tribunal of India, Original Application No 21 of 2014, 4 December 2014).

93 *Vardhaman Kaushik v Union of India* (National Green Tribunal of India, Original Application No 21 of 2014, 4 December 2014) p. 9.

94 *Vardhaman Kaushik v Union of India* (National Green Tribunal of India, Original Application No 21 of 2014, 4 December 2014) p. 17.





In *Court (on its own motion) v State of Himachal Pradesh*,⁹⁵ the National Green Tribunal made a series of orders directing the State government to take action to redress the environmental degradation of the ‘Crown Jewel’ of Himachal Pradesh – the eco-sensitive Rohtang Pass – caused by inadequately regulated tourism related development and activities, including vehicular air pollution. Of the various tourism related impacts, the Tribunal noted that Black Carbon (primarily unburnt fuel, including from vehicular pollution) has been “the major causative factor for rapid melting of glacier in the north-western Himalaya” and a significant contributor to global warming. On 6 February 2014, the Tribunal, after articulating the importance of the constitutional right to a clean environment, ordered the government to take various actions to reduce vehicular pollution, such as enforcing emissions standards for vehicles and phasing out vehicles more than ten years old. On 9 May 2016, the Tribunal directed the government to submit to the Tribunal a comprehensive status/compliance report relating to the various environmental orders of the Tribunal.⁹⁶ In *M.C. Mehta v Union of India*,⁹⁷ there is a 30 year history of court orders compelling Indian governments to take air pollution mitigation measures to comply with public health and environmental constitutional obligations. For example, the Supreme Court of India ordered on 5 April 2002 that diesel buses in Delhi be converted from

⁹⁵ (National Green Tribunal of India, Original Application No 237 of 2013).

⁹⁶ *Court (on its own motion) v State of Himachal Pradesh* (National Green Tribunal of India, Original Application No 237 of 2013, 9 May 2016).

⁹⁷ 1987 SCR (1) 819.



diesel to cleaner natural gas.⁹⁸ On 16 December 2015, the Supreme Court made further orders including, for example, the prohibition of the registration of “luxury” diesel cars and SUVs (with a diesel capacity of 2000 cc and above) in Delhi and requiring the imposition of green taxes/toll-based measures to stop diesel trucks entering, rather than bypassing, Delhi.⁹⁹ On 5 January 2016, the Supreme Court ordered that all taxis operating in the National Capital Region be converted to natural gas.¹⁰⁰ On 10 May 2016, the Court prohibited the registration of diesel city taxis.¹⁰¹ On 12 August 2016, the Court lifted the prohibition it had ordered on 16 December 2015 on the registration of certain diesel cars on the condition that an “environment protection charge” (of 1% of the ex-showroom price of diesel vehicles, with capacity of 2000 cc or greater, sold in Delhi) is levied on the registration of such cars.¹⁰²

Human rights

Human rights under international conventions and instruments may provide a source for climate change litigation. To date, litigation under the European Convention for the Protection of Human Rights and Fundamental Freedoms has not expressly focused on the impact of climate change on human rights, but rather more generally on the environmental impact of projects and activities on human rights. The European Court for Human Rights (ECtHR) has upheld rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms including the right to life, the right to a fair trial and the right to respect for family and private life. Four cases before the European Court of Human Rights concern the infringement of human rights by air pollution.

In *Fadeyeva v Russia*¹⁰³, the applicant alleged that the operation of a steel plant (the largest iron smelter in Russia) in close proximity to her home endangered her health and wellbeing due to the State’s failure to protect her private life and home from severe environmental nuisance from the plant, in violation of Article 8 of the Convention. The ECtHR held that while the Convention does not contain a right

98 M.C. Mehta v Union of India 2002 (2) SCR 963.

99 M.C. Mehta v Union of India (Writ Petitions No 817 of 2015, 116 of 2013 and 728 of 2015, 16 December 2015).

100 M.C. Mehta v Union of India (2016) 4 SCC 269.

101 M.C. Mehta v Union of India (Writ Petition No 13029/1985, 10 May 2016)

102 M.C. Mehta v Union of India (Writ Petition No 13029/1985, 12 August 2016).

103 [2005] ECHR 376; (2007) 45 EHRR 10.



to nature preservation as such, Article 8 could apply if the adverse effects of the environmental pollution had reached a certain minimum level. This threshold had been reached as the average pollution levels were way over the safe concentrations of toxic elements and local courts had recognised the applicant's right to resettle.¹⁰⁴ The ECtHR held Russia to be in breach of Article 8 and awarded damages and costs.¹⁰⁵ The Court also ordered the Russian government to "take appropriate measures to remedy" her situation. The Court observed that it was not its role to "dictate precise measures which should be adopted by States in order to comply" with their human rights obligations. Nevertheless, in 2007, the ECtHR Department for Execution of Judgments found that Russia had not provided evidence that any appropriate measures had been taken, despite Russia's claims to that effect.¹⁰⁶

In *Okyay v Turkey*¹⁰⁷, the applicants sought to stop the operation of three thermal power plants situated in the Aegean region of Turkey. The plants used low quality lignite coal. Sulphur and nitrogen emissions from the sites affected the air quality of a large area, while activities incidental to the plant's operation adversely affected the region's biodiversity. The applicants brought proceedings in local courts seeking to stop the operation of the plants, arguing that the plants did not have the required licences to function lawfully. They relied on the right to a healthy, balanced environment in Article 56 of the Turkish Constitution, as well as provisions of the Environment Act requiring authorities to prevent pollution or ensure its effects are mitigated. The local courts upheld their appeal, finding that the plants did not have the required licences and ordered the plants to stop operating. The Turkish authorities refused to enforce the local courts' decisions. The applicants complained to the ECtHR that their right to a fair hearing under Article 6 of the Convention had been breached by the authorities' failure to enforce the local courts' decisions to halt the operation of the power plants. The ECtHR found Turkey had violated Article 6 and awarded the applicants compensation.¹⁰⁸

*Giacomelli v Italy*¹⁰⁹ involved a complaint about noise and emissions from a

104 *Fadeyeva v Russia* [2005] ECHR 376; (2007) 45 EHRR 10 [80], [84], [86].

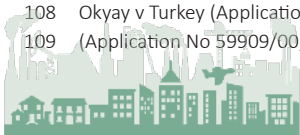
105 *Fadeyeva v Russia* [2005] ECHR 376; (2007) 45 EHRR 10 [134], [138], [149]–[150].

106 Business & Human Rights Resource Centre, "*Fadeyeva v Russia*" <<http://businesshumanrights.org/en/fadeyeva-v-russia-re-severstal-smelter>>.

107 (Application No 36220/97, ECHR 2005-VII).

108 *Okyay v Turkey* (Application No 36220/97, ECHR 2005-VII) [74]–[75], [79].

109 (Application No 59909/00, ECHR 2006-XII).



waste treatment plant that processed hazardous waste. The applicant, who lived 30 metres from the plant, sought damages and to have the facility closed down. She complained that the persistent noise and harmful emissions from the plant constituted a severe disturbance of her environment and a permanent risk to her health and home in breach of Article 8 (Right to respect for private and family life) of the Convention.¹¹⁰ The company operating the plant had been granted an operating licence in 1982 to treat non-hazardous waste and then a further authorisation in 1989 to treat harmful and toxic waste. Neither of these decisions was preceded by appropriate environmental investigation and the company was not required to carry out an environmental impact assessment until 1996. On two occasions the Ministry of the Environment found that the plant's operations were incompatible with environmental regulations. In addition, a Regional Administrative Court had held that the plant's operation had no legal basis and should be suspended immediately. However, the administrative authorities did not at any time order the closure of the facility.¹¹¹

The ECtHR held that Article 8 may apply in environmental cases whether the pollution is directly caused by the State or whether State responsibility arises from the failure to properly regulate private-sector activities. The Court must ensure that a fair balance is struck between the interests of the community and the individual's right to respect of the home and private life.¹¹² The ECtHR held that this individual right is not confined to concrete or physical breaches, such as unauthorised entry into a person's home, but also those that are not concrete or physical, such as noise, emissions, smells or other forms of interference.¹¹³ After considering the actions of the administrative authorities, the ECtHR concluded that the State did not succeed in striking a fair balance between the interest of the community in having a plant for the treatment of toxic industrial waste and the applicant's effective enjoyment of her right to respect for her home and private and family life.¹¹⁴ The ECtHR therefore found a violation of Article 8.

In another air pollution case, *MFHR v Greece*¹¹⁵, the European Commission of Social

110 *Giacomelli v Italy* (Application No 59909/00, ECHR 2006-XII) [68].

111 *Giacomelli v Italy* (Application No 59909/00, ECHR 2006-XII) [89] – [92].

112 *Giacomelli v Italy* (Application No 59909/00, ECHR 2006-XII) [82].

113 *Giacomelli v Italy* (Application No 59909/00, ECHR 2006-XII) [76].

114 *Giacomelli v Italy* (Application No 59909/00, ECHR 2006-XII) [97].

115 (European Commission of Social Rights, No 30/05, 6 December 2005).



Rights held that the Greek government had violated Article 11 of the European Social Charter – the right to protection of health – in failing “to strike a reasonable balance between the interest of persons living in the lignite mining areas and the general interest” in managing and regulating air pollution from lignite mining operations.¹¹⁶

Litigation under the American Convention on Human Rights has directly raised the impact of climate change on human rights. In 2005, the Inuit, indigenous people in the Arctic region, filed a petition against the United States alleging human rights violations resulting from the United States’ failure to limit its emissions of greenhouse gases and therefore reduce the impact of climate change. The petitioners invoked the right to culture, the right to property, and the right to the preservation of health, life and physical integrity. The Inter-American Commission for Human Rights rejected the petition in 2006 without giving reasons. However, on the request of the petitioners, the Commission agreed to afford the petitioners a hearing of the matter in 2007 but no further judgment has been given.¹¹⁷

In 2016, the Colombian government requested the Inter-American Court of Human Rights to issue an opinion on State obligations to the environment arising under Article 1(1) (Obligation to Respect Rights), Article 4(1) (Right to Life) and Article 5(1) (Right to Humane Treatment) of the American Convention of Human Rights, including the obligation of State Parties to prevent environmental harm occurring outside their territory.¹¹⁸ Of particular concern was the trans-boundary environmental impact of proposed major infrastructure projects in the Caribbean, such as the proposed Nicaraguan canal.

In February 2018, the Court published its opinion of 15 November 2017.¹¹⁹ The Court found that there is an “irrefutable relationship” between the protection of the environment and human rights because environmental degradation and climate change affect the enjoyment of human rights.¹²⁰ The Court found that

116 MFHR v Greece (European Commission of Social Rights, No 30/05, 6 December 2005).

117 Earthjustice, “Nobel Prize Nominee Testifies about Global Warming”, 1 March 2007, <<http://www.earthjustice.org/news/press/007/nobel-prize-nominee-testifies-about-global-warming.html>>; Hari M. Osofsky, ‘Inuit Petition as a Bridge? Beyond Dialectics of Climate Change and Indigenous Peoples’ Rights’ (2007) 31 American Indian Law Review 675.

118 Republic of Colombia, Request for Advisory Opinion of the Inter-American Court of Human Rights (14 March 2016).

119 Inter-American Court of Human Rights (Advisory Opinion OC-23/17 of 15 November 2017)

120 Inter-American Court of Human Rights (Official Summary of Advisory Opinion OC-23/17 of 15 November 2017) 2; Inter-American Court of Human Rights (Advisory Opinion OC-23/17 of 15 November 2017) 21-22.



Article 1 of the Convention obliges State Parties to prevent human rights violations of persons within their territory and outside their territory, where these persons are within the State's "effective authority or control".¹²¹ This obligation includes ensuring that actions occurring within a State's boundaries do not result in human rights violations from environmental harm occurring outside the State's territory.¹²² On State obligations arising under the rights to life and personal integrity in the Convention, the Court concluded that:

- States have the obligation to prevent significant environmental damage, within or outside their territory;
- States must act in accordance with the precautionary principle, for the purposes of protecting the right to life and personal integrity, against possible serious or irreversible damage to the environment, even in the absence of scientific certainty;
- States must regulate, and supervise the activities under their jurisdiction that may cause significant damage to the environment; carry out environmental impact studies when there is a risk of significant damage to the environment; establish a contingency plan, in order to have security measures and procedures to minimize the possibility of major environmental accidents; and mitigate significant environmental damage that would have occurred, even if it had occurred despite preventive actions by the State;
- States have the obligation to cooperate, in good faith, for protection against damage to the environment;
- States must notify the other potentially affected States when they become aware that a planned activity under their jurisdiction could generate a risk of significant transboundary damage and in cases of environmental emergencies, as well as consult and negotiate, in good faith, with States potentially affected by significant transboundary harm;
- States have the obligation to guarantee the right to access information related to possible effects on the environment;
- States have the obligation to guarantee the right to public participation of the

121 Inter-American Court of Human Rights (Official Summary of Advisory Opinion OC-23/17 of 15 November 2017) 3.

122 Inter-American Court of Human Rights (Official Summary of Advisory Opinion OC-23/17 of 15 November 2017) 3.



persons under their jurisdiction; and

- States have the obligation to guarantee access to justice, in relation to the State obligations for the protection of the environment that have been previously stated in the Opinion.¹²³

The emission of greenhouse gases, causing climate change, is a form of transboundary damage.

Human rights commissions in countries can also investigate the impact of climate change on human rights. In *National Inquiry on the Impact of Climate Change on the Human Rights of Filipino People*¹²⁴, a public interest petition was lodged on 12 May 2015 with the Philippines Commission on Human Rights requesting that it investigate the responsibility of 50 large multinational, publicly traded fossil fuel producing corporations for contributing to climate change and thereby allegedly violating various fundamental human rights of the Filipino people. It is alleged that these 50 corporations account for 21.71% of total cumulative carbon dioxide emissions between 1751 and 2010. The petitioners are human rights groups, typhoon victims and other concerned citizens.¹²⁵

On 4 December 2015, the Commission announced the commencement of the above inquiry and, by 27 July 2016, the Commission had furnished these 47 “carbon majors” with the petition seeking a response within 45 days.¹²⁶

Hearings in the Philippines commenced on 28 March 2018. In his opening statement, the Chairperson of the Commission, Jose Luis Martin “Chito” Gascon, remarked: “Among those who are suffering the most from the effects of climate change is the Philippines. Nowhere has it been more dramatically demonstrated than in November of 2013, when our country was visited by Typhoon Haiyan or Yolanda”.¹²⁷

123 Inter-American Court of Human Rights (Advisory Opinion OC-23/17 of 15 November 2017) 95-96.

124 (Commission on Human Rights – Philippines, CHR-NI-2016-0003).

125 Philippines Commission on Human Rights, ‘CHR to conduct first hearing investigating possible contribution of carbon to climate change and its impact on human rights’ (online) 26 March 2018 <<http://chr.gov.ph/chr-to-conduct-first-hearing-investigating-possible-contribution-of-carbon-to-climate-change-and-its-impact-on-human-rights/>>.

126 John Vidal, ‘World’s largest carbon producers face landmark human rights case’ Guardian (online) 28 July 2016 <<https://www.theguardian.com/environment/2016/jul/27/worlds-largest-carbon-producers-face-landmark-human-rights-case>>.

127 Philippines Commission on Human Rights, ‘PHL at the forefront of seeking climate justice with CHR’s landmark inquiry on the effects of climate change to human rights’ (online) 28 March 2018 <<http://chr.gov.ph/phl-at-the-forefront-of-seeking-climate-justice/>>.



The Commission is expected to release its resolution in early 2019, which may contain recommendations for local and international agencies and a model law to address climate change that could be applied globally. According to Commissioner Roberto Cadiz, who is the Chair of this inquiry, damages cannot be awarded in the course of the inquiry, however the results may be relied on as a foundation for filing subsequent cases.¹²⁸

Conclusion

At the heart of much of the recent climate change litigation is a call for climate justice. Climate change affects everyone, but it disproportionately affects those who have contributed the least to climate change and those least well placed to respond to the impacts of climate change, including those in developing countries and vulnerable peoples everywhere. In contrast, those who have contributed most to climate change – the enterprises and people with the largest carbon footprints, mostly in the developed countries – are most insulated from climate change and its consequences by their wealth and access to resources.¹²⁹

The response to climate change involves both the mitigation of greenhouse gas emissions that contribute to climate change (by reducing sources and increasing sinks) and adaptation to the impacts of climate change. Striking the right balance between mitigation and adaptation is itself a justice issue. To take strong mitigation now is to limit the need for adaptation in the future. To be weaker on mitigation now is to increase the need for future adaptation. At each end, and along, this mitigation-adaptation spectrum are issues of justice in terms of the distribution of environmental benefits and burdens, the procedure for policy and decision making and the recognition given to different people and communities.¹³⁰

Climate change and the responses to it adversely affect environmental and human rights, including rights under the public trust doctrine, constitutional and statutory environmental rights and other human rights. This exacerbates existing inequities

128 Nicole-Anne C Lagrimas, 'CHR sets 2019 target for results of landmark rights-based climate change probe' GMA News (online) 12 December 2017 <<http://www.gmanetwork.com/news/news/nation/636263/chr-sets-2019-target-for-results-of-landmark-rights-based-climate-change-probe/story/>>.

129 International Bar Association, *Achieving Justice and Human Rights in an Era of Climate Disruption* (2014), 2.

130 Brian J Preston, 'The adequacy of the law in achieving climate justice – some preliminary comments' (2016) 34(1) *Journal of Energy & Natural Resources Law* 45.



and injustices. Climate change litigation is increasingly invoking environmental and human rights to expose and remedy these inequities and injustices. This trend is likely to continue.



Climate Change and Vulnerable Groups

— Global and Regional Developments

Irum Ahsan and Briony Rae Eales



It's not rocket science. We know it but we ignore it. Climate change will impact public health and food and water security, and result in mass migration of people and species. Asia and the Pacific will see unprecedented deaths, violence, and national security crises. In the words of Mary Robinson, climate change is the greatest threat to human rights in the 21st century.¹

Climate change will result in grave injustice, most especially because “the poor and most vulnerable who have done least to cause climate change and will suffer first and worst.”² Vulnerable peoples will suffer weakened coping mechanisms and their human rights will be impaired, to an even greater extent than other members of society.

In connection with its goal of addressing climate change in Asia and the Pacific, ADB works with the region's judiciaries to strengthen their capacity for climate change decision-making. Judges frequently question what their role needs to be in promoting climate justice. Protecting the rights of vulnerable peoples is a critical element of climate justice. This paper therefore seeks to highlight the significantly greater impacts that vulnerable groups will suffer due to climate change. By doing so, ADB hopes to promote greater thought about how judiciaries can protect the needs of the world's most vulnerable as climate change impacts worsen.

1 M. Robinson. 2015. Why Climate Change is a Threat to Human Rights. TED Talks. https://www.ted.com/talks/mary_robinson_why_climate_change_is_a_threat_to_human_rights.

2 B. Ki-moon. 2015. What I Expect From the UN Climate Change Conference in Paris. <https://www.un.org/sg/en/content/sg/articles/2015-11-25/what-i-expect-un-climate-change-conference-paris>.



Varied effects of climate change

Climate change will impact people differently. The variations in impact will be unfair and unjust. Some people will suffer changed weather patterns. Temperatures will be hotter, colder, or more varied. For others, particularly vulnerable peoples, climate change will threaten their life—there will be too little or too much water and insufficient food to sustain life. Vulnerable communities stand to lose most because they often lack the resources to adapt to and protect themselves from climate change impacts.

Climate change will exacerbate existing threats to global peace, security, and prosperity. Flooding, disease, and famine will result in migration on an unprecedented scale in areas of already high tension. Drought and crop-failure will intensify competition for food, water, and energy in regions where resources are already stretched to the limit. Conflicts over land, water, and resources will likely “dwarf the conflicts of the past.”³ Both the United States and the United Kingdom have expressed concerns regarding the capacity of climate change to threaten national security.⁴

All of these effects will impact on human rights such as the: right to life; right to health; right to water and sanitation; right to food; right to adequate standard of living; right to housing; right to property; right to self-determination; right to development (sustainable); right to nationality; and right to mobility.⁵ Against this backdrop of climate rights, justice and injustices, we will now explore climate vulnerabilities.

3 E. Parry. 2007. The Greatest Threat To Global Security: Climate Change Is Not Merely An Environmental Problem. UN Chronicle. Vol. XLIV No. 2 2007. <https://unchronicle.un.org/article/greatest-threat-global-security-climate-change-not-merely-environmental-problem>. Quoting the Congolese representative at the UN Security Council debate in April 2007.

4 US Military Advisory Board categorically state in their report that projected climate change poses a serious threat to America’s national security in 2007. The United Kingdom used its presidency of the Security Council to instigate an unprecedented debate on in 2007 on energy, security and climate.

5 For more information regarding the range of human rights that climate change is likely to impact, see: UN Environment. 2015. Climate Change and Human Rights. Nairobi; J. Knox. 20017. Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment. A/HRC/34/49. Geneva. <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/009/97/PDF/G1700997.pdf?OpenElement>.



So, what is climate vulnerability?

Climate vulnerability is the degree to which geophysical, biological, and socio-economic systems are susceptible to, and unable to cope with, adverse impacts of climate change.⁶ Key vulnerabilities will result from impacts to “food supply, infrastructure, health, water resources, coastal systems, ecosystems, global biogeochemical cycles, ice sheets, and modes of oceanic and atmospheric circulation.”⁷

Who is most vulnerable to climate change impacts?



... especially when they live in developing countries.

Children

Children suffer more during natural disasters and civic unrest, which will worsen with climate change, due to their small size and relative inability to care for themselves. If orphaned or separated from their caregivers, children are more likely than adults to succumb to malnutrition, injuries, or disease in the aftermath of disaster. They simply lack the physical strength to fight for food or water and the resources to seek help. Children are also vulnerable to trafficking and other exploitation, including forced labor. Climate change will also significantly impact children’s health, nutrition, and education.

Health. Compared to an adult, a child is more vulnerable to heat waves resulting in the potential for heat injury and dehydration, vector-borne diseases such as malaria and dengue, and water-borne diseases such as cholera and dysentery. Children are also more susceptible to air pollution, particularly indoor pollution from biomass

6 S.H. Schneider, S. Semenov, A. Patwardhan, et. al. 2007. Assessing Key Vulnerabilities and the Risk From Climate Change. Climate Change 2007: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change. Cambridge. <https://www.ipcc.ch/pdf/assessment-report/ar4/wg2/ar4-wg2-chapter19.pdf>.

7 IPCC. 2007. IPCC Fourth Assessment Report: Impacts, Adaptation and Vulnerability: Climate Change 2007: Synthesis Report. https://www.ipcc.ch/publications_and_data/ar4/syr/en/spms5.html.



fuel.⁸ More than 88% of the existing global burden of climate-change related disease currently impacts children aged five and less.⁹

Nutrition. Heat waves, droughts, and floods related to climate change will exacerbate crop failures and quality of drinking water, undermining a child's nutrition and therefore survival. The WHO estimates that malnutrition causes around 35% of all deaths in children under the age of five.¹⁰ Unsafe drinking water also contributes to childhood malnourishment. The WHO estimates that 50% of global childhood malnutrition is related to diarrhea or repeated intestinal infestations due to unsafe drinking water, inadequate sanitation, and/or poor hygiene conditions.¹¹

Education. Loss of livelihood and assets and natural disasters reduce opportunities for full-time education. Children (especially girls) are more likely to be taken out of school to help fetch water, earn an income, or care for ill family members, particularly in the aftermath of a disaster. Malnourishment and illness also reduce school attendance and the ability of children to learn. Displacement and migration reduce access to education.

Older adults and persons with different abilities

In an ageing world, increasing numbers of older people will be affected by climate change and have disabilities. Taking steps to protect the rights of older adults from climate change cannot necessarily be deferred to the future. For example, Pakistan is one of 15 countries globally to have an older population of over 10 million people.¹² By 2050, almost 16% of Pakistan's population will be over 60.¹³

Differently abled persons are often seen as the most disadvantaged people within

8 UNICEF. Undated. Climate change and child rights. <https://www.unicef.org/rightsite/sowc/pdfs/panels/Climate%20change%20and%20child%20rights.pdf>.

9 Y. Zhang, P. Bi, J.E. Hiller. 2007. Climate change and disability-adjusted life years. *J Environ Health*. 70. pp. 32–36. <https://ehp.niehs.nih.gov/1002233/#r120>.

10 WHO. 2017. Unsafe water and sanitation as deadly to acute malnourished children as lack of food. Geneva. <http://www.who.int/health-cluster/news-and-events/news/Global-WASH-Cluster-malnutrition.pdf>.

11 WHO. 2008. Safer water, better health: Costs, benefits and sustainability of interventions to protect and promote health, cited in WHO. 2017. Unsafe water and sanitation as deadly to acute malnourished children as lack of food. Geneva. <http://www.who.int/health-cluster/news-and-events/news/Global-WASH-Cluster-malnutrition.pdf>.

12 HelpAge International. Pakistan. London. <http://www.helpage.org/where-we-work/south-asia/pakistan/>.

13 HelpAge International. Pakistan. London. <http://www.helpage.org/where-we-work/south-asia/pakistan/>.



their communities. The World Bank estimates that 20% of the world's poorest people have a disability.¹⁴ Furthermore, the World Bank projects that 20% of the global population 60 years or older by 2050 will have a disability.¹⁵

Diminished ability to seek help during disasters. Older adults and differently abled persons are among the most vulnerable in an emergency, sustaining disproportionately higher rates of morbidity and mortality, and at the same time being among those least able to access emergency support. Older adults and differently abled persons are less likely to respond to flood warnings. 56.7% of those who died during Japan's 2011 tsunami were aged 65 or over.¹⁶ Further, around 75% of those who died during Hurricane Katrina in 2005 were aged over 60 (16% of local population).¹⁷ Data from the Louisiana Department of Health showed that almost 70 of its nursing home residents died during Hurricane Katrina because their caretakers allegedly abandoned them.¹⁸ Lack of resources, particularly transportation, also means that many older adults and differently abled persons are unable to evacuate during a disaster.¹⁹

Diminished ability to adapt or respond to disaster. Older adults and differently abled persons are more likely to suffer from chronic health conditions, rendering them bed-bound, unable to leave home daily, or unable to care for themselves because they suffer from dementia or other degenerative illnesses. Disabilities may limit their communication (seeing, hearing, or speaking); mental functioning (such as Alzheimer's disease, senility, or dementia); and physical functioning (limited or no ability to walk, climb stairs, or lift or grasp objects).

Extreme heat exposure can increase the risk of illness and death among older adults and differently abled persons, especially people with congestive heart failure, diabetes, and other chronic health conditions that increase sensitivity to

14 UN. Fact sheet on Persons with Disabilities. <http://www.un.org/disabilities/documents/toolaction/pwdfs.pdf>.

15 WHO and The World Bank. 2011. World Report on Disability. http://www.who.int/disabilities/world_report/2011/report.pdf.

16 J Epidemiol. 2013. Mortality in the 2011 Tsunami in Japan. Journal of Epidemiology. 23 (1). pp. 70–73.

17 N Wilson. 2006. Public Policy and Ageing Report, cited by HelpAge International. 2015. Climate change in an ageing world. London. https://reliefweb.int/sites/reliefweb.int/files/resources/COP21_HelpAge_PositionPaper_Final_0.pdf.

18 CDC. CDC's Disaster Planning Goal: Protect Vulnerable Older Adults. https://www.cdc.gov/aging/pdf/disaster_planning_goal.pdf.

19 CDC. CDC's Disaster Planning Goal: Protect Vulnerable Older Adults. https://www.cdc.gov/aging/pdf/disaster_planning_goal.pdf.



heat. Higher temperatures have also been linked to increased hospital admissions for older people with heart and lung conditions.²⁰ Food shortages will also result in higher rates of malnutrition for older adults and differently abled persons, which will exacerbate impairments. Malnutrition is estimated to cause approximately 20% of impairments worldwide.²¹

Older adults and persons with disabilities are more likely to be living on lower or fixed incomes. Given their limited capacity to earn money, older adults and differently abled persons have diminished capacity to recover financially from a disaster that damages or destroys their home.²²

Indigenous peoples and poor minorities

Roughly two thirds of the world's indigenous peoples (IPs) live in Asia.²³ They live in geographical regions and ecosystems that are particularly vulnerable to climate change. IPs subsist as farmers, herders, fishers, and hunters and have a unique and spiritual connection with their lands.²⁴ Climate change will exacerbate IPs' existing challenges such as "political and economic marginalization, loss of land and resources, human rights violations, discrimination and unemployment."²⁵

Poor minorities also tend to live subsistence lifestyles, making them vulnerable to changes to their ecosystems. Like IPs, they are vulnerable to losing their lands, culture, housing, health, food, livelihoods, and right of self-determination, and such losses impact their fundamental human rights.

Climate migration impacts. More and more people (often IPs and poor minorities) will be displaced following climate-induced disasters, leaving them vulnerable to

20 Jean Coutu. The impact of a heat wave on the elderly and on babies. Québec. <https://www.jeancoutu.com/en/health/health-tips/impact-of-a-heat-wave-on-the-elderly-and-on-babies/>.

21 DFID. 2000. Disability, poverty and development. London. <http://hpod.org/pdf/Disability-poverty-and-development.pdf>.

22 CDC. CDC's Disaster Planning Goal: Protect Vulnerable Older Adults. https://www.cdc.gov/aging/pdf/disaster_planning_goal.pdf.

23 ILO. 2017. The Rights of Indigenous Peoples in Asia: Executive Summary. Geneva. http://www.ilo.org/wcmsp5/groups/public/---dgreports/---gender/documents/publication/wcms_545484.pdf.

24 M. Cherrington. 2008. Indigenous Peoples and Climate Change. Cultural Survival Quarterly Magazine. <https://www.culturalsurvival.org/publications/cultural-survival-quarterly/indigenous-peoples-and-climate-change>.

25 United Nations. Climate Change and Indigenous Peoples: Backgrounder. New York. http://www.un.org/en/events/indigenousday/pdf/Backgrounder_ClimateChange_FINAL.pdf.



discrimination, human trafficking and smuggling, and to living as stateless illegal immigrants or “environmental refugees.”²⁶

Relocation is particularly difficult for IPs, who are frequently spiritually connected to their lands. Even planned relocation creates a risk of human rights violations, particularly if vulnerable groups are not consulted.²⁷ If vulnerable groups like IPs and poor minorities cannot participate in relocation planning, they will have no say in where or how they live, potentially impacting on a range of their human rights. Courts can monitor relocation planning to ensure that it protects the right of vulnerable parties to meaningfully participate and consent to their relocation. Courts should also assess whether IPs have a right to exercise free, prior and informed consent over such processes.

Exclusion from post disaster responses. IPs and poor minorities are frequently excluded from disaster responses. In 2007, the unusually severe monsoon floods hit northern parts of India, affecting some 170 million people known as Dalits. As Dalits were physically, socially, and economically excluded from the rest of society, they were left behind in the disaster response process. A similar fate befell the African-Americans following Hurricane Katrina in New Orleans in 2005. A 2015 study showed that 59% of African-American respondents had “mostly not recovered” in the decade following Hurricane Katrina. In contrast, almost 80% of white residents reported that they had “mostly recovered.”²⁸

Biofuels. The recent rise in popularity of biofuels due to their lower emissions has negatively impacted the world’s IPs.²⁹ Unscrupulous biofuel producers have acquired land for biofuel plantations by intimidation and violence, grabbing land from IPs. In 2008, the chairperson of the United Nations Permanent Forum on

26 To date, courts have been unwilling to recognize the concept of “environmental refugee.” See *Teitiota v Chief Executive Ministry of Business, Innovation and Employment* [2015] NZSC 107. The court was not satisfied that the plaintiff would face “serious harm” if he returned to his native Kiribati.

27 Planned relocation of communities is gaining traction as a potential adaptation measure. For more information, see UNHCR. 2014. *Planned Relocation, Disasters and Climate Change: Consolidating Good Practices and Preparing for the Future*. Geneva. <http://www.unhcr.org/54082cc69.pdf>.

28 Al Jazeera Staff. 2015. ‘Stark’ racial divide in views on post-Katrina recovery, study finds. Al Jazeera. 24 August. <http://america.aljazeera.com/articles/2015/8/24/study-black-residents-of-new-orleans-more-critical-of-recovery.html>.

29 Biofuels are liquid or gas fuels made from corn, oil palm, sugar cane, soya and wheat. Bioenergy covers approximately 10% of total world energy supply. GreenFacts. 2018. *Liquid Biofuels for Transport Prospects, Risks and Opportunities*. <https://www.greenfacts.org/en/biofuels/l-3/1-definition.htm#1p0>.



Indigenous Issues predicted that if biofuel plantations continued as planned, 60 million indigenous people worldwide would be threatened with losing their land and livelihoods.³⁰ Biofuel development has also been blamed for increasing food costs worldwide.³¹

Women and girls

Women and girls lag behind men and boys in access to resources, training, and opportunities; the ability to participate; and land ownership and occupation rights. They are subjected to physical violence, within their homes and in broader society. Women and children are 14 times more likely to die or be injured during a disaster than men.³² Women and girls are particularly vulnerable to climate change impacts in the following ways.

Land ownership and displacement. Women own less than 20% of the world's land.³³ In 2010, UNDP estimated that only 3% of land in Pakistan was owned by women. Women frequently face legal and customary barriers to inheriting land, including when widowed. This affects their capacity to earn income and provide for their families. Women's simple ineligibility or incapacity to own or hold tenure over land limits their decision-making and leaves them vulnerable to displacement.³⁴ Displacement results in forced migration and makes women vulnerable to trafficking.

Unequal access to resources. On average, women make up 43% of the agricultural labor force and produce 60%–80% of food crops in poorer parts of the world, often as low paid or unpaid laborers. According to the Food and Agriculture Organization of the UN (FAO), women in rural areas could boost their farm yields by 20%–30% if

30 Survival International. 2008. Biofuels threaten lands of 60 million tribal people. London. <https://www.survivalinternational.org/news/3279>.

31 UN Secretariat for the Permanent Forum on Indigenous Issues. 2008. DPI/NGO Briefing on "Indigenous Peoples and Climate Change". The Message Stick. http://www.un.org/esa/socdev/unpfii/documents/messagestick_v6n1_en.pdf.

32 Soroptimist International of the Americas. (2008). "Reaching Out to Women When Disaster Strikes." White Paper: Disaster Relief. Philadelphia, PA: Soroptimist International of the Americas. www.soroptimist.org/whitepapers/whitepaperdocs/wpreachingwomendisaster.pdf.

33 M. Villa. 2017. Women own less than 20% of the world's land. It's time to give them equal property rights. World Economic Forum. Geneva. <https://www.weforum.org/agenda/2017/01/women-own-less-than-20-of-the-worlds-land-its-time-to-give-them-equal-property-rights/>.

34 P. Hawken, ed. 2017. Drawdown: The Most Comprehensive Plan Ever Proposed to Reverse Global Warming. Penguin Publishing Group, New York, p. 76.



given the same access to productive resources (land, technology, financial services, education, and markets).³⁵ Agricultural output in low-income countries would therefore increase by 2.5%–4%, and the number of undernourished people in the world could drop by 12%–17%.³⁶ The increased food production could alleviate malnourishment for around 100–150 million people.³⁷ Given women's potential productivity and efficiency, protecting their right to access resources has benefits for the climate.

Crop failure, fuel shortages, and water scarcity. When crops fail as a result of changes in weather patterns, women experience increased agricultural work and overall household food production burden. Failed crops result in food scarcity and increases in malnutrition among women and girls.

In periods of fuel shortage, women spend more time collecting fuel and fodder and more time performing chores. Water scarcity further increases the workload of women and girls. They are forced to walk further distances to access safe water, detrimentally impacting on girls' education and future economic stability.

Natural disasters and violence against women. Women have higher incidence of mortality in natural disasters, particularly in places where the socioeconomic status of women is low. Following the 2004 Indian Ocean tsunami, around 77% of the fatalities were women, some of whom drowned because they were not taught how to swim.³⁸

In post disaster situations there is an increased threat of sexual violence. When women are less able to fulfill their duties as managers of the household, they are more vulnerable to domestic violence, and in the aftermath of disasters there has been a marked increase in the rates of sexual and domestic abuse towards women. After two tropical cyclones hit Tafe Province in Vanuatu in 2011, there was a 300% increase in new domestic violence cases.³⁹

35 FAO. 2011. The State of Food and Agriculture. Rome. <http://www.fao.org/docrep/013/i2050e/i2050e00.htm>.

36 FAO. 2011. The State of Food and Agriculture. Rome.

37 FAO. 2011. The State of Food and Agriculture. Rome.

38 J. Aglionby. 2005. Four times as many women died in tsunami. The Guardian. 26 March. <https://www.theguardian.com/society/2005/mar/26/internationalaidanddevelopment.indianoceansunamidecember2004>.

39 D. Kilsby and H. Rosenbaum. 2012. Scoping of Key Issues in Gender, Climate Change, and Disaster Risk Management. Internal Briefing Document for UN Women. New York.



As caregivers, women experience an increased burden of caring for the young and elderly, particularly following a disaster. Rising temperatures will increase the transmission of malaria, further endangering the health of pregnant women, who are particularly vulnerable to malaria.

How can judges respond to climate change?

In the broad scheme of global justice, there are few landmark cases that specifically look at the climate change rights of vulnerable peoples. These cases include a few discussing rights of children and intergenerational equity such as *Oposa v. Factoran*, *Juliana v. United States*, and *Leghari v. Federation of Pakistan*⁴⁰. There is also the 2016 petition filed by the Union of Swiss Senior Women for Climate Protection against the Swiss Federal Council. In this Swiss case, petitioners specifically argue that they are a most vulnerable group with regard to the effects of climate change given their advanced age.⁴¹

Importantly, however, climate justice will also be served by looking beyond this narrow band of direct climate change cases. Cases do not have to be “climate change cases” in order to have an important impact on protecting vulnerable people from climate change. It will be important for the judges to discern how and when climate justice demands the protection of rights in cases which are not seemingly climate or environment related. For instance, cases relating to infrastructure or energy etc. will have to be looked at with the climate change lens to ensure that development planning is inclusive, resilient, sustainable, and equitable.

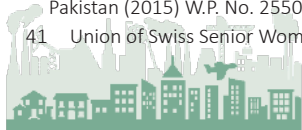
While the following discussion of cases is not exhaustive, it provides examples of areas in which judges can make a difference.

Protect equal access to water

There are a growing number of decisions protecting the rights of community members to water. Protecting the right of communities (particularly vulnerable

40 See *Oposa v Factoran* (1993) 224 SCRA 792; *Juliana v. United States*, No. 6:15-CV-01517-TC; *Leghari v. Federation of Pakistan* (2015) W.P. No. 25501/201.

41 *Union of Swiss Senior Women for Climate Protection v. Swiss Federal Council*.



community members) to access water will be vital as climate change impacts worsen. The following cases contain useful principles that could be expanded to vulnerable peoples:

- *Asghar Leghari v the Federation of Pakistan* (Lahore High Court, 2015). The court considered that “water justice” is a sub-concept of climate justice, meaning that individuals have a human right to clean water for survival and recreational purposes.
- *SWIM (Save Waters of Indang, Cavite Movement Inc.) v PTK2 H2O Corporation* (Court of Appeal of the Philippines, 2015). Petitioners sought a Writ of Kalikasan and a Temporary Environmental Protection Order against an approved water supply contract. The court concluded that water is an essential element of life and an environmental resource. Therefore, the respondent’s excessive water extraction could dangerously impact the riparian ecosystem and locals’ livelihoods and should not be permitted.

Champion the right of vulnerable peoples to be included in decision making

It will continue to be important for indigenous peoples to have a right to participate in discussions about their lands. Resettlement will occur on an unprecedented scale, either as a planned adaptation strategy or in response to disaster. Courts may be asked to monitor the procedures for free, prior, and informed consent. The procedures should ensure meaningful consultation and opportunities for a life with dignity at new locations.

Champion the right of indigenous peoples to a clean environment

Indigenous peoples have close bonds with their lands, intensifying their need for a clean environment. Courts can champion the right indigenous peoples to a clean environment. In *Ali Steel Industry v Government of Khyber Pakhtunkhwa* (Peshawar High Court, 2016), the court concluded that Ali Steel could not harm local residents’ health and life just because Pakistan’s Environmental Protection Act did not cover the tribal areas. The court found that the indigenous peoples’ right to a clean environment was an integral part of their right to life and dignity under the constitution.



Protect the right of women to hold legal tenure of land

In view of their vulnerability to displacement due to poor rights of property ownership, courts can uphold the natural right of women to own or hold legal rights in land:

- *Ukeje v. Ukeje* (Supreme Court of Nigeria, 2014). Igbo (ethnic group) law and custom discriminated against daughters inheriting their fathers' estate, conflicted with a number of sections contained in the Nigerian constitution. The court therefore found that a daughter was entitled to inherit land in accordance with her constitutional rights.
- *Ramantele v. Mmusi and Others* (Court of Appeal of Botswana, 2013). The court concluded that customary rules that deny women the right to inherit the family home violate Botswana's constitution.

Conclusion

Judges have a very important and natural part to play in combating climate injustice. As Justice Syed Mansoor Ali Shah noted, climate justice requires that judges be vigilant and apply “climate-compatible and climate resilient” approaches to matters.⁴² Climate change will impact on our most basic rights. Unfortunately, those who are most vulnerable to climate change are often overlooked and powerless. Children, women, persons with disabilities, older adults, and indigenous people are often left behind. When judiciaries better understand the challenges, they can better protect the rights of vulnerable people in the climate era.

42 S. Shah. 2018. Environmental and Climate Justice—A perspective from Pakistan. Speech prepared for the Asia Pacific Judicial Colloquium on Climate Change: Using Constitutions to Advance Environmental Rights and Achieve Climate Justice. Pakistan. 26–27 February.



Environmental and Climate Justice – A Perspective from Pakistan

Justice Syed Mansoor Ali Shah



Keynote address at the inaugural session

Irum Ahsan, a friend, from Asian Development Bank (ADB) reached out to me, when I was the Chief Justice of the Lahore High Court and asked me whether the Court will be interested to house an environmental/climate change colloquium co-sponsored by UNEP.

I, loved the idea and was on a conference call with the organizers within a week. I was thrilled at the idea of hosting a world class colloquium attracting the best human resource on environment and climate change to Lahore, a subject that is perhaps Pakistan's most fundamental governance and security issue. I wanted the judiciary to take a head start on climate change.

Thanks to UNEP and ADB for bringing these wonderful people to this beautiful and historical city of Lahore and to Pakistan. I am honoured that we have amongst us a dazzling assemblage of an illustrious group of climate and environmental experts and some of them have been good friends over the years. Elizabeth Mrema, Prof John Knox, Lord Carnwath, Prof R May, Antonio Oposa, Justice Brian Preston, Prof Ben Boer, Justice Antonio Benjamin, Prof Denise Antolini, Prof Erin Daly, Marlene Oliver, Justice Dato Sri Azhar Muhammed, Sumudu Atapattu, Judge Fleur Kingham. Prof Qin Tianbao, Andy Raine and Nils Henrik Rolf Ring.

Let me also say that during the run up to the colloquium, I went through a personal change, thankfully not climate change. I was elevated to the Supreme Court of Pakistan and our new Chief Justice, Justice Yawar Ali, held up the torch and kept the fire burning alongwith the amazing dream team of green judges of the court: Justice Ayesha A. Malik, Justice Ali Baqir Najafi, Justice Jawad Hassan and from the District



Judiciary Judge Mahrukh, DG, PJA, Judge Shazib Saeed, Chairman Environmental Tribunal, Judge Shazia Munawar, Judge Rai and several other judges of the District Judiciary.

So here we are !

Pakistan and climate change

Pakistan has faced catastrophic floods, droughts, and cyclones in recent years that have killed and displaced thousands, destroyed livelihoods, and damaged infrastructure.

Climatic changes are expected to have wide-ranging impacts on Pakistan: reduced agricultural productivity, increased variability of water availability, increased coastal erosion and seawater incursion, and increased frequency of extreme climatic events.

Glacier melt in the Himalayas is projected to increase flooding and will affect water resources within the next two to three decades. This will be followed by decreased river flows over time as glaciers recede.

Fresh water availability is also projected to decrease which will lead to biodiversity loss and reduce availability of freshwater for the population.

Coastal areas bordering the Arabian Sea in the south of Pakistan will be at greatest risk due to increased flooding from the sea and in some cases, the rivers.

Being a predominantly agriculture economy, climate change is estimated to decrease crop yields in Pakistan which in turn will affect livelihoods and food production. Combining the decreased yields with the current rapid population growth and urbanization in the country, the risk of hunger and food security will remain high.

Endemic morbidity and mortality due to diseases primarily associated with floods and droughts are expected to rise. Increases in coastal water temperatures would exacerbate the abundance of cholera.



The impact of climate change will also aggravate the existing social inequalities of resource use and intensify social factors leading to instability, conflicts, displacement of people and changes in migration patterns.

Pakistan ranks seventh among the most adversely affected countries by climate change on the Global Climate Risk Index 2017. Pakistan has suffered the devastating impacts of natural disasters and climate change in the recent years, witnessing an earthquake in 2005 and heavy floods in 2010. Climate change have rapidly increased in Pakistan, causing and exacerbating disasters, forcing people to flee their homes and seek shelter elsewhere, thus leading to a climate-induced migration. The summer monsoon has shifted toward the end of the season and the winter rains have shifted toward late February and March.

Likewise, the snowfall season in Pakistan that usually started in November and ended by December now extends through March.

According to reports: “The high rate of population growth has reduced per capita water availability from an ample 5,200 cubic meters per person per day to less than 1,000.

Future projected population growth will reduce this to less than 500 by mid-century, which will make the country dependent on others for its food security.

Climate change may reduce the water resources even further and this will affect lives, livelihoods and civic peace.

This is a clarion call that Pakistan is one of the countries most vulnerable to the effects of climate change.

Mainstreaming Climate Change

In response to these formidable and unnerving challenges and threats, The Government of Pakistan came up with a Climate Change Policy, 2012 and the Framework for the Implementation of the Climate Policy (2014-2030). Adaptation effort is the focus of this policy document.



The vulnerabilities of various sectors to climate change have been highlighted and appropriate adaptation measures spelled out. These cover policy measures to address issues in various sectors such as water, agriculture, forestry, coastal areas, biodiversity and other vulnerable ecosystems.

Framework for implementation of Climate Change Policy (2014-2030)

The Framework for Implementation of NCCP is divided into four timeframes. Short Term Action (within 2 years), Short Term Action (within 5 years), Medium Term Action (within 10 years) and Long Term Action (within 20 years).

The National Climate Change Policy of 2012 is Pakistan's guiding document on climate change, setting out the goal of achieving climate-resilient development for the country through mainstreaming climate change in the economically and socially vulnerable sectors of the country.

Climate Change and Human Rights

We in Pakistan, undisputedly recognize that clean, healthy and functional environment is integral to the enjoyment of human rights, such as the rights to life, health, food and an adequate standard of living. Indubitably, climate change will have a profound effect on the enjoyment of human rights for individuals and communities globally. This is not merely an abstract assumption or a future possibility. According to UNEP

“The impacts of climate change on freshwater resources, ecosystems, and human settlements are already undermining access to clean water, food, shelter, and other basic human needs; interfering with livelihoods; and displacing people from their homes. These impacts constitute a serious interference with the exercise of fundamental human rights, such as the rights to life, health, water, food, housing, and an adequate standard of living.”



Pakistan's Perspective: Judicial Role

No one here can deny that there is an inseparable nexus between climate change and human rights. Our Constitution authorizes our constitutional courts to directly deal with the enforcement of fundamental rights. Our constitutional values provide that principles of democracy, freedom, equality of opportunity, social, political and economic justice shall be fully observed. Our Fundamental Rights (human rights) provide for right to life, right to dignity, right to non-discrimination, right to movement, right to information, right to property or against its deprivation.

Pakistan has had a telling and a robust experience with the environmental rights. Years of judicial engineering has intricately weaved, through purposive and progressive interpretation, international environmental principles with our constitutional values and fundamental rights and generated jurisprudence that protects and safeguards nature. At the heart of this jurisprudence is the new constitutionalism – a blend of human rights and international environmental principles, with a singular purpose to safeguard and protect Nature, and especially, the marginalized people including women, children and those falling below the poverty line.

In not more than two decades, our courts starting from *Shela Zia* (1994) down to *Imrana Tiwana* (2016) and now *Maple Leaf* (2018), have been loud and clear that environmental rights and international environmental principles are an integral part of our constitutional values, fundamental rights and principles of policy and can be enforced by the constitutional courts as fundamental rights. The growth of environmental jurisprudence in Pakistan is in effect the story of constitutionalization of the environmental rights. Additionally, this judicialization of environmental rights is to us environmental justice.

In *Imrana Tiwana* (2016), a full bench of this court for the first time referred to the concept of *environmental justice* in the following words:

The corpus of environmental laws have a singular purpose of protecting life and nature....To us *environmental justice* is an amalgam of the constitutional principles of democracy, equality, social, economic and political justice guaranteed under our [constitution] and the fundamental right to life, liberty and human dignity which



include the international environmental principles of sustainable development, precautionary principle, environmental impact assessment, inter and intra-generational equity and public trust doctrine.”

Environmental jurisprudence or environmental justice in Pakistan, however, remained grounded in fundamental rights and stood anchored within the statutory framework of our Environmental Protection Law. The matrix of environmental justice remained confined to the polluter, the aggrieved party and the EPA. Environmental justice is, therefore, geographically confined within the national boundaries and so are the parties concerned. You will hear a lot more on the subject from my colleagues who will share our rich jurisprudence on constitutionalization of the environmental rights. So I dare not encroach on their domain.

I move on to an area that concerns me the most i.e., Climate Change.

Ashgar Leghari case (2015-2018) brought Climate Change to court, for the first time, in Pakistan. A case, where an agriculturist or a farmer prayed that Climate Change Policy (2012) and the Framework for the Implementation of the Climate Change Policy (2014-2030) of the Federal Government be enforced. He prayed that as a farmer, he will lose his crops and livelihood if water scarcity, repeated droughts and lack of climate friendly agriculture is not introduced by the State as per the stated policy. He pressed his human rights, in other words, the constitutional guarantees of right to life, right to business and right to dignity to approach the constitutional court.

Enforcement of fundamental rights or human rights by issuing a writ of mandamus against the Federal Government was something simple and straight forward, but the challenge and opportunity was to judicialize climate change by connecting the Climate Change Policy and its lack of enforcement with violation of human rights like rights to life and dignity. Building this link was a unique opportunity and the Court didn't let it go. Hence starts our journey into the realm of climate justice.

The court set out to deal with *Asghar Leghari* like any other environmental case but soon realized that the case was more than a regular environmental case, it required adaptive strategies rather than polluter pays principle. Adaptation and courts



was something new to the green benches and environmental courts. It wasn't about curbing pollution or dealing with mitigation under the environmental statute, it was much more. The court was informed that Pakistan is expected to experience increased variability of river flows due to increased variability of precipitation and the melting of glaciers. Demand for irrigation water may increase due to higher evaporation rates. Yields of wheat and basmati rice are expected to decline, subject to water availability. Water availability for hydropower generation may decline. Hotter temperatures are likely to increase energy demand. Warmer air and water temperatures may decrease the efficiency of nuclear and thermal power plant generation. Mortality due to extreme heat waves may increase. Urban drainage systems may be further stressed by high rainfall and flash floods. Sea level rise and storm surges may adversely affect coastal infrastructure and livelihoods, leading to disease and health issues.

The court soon realized that *Adapting* to these impacts may include: development or use of crop varieties with greater heat and drought tolerance, modernizing irrigation infrastructure and employing water-saving technologies, integrated watershed management, reforestation of catchment areas and construction of additional water storage, diversification of energy mix including investment in renewable and small hydropower projects, improved weather forecasting and warning systems, retrofitting of critical energy infrastructure, and construction of dikes or sea walls. Addressing inland migration and dealing with climate refugees.

Furthermore, appropriate measures relating to disaster preparedness, capacity building, institutional strengthening, building the right infrastructures, technology transfer and the list went on.

The existing environmental statute, a construct of polluter pays principle was inadequate to deal with these heterogeneous dimensions. The Court realized that enforcement of the Policy would be enforcing the fundamental rights of the people as it would safeguard their right to clean, healthy and an enjoyable life. However, this simple looking enforcement of the policy, brought the court into contact with numerous actors with different roles. In this case issues of irrigation, crop resilience, water scarcity, food security, etc came up for discussion. It wasn't an environmental case, which was to be confined within the environmental statute.



Our existing jurisprudence had dealt with mitigation, but adaptation required a different approach.

The multiplicity of issues made the court constitute a Climate Change Commission, comprising neutral environmental experts, international organizations like LEAD, WWF and IUCN, local expertise, representative of the Government and other stakeholders to move forward in a participatory manner and to unravel and understand how to deal with this brave new world of adaptation through court orders. Climate Change Commission has been the most important development. Dr. Parvez Hassan who sits here amongst us today, headed the Commission and mobilized the actors including the Government. So most importantly, *Asghar Leghari* breathed life into the Climate Change Policy. Jump started the process. The Priority Action Items under the Policy got moving and a large percentage of them got implemented. The Chairman of the Commission was pleased to submit in court that due to the intervention of the Court, Government has come of age and can now deal with the challenges of climate change. *Asghar Leghari* also introduced the concept of climate justice and water justice into our jurisprudence.

Where do we go after *Asghar Leghari*? To me *right to Climate* and *right to Adaptation* are human rights and I hope the Courts will soon acknowledge this. I also feel that the time has come to bring under the constitutional fold and make the Sustainable Development Goals (SDGs) and Nationally Determined Contributions (NDCs) as part of human rights i.e, right to life. Climate Finance and climate investment and the debate on Loss and Damage must soon move into the realm of human rights. The role of Government in all these matters has a deep bearing on the life and welfare of the people. In fact the stance of the Government in international negotiations on climate change is also a part of the fundamental rights of the people of Pakistan. It is just a matter of time. With CPEC (China Pakistan Economic Corridor) new challenges will unfold in the area of Climate Change and we must be prepared to deal with them.

Judiciary has single handedly moved the climate change agenda in Pakistan. Infact the judiciary has played a far more active role than the Government. Don't take me wrong, there is no competition here and no one is vying for the first place. We all work for the same country and the same people. This is to underline that the lead



role played by the judiciary has resulted in the promulgation of the Climate Change Act, 2017. The Act provides for the establishment of Pakistan Climate Change Council with the mandate to mainstream climate change concerns into decision-making and for developing climate-compatible and climate resilient development processes in various sectors of the economy and to meet Pakistan's obligations under the Sustainable Development Goals (SDGs). This is a wonderful development.

So *Climate Justice* goes beyond to providing *adaptive strategies*, to me it is a judicial mind-set. Climate Justice and its variant water justice require that we the judges be vigilant and apply climate-compatible and climate resilient approach to matters that come before us. There is no such thing as a climate change case, infact many cases that come before us dealing with urban development, licensing, land acquisition, project financing will invariably have a bearing on climate change- we just have to be vigilant to identify the issue and be always geared to do climate justice.

Ladies and gentleman this is what Pakistan's judiciary has to offer the world of climate change.

One last thing, inspite of this robust judicial role, Judiciary as an institution or an actor has not been considered as an integral part of the climate change debate. International negotiations or International platforms do not include the judiciary as a major stakeholder or as a major policy player. I urge the international organizations here to look into this aspect. Our efforts to combat climate change might remain incomplete without taking the judiciary along.

I eagerly look forward to hearing the members of the judiciaries of other countries and environmental and climate experts gathered here today– so that we can develop a collective strategy and be brothers and sisters in arms to combat climate change.

I wish Pakistan and the international community - best of luck.





PART 3

The Convergence of Environmental Constitutionalism, Rights, and Climate Justice





Constitutionalism and Climate Justice

Professors James R. May and Erin Daly



I. Introduction

This essay explores whether and the extent to which countries have seen fit to constitutionalize responses to climate change expressly or by judicial engagement. First, at least seven countries now expressly address climate change in their constitutions. Second, an increasing number of courts are finding that governmental inaction in the face of climate change can abridge constitutional rights to life, dignity or due process, or to a healthy environment.

II. Express Constitutional Incorporation of Climate Justice

Climate justice promotes policies, practices and jurisprudence that advance the rights and dignity of the world's most vulnerable people.¹ Climate justice falls at the vertex of international, regional, national and the common law, basic notions of human and environmental rights, and human dignity.

One way to advance climate justice is by constitutionalizing it. As of this writing, at least seven countries have incorporated climate change into their domestic constitutions. The Dominican Republic may have been the first to make a constitutional commitment to address climate change in 1998,² followed by

1 See generally, Climate Justice: Case Studies in Global and Regional Governance Challenges (Randy Abate, Ed., 2016); Dominic Rosen and Christian Seidel, Climate Justice: An Introduction (2017).

2 Const. of Dominican Republic (2015), Tit. IX, Ch. 1, Art. 194: "The formulation and execution, through law, of a plan of territorial ordering that ensures the efficient and sustainable use of the natural resources of the Nation, in accordance with the necessity of adaptation to climate change, is a priority of the State."



Venezuela the following year.³ The last decade has seen many developments that touch on climate change. Ecuador amended its constitution in 2008 to adopt comprehensive climate mitigation measures, limit greenhouse gas emissions and deforestation, and promote the use of renewable energy.⁴ In 2013, Viet Nam amended its constitution to ensure that the government “takes initiative in prevention and resistance against natural calamities and response to climate change.”⁵ Tunisia – which stands to lose up to one-third of its land to climate change – entered the canon of climate constitutionalism in 2014, guaranteeing the “right to participate in the protection of the climate.”⁶ The Preamble to Cote d’Ivoire’s 2016 constitution now provides for the government’s express “commitment to ... contributing to climate protection.”⁷ And in 2017, Thailand amended its constitution to provide for protection of water resources under threat from climate change.⁸

These provisions have helped to spur national action on climate change. For example, the Dominican Republic has developed a National Development Strategy that aims to reduce emissions of greenhouse gases by 25 percent by 2030. Ecuador engaged in a national campaign to convert to hydroelectric, wind and solar energy.⁹ And Tunisia was one of the first countries to adopt a climate action plan in advance of the Paris climate talks in 2015.¹⁰ These developments provide bases for considering

3 Const. of Venezuela (2009), Tit. III, Ch. IX, Art 127: “It is a fundamental duty of the State, with the active participation of society, to ensure that the populace develops in a pollution-free environment in which air, water, soil, coasts, climate, the ozone layer and living species receive special protection, in accordance with law.”

4 Const. of Ecuador (2008), Tit. VII, Ch. 2, Section 7, Art. 414: “The State shall adopt adequate and cross-cutting measures for the mitigation of climate change, by limiting greenhouse gas emissions, deforestation, and air pollution; it shall take measures for the conservation of the forests and vegetation; and it shall protect the population at risk.”

5 Const. of Viet Nam (2013), Ch. III, Art. 63, Sec. 1: “The State has a policy to protect the environment; manages, and effectively and stably use natural resources; protects the nature and biodiversity; takes initiative in prevention and resistance against natural calamities and response to climate change.”

6 Const. of Tunisia (2014), Tit. 2, Art. 45: “The state guarantees the right to a healthy and balanced environment and the right to participate in the protection of the climate.”

7 Côte d’Ivoire (2016), Preamble: “Express our commitment to ... contributing to climate protection and to maintaining a healthy environment for future generations”

8 Const. of Thailand (2017), Chapter XVI, Sec. 258(g)(1): “National reform in various areas shall be carried out to at least achieve the following results ... having a water resource management system which is efficient, fair and sustainable, with due regard given to every dimension of water demand in combination with environmental and climate change.”

9 See “Ecuador Present in Forums on Climate Change at the Climate Summit of the United Nations,” <http://eeuu.embajada.gob.ec/ecuador-present-in-forums-on-climate-change-at-the-climate-summit-of-the-united-nations-2/> (last visited 8 February 2018).

10 See <https://cop23.unfccc.int/news/tunisia-submits-its-climate-action-plan-ahead-of-2015-paris-agreement> (last visited 8 February 2018).



climate justice in the national conversation about climate change.¹¹

Express constitutional incorporation of provisions addressing climate change provides new avenues for advancing climate justice. These developments reflect the broader and steady accretion of global environmental constitutionalism, which explores the constitutional incorporation, implementation, and jurisprudence of environmental rights, duties, procedures, policies and other provisions to promote environmental protection.¹² Indeed, about one-half of the nations on the planet have seen fit to incorporate an express environmental right into their constitution.¹³ It has also inspired considerations of constitutional reform at the subnational level.¹⁴

Environmental constitutionalism has provided new causes of action and stretched existing environmental rights into new forms.¹⁵ It has also served to promote human and environmental rights,¹⁶ procedural guarantees,¹⁷ remedies,¹⁸ and judicial engagement.¹⁹ Environmental constitutionalism has also animated international considerations about inherent rights to a healthy planet, including the United Nations mandate on human rights and the environment and the appointment of a special rapporteur, culminating in Framework Principles on Human Rights and

11 Const. of Thailand (2017), Chapter XVI, Sec. 258(g)(1): “National reform in various areas shall be carried out to at least achieve the following results ... having a water resource management system which is efficient, fair and sustainable, with due regard given to every dimension of water demand in combination with environmental and climate change.”

12 See generally Louis Kotzé, *Global Environmental Constitutionalism in the Anthropocene* (2016); James R. May & Erin Daly, *Global Environmental Constitutionalism* (2015); James R. May, Symposium on Global Environmental Constitutionalism: An Introduction and Overview, 21 *Widener L. Rev.* 139 (2015); Louis Kotzé, The Conceptual Contours of Environmental Constitutionalism, 21 *Widener L. Rev.* 187 (2015). E. Daly and J. May, Comparative Environmental Constitutionalism, 6 *Jindal Global L. Rev.* 10 (2015); David Boyd, The Environment Rights Revolution, 226 (2011); Richard P. Hiskes, The Human Right to a Green Future: Environmental Rights and Intergenerational Justice (2009).

13 See Environmental Rights Map, available at <http://enviromap.org> (last checked 7 February 2018).

14 See, e.g., Maya van Rossum, The Green Amendment: Securing our Right to a Healthy Environment (2017), James R. May, & Kenneth T. Kristl & John C. Dernbach, *Pennsylvania Environmental Defense Foundation v. Commonwealth of Pennsylvania: Recognition of Environmental Rights for Pennsylvania Citizens*, 70 *Rutgers U. L. Rev.* __ (2018) (Pennsylvania); Subnational Environmental Constitutionalism and Reform in New York State, 38 *Pace L. Rev.* 121 (2017) (New York).

15 See generally, *Environmental Constitutionalism* (James R. May & Erin Daly, Eds. 2016).

16 See generally, John H. Knox & Ramin Pejan, *The Human Right to a Healthy Environment* (2018); A Stephen Turner, A Global Environmental Right (2014); James R. May & Erin Daly, *New Directions in Earth Rights, Environmental Rights and Human Rights: Six Facets of Constitutionally Embedded Environmental Rights Worldwide*, IUCN Academy of Environmental Law E-Journal, vol. 1, 2011, posted Feb. 22, 2011; Stephen Turner, A Substantive Environmental Right (2008); Tim Hayward, *Constitutional Environmental Rights* (2004).

17 James R. May, *Constitutional Directions in Procedural Environmental Rights*, 28 *Jrnl. Envtl. L. & Lit.* 101 (2014).

18 James R. May & Erin Daly, *Environmental Rights and Liabilities*, 3 *Eur. J. Env. Lia.* 75 (2012).

19 James R. May & Erin Daly, *Vindicating Fundamental Environmental Rights Worldwide*, Symposium: The Confluence of Human Rights and the Environment, 11 *Or. Rev. Int’l L.* 365 (2010).



the Environment and calls for the United Nations to recognize the human right to a healthy environment.²⁰ Environmental constitutionalism also has normative spillover effects, including lower greenhouse gas emissions.²¹

III. Climate Justice Constitutionalism in the Courts

Even lacking express constitutional incorporation, there is a growing body of jurisprudence from international and regional courts and tribunals surrounding climate change worldwide,²² including a recent decision that recognizes climate change's disproportionate impact from the Inter-American Court on Human Rights.²³ Yet almost none of it yet involves express provisions about climate change; an advisory opinion from Ecuador upholding the constitutionality of a bilateral agreement between Ecuador and Peru seems to be an outlier.²⁴ Yet an increasing number of courts have turned to other constitutional rights – including environmental rights, as well as the right to life, health or dignity – to advance climate justice.

A leading example stems from the Constitutional Court of Colombia, which in 2018 issued a landmark decision involving the need to protect the Amazon rainforest as a palliative against climate change. In that case, 25 plaintiffs between the ages of 7 and 26 sought individualized constitutional protection against the government's failure to protect against deforestation in the Colombian Amazon (an area roughly the size of Germany and the U.K. combined), which was increasing at the alarming rate of 44% between 2015 and 2016. The nation's most senior judge, following a 2016 judgment which had recognized the juridical personality of the Rio Atrato – Colombia's largest river – reasoned that because the Amazonian ecosystem is vital for the future of the globe, that the Colombian Amazon, too, enjoys legal

20 John H. Knox, Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment: Framework Principles, UN Doc. A/HRC/37/59 (January 24, 2018). For a discussion of the mandate and its outcomes, see generally, John H. Knox, "The United Nations Mandate on Human Rights and the Environment," in *Encyclopedia of Human Rights and the Environment: Indivisibility, Dignity and Legality* (James R. May and Erin Daly, eds., 2019).

21 See D. Boyd, *The Environment Rights Revolution*, 226, 273 (2011).

22 See generally, Michael Burger & Justin Gundlach, *The Status of Climate Change Litigation: A Global Review* (UNEP 2017).

23 See OPINIÓN CONSULTIVA SOBRE MEDIO AMBIENTE Y DERECHOS HUMANOS, http://www.corteidh.or.cr/docs/comunicados/cp_04_18.pdf (last visited 10 February 2018).

24 Advisory Opinion no. 016–13-DTI-CC "Dictamen no. 016–13-DTI-CC," available at: <http://climatecasechart.com/non-us-case/advisory-opinion-no-016-13-dti-cc/> (last visited 8 February 2018).



rights to protection, conservation, maintenance, and restoration from the State.²⁵ Following the Rio Atrato case, the Court based its ruling on “many clauses” of the Colombian Constitution which, collectively, make it an “Ecological Constitution” or a “Green Constitution.”²⁶

In countries where the text of the constitution is not as green, courts have looked elsewhere to advance climate justice – often in the rights of life and dignity, exemplified by three recent cases. First, in 2018’s *Ashgar Leghari v. Federation of Pakistan*, the Lahore High Court invoked continuing mandamus jurisdiction to assess the work of the Climate Change Commission it had established pursuant to a ruling in 2015 to implement climate change mitigation and adaptation plans to fulfill constitutional rights to life and dignity.²⁷ In the 2018 decision, the Court reviewed at some length the threats of climate change in Pakistan, considering its effects on water resources as well as forestry and agriculture, among other things but found that the Commission had been the driving force in sensitizing the Governments and other stakeholders regarding the gravity and importance of climate change and had accomplished 66 percent of the goals assigned to it. The Court then dissolved the CCC and established a Standing Committee to act, on an ongoing basis, as a link between the Court and the Executive and to render assistance to the government to further implementation.²⁸

Second, in a 2017 case of “losing the battle but winning the war,” an Irish environmental organization challenged a permit issued by the Fingal County Council authorizing an expansion of the Dublin Airport. The plaintiffs argued that the permit violated statutory and regulatory requirements, as well as Ireland’s obligations relating to climate change. The Irish High Court, finding no standing, nonetheless issued an opinion of nearly 300 pages in which found that “an unenumerated

25 STC4360-2018 of 5 April 2018 at para 14: « Por tanto, en aras de proteger ese ecosistema vital para el devenir global, tal como la Corte Constitucional declaró al río Atrato, se reconoce a la Amazonía Colombiana como entidad, “sujeto de derechos”, titular de la protección, de la conservación, mantenimiento y restauración a cargo del Estado y las entidades territoriales que la integran. ». See also Peter Stubley, “Colombian government ordered to protect Amazon rainforest in historic legal ruling” available at <https://www.independent.co.uk/news/world/americas/amazon-rainforest-colombia-protect-deforestation-environment-logging-supreme-court-legal-rights-a8292671.html> (visited May 22, 2018).

26 STC4360-2018 of 5 April 2018 at para. 12: “Esta interpretación encuentra plena justificación en el interés superior del medio ambiente que ha sido ampliamente desarrollado por la jurisprudencia constitucional y que está conformado por numerosas cláusulas constitucionales que constituyen lo que se ha denominado la ‘Constitución Ecológica’ o ‘Constitución Verde’.”

27 *Ashgar Leghari v. Federation of Pakistan*, Lahore High Court Green Bench (W.P. No. 25501/2015) (4 September 2015).

28 *Ashgar Leghari v. Federation of Pakistan* (Lahore High Court, Pakistan, 2018).



personal constitutional right to an environment that is consistent with the human dignity and well-being of citizens at large” exists in the Irish Constitution, whose Article 40.3.1, “guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.”²⁹

Last, the court in *Gbemre v. Shell Petroleum Development Company Nigeria*, sounded a claim by farmers to address natural gas flaring and climate change in a constitutional right to dignity. It held that the petroleum developers’ flaring of ‘waste’ natural gas in the Niger Delta without the preparation of an environmental impact statement abridged the community plaintiffs’ constitutionally guaranteed right to dignity.³⁰ In observing that flaring activities contributes to climate change, the court held: “the inherent jurisdiction to grant leave to the applicants to apply for the enforcement of their fundamental rights to life and dignity of the human person as guaranteed by sections 33(1) and 34(1) of the Constitution of the Federal Republic of Nigeria, 1999 and moreover, that these constitutionally guaranteed rights inevitably include the right to a clean, poison-free, pollution-free healthy environment.”³¹

Constitutional rights to health and welfare can also be used to advance climate justice. The leading case so far is *Urgenda Foundation v. Kingdom of the Netherlands*, where a trial court ordered the federal government to reduce greenhouse gas emissions and to mitigate the effects of climate change as a means of fulfilling constitutionally recognized rights to health and welfare.³²

Oblique notions of ‘due process’ may form the basis for a constitutional claim to address climate change. Deprivation of due process can have substantive or procedural dimensions. On the substantive side, the leading case is *Juliana v. United States*, in which a federal trial court held that the plaintiffs had a legally cognizable cause of action in to assert that the U.S. government’s collective actions and inactions concerning greenhouse gas emissions deprived them of a “right to

29 Merriman & ors -v- Fingal County Council & ors; Friends of the Irish Environment Clg -v- Fingal County Council & ors
Neutral Citation: [2017] IEHC 695 at 292, citing Constitution of Ireland (Bunreacht Na Héireann), Art. 40.3.1.

30 *Gbemre v. Shell Petroleum Development Company Nigeria Limited* (2005).

31 Ibid.

32 *Urgenda Foundation v. Kingdom of the Netherlands* (2017). But see *Stichting Waterpakt v. Netherlands Stichting Waterpakt v. Netherlands*, LJN: AE8462, March 21, 2003 (where the Supreme Court of the Netherlands held that the obligation imposed on the State by article 5 of the Nitrates Directive to establish antipollution programs to prevent harm to the climate is not enforceable).



a stable climate” under the Due Process Clause of the 5th Amendment. In a case of first impression, the court agreed that plaintiffs pled a plausible cause of action, concluding: “Exercising my ‘reasoned judgment,’ I have no doubt that the right to a climate system capable of sustaining human life is fundamental to a free and ordered society.”³³ Although the United States government took the extraordinary step of asking the 9th Circuit Court of Appeals to intercept the case from the lower court and dismiss it without further proceedings, the motion was denied and trial is set for October 2018.

Some courts have turned to constitutionally-entrenched environmental rights provisions to resolve climate justice-based claims. For example, in *Earthlife Africa Johannesburg v Minister of Environmental Affairs* (2017), an ENGO appealed the issuance of a permit to build a large coal-fired power station without having considered the climate change impacts. The Court considered the regulations and the environmental management act in light of South Africa’s constitutional environmental rights provision and under international law. The Court held that even in the absence of an express obligation to consider climate change, the ministry is nonetheless required to consider all the relevant issues and this includes climate change and to do so before, and not after, the permit is issued.³⁴

Courts in the U.S., however, have not been receptive to climate-justice advancing claims.³⁵ In particular, the U.S. Supreme Court in *American Electric Power (AEP) v. Connecticut* held that the federal Clean Air Act has ‘displaced’ the federal common law tort system as applied to climate change, even though the statute did not provide the necessary protection.³⁶ Courts in the U.S. have also found that federal law preempts common law claims to advance climate justice under subnational law, for example, in *Comer v. Murphy Oil*.³⁷ Moreover, climate justice cases have also

33 *Juliana v. United States* (United States Federal District Court for the District of Oregon 2016) at 32.

34 *Earthlife Africa Johannesburg v Minister of Environmental Affairs* (High Court of South Africa, Gauteng Division 2017).

35 See generally, Will Burns and Hari Osofsky, *Adjudicating Climate Change: State, National and International Approaches* (2009); James R. May, *Civil Litigation as a Tool for Regulating Climate Change*, 46 Val. U. L. Rev. 357 (2012); James R. May, *Constitutional Climate Change in the Courts*, in *Environmental Law* 341 (Cosponsored by the Environmental Law Institute and The Smithsonian Institution, ALI-ABA Course of Study, Feb. 6-8, 2008).

36 See *American Electric Power v. Connecticut*, 131 S. Ct. 2527 (2011). See also, *AEP v. Connecticut* and the Future of the Political Question Doctrine, 121 Yale L. Jnl. (Online) 127 (2011); James R. May et al., *American Electric Power v. State of Connecticut*, Brief of Law Professors as Amici Curiae in Support of Respondents (2012), 46 Val. U. L. Rev. 459 (2012).

37 *Comer v. Murphy Oil of U.S.A.*, 585 F.3d 855, 879-80 (5th Cir. 2009).



been thwarted by myriad constitutional defenses, including lack of justiciability,³⁸ the standing doctrine,³⁹ and (in the U.S.) procedural and substantive due process, which can limit both access to courts and the availability of damages to prevailing parties.⁴⁰

Conclusion

Constitutionalism can play an important role in advancing climate justice. A handful of countries address climate change expressly into their constitutions and a growing number of courts have recognized that governmental action or failure to act on climate change can abridge a right to a healthy climate as implied by an express constitutional right to life, dignity or due process, or an emerging right to a healthy environment.



38 James R. May, Climate Change, Constitutional Consignment, and the Political Question Doctrine, Symposium: Global Climate Change: Integrating Environmental Justice into Policy, Regulation, and Litigation, 85 Denver U. L. Rev. 919 (2008).

39 See, e.g., Bradford Mank, Standing for Private Parties in Global Warming Cases, 2012 Mich. St. L. Rev. 869 (2012).

40 James R. May, Fashioning Procedural and Substantive Due Process Arguments in Toxic and Other Tort Actions Involving Punitive Damages After *Pacific Mutual Life Insurance Co. v. Haslip*, 22 Envtl. L. 573 (1992).



A dignity based-approach to environmental and climate justice

Professor Erin Daly*



This contribution describes how the right to human dignity – as recognized in constitutions and jurisprudence around the world – can advance environmental constitutionalism by providing a framework for charting the wrongs that environmental and climate degradation can cause. By focusing on the experience of individuals and communities, the right to dignity can help bridge the gap between environmental law and environmental justice.

The Complexities of Environmental Constitutionalism

Judges engaging in constitutional environmental jurisprudence are working largely in uncharted territory, at the intersection of areas of law that haven't before been brought together, and in the name of people whose claims haven't historically been recognized. Environmental justice, climate and water justice, environmental constitutionalism, environmental rights – these are all terms that have been coined in the last few decades, and some in the last few years, responding to changes in public awareness of how the natural environment and the people who live in it interact and impact one another, and to changes in the global environment that are happening so fast and so dramatically that they demand a response from state authorities and, failing that, demand action from judiciaries to propel governments to act.

But the law so far has proven itself only partially equipped to deal with the human effects of impending environmental crises. International environmental law has

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been elaborate but only minimally enforceable. Domestic law has long recognized both environmental commitments and human rights commitments but has typically treated them as separate concerns giving rise to distinct claims (sometimes in separate courts). Constitutions have historically protected the most fundamental human rights and, since the 1970s, have incorporated environmental rights and values as well: as of now, 167 constitutions with environmental provisions. This includes 85 express substantive right to a quality environment and 36 with procedural environmental rights – information, participation, access to justice provisions.¹

And now, even though environmental rights are beginning to be adumbrated in the jurisprudence of courts around the world, constitutional environmental cases are among the most difficult for courts to manage. They often involve complex factual and scientific evidence showing the extent of environmental damage or impact on human health, highly charged economic and political considerations if they implicate questions of national or local policy, and difficult legal questions involving standing, interpretation, remedies and more with few pertinent legal analogs to guide courts. Courts with little experience in environmental, human rights, or constitutional matters might well be disinclined to venture into these new areas.

To make matters even more difficult, cases involving environmental constitutionalism or climate justice aren't always labeled that way. Property rights cases, for instance, often implicate the environment and a judge might ask, even if the parties haven't, whether environmental endowments are being adequately protected for themselves and for present and future generations. A private nuisance may often be a public nuisance if the harms caused affect the environment generally. A dispute between local and federal jurisdictional might be better adjudicated in terms of the natural resources at issue.

Conversely, an environmental claim – such as a claim involving pollution, or relating to resource extraction – may have human rights implications that the parties themselves may not be focusing on but that are real to parties and to people not party to the action. Often women and especially vulnerable populations may be especially affected by adverse environmental conditions, and courts may ask to hear their stories, too.

¹ May & Daly, *Global Environmental Constitutionalism* (Cambridge 2015).



Given these challenges to interpretation and application of the law, it is remarkable that these provisions are being enforced at all. Sometimes, it can take time, even in the relatively simple situations where the constitution speaks clearly of the environmental values to be protected: The Pennsylvania environmental rights provision lay dormant for 42 years until the state supreme court was ready to apply the law that was written into the Bill of Rights and thereby protect the state's residents from harmful hydrofracking right in their back yards.²

But even in jurisdictions where the constitution does not speak of environmental rights, or climate justice, courts are applying other provisions. Court in more than a dozen countries have implied environmental constitutionalism where the constitutions have not been explicit, many of them in the Asia Pacific region. Most commonly, environmental constitutionalism is being implied from the right to life and the right to dignity: the constitutional right to live with dignity includes the right to live in a healthy environment – that is, an environment that is capable of providing adequate food and clean water and one where noise, air, water pollution is reduced. The question thus posed is why courts are defining human dignity as living in a clean environment. And what is it about human dignity that draws judicial attention to it in cases involving environmental and climate justice?

Dignity as a Unifying Theory

Most of the world's constitutions have incorporated dignity not only as a foundational value but also as a right; by now, hardly a new constitution is adopted without reference to the right to dignity. It can be a stand-alone right that is eternal,³

2 Pennsylvania Const., Art. I s. 27. See *Robinson Twp. v. Commonwealth* (Robinson Township), 83 A.3d 901 (Pa. 2013); *Pennsylvania Environmental Defense Fund v. Commonwealth*, 108 A.3d 140, 159 (Pa. Commw. Ct. 2015), rev'd, 161 A.3d 911 (Pa. 2017). See also Erin Daly & James R. May, *Robinson Township: A Model for Environmental Constitutionalism*, 21 *Widener L. Rev.* 151 (2015); Dernbach, John C. and May, James and Kristl, Kenneth, *Robinson Township v. Commonwealth of Pennsylvania: Examination and Implications* (March 1, 2014). *Rutgers U. L. Rev.* Vol. 67, 2015; Widener Law School Legal Studies Research Paper No. 14-10. Available at SSRN: <https://ssrn.com/abstract=2412657> or <http://dx.doi.org/10.2139/ssrn.2412657>.

3 See Germany, Basic Law, Art. 1. "(1) Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority. (2) The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world." And See Art. 79 (3), prohibiting amendment of Article 1.



foundational⁴, implied in life⁵, or a mother right whose progeny has constitutional status.⁶ Sometimes, it is associated with other important rights of vulnerable groups, such as the rights of prisoners⁷, of women and children⁸, of the disabled⁹, and so on. It can be conceptualized simply, but profoundly, as the right to have rights.¹⁰ And over the last sixty years, courts in Latin America, Europe, Asia, Africa, the Middle East, and North America have developed a robust jurisprudence of dignity on subjects as diverse as health care, imprisonment, privacy, education, culture, sexuality, and death, among other things.¹¹

Because dignity can be a stand-in for many other rights, it helps to highlight what is truly at stake when the environment is despoiled or when the climate changes. And because it resonates in the hearts of women, men, and children, it can tell stories that legal doctrine might otherwise miss. Take, for instance, the circumstances of climate refugees, a group of people whose numbers will climb to staggering heights in the years to come. People who are forced to move from their homes due to changes in the climate which renders their homelands inhospitable or uninhabitable suffer the following kinds of indignities, among others: they lose shelter¹² and a means of self-support¹³, their mental and physical health needs go unmet,¹⁴

4 See South Africa Constitution, Art. 1: “The Republic of South Africa is one, sovereign, democratic state founded on the following values: (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.” And see *S v. Makwanyane and Another*, 1995 (6) BCLR 665 (CC) at para. 328: (“The importance of dignity as a founding value of the new Constitution cannot be overemphasized. Recognizing a right to dignity is the acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worth of respect and concern. This right therefore is the foundation of many of the other rights that are specifically entrenched.”)

5 *Danial Latifi & Anor v. Union of India and Other Petitions* (2002) 4 LRI 36, citing *Olga Tellis v. Bombay Municipal Corp* (1985) 3 SCC 545; and *Maneka Gandhi v. Union of India* (1978) 1 SCC 248.

6 *Barak*, at 299-300 noting that the rights to due process, education, and labor relations are daughter rights which derive from the mother-right to human dignity. See also Hungary Const. Court, Decision 8/1990 (IV. 23.) AB, ABH 1990, 42, 44, 45.

7 See e.g. Haiti Constitution, Art. 44-1: “Prisons must be operated in accordance with standards reflecting respect for human dignity according to the law on this subject.”

8 India Constitution, Arts. 39 and 51(a).

9 Uganda Constitution, Art. 16.

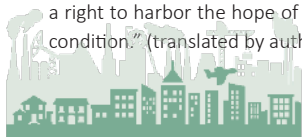
10 See Daly, *Dignity and Democracy* (forthcoming 2019).

11 See generally, Daly, *Dignity Rights: Courts, Constitutions, and the Worth of the Human Person* (Penn Press 2013).

12 *Olga Tellis v. Bombay Municipal Corporation* 214. A.I.R. 1986 S.C. 180, 195-96.

13 *Francis Coralie v. Union of India* AIR 1981 SC 746 (Bagwhati J.). See also Catherine Dupre, *The Age of Dignity* (Bloomsbury 2015).

14 See e.g. *Sentencia T-244/08* (Constitutional Court of Colombia): “A human being needs to maintain appropriate levels of health, not only to survive, but also to perform adequately, such that the presence of certain conditions, even if they are not serious illnesses, can deteriorate and can threaten dignity; it is legitimate to think, then, that the patient has a right to harbor the hope of recovery and, in effect, to seek relief for her suffering and a life according to her human condition.” (translated by author).



children experience ruptures or total loss of educational opportunities,¹⁵ parents lose the ability to nurture and guide their children with the loss of family structure and cohesion,¹⁶ and communities and communal bonds disintegrate.¹⁷ With the loss of social community, they lose their emotional support system; with the loss of political community, they become stateless and their ability to exercise their civil and political rights of speech, assembly, and association become compromised.¹⁸

As the dignity jurisprudence outside of the environmental context has shown, all of these harms impact human dignity. As just one prominent example, climate refugees may not meet the legal standards for refugee status¹⁹ and they may not be able to identify a particular environmental violation that has caused their injuries but adverting to dignity rights can help frame the consequences of environmental degradation.

Dignity and Environmental Rights

Because dignity is a human quality and not just a human right, because it exists not only in positive law but in the individual soul, because everyone everywhere knows that she or he has dignity that should be protected and respected, it has a special role to play in the implementation of constitutional environmental rights. It is often what motivates people to take action and what motivates activists to sue: the sense that the grant of a mining or timber permit violates not only some provision of some law but that it showed a lack of respect for the people most affected, the feeling of indignity when there is a lack of water with which to clean oneself or one's child.

15 Bandhua Mukti Morcha v. Union of India & Ors, AIR 1984 SC 802, 811-12.

16 See e.g. HCJ 7052/03 Adalah v. Minister of Interior, para 32 (opinion of A. Barak) "Indeed, the right to live together as a family unit is a part of the right to human dignity. It falls within the scope of the essence of the right to dignity. One of the most basic elements of human dignity is the ability of a person to shape his family life in accordance with the autonomy of his free will, and to raise his children within that framework, with the constituents of the family unit living together. The family unit is a clear expression of a person's self-realization."

17 "The structure, then, on which the self is built is this response which is common to all, for one has to be a member of a community to be a self." George Herbert Mead, *Mind, Self, and Society*, ed. Charles W. Morris (Chicago: University of Chicago Press, 1962), 162, quoted in Post, "Dignity, Autonomy, and Democracy." Inaugural Richard Daub Lecture at J. W. Goethe Universität, Frankfurt/M., November 1999, http://igs.berkeley.edu/publications/working_papers/WP2000-11.pdf.

18 See e.g. *Asociación Lucha por la Identidad Travesti-Transsexual v. Inspección General de Justicia* (2006), www.cpacf.org.ar/gris/X_jurispru/AsocTravesti.doc.

19 *Teitiota v Ministry of Business Innovation and Employment* (Supreme Court of New Zealand 2015).



Courts are beginning to understand the place of dignity in constitutional environmental adjudication. Kenya's Environmental and Land Court in Nairobi has recognized the indivisibility of human and environmental rights, acknowledging that environmental rights must be read in light of the constitutional commitment to human dignity.²⁰ "The Preamble to the Constitution proclaims that the people of Kenya, when making the Constitution were committed to nurturing and protecting the well-being of the individual, the family, communities and the nation. Likewise, the national values and principles that bind this Court ... include human dignity, equity, social justice, human rights, non-discrimination, protection of the marginalized and sustainable development."²¹

The Nepalese Supreme Court recognized that marble quarrying the resulted in the despoliation of a treasured environment impaired citizens' ability to live with dignity: "Article 12(1) of the Interim Constitution has also incorporated the right to live with dignity under the right to life. It shall be erroneous and incomplete to have a narrow thinking that the right to life is only a matter of sustaining life. Rather it should be understood that all rights necessary for living a dignified life as a human being are included in it. Not only that, it cannot be imagined to live with dignity in a polluted environment rather it may create an adverse situation even exposing human life to dangers."²²

Likewise, in Asghar Leghari, the Lahore High Court in Pakistan explained that

"Fundamental rights, like the right to life (article 9) which includes the right to a healthy and clean environment and right to human dignity (article 14) read with constitutional principles of democracy, equality, social, economic and political justice include within their ambit and commitment, the international environmental principles of sustainable development, precautionary principle, environmental impact assessment, inter and intra-generational equity and public trust doctrine. ... Right to life, right to human

20 Kenya Constitution, Art. 10(2) (b) and (2)(d).

21 Friends of Lake Turkana Trust v Attorney General & 2 others [2014] eKLR, ELC SUI NO. 825 OF 2012 (finding insufficient evidence of actual violations of the right to dignity, life, livelihood and cultural and environmental heritage by the Gibe III hydroelectric project at the planning and implementation stages, but finding that the risks "that the harnessing of such electricity in Ethiopia is likely to affect its right to life and a livelihood and its cultural and environmental heritage ... imposes a positive duty upon the Respondents and Interested Party to provide the Petitioner with the all relevant information in relation to importation and/or purchase and transmission of electric power from Ethiopia."

22 Pro Public v. Godavari Marble Industries, 068-WO-0082 (Supreme Court of Nepal 2016).



dignity, right to property and right to information under articles 9, 14, 23 and 19A of the Constitution read with the constitutional values of political, economic and social justice provide the necessary judicial toolkit to address and monitor the Government's response to climate change.”²³

The Irish High Court, too, recently held that “an unenumerated personal constitutional right to an environment that is consistent with the human dignity and well-being of citizens at large” exists in the constitutional guarantee that the laws should respect and “defend and vindicate the personal rights of the citizen.”²⁴

Even the cases establishing particular rights of nature have recognized that they are linked in some fundamental way to human dignity. As the Colombian Court has explained,

“the fundamental rights of life, health, the minimum subsistence, freedom, and human dignity are substantially linked and determined by the environment and the ecosystem. Without a healthy environment, subjects of law and sentient beings in general will not be able to survive, much less protect those rights, for our children or for future generations. Neither can the existence of the family, society or the state itself be guaranteed”²⁵ in the absence of a healthy environment.²⁶

23 Asghar Leghari v. Federation of Pakistan (W.P. No. 25501/2015) (2018)

24 Merriman & ors -v- Fingal County Council & ors; Friends of the Irish Environment Clg -v- Fingal County Council & ors Neutral Citation: [2017] IEHC 695 at 292, citing Constitution of Ireland (Bunreacht Na Héireann), Art. 40.3.1.

25 Id. at 12: “En virtud de lo discurrecido, puede predicarse, los derechos fundamentales de la vida, salud, el mínimo vital, la libertad y la dignidad humana están ligados sustancialmente y determinados por el entorno y el ecosistema. Sin ambiente sano los sujetos de derecho y los seres sintientes en general no podremos sobrevivir, ni mucho menos resguardar esos derechos, para nuestros hijos ni para las generaciones venideras. Tampoco podrá garantizarse la existencia de la familia, de la sociedad o del propio Estado.”

26 Finding that the 25 youths who had brought the case arguing that climate change was violating their constitutional rights, the Colombian Court found that “in reality, there exists a causal nexus between climate change generated by the progressive reduction of forest cover, caused by the expansion of agriculture, the cultivation of narcotics, mining and other illicit activities, which presumptively negatively affect the health of those who live in the Colombian territory, and ... the uncontrolled degradation of the rainforest, which directly impairs the human rights to live in dignity, to water, and to food of the petitioners.” Colombia Supreme Court of Justice (STC4360-2018; Number: 11001-22-03-000-2018-00319-01(Approved in session on April 4th, 2018)) at 33 : « en realidad existe un nexo causal entre el cambio climático generado por la reducción progresiva de la cobertura forestal, causada ésta por la expansión de la frontera agrícola, los narco cultivos, la minería y la tala ilícitas, frente a los supuestos efectos negativos en la salud de las personas que residen en el territorio colombiano y, a continuación, tendrá que establecer si por la degradación incontrolada de los bosques selváticos se menoscaban, directamente, los derechos a la vida digna, al agua y a la alimentación de los tutelantes. »



There is thus a discernable trend in the judicial recognition of the impact of the deteriorating environment (and climate change) not only on the rights to life, health, and property, but on the very essence of our being – on human dignity.

Dignity and Environmental Justice

Retaining the focus on human dignity advances several goals. First, if there is no explicit and enforceable environmental rights provision in the constitution, a constitutionally recognized right to dignity can help anchor judicial vindication of environmental rights, as happened in India, Nepal, Pakistan, and Ireland. Second, even if environmental and human rights do co-exist in the constitutional enumeration of rights, it unites the human and the environmental interests, as happened in Colombia and Ecuador. A third value of dignity-centrism is less doctrinal but perhaps more important: it reminds us of the human beings whose lives are at issue. As John Knox, the Special Rapporteur for Human Rights and the Environment, has said: “Most important, a human rights perspective helps to ensure that environmental and development policies improve the lives of the human beings who depend on a safe, clean, healthy and sustainable environment — which is to say, all human beings.”²⁷ And dignity is at the heart of that human rights perspective: dignity reminds us of the importance of the issues to the people themselves – not only their lives and their health, but their ability to control their own destinies, their ability to engage with others in their communities on an equal footing, their sense of self-worth.

This is the value, in general, of adopting a human rights approach to environmental protection. The focus on dignity directs a laser beam at the heart of human rights. Dignity is what distinguishes environmental law from environmental justice, climate mitigation adaptation from climate justice.²⁸ It is what draws law ever closer to justice.

²⁷ Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, A/HRC/37/59 (24 January 2018), at para. 55

²⁸ See *Asghar Leghari v. Federation of Pakistan* (W.P. No. 25501/2015) (2015 and 2018).







PART 4

Judicial Remedies and Enforcement





Climate Litigation: A suitable discourse for China's Green Courts?

Professor Qin Tianbao



1. Background and introduction

Climate change is a major challenge for the entire international community in regard to our survival and development in the 21st century. As the largest developing country with a large population, an active response to climate change is not only China's responsibility for extensively participating in global governance and building the common destiny of mankind,

but also the inherent requirement to achieve sustainable development.

In 2015, China formulated and submitted the Enhanced Actions on Climate Change: China's Intended Nationally Determined Contributions (INDC) to the UNFCCC, becoming the first developing country to submit such a document, in which it declared that China will achieve the peaking of carbon dioxide emissions around 2030 and making best efforts to peak early, and lower carbon dioxide emissions per unit of GDP by 60 percent to 65 percent from the 2005 level, which provides a medium to long-term direction for China's work in combating climate change¹. It is also worth noting that the 19th National Congress of Communist Party of China (CPC) raised higher requirements for addressing global climate change and promoting low-carbon development from the perspective of China and the world. In the future, we will develop a green, low-carbon and circular economy, build a clean, safe, efficient and low-carbon energy system, advocate a simple, moderate, green and low-carbon lifestyle, accelerate the formation of green low-carbon new growth drivers, promote the improvement of development quality, actively fulfill

1 Enhanced Actions on Climate Change: China's Intended Nationally Determined Contributions, Government of China, 2015



the mitigation commitment, and achieve the NDC as scheduled².

2. Legal basis: regulatory and institutional frameworks

2.1 Laws

China does not currently have any climate-specific legislation; therefore, its enforcement models will require further development in order to address many of the critical elements of a climate mitigation/adaptation enforcement regime. Perhaps more positively, the study revealed that, in many instances, China still has a strong foundation of existing environmental and energy law upon which climate-specific regimes may be established. And the current domestic environmental and energy regulatory frameworks such as planning approvals, pollution prevention and environmental impact assessment legislation may all offer a basis for addressing climate change. During the last few decades, China has created a well-established framework of environmental legislation that takes the Constitution of the People's Republic of China as the foundation and the Environmental Protection Law of the People's Republic of China as the main body while incorporating two departmental branches of legislation: one to prevent and control pollution and the other to conserve nature and biodiversity.

Within the current legal framework in China, the *Environmental Protection Law*, the *Civil Procedure Law* and the *Administrative Procedure Law* are the most crucial legal basis for the Environmental Public Interest Litigation in China. According to the Article 55 of the Civil Procedure Law, for activities that pollutes environment, infringes upon the lawful rights and interests of vast consumers or otherwise damages the public interest, an authority or relevant organization as prescribed by law may institute an action in a people's court³. And the Article 58 of the Environmental Protection Law states that for activities that cause environmental pollution, ecological damage and public interest harm, social organizations that meet the following conditions may file litigation to the people's courts: (1) Have their registration at the civil affair departments of People's Governments at or above municipal level with sub-districts in accordance with the law; (2) Specialize in environmental protection public interest

² Report of the 19th National Congress of the Communist Party of China, 18-10-2017, China Daily <http://www.chinadaily.com.cn/interface/flipboard/1142846/2017-11-06/cd_34188086.html> accessed 14 February 2018.

³ Civil Procedure Law, P.R. China, last amended in 2017.



activities for five consecutive years or more, and have no law violation records⁴.

On June 27, 2017, the Civil Procedure Law was formally defined procuratorial organs as plaintiff of public interest litigation. Whilst on the same day, Article 25 of the Administrative Procedure Law was revised similarly to include defined procuratorial organs as plaintiff of public interest litigation. Where the people's procuratorate finds in the performance of functions that any administrative authority assuming supervision and administration functions in such fields as the protection of the ecological environment and resources, food and drug safety, protection of state-owned property, and the assignment of the right to use state-owned land exercises functions in violation of any law or conducts nonfeasance, which infringes upon national interest or public interest, it shall offer procuratorial recommendations to the administrative authority, and urge it to perform functions in accordance with the law. If the administrative authority fails to perform functions in accordance with the law, the people's procuratorate shall file a lawsuit with the people's court in accordance with the law⁵.

2.2 Judicial Interpretation and Policy

In China's environmental legislation system, judicial interpretations and policies made by the Supreme People's Court are also play important roles in regulating the Environmental Public Interest Litigation. On January 6, the SPC issued the *Interpretation of the Supreme People's Court on Several Issues Concerning the Application of Law in the Trial of Environmental Public Interest Cases*; On Feb. 24, 2016, the SPC issued the *Opinions on Provide Judicial Service and Safeguard for Development of Yangtze River Economic Belt*; On May 26, 2016, the SPC issued the *Opinions on Giving Full Play to the Role of Adjudicatory Function to Provide Judicial Service and Safeguard for Promoting the Construction of Ecological Civilization and Green Development*.

2.3 Judicial Institutions

The Constitution of the People's Republic of China provides that the courts are judicial organs of the State. The State sets up Supreme Court, local courts at different levels

4 Environmental Protection Law, P.R. China, enacted in 1989, last amended in 2014.

5 Administrative Procedure Law, P.R. China, last amended in 2017.



and special courts such as military courts. These courts adjudicate civil, criminal and administrative suits concerning climate change affairs in accordance with laws, and carry out judicial activities including the execution of civil and administrative decisions and state compensation⁶.

The Supreme Court, as the highest judicial organ of the People's Republic of China, is responsible for adjudicating various cases, including climate change cases, that have material effects nationwide or are subject to its adjudication according to law, formulating judicial interpretations, supervising and guiding the judicial work of local courts at different levels and special courts, and managing certain judicial administration work of the courts nationwide within the scope of its functions and powers as per laws. A court at a higher level supervises the judicial work of the courts at the next lower level. In climate litigious activities, the courts adopt the systems of public trial, collegiate panel, challenge, assessors, defense, and judgment of the second instance as final, etc⁷.

Local courts at different levels include primary courts, intermediate courts and higher courts. Special courts include military courts, maritime courts, IP courts, environmental courts etc. So far China still has not established special climate change courts yet.

3. Tentative legal practice: developing climate litigation within developing environmental public interest litigation

As a concept developing gradually in various countries in recent years, 'Climate litigation' is not strictly a term in environmental judicial practice in China. However, the Supreme People's Court in China takes climate change-related cases as one of the major types of environmental cases, so they are essentially the same as climate litigation. With the specialization of environmental judiciary in China, litigation in the field of climate change will receive more and more attentions. At current phase, the environmental public litigation is a mixed mechanism for an individual to bring a case against public/private actors whose actions contribute to a rise in greenhouse gas emissions or difficult adaptation to climate change in China. But in current judicial practice, you could still rarely see the cases brought by any individuals

⁶ Constitution of the P.R.China, 1982

⁷ Organic Law of the People's Courts of the People's Republic of China, P.R. China, enacted in 1979, last amended in 1983.



against public/private actors concerning climate mitigation or adaptation in China.

Legally and theoretically speaking, there are two main types of climate litigation in China: carbon emission related cases and energy-saving related cases, in accordance with China's current legal framework. Carbon emission related cases include cases related to carbon emissions trading, cases involving key industries of carbon emission such as electricity, steel, building materials and chemicals as well as cases involving key fields of carbon emission such as industry, energy, construction and transportation. Whilst the type of energy-saving related cases contains cases related to energy-saving service industries such as contractual energy management and contractual water-saving management, and disputes over intellectual property such as patents, technology transfer and other fields in the fields of energy saving, water saving, land saving, material saving, section ores, sludge decontamination and resource utilization.

The significant progress of environmental public litigation is a crucial condition for the potential climate litigation. To promote the establishment of the specialized judicial mechanism for environmental and resource cases, in June 2014, the Supreme People's Court established the Environmental and Resource Tribunal, and instructed the courts in all regions to enhance the establishment of judicial organs for environmental and resource cases. As of the end of 2016, the people's courts in all regions had established 558 tribunals, collegiate panels and circuit courts for environmental and resource cases in total. 15 higher people's courts in Guizhou, Fujian, Hainan and other regions have established environmental and resource tribunals and Jiangsu, Chongqing and other regions have established three-level judicial system for environmental and resource cases. In April 2016, the Supreme People's Court decided to designate the Environmental and Resource Tribunal to be responsible for the administrative cases of second instance and retrial of administrative cases against any environmental protection authorities and supervision and guidance in respect of such cases. The local courts also have been exploring the mode of specialized adjudication of environmental and resource cases, for example, the Jiangsu Higher People's Court designated 31 grass-roots courts to exercise jurisdiction over trans-regional environmental and resource cases in a centralized manner, and the Hainan Higher People's Court designated 8 courts to hear and adjudicate civil, administrative and criminal environmental and resource



cases in a centralized manner⁸.

The courts throughout the country tried and closed 18,900 criminal cases of environments and resources, 84,700 civil cases of environments and resources and 29,100 administrative cases of environments and resources in 2016. The procuratorial organs throughout the country prosecuted 29,173 persons for the offences of destroying environments and resources. The Supreme People's Procuratorate carried out the activities of exercising supervision over filing special cases of destroying environments and resources, and suggested the transfer of 2,016 cases of committing suspected offences. The Supreme People's Procuratorate popularized the practices of Fujian, Guizhou, Jiangxi and Chongqing, and explored the ecological procuratorial model of "specialized legal supervision + restorative judicial practice + socialized comprehensive governance" to promote environment protection and ecological restoration. Since the newly revised Environmental Protection Law took effect on January 1, 2015, the courts accepted a total of 112 cases of environmental public interest cases of first instance and 54 cases of second instance, and closed 54 cases of first instance and ten cases of second instance. The court in Dezhou of Shandong Province tried and closed China's first public interest litigation case of air pollution in the Beijing-Tianjin-Hebei region and their surrounding areas since the new Environmental Protection Law took effect, and sentenced the defendant to a compensation of more than 21.98 million yuan for the restoration of the quality of the air environment in July⁹.

Environmental public interest litigation has now gained stronger legal grounding. The revision of the Civil Procedure Law in 2013¹⁰ and the Environmental Protection Law in 2014¹¹ granted environmental NGOs that have been registered and operating for over 5 years the ability to sue polluters in the public interest. They are supported by a detailed judicial interpretation on civil environmental public interest litigation, issued by China's Supreme People's Court in early 2015. So far lawsuits have mainly targeted polluting enterprises, but also some government departments¹². While

8 White Paper: Court Reform in China, 14-03-2017, Supreme People's Court of P.R. China<http://english.court.gov.cn/2017-03/14/content_28552928.htm> accessed 14 February 2018.

9 Annual Report on Promoting the Rule of Law in China(2016), 14-06-2017, China Law Society<<http://legal.people.com.cn/n1/2017/0614/c42510-29339803.html>> accessed 14 February 2018.

10 Civil Procedure Law, P.R. China, last amended in 2017.

11 Environmental Protection Law, P.R. China, enacted in 1989, last amended in 2014

12 Opinion: The future of public interest litigation in China, Dimitri de Boer, Douglas Whitehead, China Dialogue,

08-11-2016



Chinese Non-Governmental Organisations (NGOs) continue to face challenges in filing public interest lawsuits, the capacity for them to take on more major emitters is growing.

However, challenges remain for both NGOs and prosecutors bringing environmental public interest cases. A relatively small number of the 700 NGOs in China which are qualified to file public interest environmental lawsuits have so far brought cases to the courts – only six NGOs have brought cases in 2016. And despite clear rules about who can bring cases, last year some NGOs still faced obstacles in having their cases filed in local courts. For example, in the Tengger desert case, the first instance court rejected China Biodiversity Conservation and Green Development Foundation (CBCGDF)’s ability to sue based on a controversial reading of their articles of association (a document which defines the responsibilities of an organisation or its directors), a judgement which was ultimately overruled by the Supreme People’s Court. CBCGDF have since successfully filed eight lawsuits against the culpable polluters¹³. Also, for NGOs and prosecutors alike, establishing causation and estimating environmental damages can be difficult, particularly for air pollution cases or in cases where there are multiple polluters. In most cases the burden of proof falls on the plaintiff but in some cases the courts will commission their own assessment. In All-China Environment Federation (ACEF) vs. Zhenhu¹⁴, for instance, the plaintiff attempted to assess air pollution damages based on operating cost, as allowed by the judicial interpretation on environmental public interest litigation¹⁵. However, the court rejected this, opting instead for a ‘treatment cost estimate’ approach, a method that is difficult to apply accurately to damages from climate change.

Recent years witness the largely successful experimentation of Environmental Public Litigation in China. And the impacts of environmental public interest litigation are expected to continue to grow. New legislation and policies are likely to lend further support to NGOs seeking to bring cases. Courts around China are encouraged by the Supreme People’s Court approach to climate change-related cases. NGOs continue

13 See, Tengger desert case brought by CBCGDF, 03-01-2017, Supreme People’s Court of P.R. China<<http://www.court.gov.cn/shenpan-xiangqing-34322.html>> accessed 14 February 2018.

14 See, ACEF vs. Zhenhua, 29-12-2015, ChinaCourt<<http://www.chinacourt.org/article/detail/2015/12/id/1777819.shtml>> accessed 14 February 2018.

15 Opinion: The future of public interest litigation in China, Dimitri de Boer, Douglas Whitehead, China Dialogue, 08-11-2016



to gain experience, as well as confidence, and technical and financial resources to bring to cases. In a long run, to improve the development of climate litigation, China is required to design a climate litigation system within the framework of Environmental Public Litigation, which is tailored specifically to climate change-related cases.

Based on my personal observations, the value of environmental judiciary is becoming increasingly prominent in China. Climate Litigation is a more recent discourse. It might be difficult to transplant it into China directly. However, climate cases are included in the main types of China's environmental courts, and may get higher priority in near future.

4. Conclusion

As a milestone for China in its battle to address climate change, in 2015 China formulated and submitted its Intended Nationally Determined Contributions (INDC) to the UNFCCC, becoming the first developing country to submit such a document. The NDCs provides a medium to long-term direction for China's work in combating climate change. As a state where the ruling communist party operates in a central planning mode, the policies of the ruling party and central government exert a great influence on national affairs with a long historical tradition, which can be even more obviously illustrated in the issues of climate change. But on the other hand, there is still no specific national climate legislation in China, which is currently the main barrier and challenge in China's legal system for an individual to bring a case against the government for allegedly not complying with its international climate change obligations. As a concept developing gradually in various countries in recent years, 'Climate litigation' is not strictly a term in environmental judicial practice in China. However, the Supreme People's Court in China takes climate change-related cases as one of the major types of environmental cases, so they are essentially the same as climate litigation. At current phase, the environmental public litigation is a mixed mechanism for an individual to bring a case against public/private actors whose actions contribute to a rise in greenhouse gas emissions or difficult adaptation to climate change in China. In a long run, to improve the development of climate litigation, China is required to design a climate litigation system within the framework of Environmental Public Litigation, which is tailored specifically to



climate change-related cases. With the specialization of environmental judiciary in China, litigation in the field of climate change will receive more and more attentions and it will have a brilliant future in China.





Summaries of selected landmark judicial decisions

Professors Erin Daly and James R. May



(Chronologically by region; * = edited version included in Companion to Global Judicial Handbook on Environmental Constitutionalism)

Asia Pacific

Juan Antonio, Anna Rosario and Jose Alfonso Oposa & Others v. The Honorable Fulgencio S. Factoran, Jr., (Supreme Court of the Philippines, 1993).* *The court recognized the*

principle of intergenerational justice and granted standing to petitioners, who represented their generation and generations of unborn Filipinos in a petition opposing timber license agreements.

Virender Gaur and Ors. v State of Haryana and Ors (Supreme Court of India, 1995). *The appellant surrendered 25% of her land to her municipality, which was a condition for her to construct a building. The law required that the surrendered land be reserved for open space for better sanitation and environment. The government granted a 99-year lease and a building was constructed on the site. The court held that the environment had within its ambit hygienic atmosphere and ecological balance. The court found it was the duty of the State to shed its unbridled sovereign power and to forge an ecological balance and hygienic environment. The court observed that article 21 of the constitution protected the right to live as a fundamental right, encompassing the protection and preservation of environment, ecological balance, and freedom from pollution of air and water, sanitation. Therefore, any action causing environmental, ecological, air, or water pollution, etc. violated the right to life.*

Vellore Citizens' Welfare Forum v. Union Of India (Supreme Court of India,



1996).^{*} This is a public interest case that held, *inter alia*, that the government's allowance or acquiescence in the decades-long discharge of toxic chemicals into surface and drinking water systems from more than 900 tanneries in the five districts of Tamil Nadu, India, amounted to a violation of constitutional rights to life, among others. The Court issued a wide-ranging remedial plan to install pollution control equipment, close facilities, issue and collect fines, restore affected areas, and exercise administrative and judicial oversight.

Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor (Supreme Court of Malaysia, 1996). The case related to procedural fairness and the constitutional rights of a civil servant facing dismissal. The court noted that "life" in the constitution does not refer to mere existence. The court interpreted the "right to life and liberty" under art. 5 of the constitution as "incorporating all those facets that are an integral part of life itself and those matters which go to form the quality of life. It includes the right to live in a reasonably healthy and pollution free environment."

Dr. Mohiuddin Farooque and another v. Bangladesh (Supreme Court of Bangladesh, 1997).^{*} In this case, the Supreme Court of Bangladesh upheld the government's implementation of a wide-ranging and controversial flood control plan that displaced more than a million people. In so doing, however, and to reflect various constitutional protections – including the "right to life," – the court directed agencies to "strictly comply" with measures to ensure access to water, protection of ecological and historical resources, and provide just compensation, and to comply with other environmental and land use requirements.

Bulankulama v Secretary, Ministry of Industrial Development (Supreme Court of Sri Lanka, 2000). Petitioners challenged a mining project that had not yet obtained a feasibility study or development plan. Once obtained, the feasibility study and development plan would be confidential and the Secretary of the Ministry of Industrial Development was required to approve them without unreasonable delay. Mining operations would exhaust all known phosphate reserves. The court held that the government is the trustee of natural resources in Sri Lanka and that the organs of State are guardians to whom the people have committed the care and preservation of the resources of the people. The court considered the agreement must be considered in light of the principles contained in the Rio Declaration,



which provides that human beings are at the center of concerns for sustainable development. The court concluded that there was an imminent infringement of the petitioners' constitutional rights to equal protection before the law (art. 12(1)) and constitutional freedoms to (a) engage in association with others in any lawful occupation, profession, trade, business or enterprise (art. 14(1)(g), and (b) move and choose their residence within Sri Lanka (art. 14(1)(h)).

KM Chinnappa and TN Godavarman v Union of India (Supreme Court of India, 2002). *The lead case dealt with the adverse environmental impact of mining activities on the flora and fauna of the Kudremukh National Park. However, this matter arose from an Interlocutory Application filed by the Amicus Curiae in the main matter. The Amicus submitted that certain laws passed by the State of Karnataka and Uttar Pradesh violated the Wildlife Protection Act, 1972. The Amicus further submitted that despite the court's orders, mining activities continued in and around the Kudremukh National Park by the Kudremukh Iron Ore Company Ltd. The court held that "intergenerational equity" is part of the constitutional right to life.*

Prakash Mani Sharma v. His Majesty's Government Cabinet Secretary and Other (Supreme Court of Nepal, 2003). *The petitioner sought to quash a government decision to allow importation and operation of diesel taxis in the Katmandu Valley. The petitioner further sought mandamus orders to protect the environment on the grounds that unfettered importation of diesel vehicles and unrestricted importation of leaded petrol would negatively impact human health as well as Katmandu Valley's historical, cultural, and archaeological life. The court held that the constitutional right to freedom of personal liberty may only be protected by a healthy environment and that the state has primary responsibility for protecting the right to personal liberty by mitigating environmental pollution as much as possible.*

M.C. Mehta v. Union of India & Others (Supreme Court of India 2004).* *In a previous opinion, the Court came to the conclusion that the mining activities in the vicinity of protected wildlife sanctuaries and tourist resorts are bound to cast serious impact on the local ecology. The Court applied the precautionary principle and principles of sustainable development and ordered a series of remedies including the establishment of a monitoring committee to oversee compliance with administrative orders on a mine to mine basis.*



Santosh Mittal vs State Of Rajasthan And Ors. (The High Court of Judicature for Rajasthan 2004).* *Relying on data from an NGO, the Court found that drinks made locally by PepsiCo and Coca-Cola contained pesticides and other carcinogenic chemicals that were not found in similar drinks made elsewhere. The Court held that plaintiffs' constitutional right to free expression included the right to receive information and therefore ordered the makers of carbonated beverages to indicate clearly on the package the details of its composition & nature and quantity of pesticides and chemicals, if any, present therein.*

Advisory Opinion: Whether the Supervision of and Assistance to Public and Private Waste Cleanup and Disposal Organs is Unconstitutional? (Taiwan Constitutional Court 2006).* *This advisory opinion concludes that a law that permits federal authorities to suspend the licensure of non-complying waste disposal companies does not exceed constitutional constraints on legislative power, or unduly infringe upon constitutionally guaranteed rights to work.*

Naewonsa Temple v. Korea Rail Network Authority (Supreme Court of Korea 2006).* *The temple and 3 other plaintiffs challenged the construction of a railroad in an area with historic, spiritual, and ecological significance. The Court summarily rejected the argument that the salamanders whose habitat would presumably be threatened had standing to sue. Interpreting the constitutional right to live in a healthy and sound environment in conjunction with the Framework Act on Environment Policy, the Court found that the environmental impact assessments indicated that there was insufficient possibility that the construction of the tunnel in this case would infringe the environmental benefits of the above appellants.*

Watte Gedera Wijebanda v. Conservator General of Forest (Supreme Court of Sri Lanka, 2007). *The petitioner challenged the government's decision to refuse his application to mine silica quartz. The court held that the right to a clean environment and the principle of inter-generational equity with respect to the protection and preservation of the environment are inherent in a meaningful reading of the equal protection provisions contained in the Constitution of Sri Lanka. Article 12(1) of the constitution provides, "All persons are equal before the law and are entitled to the equal protection of the law."*



Glanrock Estate (P) Ltd. v. The State of Tamil Nadu, (Supreme Court of India, 2010). *This case related to land ownership rights and the vesting of forests in the state. The court held that the doctrine of sustainable development also forms part of article 21 of the constitution. Further, the “precautionary principle” and the “polluter pays principle” flow from the core value in article 21.*

Arnold v Minister Administering the Water Management Act 2000 (High Court of Australia 2010).* *In this case, the High Court rejected a constitutional challenge to the federal government’s increased regulation of groundwater extraction, which affected landowners and farmers claimed contravened a constitutional prohibition against the Commonwealth abridging “the right of a State or of the residents therein to the reasonable use of the waters of rivers for conservation or irrigation.” Based on reasoning in the Tasmanian Dam and other cases, the High Court held that groundwater does not constitute “waters of rivers” under the constitution.*

Mendaing v. Ramu Nico Management (National Court of Justice for Papua New Guinea, 2011).* *In this case, the National Court of Justice of PNG found that the plaintiffs proved that the defendant’s method of disposing of tailings from the Ramu Nickel Mining Project via deep-sea injection near the Basamuk, Madang Province violated National Goal No 4 of the national constitution, which provides that “Papua New Guinea’s natural resources and environment to be conserved and used for the collective benefit of us all, and be replenished for the benefit of future generations.” The court also held that the plaintiffs had standing to pursue their claims.*

Animal Welfare Board v. A Nagaraja, (Supreme Court of India 2014). *The appeal challenged the legality of bullock cart racing, alleging that it violated the Prevention of Cruelty to Animals Act. The court found that every species has a right to life and security and therefore expanded the meaning of “life” under the constitutional right to life to cover animals. It concluded that all animals have the right to dignity and fair treatment.*

Resident Marine Mammals v. Reyes (Supreme Court of the Philippines, 2015). *The court permitted standing to petitioners, being stewards of the marine mammals of the Tañon Strait. Standing was granted in accordance with the Rules of Procedure*



for Environmental Cases (A.M. No. 09-6-8-SC, effective 29 April 2010), which clarify that any Filipino may commence a citizen suit in representation of others, including minors or generations yet unborn, to enforce rights or obligations under environmental laws. The Court cited annotations to the rules, which provide that the rule on standing “collapses the traditional rule on personal and direct interest, on the principle that humans are stewards of nature.”

Pro Public v Godavari Marble Industries Pvt. Ltd. and Others (Supreme Court of Nepal 2015).* In this case, the Court considered whether continued marble mining in an area protected both by the government and by UNESCO because of its ecological, historic, and spiritual significance was consistent with the constitutional commitment to a healthy environment. The Court reviewed the history of international environmental protection, as well as Nepal’s constitutional environmental jurisprudence and found a strong constitutional commitment to environmental justice. It held that the anticipated economic benefits of continued mining were outweighed by the harm it would do to the environment and to the people whose right to live with dignity and freedom required a healthy environment.

Teitiota v Ministry of Business Innovation and Employment (Supreme Court of New Zealand 2015).* Application for refugee status for native of Kiribati which is facing steadily rising sea water levels as a result of climate change which, over time, may force the inhabitants of Kiribati to leave their islands. However, the Court found that on the facts of this case, the applicant did not face “serious harm” and that there was no evidence that the Government of Kiribati is failing to take steps to protect its citizens from the effects of environmental degradation to the extent that it can.

Raub Australian Gold Mining v. Hue Shieh Lee (Court of Appeal, Malaysia 2016).* This is a SLAPP suit, in which a gold mining company sued a community activist for defamation because of statements she had made describing the results of surveys which had indicated a higher than normal prevalence of illness in areas near the gold mining operations. Recognizing the value to society of activists, the Court held that the statements were not defamatory.

Salim v. State of Uttarakhand (High Court of Uttarakhand at Nainital 2017).*



Following the precedent that a Hindu idol is a juristic entity, the Court in this case held that the Rivers Ganges and Yamuna, worshipped by Hindus, was a juristic person. The Court discussed Hindu practice and belief systems at length and examined the distinction between juristic and natural persons, finding that recognition of an entity as juristic person is for subserving the needs and faith of society which required the rivers be declared legal persons/living person under Articles 48-A and 51A(g) of the Constitution of India. The Court further declared that certain government representatives were to act in loco parentis as the human face to protect, conserve and preserve Rivers Ganga and Yamuna and their tributaries and also to promote the health and well being of these rivers.

Miglani v. State of Uttarakhand & others (High Court of Uttarakhand at Nainital 2017).* Ten days after the Salim case, and under continuous mandamus in this PIL, the Court declared, in its parens patriae jurisdiction, that Rivers, Forests, Lakes, Water Bodies, Air, Glaciers and Springs have a right to exist, persist, maintain, sustain and regenerate their own vital ecology system and have the status of legal persons with all corresponding rights. The Court focused on the importance of nature for the planet and for human development, citing a wide variety of literary, spiritual, ecological, as well as domestic and foreign legal sources, and held that the fundamental human rights on which human survival depends are Nature's rights. Skeptical of traditional principles of environmental law (including sustainable development, greening economies, polluter pays, and the precautionary principle), the Court identified certain individuals to act in loco parentis as the human face to protect, conserve and preserve all the Glaciers including Gangotri & Yamunotri, rivers, streams, rivulets, lakes, air, meadows, dales, jungles, forests wetlands, grasslands, springs and waterfalls in the State of Uttarakhand.

Muhammad Ayaz v Government of Punjab through its Chief Secretary & Ors (High Court of Lahore, 2017). The court upheld the Punjab Environmental Protection Agency's decision to seal a steelworks factory that was non-compliant with an environmental protection order (EPO) and was causing air and noise pollution. The court noted that the EPA's legislative authority to take this action was based on the precautionary principle. Cognizant of the growth of jurisprudence on the establishment of environmental justice in Pakistan, the Court considered it necessary to ensure that enforcement mechanism responded swiftly, especially where public



safety, public health and the environment must be protected from irreparable harm.

Ridhima Pandey v Union of India. (Writ Petition in the Supreme Court of India, 2017.) *Applicant seeks directions that the government act to reduce the adverse impacts of climate change in India. The applicant invokes the principle of sustainable development and precautionary principle, as well as inter-generational equity principle and the public trust doctrine.*

Ashgar Leghari v. Federation of Pakistan (Lahore High Court, Pakistan, 2018).* *This case was brought under the Lahore High Court's continuing mandamus jurisdiction, assessing the work of the Climate Change Commission it had established in 2015. The Court reviewed at some length the threats of climate change in Pakistan, considering its effects on water resources as well as forestry, agriculture, among other things but found that the Commission had been the driving force in sensitizing the Governments and other stakeholders regarding gravity and importance of climate change and had accomplished 66% of the goals assigned to it. The Court then dissolved the CCC and established a Standing Committee to act as a link between the Court and the Executive and to render assistance to the government to further implementation.*

Central and South America

Pablo Miguel Fabián Martínez Y Otros (Tribunal Constitucional de Peru, 2006) (La Oroya).* *Plaintiffs living in one of the most polluted cities in the world argued that nearby smelters were contaminating their air and giving them lead poisoning; they sought information about health risks and remedial measures to improve the health of members of the community as well as ongoing monitoring of epidemiological and environmental conditions. The court emphasized the indivisibility and interdependence of all rights including especially rights to health, education, dignified quality of life, and social equality, as well as rights of citizenship and political participation to ensure respect for human dignity, which is the purpose of all human rights. Relying on constitutional law and general principles of international environmental law, the Court ordered a series of remedial measures including the establishment of a medical emergency response system for lead poisoning, the identification of baseline levels of ambient air quality, the conduct of epidemiological and environmental surveys, and provisions for providing the community with adequate access to information*



about the health and environmental health effects of nearby industries.

Beatriz Silvia Mendoza and others v. National State of Argentina (Supreme Court of Argentina 2008).* *In a landmark ruling against 44 companies and several governmental agencies at the national, provincial, and municipal levels, the Supreme Court of Argentina developed a multi-pronged action plan to assure the clean up of the Matanza/Riachuelo basin, one of the most polluted urban rivers in the world. The action plan included the provision of information, the control of further industrial pollution, cleaning up existing waste dumps, expanding the water and sanitation infrastructure, providing a federal court with ongoing oversight jurisdiction. The case is particularly important for the fusion of environmental and human rights, and for the elaborate remedial measures ordered by the Court.*

Padilla Gutierrez, Clara Emilia y otros, todos en su condición de vecinos de lugares aledaños al Parque Nacional Marino Las Baulas de Guanacaste c/ SETENA, Secretaria Técnica Nacional Ambiental (Corte Suprema de Justicia de Costa Rica, Sala Constitucional 2008).* *Neighbors near a national park established for the protection of leatherback turtles (as well as many other species, including some protected under international law (CITES, RAMSAR) sought an order requiring the national government to assess the impact of tourism (including construction) on the flora and fauna of the park in an integrated and strategic way that accounts for the cumulative effects on the entire ecosystem, instead of on an individualized basis. Sensitive to the ecological interests, the court canceled all the licenses that had already been issued and suspended all work on the project pending the completion of an appropriate study coordinated with all relevant authorities.*

Domitila Rosario Piche Osorio, conocida por Domitila Rosario Piche Estrada, en contra del Ministro y de la Viceministra del Medio Ambiente y Recursos Naturales, (Sala de lo Constitucional de la Corte Suprema de Justicia, El Salvador, 2010).* *When the environmental ministry failed to respond to a petition requesting information about the technical studies on the basis of which a state of environmental emergency was declared due to heightened levels of lead in the petitioner's district, the Court held that the petitioner had established a violation of her constitutional rights to information and petition, and ordered the government to, within 15 days, issue the issued certification of a biochemical study and within 30 days, issue*



respond to the request with regard to the evaluation of water pollution and gases in the sewage, rainwater, and building pipes. The court also ordered the government to provide damages for failing to respond in a timely manner to petitioner's request.

Expediente sobre permisos de mineras a cielo abierto en los sitios de la UNESCO (Superior Tribunal de Justicia de Argentina, 2010).*

Plaintiffs brought an amparo action to seek reversal of a lower court order to grant a permit to allow mining exploration and extraction in an open mine in a UNESCO natural heritage site. Relying on the precautionary principle and other general principles of international environmental law, and with heightened awareness of the historical and natural value of the site, the Court put aside traditional procedural rules, holding that when there is the danger of grave or irreversible "generational harms," the absence of information or scientific certainty can't be used as a reason to delay the adoption of effective means to protect the environment. Moreover, the Court imposed on the defendant the obligation to supply the positive proof that the UNESCO environment was protected. In environmental matters, the court insisted, it is the undeniable role of the judge to participate actively with a view toward vindicating the right to a healthy and uncontaminated environment, as a Fundamental Human Right.

La Camaronera en la Reserva Ecológica (Corte Constitucional del Ecuador, 2015).*

This was the first major constitutional court case interpreting the rights of nature provision, unique to Ecuador's constitution. The Court held that a judgment below violated due process because it unreasonably ruled in favor of a shrimp farmer's property rights, while ignoring the constitutionally protected rights of nature at the expense of the mangroves. The Court held that the latter provision effected a transformation of the juridical order from one in which humans were at the center, to one in which humans live harmoniously in an ecosystem. The rights of nature entail the right to restoration, which implicates recuperation and the rehabilitation of nature's functions, of her vital cycles, her structure, and her evolutionary processes. The court also referred to the human right to live in a healthy and ecologically balanced environment.

T-622 of 2016 (Corte Constitucional de Colombia 2016). *In this tutela action brought by the social justice organization Tierra Digna, the Court held that Colombia's ecological constitution gave the Rio Atrato – the nation's largest river and one of*



its most important ecosystems integral to the indigenous communities -- juridically cognizable rights. Ordering the government to create a national mining and energy policy that would protect the river and riverine inhabitants, the Court explained that “The importance of the biological and cultural diversity of the nation for future generations and the survival of our natural and cultural wealth imposes on the state the obligation to adopt public policies for the conservation, preservation and compensation that take into account the interdependence of biological and cultural diversity.” This, the Court said, means that “justice must go beyond human beings to permit nature to be the subject of rights.” The Court explained the necessity of taking “a further step in its jurisprudence toward the constitutional protection of one of our most important sources of biodiversity: the Atrato River” – resting on constitutional environmental provisions and the Court’s own ample constitutional environmental jurisprudence.

Africa

Gbemre v Shell Petroleum Development Company Nigeria Limited and Others (Federal High Court, Nigeria 2005).* An intermediate level court held that the petroleum developers’ flaring of ‘waste’ natural gas in the Niger Delta without the preparation of an environmental impact statement abridged the community plaintiffs’ constitutionally guaranteed right to dignity. In observing that flaring activities contributes to climate change, the court held: “the inherent jurisdiction to grant leave to the applicants to apply for the enforcement of their fundamental rights to life and dignity of the human person as guaranteed by sections 33(1) and 34(1) of the Constitution of the Federal Republic of Nigeria, 1999 and moreover, that these constitutionally guaranteed rights inevitably include the right to a clean, poison-free, pollution-free healthy environment.” Accordingly, the court issued an injunction, which, unfortunately, was not enforced.

Earthlife Africa Johannesburg v Minister of Environmental Affairs (High Court of South Africa, Gauteng Division 2017).* An ENGO appealed the issuance of a permit to build a large coal-fired power station without having considered the climate change impacts. The Court considered the regulations and the environmental management act in light of the constitutional environmental provision and under international law. The Court held that even in the absence of an express obligation



to consider climate change, the ministry is nonetheless required to consider all the relevant issues and this includes climate change and to do so before, and not after, the permit is issued.

Europe

Lopez Ostra v. Spain, (European Court of Human Rights, First Section 1994). *Mrs. Gregoria López Ostra brought an action before the European Court of Human Rights against the Government of Spain Lorca (Murcia) for allowing tanneries located near the house that she shared with her husband and two daughters in Lorca to pollute to the extent that it adversely affected their health and well-being, in violation of Article 8 of the European Convention of Human Rights, which provides that “everyone has the right to respect for his private and family life, his home and his correspondence.” The ECHR agreed, and ordered the state to pay four million pesetas for damage and 1.5 million pesetas for costs and expenses.*

*Fadeyeva v. Russia (European Court of Human Rights, First Section 2005).** The European Court of Human Rights found that the Russian Federation’s operation of a steel plant near the complainant’s home endangered her health and well-being in violation of Article 8 of the European Convention on Human Rights, which provides: “Everyone has the right to respect for his private and family life, his home, and his correspondence [except in] accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.” Accordingly, the court ordered the Russian Federation to pay plaintiff for damages.

United States

Juliana v. United States (United States Federal District Court for the District of Oregon 2016).* *In this case, the court held that the plaintiffs had a legally cognizable cause of action in to assert that the U.S. government’s collective actions and inactions concerning greenhouse gas emissions deprived them of a “right to a stable climate” under the Due Process Clause of the 5th Amendment. The U.S. government found this decision so problematic that it took the extraordinary step of asking the 9th Circuit Court of Appeals take the case away from the lower court, and*



dismiss it without further proceedings. Oral argument occurred in December 2017. A ruling from the appellate court is pending.

Pennsylvania Environmental Defense Foundation v. Commonwealth of Pennsylvania, 161 A.3d 911 (Supreme Court of Pennsylvania 2017).* *In this case, the Pennsylvania Supreme Court held (4-1-1) that a state constitutional provision (The Environmental Rights Amendment of 1971) providing that “The people have a right to clean air, pure water, and ... values of the environment” is self-executing and enforceable. Moreover, the same constitutional provision impels the state government and its local agents as “trustee,” to manage state lands in public trust, including use of proceeds from the leasing of lands for oil and gas development.*

In Re Application of Maui Electric Company (Sierra Club v. Public Utility Commission of Hawai’i) (Supreme Court of Hawai’i 2017).* *In this case, the Supreme Court of Hawai’i held that the Hawai’i constitution’s explicit right to a healthy environment is a protectable property interest under the Due Process Clause of the Hawai’i constitution. Accordingly, the Court held that Petitioner-Sierra Club is entitled to a due process hearing to challenge the Public Utility Commission’s grant of a Power Purchase Agreement to continue to combust fossil fuels that it claims does not comport with the state’s statutory goal to convert to 100 percent renewable energy by 2045. The Court also held that Sierra Club possesses constitutional standing to challenge the permit because the injury of its members is fairly traceable to greenhouse gas emissions.*





ANNEXES





Annex A. Agenda of the colloquium

Monday, 26 February 2018

08.00-9.00 Registration of participants by PJA

9:00-10:00 INAUGURAL SESSION

Moderated by Ms. Irum Ahsan, Senior Counsel, Law and Policy Reform, ADB

- Welcome Address by Hon. Justice Muhammad Yawar Ali, Chief Justice, Lahore High Court, Pakistan
- Opening Remarks by Ms. Elizabeth Mrema, Director of the Law Division, UN Environment
- Opening Remarks by Mr. Sunil Mitra, Deputy Country Director, Pakistan Resident Mission, ADB
- Video Remarks from the Global Judicial Institute on Environment by Justice Antonio Benjamin of the National High Court of Brazil, and the Secretary General of the UN Environmental International Advisory Council of Environmental Justice
- Environmental and Climate Justice – A perspective from Pakistan by Hon. Mr. Justice Syed Mansoor Ali Shah, Judge, Supreme Court of Pakistan

10:00-10.30 Coffee Break and Group Photo

10:30-12:00 SESSION I: Evolution and Innovations in Environmental Constitutionalism and Rights

Moderated by Mr. Andy Raine, Regional Coordinator for Environmental Law and Governance, UN Environment

- Introduction and Overview by Professor James R. May, Widener University Delaware Law School
- The interdependence of Human Rights and the Environment by Professor John



Knox, UN Special Rapporteur on Human Rights and the Environment

- The Role of Constitutional Courts in Rendering Environmental Justice, by Hon. Ms Justice Ayesha Malik, Judge, Lahore High Court
- Judicial Commissions and Climate Change in Pakistan by Dr. Parvez Hassan, Chairperson, Climate Change Commission, Lahore, Pakistan
- Climate Justice for Future Generations by Attorney Antonio Oposa, Jr, Environmental Lawyer
- Q&A

12:00-14:00 Lunch

14:00-16:00 SESSION II: Global and Regional Developments in Climate Justice

Moderated by Professor Erin Daly, Widener University Delaware Law School

- Climate Justice and the Global Pact by Rt. Hon. Lord Carnwath of Notting Hill, Justice of the Supreme Court of the United Kingdom
- Global and Regional Development in Climate Change by Hon. Mr. Justice Tassaduq Jillani, Former Chief Justice, Supreme Court of Pakistan
- Recent Climate Litigation Concerning Environmental Rights by Justice Brian Preston, Chief Judge of the Land and Environment Court, NSW, Australia
- Climate Change and Vulnerable Groups – Global and Regional Developments by Ms. Irum Ahsan, Senior Counsel, Law and Policy Reform, ADB
- Q&A

16:00-16:30 Coffee break

16:30-18:00 SESSION III: The Convergence of Environmental Constitutionalism, Rights, and Climate Justice

Moderated by Ms. Elizabeth Mrema, Director of the Law Division, UN Environment

- Climate Change, Environmental Threats, and Human Rights in Pakistan by Justice Ali Baqar Najafi, Judge, Lahore High Court, Pakistan
- Constitutionalism and Climate Justice by Professor James R. May, Widener



University Delaware Law School

- Climate-induced Migration, Justice and the Courts by Professor Ben Boer, Wuhan University
- Intersections of Climate Justice and Human Rights: Lessons from South Asia by Dr. Sumudu Anopama Atapattu, Director of Research Centers and Senior Lecturer at UW Law School, Affiliated Professor with RWI
- Q&A

19:00-22:00 Dinner Hosted by the Lahore High Court

Tuesday, 27 February 2018

9:30-11:00 SESSION IV: Special Issues in Judicial Implementation of Environmental Constitutionalism, Rights and Climate Justice

Moderated by Professor Denise Antolini, Associate Dean for Academic Affairs, The William S. Richardson School of Law, University of Hawaii, and Deputy Chair, World Commission on Environmental Law

Format: One speaker in plenary, followed by five breakout groups that report back to plenary. Breakout groups will be led by Moderators and facilitated by the rapporteurs from Pakistan's organizing team.

Speaker: Professor Erin Daly, Widener University Delaware Law School

Discussion Topics for Breakout Sessions:

- Interpretation and application of environmental constitutional provisions in international, regional, national, and subnational law, with attention to how the various layers interrelate with and complement one another
- Direct implementation of constitutional provisions, and other problems of constitutional interpretation
- How environmental constitutional provisions can be used for climate justice

11:00-11:30 Coffee break

11:30-13:00 SESSION V: Judges, the Environment, and Access to Justice in Asia



Pacific (Panel Discussion)

Moderated by Professor James R. May, Widener University Delaware Law School

Panellists:

Hon. Mr. Justice Jawad Hassan, Judge, Lahore High Court, Pakistan

Hon. Judge Fleur Kingham, President of the Land Court of Queensland, Australia

Ms. Marlene Oliver, Former Environment Commissioner, New Zealand

Hon. Justice YA Tan Sri Dato Sri Azahar bin Mohamed, Judge, Federal Court of Malaysia

Topics:

- The role of judges in protecting the environment and advancing climate justice, considering separation of powers, environmental rule of law, and the relationship with environmental constitutionalism
- The role of citizens, the public, and NGOs in bringing cases to the courts. Also role of other pillars of the justice system
- Access to justice issues: costs, standing, statutes of limitations, burdens of proof, interim relief, strategic lawsuits against public participation, access to justice by vulnerable groups (e.g., women, indigenous people) and alternative dispute resolution mechanisms

13:00-14:00 Lunch

14:00-16:00 SESSION VI: Judicial Remedies and Enforcement

Moderated by Ms. Irum Ahsan, Senior Counsel, Law and Policy Reform, ADB

Format: Two speakers in plenary, followed by five breakout groups, that report back to the plenary. Breakout groups will be led by Moderators and facilitated by the rapporteurs from Pakistan's organizing team.

Speakers:

Evolution of Law and Judicial Remedies in Environmental and Climate Change Matters by Ms. Saima Amin Khawaja, Managing Partner, Progressive Advocates and Legal Consultants, Pakistan



Climate Litigation: A suitable Discourse for China's Green Courts? by Professor Qin Tianbao, Research Institute of Environmental Law (RIEL), Wuhan University

Discussion Topics for Breakout Sessions:

- Environmental courts and tribunals: developing special rules for environmental/ climate change cases; green benches and specialized tribunals
- Remedial orders: judicial responses to a finding of a violation of rights including orders to restore the environment, pay damages, clean up environmental harms, or prevent environmental damage, other innovative orders
- Evidentiary issues in environmental and climate change litigation
- Remedies and enforcement, including the judicial role in coordinating the execution of judgments with other branches of government
- Trends, progress, and challenges in guaranteeing and implementing of environmental constitutionalism for climate justice in countries of the region

16:00-16:30 Coffee break

16:30-18:00 SESSION VI: Next Steps, Conclusions, and Recommendations

Moderated by Professor Erin Daly, Widener University, Delaware Law School

Speakers:

Hon. Mr. Justice Syed Mansoor Ali Shah, Judge, Supreme Court of Pakistan

Professor John Knox, UN Special Rapporteur on Human Rights and the Environment

Mr. Andy Raine, Regional Coordinator for Environmental Law and Governance, UN Environment

Ms. Irum Ahsan, Senior Counsel, Law and Policy Reform, ADB

18:00-18:30 CLOSING CEREMONY

Moderated by Mr. Andy Raine, Regional Coordinator for Environmental Law and Governance, UN Environment

Closing Address by Hon. Mr. Justice Muhammad Anawaarul Haq, Judge, Lahore High Court, Pakistan

Closing Remarks by Mr. Nils Henrik Rolf Ring, Deputy Director, Raoul Wallenberg



Institute

Closing Remarks by Ms. Elizabeth Mrema, Director of the Law Division, UN Environment

19:00-22:00 Dinner Hosted by the Lahore High Court



Annex B. List of international participants

Justice A.K.M. Abdul Hakim

Justice Tshering Namgay

Justice Azahar Mohamed

Hon Mr. Justice Aung Zaw Thein

Hon. Mr Justice Ananda Mohan
Bhattarai

Justice Gabriel Ingles

Hon. Mr. Justice Priyasath Dep, PC

Justice Nipon Chaisamran

Judge Angkana Sinkaseam

Mr. Ha Tuan Hiep

Justice Nguyen Van Tien

Professor Erin Daly

Professor James R. May

Justice Brian Preston

Lord Carnwath of Notting Hill

Professor Ben Boer

Professor John H. Knox

Professor Qin Tianbao

Ms. Marlene Oliver

President Fleur Kingham

Supreme Court of Bangladesh

Green Bench at the High Court of
Bhutan

Federal Court of Malaysia

Supreme Court of the Union of
Myanmar

Supreme Court of Nepal

Court of Appeals, Cebu, Philippines

Supreme Court of Sri Lanka

Supreme Court of Thailand

Rayong Provincial Court , Thailand

Supreme People's Court of Viet Nam

Supreme People's Court of Viet Nam

Delaware Law School, Widener
University

Delaware Law School, Widener
University

Land and Environment Court, NSW,
Australia

CVO, Supreme Court of the UK

Wuhan University

UN Special Rapporteur on Human
Rights and the Environment

Wuhan University

Former Environment Commissioner of
New Zealand

Land Court in Queensland, Australia



Ms. Denise Antolini
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Ms. Yoke Sudarbo
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Ms. Charlotta Bredberg
Ms. Orawan Raweekoon
Mr. Irum Ahsan
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Mr. Gregorio Rafael Bueta
Ms. Briony Rae Eales
Ms. Elizabeth Mrema
Mr. Andrew Raine
Ms. Angela Kariuki
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Annex C. Background note for the colloquium



ASIA PACIFIC JUDICIAL COLLOQUIUM ON CLIMATE CHANGE: USING CONSTITUTIONS TO ADVANCE ENVIRONMENTAL RIGHTS AND ACHIEVE CLIMATE JUSTICE

BACKGROUND NOTE

This background note details Colloquium planning and partnership, objectives, approach, intended outcomes, materials overview, synopsis, case summaries, and graphics.

COLLOQUIUM PLANNING AND PARTNERSHIP

Hosted by the Lahore High Court in Pakistan. Co-sponsored by and organized in partnership with the Punjab Judicial Academy (PJA), the United Nations Environment Programme (UN Environment), the Asian Development Bank (ADB), the Asian Judges Network on Environment (AJNE), the Raoul Wallenberg Institute (RWI), the World Commission on Environmental Law (WCEL), the Global Judicial Institute on the Environment (GJIE), the UN Special Rapporteur on Human Rights and the Environment, and Widener University Delaware Law School (USA).

OBJECTIVE

The objective of the colloquium is to assist and build capacity of judges in Asia Pacific in applying environmental constitutionalism to achieve climate justice and advance human dignity. The judicial colloquium will assemble senior judges from across Asia Pacific and other legal stakeholders (Government, prosecutors, civil society, academicians) to discuss the role of the judiciary in advancing environmental rights and climate justice.



As is detailed in the *Global Judicial Handbook of Environmental Constitutionalism* (James R. May and Erin Daly, United Nations Environment, 2nd Ed.) and the associated *Companion to Global Judicial Handbook of Environmental Constitutionalism* (Erin Daly and James R. May, United Nations Environment) produced for this meeting, about 100 national constitutions guarantee environmental rights in some form, ranging from explicit substantive rights to a clean, beneficial or healthy environment, to implicit rights to life, dignity or health, to procedural rights, such as the rights to access to justice, public participation, and environmental information. Many subnational constitutions are following suit. Courts are increasingly engaging these provisions in resolving environmental disputes, including those involving climate change.

APPROACH

Day one will be a plenary session for all participants (approximately 250-300 people). Day two will then move into a more targeted workshop for up to 100 selected participants with roundtable and working group sessions. Topics to be discussed include:

1. Trends in global environmental constitutionalism and climate litigation;
2. The link between constitutionalism, climate change and human rights;
3. The role of judges in recognizing environmental rights and advancing climate justice, considering such issues as separation of powers, standing to sue, environmental rule of law, and the relationship between environmental and other rights;
4. Interpretation and application of environmental rights provisions in international, regional, and constitutional law, with attention to how the various layers interrelate with and complement one another; and
5. Remedies and enforcement including, inter alia, the judicial role in coordinating with other branches of government.

The Colloquium is part of a larger programme under the leadership of the UN Special Rapporteur on Human Rights and the Environment, Professor John H. Knox, and supported by the United Nations Environment Programme (UN Environment) to enhance judicial capacity in environmental constitutionalism, identify gaps and opportunities, and support judges worldwide. It also takes place within the



framework of ongoing technical assistance by the Asian Development Bank on supporting judges in Asia-Pacific, under the Asian Judges Network on Environment (AJNE), to develop judicial capacity for adjudicating climate change and sustainable development issues. Additionally, the Colloquium is an innovative collaboration initiated by partners at Widener University Delaware Law School (USA) and North-West University (South Africa) in conjunction with the New Frontiers in Environmental Constitutionalism conference held in South Africa in 2016, and further developed by the IUCN World Commission on Environmental Law and the Global Judicial Institute for the Environment at the Colloquium on Human Rights and the Environment in Brazil in 2017.

INTENDED OUTCOMES

The intended outcomes are as follows:

1. Enhance the capacity of participating judges and legal stakeholders to implement constitutionally-entrenched environmental rights by considering pleading, standing, standards of judicial review, interpretation, and remedies in constitutional environmental rights cases, so that they can be more effectively enforced in the pursuit of climate justice.
2. Provide materials to contribute to and be used in national judicial training institutes or organisations, and facilitate conversations about good practices in implementing environmental constitutionalism and advancing climate justice.

MATERIALS OVERVIEW

This Colloquium, and the materials that animate it, are designed to help judges navigate through these complex issues to achieve environmental, climate, and social justice.

First, the *Handbook* invites analysis and discussion of the issues judges face when they encounter claims of constitutional environmental and human rights. The Sessions of the Colloquium roughly follow the logic of the Handbook, which has eight chapters, each addressing subjects that jurists are likely to consider when hearing claims involving constitutional environmental provisions. It includes chapters on (1) the roles of the judiciary in resolving claims sounding in



environmental constitutionalism, including climate change; (2) how environmental constitutionalism is exhibited at the national and subnational levels around the globe, including substantive, procedural and other provisions; (3) issues that affect whether constitutionally-recognized environmental rights are justiciable, including standing, causes of action, timing and defenses, and presumptions about enforceability; (4) the adjudication, interpretation, and application of constitutional environmental claims, including textual interpretation, especially of provisions that purport to guarantee a fundamental right to an adequate environment; (5) judicial remedies for violations of constitutional environmental rights; (6) the interplay between constitutionally-incorporated dignity rights and environmental constitutionalism; (7) the role of environmental constitutionalism in advancing climate justice; and (8) the particular and sometimes peculiar challenges and opportunities that environmental constitutionalism presents jurists.

Second, the *Companion to the Handbook* includes primary sources that illustrate how jurists and others have implemented environmental constitutionalism. It collects about 30 landmark cases from all regions of the world (edited for this Colloquium) and summaries of other cases, the most recent report of the UN Special Rapporteur for the Human Rights and the Environment, examples of substantive and procedural environmental rights, an infographic that details environmental constitutionalism at work in Asia Pacific, as well as a selective list of cases and bibliography. Participants will also have access in digital form to the presentations, UN Environment's publications on climate change, and other relevant materials.







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