

Climate Justice and the Global Pact
Judicial Colloquium on Climate Change and the Law in Lahore, Pakistan
Lord Carnwath, Justice of The Supreme Court
26 February 2018

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

¹ Co-authored by Diana Shelton and Alexandre Kiss.

https://www.elaw.org/system/files/UNEP_judicial_handbook_enviro_law_.pdf

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 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 Bank-i-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”.

² <https://www.eufje.org>

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; and 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 International Union for Conservation of Nature (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

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.

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” - Article 13). The Global Pact could build on the same model.

A striking example of how national judges 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 Shah,⁸ 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 working programme, leading to its recent final report following the successful completion of the main phases of its work.

In my own country, the United Kingdom, we are perhaps not so adventurous in terms of legal remedies. But new approaches are being considered, as appears from a very recent

⁷ WP No 25501/2015

⁸ Recently elevated to the Pakistan Supreme Court.

judgment by Mr Justice Garnham in the *ClientEarth* case. This is the case brought by that campaigning group 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 Justice Garnham 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 It will be interesting to see how the case develops.

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:

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

“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.”

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 can 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 electromagnetic 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

¹³ Human Rights Case No.15-K of 1992

¹⁴ Cf *Teob's case (Minister of State for Immigration and Ethnic Affairs v Ab Hin Teob)* (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...”

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 –

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

“... 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”.

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 might also provide a basis for national judges, even those less adventurous than in Pakistan, to develop and apply their own laws in 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.