

Human Rights and the Environment

The Institute of International and European Affairs, Dublin

Lord Carnwath, Justice of the Supreme Court

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A month ago it was announced that eight residents of the Torres Strait Islands in Australia were bringing a human rights challenge against the Australian Government. These are a group of islands north of Queensland, home to a unique first nation people, who have inhabited the region for thousands of years, making it one of the oldest continuous cultures in the world. They are threatened by climate change, which is already causing regular flooding of their land and homes and is predicted to get much worse. Rising sea temperatures are also affecting the health of the marine environment.

The islands are within the jurisdiction of the Australian government. They complain that the government has not done enough to protect their interests, either by adopting sufficiently rigorous greenhouse gas targets, or funding adequate coastal defences. But they are not bringing their cases under Australian law. There appears to be no suitable domestic law framework of legal duties and remedies. Instead they are taking the case to the United National Human Rights Committee, under the International Covenant on Civil and Political Rights (ICCPR) dating from 1966. It is being brought under article 27 (right to culture), article 17 (protection of family and home life), and article 6 (right to life). You will not find anything in those articles about climate change, or even about the environment. But things have moved on since 1966. A “General Comment” on article 6 (replacing previous commentaries dating from the early 1980s) issued by the Committee in 2018 expanded on the meaning of the right to life:

“Environmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life. Obligations of States parties under international environmental law should thus inform the contents of article 6... Implementation of the obligation to respect and ensure the right to life, and in particular life with dignity, depends, inter alia, on measures taken by states to

preserve the environment and protect it against harm, pollution and climate change caused by public and private actors...”

A FAQ put out by ClientEarth gives a pithy summary of what the case is about:

“How is Australia failing on climate change?

Currently, the Australian government has no policies to meet its low emissions reduction target of 26-28% by 2030. Meanwhile Canberra has continued to push the interests of fossil fuel industries, in particular coal and coal seam gas. Last year the UN’s International Panel on Climate Change released a report stating humanity has just over a decade to introduce rapid decarbonisation of its economy to avert the worst of catastrophic climate change.”

It is less upbeat about the prospects of securing effective action in the near future:

When will the claim be decided?

The process is quite involved, and it could take up to three years for a decision. After the claim is filed on May 13th, 2019, the Committee is likely to request a response from the Australian government later this year. Once Canberra responds, the authors could expect a reply from the Committee in 2020 and, following a potential oral hearing, a decision in 2021.

What would a successful decision mean legally?

If successful, it would be the first decision from an international body finding that nation states have a duty to reduce their emissions under human rights law. Unfortunately, even if the Committee finds that there has been a violation, it cannot force Australia to comply with its decision, however taking a case to the Committee result in international pressure on Australia and nation states do frequently comply with rulings of the Human Rights Committee.

Of course I say nothing about the merits of case. I cite it to underline a basic problem about the concept of human rights in national and international environmental law. It is one thing to assert such rights, or even to establish them to the satisfaction of a tribunal. It is quite another to convert them into action, or into effective and enforceable duties at national or, still less, at international level. As judges we are inevitably restricted both by the cases that come before us, and by the limits of the legal toolbox at our disposal. That raises the question whether human rights law can make a significant contribution to addressing the immense challenges we face in protecting the environment. Or is it just chipping away at the edges?

I was struck by this dilemma a few weeks ago when the Extinction Rebellion demonstrators occupied Parliament Square. They made a powerful case for stronger action on environmental issues, notably climate change, and attracted a lot of media attention. I could look down on them from my room in the Supreme Court. They had even gone as far as to put an information tent immediately outside the entrance to the Supreme Court, which we had to negotiate coming into and out of the building. The police had evidently decided to take a hands-off approach, and on the whole we were treated with due courtesy.

Looking down on them, I wondered whether there was any intended symbolism in the location of their tent. Was it a coded message to us as judges to be more proactive in holding the executive to account? I don't think so. We just happened to be a convenient location opposite Parliament, which was their real focus of attention. But what if one of them had recognised me as a judge with a special interest in environmental law? What sort of conversation might I have had with such an activist, and with how much common ground? I will come back to that later. First I want to look at some examples of effective use of human rights laws.

In some jurisdictions the courts have been able to build on constitutional guarantees to turn such rights into effective action. In the famous *Oposa* case¹ in 1993, the Philippines Supreme Court described rights to a balanced and healthful ecology as “basic rights” which “predate all governments and constitutions” and “need not be written in the Constitution for they are assumed to exist from the inception of humankind”. The court memorably upheld a challenge to the state’s policies for granting consents to fell in the countries’ virgin forests, brought by some 43 children from all over the Philippines, on behalf of themselves and “generations yet unborn”.

In the same spirit, the courts of India and Pakistan have taken the lead in interpreting constitutional guarantees of the right to life to include environmental rights. In the words of the Pakistan Supreme Court, in the leading case of *Shebla Zia v WAPDA pld* (1994)², the right to life -

“...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.”

As is well known, the Indian Supreme Court has been particularly active in using such constitutional rights as the legal basis for detailed mandatory orders relating to such intractable problems as pollution in Delhi.

A powerful example of the potential of this approach is the case of *Leghari v Attorney-General*³, in the Lahore High Court in 2015. The court was faced with a claim by a farmer whose land was suffering from the effects of climate change, and who charged the

¹ *Oposa v Factoran* GR No 101083 (SC 30 July 1993)

² Human Rights Case No.15-K of 1992

³ WP No 25501/2015

Government with failure to implement its own climate change policies. The court upheld the claim, relying again on the constitutional right to life. It ordered the setting up of a Climate Change Commission, to oversee the implementation of those policies under the supervision of the court. It has recently submitted its final report following the successful completion of the main phases of its work.

It was important to the success of that case that the court was not seeking to impose on the government anything to which it was not already in principle committed. It was simply seeking to hold the government to its own policies.

The South-Asian courts have gone much further than would as yet be thought appropriate for common law or civil courts in other parts of the world, including our own. In Europe part of our legal tool-box is the European Convention on Human Rights. The European Convention itself says nothing about the environment. As my colleague Jonathan Sumption pointed out in his recent Reith lecture, protection of the environment is one of the areas in which the Strasbourg court has felt able to develop the scope of article 8 (“protection of the home and family life”) well beyond what might have imagined by the original drafters. It has been treated as covering (in his words) “anything that intrudes upon a person’s autonomy unless the court considers it to be justified.” Jonathan has also emphasised the dangers of the expansion of the law into areas better left to political resolution. As he put it: “Human rights are where law and politics meet: it can be an unfriendly meeting”. He quoted our former Prime Minister’s comment that a recent decision of the European Court of Human Rights (on votes for prisoners) had made him “physically sick”.

Happily I am not aware of any comparable reaction to decisions of the Strasbourg court relating to the environment. This may be because in practice the court has steered a careful line between the protection of individual rights, and the margin of appreciation allowed to the government on policy issues.

Two cases illustrate the contrast. The first significant environmental case in Strasbourg was *Lopez Ostra v Spain*⁴ in 1995, in which the court upheld a complaint of the government's failure to deal with smells, noise and fumes from a waste-treatment plant situated a few metres away from her home. She had withstood it for three years before having to move. There was a violation of Article 8 as the authorities had not struck a fair balance between the town's economic well-being and the applicant's private life. There was a total failure by the government to respond to a serious and unlawful interference with her home life.

At the other end of the spectrum is the leading Grand Chamber case relating to night flights at Heathrow: *Hatton and Others v United Kingdom* (2002) 34 EHRR 1. There was no doubt about the sleep interruptions caused by night flights. The Third Section initially upheld the claim by a majority⁵, but the Grand Chamber disagreed. The difference turned on the view taken of the margin of appreciation and whether the regulations reflected a "fair balance". The previous cases, such as *Lopez Ostra*, were distinguished on the basis that "...the violation was predicated on a failure by the national authorities to comply with some aspect of the domestic regime", whereas "This element of domestic irregularity is wholly absent in the present case". Overall, the Court "does not find that, in substance, the authorities overstepped their margin of appreciation by failing to strike a fair balance between the right of the individuals affected by those regulations to respect for their private life and home and the conflicting interests of others and of the community as a whole..."⁶

My colleague Lord Kerr, sitting as an ad hoc judge in the Chamber had dissented for reasons very close to those of the Grand Chamber. As he observed, a central problem in

⁴ (1995) 20 EHRR 277

⁵ [2001] ECHR 565 (Third Section)

⁶ HATTON AND OTHERS v. THE UNITED KINGDOM - 36022/97 [2003] ECHR 338 (8 July 2003) paras 120-129

such cases is to define the boundaries between the respective roles of policy-makers and the courts:

“... If Convention standards are not met in an individual case, it is the role of the Court to say so, regardless of how many others are in the same position. But when, as here, a substantial proportion of the population of south London is in a similar position to the applicants, the Court must consider whether the proper place for a discussion of the particular policy is in Strasbourg, or whether the issue should not be left to the domestic political sphere.”

Similar issues are at the heart of the arguments in the Netherlands, where last year the Hague Court of Appeal dismissed the Government’s appeal in the *Urgenda* case. That was a case brought by the Dutch Urgenda Foundation and 886 individual citizens to compel the government to comply with its Kyoto commitments. During the 2010 climate conference in Cancun, the Netherlands along with other EU states had acknowledged the need by 2020 to limit their emissions by 25-40%, compared to 1990. Yet the State’s evidence confirmed that the expected reduction under its current plans was no more than 14 to 17%. The District Court rejected arguments that these were purely political issues. It held that, given the undisputed evidence as to the serious threat to man and the environment posed by climate change, and even without specific legislation, the government had a duty to take appropriate mitigation measures in its own territory to address it. Its failure to do so amounted under Dutch law to “unlawful hazardous negligence”.

The Court of Appeal upheld their decision but on grounds of more general interest than the somewhat esoteric subtleties of Dutch tort law. They based their decision on the European Convention. They held that climate change presents a “real threat... resulting in the serious risk that the current generation of citizens will be confronted with loss of

life and/or a disruption of family life”, and that under articles 2 and 8 of the Convention “the State has a duty to protect against this real threat”. That has rightly been treated as a landmark case, in its recognition that the threat posed by climate change can be seen as a human rights issue. We are currently awaiting the result of the government’s appeal to the Supreme Court. I understand that a similar case brought in this country by Friends of the Irish Environment was heard in the High Court earlier this year and judgment is awaited. It would not of course be appropriate for me to comment on the legal merits of either case.

On any view, however, it is a significant limitation on the value in this context of article 8 that it is about the protection of people, and their homes and families, rather than of the environment for its own sake. In *Kyrtatos v Greece* (2005) 40 EHRR 16, the applicants challenged the Government’s failure to demolish buildings where the permits to build on a swamp had been ruled unlawful by the Greek Court. The First Section held that there was no violation of Article 8, as the applicants had not shown how damage to the birds and other protected species directly affected their private or family life rights. The Court observed (at [52]):

“Neither Art.8 nor any of the other Articles of the Convention are specifically designed to provide general protection of the environment as such; to that effect, other international instruments and domestic legislation are more pertinent in dealing with this particular aspect.”

As that passage implicitly recognises, environmental rights are not “human rights” in the ordinary sense. They are much more than that. They involve rights and duties. The rights are those of not just humans, but of all living things. The duties are ours, as the species which has the unique ability to influence the environment for good or ill. But it is not at all clear that we yet have in place “other international instruments” fit for the purpose.

A more comprehensive view of the scope of environmental rights and duties is found in the important decision in February 2018, of the Inter-American Court of Human Rights in its Advisory Opinion OC-23/17 at the request of the Republic of Columbia concerning state obligations in relation to the environment. The original version of the American Convention on Human Rights, dating from 1969 said nothing about the environment. Article 26 merely imposed a general obligation for the progressive development of “economic, social and cultural rights”. It was not until the El Salvador Protocol of 1989 that there was included a specific reference to the environment. Article 11 of the San Salvador Protocol is in relatively simple terms:

“1. Everyone shall have the right to live in a healthy environment and to have access to basic public services.

2. The States Parties shall promote the protection, preservation, and improvement of the environment.”

From this text the judgment develops an elaborate framework of rights and responsibilities – national and transboundary. In an illuminating article by Monica Feria-Tinta and Simon Milnes,⁷ the authors comment⁸:

“It is... the first legal pronouncement ever by an international human rights court that has a true focus on environmental law as a systemic whole (as distinct from isolated examples of environmental harm analogous to private law nuisance claims [they mention *Lopez Ostra v Spain* in the ECHR]). Further, it is a landmark in the evolving jurisprudence on ‘diagonal’ human rights obligations (that is, obligations capable of being invoked by individual or groups against states other than their own), which thereby opens a door—albeit, in a cautious and pragmatic way—

⁷ Monica Feria-Tinta and Simon Milnes: *The rise of Environmental Law In International Dispute Resolutions* (2018) Yearbook of International Environmental Law pp 1-18.

⁸ *Op cit* p 2

to cross-border human rights claims arising from transboundary environmental impacts.”

They also emphasise the court’s acknowledgement of the importance of the protection of the environment as an end in itself, quite apart from the risk to individual human beings.

An important move towards a broader view of environmental rights and duties has been the proposal for a Global Pact for the Environment presented by President Macron to the UN General Assembly in September 2017. The ambition, according to the accompanying material, was for the Pact to become “the cornerstone of international environmental law”, and to stand alongside the two international covenants of 1966, related to civil and political rights, and to economic, social and cultural rights, so establishing “a third generation of fundamental rights, the rights related to environmental protection”.⁹ I was honoured to be a member of the group of international legal specialist invited to advise on the text.

The Pact 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. They include many familiar concepts: Sustainable development; Intergenerational Equity; Precaution; Polluter-Pays¹⁰; access to information, and so on. Most important for me is the starting point. It emphasises that this is not just about rights, but about the balance of rights and duties – individual and collective. This is simply and clearly stated in the first two articles:

“Article 1

⁹ <http://pactenvironment.org/aboutpactenvironment/les-raisons-du-pacte/>

¹⁰ Cited by me in *Fishermen and Friends of the Sea v Minister of Planning (Trinidad and Tobago)* [2017] UKPC 37

Right to an ecologically sound environment

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.”

Although there has been a large measure of international support for the Pact, and the text has it has been considered at a series of meetings under the auspices of the UN, there has been opposition from predictable quarters and future progress is uncertain.

Let me come back to my hypothetical conversation with the environmental activist on the doorstep of the Supreme Court. She might have asked me to explain what courts like mine were doing in practical terms to enforce environmental rights, and with what results. I could have offered some examples. I might have pointed to the order we made against the government in 2015 in the case brought by ClientEarth, challenging the government's failure to bring pollution levels in certain major urban areas within the mandatory limits set by European Directives. The Supreme Court ordered the government to produce a revised plan within a period of 9 months, and gave liberty to

apply to the Administrative Court for consequential orders.¹¹ A revised plan was produced but that was challenged by ClientEarth and found wanting by the Administrative Court¹². The court laid down a tight programme for its improvement.

So far so good. But I would have had to admit that we were not enforcing environmental rights as such, but specific statutory rules laid down by a Directive. Even in that context there had been a question whether enforcement was a matter for the European Commission rather than the courts, which we had referred to the European Court. I would have had to admit that the legal process was slow and not necessarily effective. The case started in July 2011, and even now 8 years later it is open to question how much it has achieved in terms of strict compliance with the limits. Air pollution in London remains a major issue.

I might perhaps have turned our conversation to the courts of the USA and the great case of *Massachusetts v Environment Protection Agency* in 2007¹³. The Supreme Court decided by 5-4 that the EPA's powers under the Clean Air Act extended to greenhouse gas emissions, such as CO₂ emissions from motor vehicles. In the face of unchallenged evidence of a "strong consensus" that global warming threatens a precipitate rise in sea levels by the end of the century, and "severe and irreversible changes to natural ecosystems", the EPA's failure to take any action was held to be "arbitrary and capricious" and therefore unlawful. Again that was not a case about human rights as such. It turned on the construction of a particular statute. But it became critically important following the change of administration, and paved the way for the strong climate change programme initiated by President Obama, and for USA's crucial participation in the Paris negotiations in late 2015.

¹¹ *ClientEarth, R (on the application of) v Secretary of State for the Environment, Food and Rural Affairs* [2015] UKSC 28 (29 April 2015)

¹² *ClientEarth (No 2) v Secretary of State* [2016] EWHC 2740 (Admin)

¹³ *Massachusetts v EPA* 549 US 497 (2007)

Again, however, I would have had to admit that subsequent progress has been patchy. The judgment still stands. It has not been questioned in later cases. But it has not prevented the next President reversing the EPA's policy approach and deciding to pull out of the Paris agreement. You will not find any coherent explanation of this change of view on the EPA website. Curiously, you will find a page headed "Climate Change in the United States: Benefits of Global Action".¹⁴ It gives a link to a 2015 report by the "Climate Change Impacts and Risk Analysis (CIRA)" which, it is said, "shows that global action on climate change will significantly benefit Americans by saving lives and avoiding costly damages across the U.S. economy". How this is compatible with the decision to pull out of the Paris agreement is not explained.

Another USA case which has attracted a lot of interest was the judgment of Judge Aiken in *Juliana v USA*, given in November 2016 in the US District Court of Oregon¹⁵. But again progress has been slow. The plaintiffs were a group of young people alleging specific harm due to the effects of climate change, and challenging the Federal Government's failure to take adequate steps to protect them. Judge Aiken dismissed the government's attempt to have the case struck out as disclosing no arguable case. She rejected arguments that these were "political questions", and held that "the right to a climate system capable of sustaining human life is fundamental to a free and ordered society", and thus protected by the Due Process clause of the Constitution. The case was supposed to go to a full hearing last Autumn, but it was delayed by interlocutory wrangles which went all the way up to the Supreme Court, and are still waiting resolution.

I would have had to confess to my environmental activist that, when one is dealing issues as complex and wide-ranging as climate change, human rights law is an imperfect tool. Ultimately there is no real alternative to political consensus supported by robust legal frameworks I would have emphasised that in the United Kingdom we are fortunate that

¹⁴ <https://www.epa.gov/cira>

¹⁵ Case No. 6:15-cv-01517-TC

the issue was taken out of the area of serious political controversy by legislation long before the Paris agreement. The Climate Change Act 2008 imposes a duty on the Secretary of State to ensure that the net emissions of greenhouse gases for the year 2050 are at least 80% lower than the 1990 baseline. It provided the machinery for the Secretary of State to set statutory “carbon budgets” for successive five-year periods, starting from 2008-12. The Act established an independent Climate Change Committee to give expert advice under the Act, including on the setting of the carbon budgets. For the moment our performance is on track, although the Committee has made clear than more needs to be done for the future.

Last month the Committee advised that, to satisfy our Paris commitments, the target in the Act needs to be revised downwards to net zero emissions by 2050. Recently the government announced that it had accepted this advice, and would promote the necessary statutory instrument to give it legislative effect. This announcement attracted criticism on both sides. Some said it was unachievable. Others said that it did not go far enough. The BBC reported that the Chancellor of the Exchequer had warned that it would cost £1trillion by 2050, while the Acting Energy Minister had pointed out that this is no more than 1 and 2% of the UK’s GDP. Whatever target is proposed, it will attract intense political debate. I note that this week Ireland has launched its own climate change plan aiming for net zero carbon emissions by 2050.

To me as an environmental lawyer and judge, the crucial point is that we have more than political commitments or even general human rights protections. We have a strong legal framework, with clear and enforceable precise targets based not on independent expert advice. We need to direct all our efforts to achieving comparable legal regimes across the globe. That is the priority - whatever else is done to give urgency to the political debate – by test cases like the Torres Island case or even direct protests like Extinction Rebellion. In this context I was delighted to see the announced that the UK has reached an agreement with Italy in its bid to host the 26th Conference of the Parties under the UN Framework Convention on Climate Change. This is a crucial meeting marking the 5th anniversary of the Paris agreement. It happens to coincide with the USA Presidential Elections. It is impossible to overestimate the importance of that meeting for the future

of the world as we know it. As my activist friend would no doubt tell me, the Paris Agreement is far from perfect. But I would reply that from a legal point of view it is the best thing we have. We have to make it work.

Robert Carnwath

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