Dublin June 2019

Human Rights and the Environment
by Lord Carnwath JSC

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 parities 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. It could be a very valuable initiative. 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.

In some jurisdictions the courts have been able to build on constitutional guarantees to turn such rights into effective action. In the famous *Oposa* case[1] 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 *Shehla 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."

[1] *Oposa v Factoran* GR No 101083 (SC 30 July 1993
[2] Human Rights Case No.15-K of 1992

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 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. No doubt for this reason the government did not appeal the decision, but co-operated fully in the work of the court-appointed Commission. It remains to be seen how the Australian courts in due course might react to a finding by the UN Committee of a violation of rights protected by international law, but not directly reflected in domestic law or policy.

[3] WP No 25501/2015

But 4 years on from the first court's decision in 2015 we are still some way from finding an effective means to convert such rights into enforceable duties. 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 appeared to be its original scope - to cover (in his words) "anything that intrudes upon a person's autonomy unless the court considers it to be justified." He he also observed: "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. In such cases, there can be a very difficult balance between the distinctive roles of the courts and of the executive. But 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 case was *Lopez Ostra v Spain*[4], 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. But the Grand Chamber disagreed with the Chamber[5] which by a majority had held that there was a violation. 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".

[4] (1995) 20 EHRR 277
[5] [2001] ECHR 565 (Third Section)

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 adhoc judge in the Chamber had dissented for reasons very close to those of the Grand Chamber. As he observed, a central problem in 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 no doubt 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

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

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 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 on less esoteric grounds, based on the European Convention. The court 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.

A limitation of article 8 is 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.

For a more comprehensive view of the scope of environmental rights I turn to the important decision in February 2018, 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.

In its recent opinion the court described a healthy environment as "a fundamental right for the existence of humankind". Although it relied principally on the El Salvador protocol, it also held that this right should be considered to have been implicitly included among the economic, social and cultural rights protected by Article 26.

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."

But the judgment develops a much more elaborate framework of rights and responsibilities – substantive and procedural. I quote the official summary:

> "… the Court found that, to respect and ensure the rights to life and personal integrity:
>
> a. States are obligated to prevent significant environmental damages within and outside their territory.
>
> b. To comply with this obligation of prevention, States must regulate, supervise and monitor the activities under their jurisdiction that could cause significant damage to the environment; carry out environmental impact assessments when there is a risk of significant damage to the environment; prepare contingency plans in order to establish safety measures and procedures to minimize the possibility of major environmental disasters, and mitigate any significant environmental damage that could have occurred, even when this happened despite preventive actions by the State.
>
> c. States must act in keeping with the precautionary principle to protect the rights to life and to personal integrity in the event of possible serious and irreversible damage to the environment, even in the absence of scientific certainty.
>
> d. States are obligated to cooperate, in good faith, to protect against environmental damage.
>
> e. To comply with the obligation of cooperation, when States become aware that an activity planned under their jurisdiction could generate a risk of significant transboundary damage and in cases of environmental

> emergencies, they must notify other States that could be affected, as well as consult and negotiate in good faith with the States potentially affected by significant transboundary damage.
>
> f. States have the obligation to ensure the right of access to information recognized in Article 13 of the American Convention in relation to possible damage to the environment.
>
> g. States have the obligation to ensure the right to public participation of the persons subject to their jurisdiction, as established in Article 23(1)(a) of the Convention, in the decision-making process and in the issuing of policies that may affect the environment.
>
> h. States have the obligation to ensure access to justice, regarding the state obligations for the protection of the environment previously indicated in this Opinion."

(The judgment is in Spanish but there is an "official summary" in English issued by the Court. For those looking for a fuller account and critical discussion, I commend an illuminating article by Monica Feria-Tinta and Simon Milnes.[7] The authors comment[8]:

> "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

[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

> '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—to cross-border human rights claims arising from transboundary environmental impacts."

They rightly emphasise the court's acknowledgement (not apparent from the official summary) of the importance of the protection of the environment as an end in itself, quite apart from the risk to individual human beings: and "the evolving tendency in contemporary law to recognize legal personality, and, therefore, rights, to nature not only in judicial cases but also in constitutional systems".

Another potentially important move towards a broader view of environmental rights 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]

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

[9] http://pactenvironment.org/aboutpactenvironment/les-raisons-du-pacte/

environment, and six articles largely concerned with implementation and supervision. The starting point is to emphasise in articles 1 and 2 that this is not just about rights, but about the balance of rights and duties:

> "Article 1
>
> 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."

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. 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. 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. Indeed I have already cited its statement of the Polluter Pays principle in a judgment on the Privy Council.[10] The Pact has attracted a large measure of support within the United Nations, but opposition from some predictable quarters. Future progress is uncertain.

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

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

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? He might have asked me to explain what courts like mine were doing in practical terms to enforce environmental rights.

A striking example of judicial review against public authorities was the recent challenge by the campaigning NGO ClientEarth to the government's failure to bring NO2 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. The resulting plan was challenged and found wanting last November[11], and the court laid down a tight programme for its improvement. However, it should not be forgotten that it was the US Supreme Court in the great case of *Massachusetts v*

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

Environment Protection Agency in 2007[12], which paved the way to the strong climate change programme initiated by President Obama, and for USA's crucial participation in the Paris negotiations. 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. The leading judgment was given by Justice Kennedy, now to be succeeded by Justice Kavanagh.[13]

A page is headed Climate Change in the United States: Benefits of Global Action.[14] It describes the "Climate Change Impacts and Risk Analysis (CIRA)" which "quantifies the physical effects and economic damages under multiple climate change scenarios". It gives a link to the 2015 CIR Report, which it is said

> "estimates the physical and monetary benefits to the U.S. of reducing global greenhouse gas emissions. The report shows that global action on climate change will significantly benefit

[12] *Massachusetts v EPA* 549 US 497 (2007)

[13] According to some reports, while he has "repeatedly voiced the belief that global warming is a serious problem", he has "challenged the view that Congress has given the EPA authority to do something about it". https://insideclimatenews.org/news/10072018/brett-kavanaugh-supreme-court-confirmed-climate-change-policy-environmental-law-trump

[14] https://www.epa.gov/cira

> Americans by saving lives and avoiding costly damages across the U.S. economy.
>
> Contact Us

President Trump may not like the Paris Agreement, but the Supreme Court's ruling still stands, and with it presumably the holding that the failure by the EPA to address the issue of climate change would be a breach of its statutory duties. I attempted to discover from the EPA website what its formal position now is. The best I can discover is that on 20 January 2017 they deleted the Climate Change section and all references to climate change across the website[15]. Instead there is a note under the heading "This page is being updated":

> "Thank you for your interest in this topic. We are currently updating our website to reflect EPA's priorities under the leadership of President Trump and Administrator Pruitt[16]. If you're looking for an archived version of this page, you can find it on the January 19 snapshot."

The so-called snapshot shows what the website used to look like, with a warning that this is no longer the current position.

In April this year it was reported[17] that the attorney-generals for fifteen states, led by New York and California, are suing the EPA for

[15] www.epa.gov/climatechange
[16] Scott Pruitt resigned as EPA Administrator in July 2018
[17] https://psmag.com/environment/fifteen-states-suing-the-epa-for-violating-the-clean-air-act

violating the Clean Air Act, by ignoring its legal duty to control methane emissions from oil and gas emissions in the United States. We await developments with interest.

Robert Carnwath