

Human Rights and the Environment

Justice Human Rights Law Conference 2018, London

Lord Carnwath, Justice of The Supreme Court of the United Kingdom

10 October 2018

It took a long time for the right to a healthy environment to be recognised in terms in human rights conventions. The European Convention dating from 1950 does not mention the environment, and later attempts to expand it have been resisted.¹ Nor did the original version of the American Convention on Human Rights, dating from 1969. 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.

The more progressive courts have not found this a problem. Recently, in February 2018, the Inter-American Court of Human Rights issued its Advisory Opinion OC-23/17 at the request of the Republic of Columbia concerning state obligations in relation to the environment. 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. I will come back to the substance of that important decision.

Other courts have gone still further. In the famous *Oposa* case² 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

¹ The more recent EU Charter of Fundamental Rights includes a reference to “Environmental Protection” (art 37), but in very general terms; requiring a “high level” of environmental protection and improvement to be “integrated into the policies of the EU”.and “ensured in accordance with the principle of sustainable development”.

² *Oposa v Factoran* GR No 101083 (SC 30 July 1993)

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)³, 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.”

At a recent conference I attended in Lahore, Dr Parvez Hassan, who had been the successful advocate for the plaintiff, reminded us that the case was argued soon after the signing of the Rio Declaration, a fact which he had deployed with evident effect in his submissions. The Declaration was described in the judgment “as a great binding force... to create discipline among the nations” and as having “its own sanctity and (to) be implemented, if not in letter, at least in spirit”.

The scope of this jurisdiction is well illustrated by the now well-known case of *Leghari v Attorney-General*⁴, 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. The Commission was chaired by the same Dr Hassan, with

³ Human Rights Case No.15-K of 1992

⁴ WP No 25501/2015

interested parties and experts (mostly working pro bono). It has recently submitted its final report following the successful completion of the main phases of its work.

Coming back to Europe, the decisions of the Strasbourg court have to some extent filled a gap by the “greening” of articles 2 and 8⁵. Cases under article 2 tend to be at the extreme end of the scale. For example in *Budayeva and Others v Russia*,⁶ eight people had died in a mudslide. The Court concluded that the Russian state had violated Article 2, by failing to implement land-planning and emergency relief policies in a hazardous area where there was a foreseeable risk to lives.

More relevant to ordinary life are the cases under article 8. The first significant case was *Lopez Ostra v Spain*⁷, 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.

In another early case *Guerra and others v Italy*⁸ the emphasis was on the right to information. The applicants lived a kilometre away from a chemical factory producing fertilisers, where several accidents had occurred, including one in 1976 that allowed a serious escape of pollutants, as result of which 150 people suffered acute arsenic poisoning. The Court held that there had been a violation of Article 8 because the applicants had to wait until 1994 for essential information that would have enabled them to assess the risks they and their families might run if they continued to live in that town. Later cases have underlined the limits of those principles. The leading Grand Chamber case remains *Hatton and Others v United Kingdom* (2002) 34 EHRR 1. The court found that there was no violation of Article 8 where night flights at Heathrow caused regular sleep

⁵ See Alan Boyle, *Human Rights and the Environment: Where Next?* in B. Boer (ed.), *Environmental Law Dimensions of Human Rights* (OUP 2015)

⁶ (2014) 59 EHRR 2

⁷ (1995) 20 EHRR 277

⁸ (1998) 26 EHRR 357

interruptions to the applicants. It disagreed with the Chamber⁹ 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 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. Thus, in *López Ostra*, the waste-treatment plant at issue was illegal in that it operated without the necessary licence, and was eventually closed down... In *Guerra and Others*, the violation was also founded on an irregular position at the domestic level, as the applicants had been unable to obtain information that the State was under a statutory obligation to provide...”

(Interestingly my colleague Lord Kerr, sitting as an adhoc judge, 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.”)

That same issue of fair balance was highlighted in two recent cases on the right to compensation for business losses caused by environmental measures. The first in the Supreme Court was *R (Mott) v Environment Agency* [2018] UKSC 10. The claimant had a leasehold interest in a “putcher rank” fishery on the banks of the Severn. In order to

⁹ [2001] ECHR 565 (Third Section)

reduce exploitation of salmon stocks in the area, the Environment Agency placed severe restrictions on his catches, effectively putting him out of business, but without paying him compensation. The Supreme Court upheld the finding that failure to pay compensation led to a breach of Article 1 of Protocol 1. Although the restrictions were a proper exercise of the Environment Agency's powers in the interests of the protection of the environment, the authority had failed to consider the impact on Mr Mott, and to draw a fair balance. The restriction eliminated at least 95% of the benefit of the right, thus making it closer to deprivation of property than control. As we emphasised in the judgment, it was an exceptional case "because of the severity and the disproportion (as compared to others) of the impact on Mr Mott".

This can be contrasted with the more recent ECHR case of *O'Sullivan McCarthy Mussel Development Ltd v Ireland* (Application no. 44460/16, judgment of 7 June 2018). The applicant fishes for immature mussels ('mussel seed'), in order to cultivate and sell them when developed, a process that took two years. The Irish Government temporarily prohibited mussel seed fishing in 2008 in the harbour where the company operated, after the CJEU found Ireland had failed to fulfil its obligations under two EU Directives. As a result, the company had no mussels to sell in 2010 and lost profit. The Court found there was no violation of Article 1 of Protocol 1. Overall, the company had not suffered a disproportionate burden and the government had ensured a fair balance between the general interests of the community and the protection of individual rights.

It is also clear that article 8 is about the protection of people 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.

With that in mind, I return to the Columbia Advisory 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.¹⁰) What is particularly interesting about the decision is its breadth. 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.

¹⁰ Monica Feria-Tinta and Simon Milnes: *The rise of Environmental Law In International Dispute Resolutions* (2018) Yearbook of International Environmental Law pp 1-18.

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.”

Key aspects of the case are highlighted in the article I have mentioned. The authors comment¹¹:

“It is the court’s first legal pronouncement focusing on state obligations relating to environmental protection under the American Convention on Human Rights (ACHR) and indeed, 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—to cross-border human rights claims arising from transboundary environmental impacts.”

They rightly emphasise the court’s acknowledgement (unfortunately 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

¹¹ *Op cit* p 2

in contemporary law to recognize legal personality, and, therefore, rights, to nature not only in judicial cases but also in constitutional systems”. Indeed the court cites one of my own favourite examples in Bolivia’s 2010 Mother Earth law (Ley de derechos de la Madre Tierra), in which Mother Earth is defined as –

“... the dynamic living system formed by the indivisible community of all life systems and living beings whom are interrelated, interdependent, and complementary, which share a common destiny ...”

For the purpose of protecting and enforcing her rights, Mother Earth is given “the character of a collective subject of public interest ...”

Another potentially important move towards a broader view of environmental rights has been the proposal for a Global Pact for the Environment promoted by Laurent Fabius, President of the Conseil Constitutionnel. He had chaired the negotiations which led to the successful conclusion of the Paris Agreement on Climate Change. Last summer I was one of a group of judges, lawyers and academics from round the world, who were asked to spend a day in Paris reviewing a detailed draft, prepared under the chairmanship of Professor Yann Aguila. The completed text was launched the next day at a big event in the Sorbonne, addressed by such diverse figures as Ban Ki-moon, Mary Robinson, Arnold Schwarzenegger, and finally President Macron. He in turn presented it to the UN General Assembly in September 2017. It is currently being studied by a UN working group. 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”.¹²

¹² <http://pactenvironment.org/aboutpactenvironment/les-raisons-du-pacte/>

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, 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 draft Pact has sparked a lively debate, among lawyers, politicians, judges and academics, as to its content and legal form, and indeed whether it is needed at all. 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. 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.¹³ (I note as an aside that, according to Michael Gove, the Secretary of State responsible for the environment. Brexit has given the UK a “once in a lifetime opportunity” to become environmental leaders¹⁴. Perhaps joining and promoting the Global Pact would be a good start.)

Finally, I must say something about climate change. This week’s report from South Korea is a dramatic reminder of the dangers we face. It is also clear that the Paris Agreement, in spite of its importance, is no more than a first step in the right direction. As the pressures on policy-makers increase, we can expect the courts to be drawn increasingly into the arena. We have already seen a striking example from Pakistan. Closer to home in the Netherlands, we heard yesterday that the Hague Court of Appeal has dismissed the Government’s appeal in the *Urgenda* case, holding 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”.

It is far beyond the scope of this lecture to examine the complex judicial developments in the USA. However, it should not be forgotten that it was the US Supreme Court in the great case of *Massachusetts v Environment Protection Agency* in 2007¹⁵, 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

¹³ *Fishermen and Friends of the Sea v Minister of Planning (Trinidad and Tobago)* [2017] UKPC 37

¹⁴ <https://www.edie.net/news/11/Gove-insists-environmental-standards-will-rise-post-Brexit/>

¹⁵ *Massachusetts v EPA* 549 US 497 (2007)

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.¹⁶

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 website¹⁷. 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 Pruitt¹⁸. 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.

¹⁶ 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>

¹⁷ www.epa.gov/climatechange

¹⁸ Scott Pruitt resigned as EPA Administrator in July 2018

In April this year it was reported¹⁹ that the attorney-generals for fifteen states, led by New York and California, are suing the EPA for 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

10 October 2018

¹⁹ <https://psmag.com/environment/fifteen-states-suing-the-epa-for-violating-the-clean-air-act>