

Lord Carnwath at the Oxford Centre for Islamic Studies

Climate Change and the Courts

26 November 2015

“Our species, though selected to be a caretaker or steward (khalifah) on the earth, has been the cause of such corruption and devastation on it that we are in danger ending life as we know it on our planet. This current rate of climate change cannot be sustained, and the earth’s fine equilibrium (mīzān) may soon be lost. As we humans are woven into the fabric of the natural world, its gifts are for us to savour. But the same fossil fuels that helped us achieve most of the prosperity we see today are the main cause of climate change...”

(Islamic Declaration on Global Climate Change, August 2015¹)

I start, appropriately in this gathering, with a quotation from a recent declaration by a meeting of Islamic leaders. But I might equally have quoted the Papal Encyclical (“Laudato si” June 2015) which likewise acknowledges that climate change represents “one of the principal challenges facing humanity in our day.” Such statements reflect a widespread consensus among world leaders, political and religious, on the reality of climate change and the need for urgent action to avoid global catastrophe. The scientific evidence is powerful, as shown by successive reports of the Intergovernmental Panel on Climate Change (IPCC). That consensus provides the background to the negotiations about to start in Paris under the 1992 UN Framework Convention on Climate Change. The ambitious aim is to achieve a truly global agreement to limit greenhouse gas emissions to ensure that global average temperature are held at no more than 2 degrees above pre-industrial levels, or as some will argue even less.

A year ago I was privileged to give the Sultan Azlan Shah lecture in Kuala Lumpur. My subject was “Environmental law in a global society”². I traced the rapid development over the last fifty years of legal principles shared by countries and regions across the

¹ Guardian 18 August 2015

² Available on the Supreme Court website.

world. There is now general recognition of the concept of the “environmental rule of law” and the central role of the courts in interpreting and enforcing such law. I also referred to the work of United Nations Environment Programme in promoting judicial understanding of environmental law - recently through its International Advisory Council on Environmental Justice (IACEJ), of which I am a member. I ended with a brief mention of the issue of climate change - “possibly the most difficult and urgent challenge of all for the global society”. I asked how the law and the courts could help to build a bridge between the scientific consensus and effective political action. This lecture takes up the story from there.

There are those who think that this whole debate is too political and too controversial for us as judges to make any contribution. This was brought home to me recently in strong terms. In September this year, with Kings College, London, I helped to organise a conference under the catchy title “Adjudicating the future: Climate Change and the Rule of Law”. The object was to assemble a group of specialist judges from a number of different countries round the world, together with practitioners and academics, to look at the legal issues arising from climate change, and the role of the courts, national and international. The conference was supported by HM Government, and internationally by the UN Environment Programme, and the Asia Development Bank.

One session was a public lecture by Professor Philippe Sands QC on climate change and international law. It was hosted by me at the Supreme Court, and viewable on line through our website. He looked at the possible role of international law and the various international courts and tribunals. One idea he discussed was that a small island state, directly affected by rising sea-levels, might persuade the UN General Assembly to make a reference to the ICJ for an advisory opinion on the legal obligations of nation states in respect of climate change. Such a reference he suggested could enable the court to hear scientific evidence on the incidence of climate change and its causes, and so provide a settled factual basis for determining what if any consequent obligations arise under international law. I am not qualified to say how likely that is in practice. But it was an interesting idea which deserved discussion.

I was surprised, three weeks later, to be alerted by our Press Office to an article in the Spectator (10 October 2015) by James Delingpole, under the headline “A Supreme Court justice and the scary plan to outlaw climate change”.³ The burden of the Spectator article was that I and my fellow judges were scheming to “close the argument for ever, using the sledgehammer instrument of the International Court of Justice”, thus leading to “an effective global ban on so-called ‘climate change’”. He bemoaned the fact that the “green establishment, embracing everything from the Obama administration and the Vatican to the BBC” was now being joined, it seemed, by “certain members of our famously neutral and apolitical senior judiciary”.

A full video of the Sands lecture is available on the Kings College website. So you can form your own view. I mention the the article partly to underline how easy it is for any intervention by a judge in an area of potential controversy to be misinterpreted (as tends to happen, for example, when we say anything about the Human Rights Act).

More importantly, the article completely misunderstood the point of the conference. The intention of the conference was not to align ourselves as judges or individuals with any particular “establishment” position, or to “outlaw” any legitimate views one way or the other. Our personal views are of course irrelevant. But as judges we have to live in the real world. In that world it is the political establishment, whether we agree with it or not, which ultimately dictates the laws under which we as judges will have to operate. It will of course be for national governments and legislatures in the first instance to decide how to adapt their own laws to give effect to any Paris agreement. However, whatever they decide, there will be disputes and challenges, which the courts will have to resolve. Judges need to prepare themselves for the task.

³ An earlier article also by Delingpole appeared on an American website called Breitbart, which concluded with the comment “Sands is a dangerous man; even more so the man who instigated the conference, a hitherto obscure activist judge called Lord Carnwath”. An article in similar terms by Christopher Booker in the Sunday Telegraph (11.10.15) has since been partly corrected in the online version, in response to a complaint from the court.

More positively let me turn to a striking example of how the courts, properly respecting the limits of their constitutional role, can provide a vital legal springboard for political action. I mentioned this in my lecture last year, but events since then have moved on. The judgment was that of the US Supreme Court in 2007 in *Environmental Protection Agency v Massachusetts*.⁴ The court held by a narrow majority of 5-4 that the agency's duties to regulate "air-pollutants" under the existing Clean Air Act included responsibilities for greenhouse gases, such as CO₂ emissions from motor vehicles, and that the agency's failure to take any action was "arbitrary and capricious" and therefore unlawful. The majority referred to global warming as "the most pressing environmental challenge of our time". It accepted the standing of the State of Massachusetts to bring the action on the basis of threats to its coastline from rising sea-levels. It was unimpressed by arguments that American traffic made a relatively insignificant contribution to the global problem, seen against the likely contribution from developing countries such as China and India, and it was critical of what it called the EPA's "laundry list of reasons not to regulate..."

A strong minority (led by Chief Justice Roberts) would have dismissed the action for lack of standing – Massachusetts' prospective loss of land due to rising sea levels was too speculative; and also because the issues were "non-justiciable" - "redress of grievances of the sort at issue here is the function of Congress and the Chief Executive not the federal courts". The constitutional role of the courts was "to decide concrete cases—not to serve as a convenient forum for policy debates".

Roberts CJ thought the petitioners' victory would be little more than symbolic. But he was wrong. That majority judgment has had and continues to have profound consequences. It paved the way for a radical change in the approach of the EPA, particularly following the election in 2008 of a President more responsive to the challenges of climate change. In December 2009 the EPA issued a formal "endangerment finding" under the Act, highlighting the severe risks of climate change as

⁴ *Massachusetts v EPA* 549 US 497 (2007)

a basis for stronger regulatory action.⁵ The first round of the new EPA rules led to more than 100 lawsuits challenging their legality on various grounds, but with limited exceptions the rules were ultimately upheld by the Supreme Court in 2014 in the *Utility Air* case.⁶ Scott Fulton⁷, a distinguished American lawyer and fellow-member of the IACEJ, commented that the *Utility Air* decision was “significant more for what the court opted not to address than what it did address”. The basis of the review was narrow. The court declined to take review of the EPA’s endangerment finding itself, thus in effect leaving in place the foundation of the EPA’s growing regulatory programme for greenhouse gases.⁸

In summer 2014 the Obama administration launched plans for new EPA rules to limit emissions of carbon-gases from power-plants by 30% by 2030. In November 2014 there came the U.S.-China Joint Announcement on Climate Change,⁹ by which the two Presidents committed their countries to working together towards an agreed outcome “with legal force” applicable to all Parties at the United Nations Climate Conference in Paris in 2015. The final version of the Clean Power Plan, announced by the President with a flourish of publicity in August 2015, was described as “even more ambitious” proposing reduction of 32% by 2030. Not surprisingly the plan has proved controversial with the energy industry and states with substantial employment in that sector, and is bound to be challenged in the courts. But for the moment it rests on an apparently firm legal foundation.¹⁰

⁵ Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act: Federal Register / Vol. 74, No. 239 / Tuesday, December 15, 2009

⁶ *Utility Air Regulatory Group v EPA* 573 US (June 23, 2014)

⁷ President, Environment Law Institute

⁸ He notes also that the It is also significant that the majority judgment was given by Justice Scalia, one of the dissentients in the EPA case.

⁹ <https://www.whitehouse.gov/the-press-office/2014/11/11/us-china-joint-announcement-climate-change>

¹⁰ <http://www.usnews.com/news/articles/2015/08/03/epa-clean-power-plan-calls-for-bigger-greenhouse-gas-reductions>

Commenting at our conference on the impact of that case, Scott Fulton said:

“*Mass v. EPA* was unquestionably the turning point in the United States' reckoning with climate change. If that decision had gone the other way, much of what EPA has now put in place would likely not have occurred. With the stalemate on climate change in the Congress, climate change legislation would likely have remained elusive. With no legislation and no CAA rulemaking, there would have been no cornerstone for the President's climate initiative, no basis for a bilateral deal with China, no foundation for Paris COP commitments, and so on. It is impossible to overstate the importance of the Court's decision in *Mass v. EPA*, which stands as towering example of the difference that courts can make in the climate change arena.”

Turning to the United Kingdom, this country has been one of the leaders in climate change legislation. The Climate Change Act 2008 was passed in the House of Commons with only five votes against. It imposed 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 provides 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. Four budgets have already been set on the basis of a reduction of emissions by at least 50% in 2025 compared to 1990. Advice on the level of the fifth carbon budget for the period 2028-32 is due later this year. The independence of the committee was underlined recently by the exchange of letters between the chairman and the Secretary of State commenting critically on the apparent “policy gap” left by some recent government announcements, and the consequent uncertainty over the future direction of low-carbon policies.¹¹

Climate change litigation in this country has hitherto been limited, no doubt partly because of the clear legal framework set by the Climate Change Act 2008. At the simplest level our job is to decide cases as they come before us, on the law as it is, and on the evidence presented by the parties. Let me take two examples which illustrate both how courts can be brought into the debate, but also the proper limits of their role. The first is

¹¹ “UK risks missing its carbon targets, climate advisers warn” Guardian 22 September 2015

a judgment of my own, sitting as a judge of the Administrative Court in 2010.¹² It was a challenge to the then government's plans for a third runway at Heathrow. The case was brought by a coalition of local authorities and community groups from that area. They argued that the proposals were based on a national airports policy dating from in 2003, which had not been reviewed to take account of the change in government policy represented by the 2008 Act. I agreed, holding that it was not open to the Secretary of State "simply to stand on the principle of the policy decision made in 2003", without testing it against the policy commitments represented by the Climate Change Act. The actual decision was of course overtaken by the election of a new government, and the reopening of the whole third runway debate – still unresolved. But the principle stands. Government decisions across the whole spectrum of government activities must give full weight to the present implications of the Climate Change Act, even if the final statutory duty will not bite until 2050.

The other case, heard by Burton J in 2007, involved a closer examination of claims about the consequences of climate change. Mr Dimmock was a father of two sons at a local state school and also a school governor. He objected to the decision of the Secretary of State for Education to distribute to every state school a copy of Al Gore's Oscar-winning film on the threat of climate change "An Inconvenient Truth". It was issued as part of a package of material for teachers, supported by a Guidance Note. Mr Dimmock complained that the use of this film was inconsistent with the education authority's duties under the Education Act not to promote "partisan political views", and to provide "a balanced presentation of opposing views". His case in essence was that the presentation was "partisan" and "unbalanced", and therefore unlawful. For the purpose of the hearing, he was prepared to accept that the IPCC report, on which the Secretary of State relied, represented the scientific consensus. His case was that, even by reference to the IPCC report, the film was misleading and exaggerated, and the guidance note inadequate to correct it.

¹² *R(Hillingdon and others) v Secretary of State for Transport* [2010] EWHC 626 (Admin)

The judge undertook a detailed examination of the criticisms. As he put it had watched the film “with Mr Dimmock’s critique in hand”. He concentrated on nine alleged “errors” which he thought sufficiently persuasive to require specific attention. Take for example “Error 15: Death of polar bears”. The judge describes the dramatic scene in the film showing a polar bear desperately swimming through the water looking for ice, of which Mr Gore says -

“A new scientific study shows that for the first time they are finding polar bears that have actually drowned swimming long distances up to 60 miles to find the ice. They did not find that before.”

The judge comments, somewhat dryly:

“The only scientific study that either side before me can find is one which indicates that four polar bears have recently been found drowned because of a storm. That is not to say that there may not in the future be drowning-related deaths of polar bears if the trend of regression of pack-ice and/or longer open water continues, but it plainly does not support Mr Gore's description.”

Having dealt with the other eight identified errors, the judge approved a guidance note which satisfactorily addressed each point. Importantly, he also approved an insertion confirming that political balance did not requires teachers to adopt “a position of neutrality between views which accord with the great majority of scientific opinion and those which do not...”

This to my mind shows the court in its proper role. The judge was addressing a serious case brought within a clear statutory framework, informed by an objective assessment of the evidence and submissions before him. The result was that the film could be used without offending the limits set by the Act, but without hampering teachers from presenting a fair picture of the true balance of scientific opinion.

It is one thing to have an agreed scientific and factual basis for the judgment of the court in cases raising climate change issues. It is another when the court is asked to assess the

legality of policy decisions on how to address it. Are these issues for the courts at all – or, as Robert CJ thought, should we leave it to political debate? In other words, are they justiciable?

The Canadian courts said not, in a case in 2008 brought by *Friends of the Earth*.¹³ The Kyoto Protocol Implementation Act (KPIA) had been passed in June 2007 by a coalition of opposition parties requiring the government to file a climate change plan with a view to meeting Canada's obligations as a signatory to the Kyoto Protocol. The Act required the plan to include “a description of the measures to be taken to ensure that Canada meets its obligations under the Protocol”. The government produced a climate change plan, but the plan made quite clear that the government, for what it saw as compelling political and economic reasons, had no present intention of meeting its Kyoto commitments. The case was dismissed. Looking at the Act as a whole the court held that it envisaged accountability to Parliament not to the courts. The question of compliance with the Kyoto commitments was in effect non-justiciable - a matter, as it said, for “public, scientific and political discourse... not amenable or suited to judicial scrutiny”. Contrast that with the approach of the Hague District Court in May this year. It was faced with an action 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 so-called Annex I (or developed) countries under the Kyoto protocol (including the Netherlands and the 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% in 2020 compared to 1990. The court held that, given the undisputed evidence as to the serious threat to man and the environment posed by climate change, the government had a duty to take appropriate mitigation measures in its own territory to address it.¹⁴ Its failure to do so amounted under Dutch law to “unlawful hazardous

¹³ *Friends of the Earth v Canada* [2009] 3 FCR 201

¹⁴ The judgment is available in English at

<http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2015:7196>

negligence” (as it is expressed in the translation). The court rejected the argument that Holland’s contribution to the global problem was relatively small. “Climate change” it said was “a global problem and therefore requires global accountability”. The court ordered the state to limit greenhouses gases to achieve a reduction of at least 25% at the end of 2020 compared to 1990 levels. The decision is under appeal, one of the grounds being “the interference of the judiciary into the discretionary power of the government”.

A more recent, and perhaps even more striking, example comes from the High Court of Lahore.¹⁵ The case was brought against the background of Pakistan’s experience of the impact of climate change. In the judge’s words:

“For Pakistan, climate change is no longer a distant threat – we are already feeling and experiencing its impacts across the country and the region. The country experienced devastating floods during the last three years. These changes come with far reaching consequences and real economic costs.”

The judge founded his jurisdiction on the court’s constitutional obligation to protect the fundamental rights of the people to life, health and property. The government had in 2012 adopted its own National Climate Change Policy, and a Framework for its Implementation. But, as the judge found, having heard representatives of the Ministries and Provincial Departments, it was clear that “no material exercise has been done on the ground to implement the Framework”. To expedite the matter and (as he put it) “to effectively implement the fundamental rights of the people of Punjab”. He ordered the establishment of a Climate Change Commission, and named its members. They included an independent chairman, representatives of relevant government departments, and other experts. Commenting on the case in a recent interview¹⁶, the judge emphasised that the proceedings had not been “adversarial”; his intention was not to “put officials on the mat” but to help them. Senior government officials had admitted in court to receiving no response from ministries to requests on what action they had taken to implement the

¹⁵ *Leghari v Federation of Pakistan* WP 25501/2015

¹⁶ Article by Malini Mehra: <http://www.climatechangenews.com/2015/09/20/pakistan-ordered-to-enforce-climate-law-by-lahore-court/>

government's own climate commitment. Many he said were "totally at sea" with "no idea what was going on or what climate change was". The case had "jump-started" the government's climate change efforts at a time when they had been "totally dead".

In neither of these cases was there any dispute as to the scientific case for action on climate change. In each the court relied on the governments' own assessments of the nature of the threat and what was needed to deal with it. The problem was their failure to live up to their own commitments. Of particular interest to judges and lawyers in other countries is the legal basis on which each court felt able to intervene. The Urgenda decision turned on a particular doctrine of Dutch law which may not find parallels in other jurisdictions. But the Lahore decision was based much more generally on the court's constitutional obligation, as the judge described it, to protect the fundamental rights of the people to life, health and property.

This followed a long line of authorities, in both Pakistan and India, in which the courts have treated the "right to life" under their constitutions, as extending to the right to live in a healthy and unpolluted environment. They have used that to develop general principles of environmental law, even without specific legislation. I referred to some of the examples in my previous lecture. The best known come from the India Supreme Court, making orders in the 1990s, for example, for the cleaning up of industrial pollution threatening the Taj Mahal¹⁷, or to reduce air pollution in Delhi by conversion of all buses from diesel fuel to compressed natural gas.¹⁸ Only last month, it was reported, the Indian Supreme Court heard a new air pollution case in Delhi and ordered a "green tax" on trucks travelling through Delhi. The Chief Justice lamented that his grandson "looks like a Ninja" because of the mask he has to wear for protection.¹⁹

¹⁷ *M.C. Mehta v. Union of India*, WP 13381/1984 Judgment 30.12.96

¹⁸ See Michael Jackson and Armin Rosencranz *The Delhi Pollution case: Can the Supreme Court Manage the Environment?* *Environmental Policy and Law* 33 (2003) 88, for a description of the case and its political and financial consequences.

¹⁹ *Financial Times* 18 November 2015

This level of judicial activism is not without its critics. In the words of one distinguished Indian commentator:²⁰

“Courts lack the institutional competence, for instance, to assess the credibility of the relevant climate science, judge the relative merits of different policy measures on adaptation/mitigation... The judiciary also lacks the democratic accountability necessary for policy prescriptions on complex and all-encompassing issues such as climate change....”

The danger, as she sees it, is that the courts will engage in what she calls “the jurisprudence of exasperation”²¹, which articulates frustration with executive failure, but can only prescribe “an adhoc, reactive and temporary solution” which may in the end paralyse the executive and distort policy evolution on climate change.

While I respect that view, it is a little pessimistic. Views may differ as to the appropriateness and indeed effectiveness of some of the interventions by the Indian Supreme Court. But the jurisprudence was a measured response to a widespread perception of legislative and executive failure. The courts are not directly accountable to any electorate, but they have a central and vital role in any democratic society governed by the rule of law. What these various cases show is that there is no single formula, for the balance between the courts and the other organs of state. In each country the courts have had to develop their own responses to legitimate demands for action, within their own constitutional and legal frameworks. The same will no doubt apply to their responses to issues arising from climate change.

Paris negotiations and after

I end with some brief remarks about the forthcoming Conference and what may follow. For those who see climate change as a real and urgent threat, the Paris negotiations will be a crucial test for the global community. The 1997 Kyoto protocol and the attempted

²⁰ Lavanya Rajamani *Rights based climate litigation in the Indian courts: potential prospects and potential problems* Centre for Policy Research Climate Initiative, working paper 2013/1.

²¹ A term attributed by her to Pratap Bhanu Mehta *The Telegraph* 17 October 2005.

update at Copenhagen in 2009 had limited success. The agreement included specific legally binding emissions targets for the 40 developed countries but not for other major emitters like China. For that among other reasons the USA never ratified it, and Canada withdrew.

The planned Paris agreement is intended to cover all countries, and it starts from a different approach - bottom-up rather than top-down. It is to be based on nationally determined contributions, rather than imposed targets. There are grounds for cautious optimism. This time a strong lead has been given by the two largest emitters, USA and China. Recently we were told the outcome of the preliminary round of nationally determined contributions. They involve submissions by 160 member states, accounting for some 90% of global emissions.²² They have been assessed as a major step in the right direction, even if they are still some way from the reductions necessary to achieve the 2 degree target.

On the other hand, there is as yet little clarity as to the form the agreement will take, or its legal effect. The 2011 Durban conference called for “a protocol, another legal instrument or an agreed outcome with legal force... applicable to all parties”. That formula has left plenty of room for argument about the legal status of the agreement – a treaty with creating binding substantive obligations under international law? or something less than that, perhaps imposing no more than reporting requirements? Various drafts are in circulation, but not much evidence of common ground even at this late stage. Only two weeks ago, John Kerry, US Secretary of State, was widely reported as saying that the agreement was “definitely not going to be a treaty”. That was quickly met by a rebuttal from President Hollande insisting that an agreement without legal force was no agreement at all. Briefing from the US State Department said that there could be legally binding elements to the deal, but no legally binding targets for climate emissions. The Obama administration it seems is anxious to avoid anything which could be interpreted

²² *Synthesis Report on the aggregate effect of the intended nationally determined contributions* UNFCCC 30 October 2015

as a treaty requiring ratification by a hostile US Senate.²³ Such are the complexities of international negotiations, particularly with US elections looming next year.

Whatever emerges from Paris the courts will have a role. As I have attempted to show, even in advance of any an agreement setting targets binding in international law, national courts have been pressed to give effect to policy commitments using the tools of national laws and constitutions. They have responded in different ways. Those pressures will continue. Agreement or not, the perceived threat of climate change will not go away. If the politicians are seen to fail, it is likely to be to the courts, national and international, that the public will look to fill the gap.

²³ Financial Times 12-12 November 2015