

# **“Using environmental rights to address climate change”**

**A presentation by**

**The Hon. Justice Brian J Preston SC  
Chief Judge of the Land and Environment Court of NSW**

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The first case expressly litigating climate change issues is generally considered to have been brought in 1994 in the Land and Environment Court of New South Wales. An environmental non-governmental organisation, Greenpeace Australia Ltd, appealed against the grant of development consent for the construction of a coal fired power station in the Hunter Valley on the ground of the adverse effect of the greenhouse gas emissions on climate change.<sup>1</sup> Since then, litigation raising climate change issues has increased in the number and types of cases and the countries and jurisdictions in which the litigation has been brought. An emerging feature of more recent litigation is the use of some type of environmental right as the basis of the claim. The environmental rights invoked include the right of the public under the public trust doctrine, constitutional rights, particularly the right to life and the right to a clean and healthy environment, and more generally, human rights. I will survey this litigation based on environmental rights.

Despite Australia’s early lead on climate litigation, there is a noticeable lack of Australian litigation in the area of environmental rights. This is partly due the absence of a bill or charter of rights in the *Australian Constitution*. The Honourable Murray Wilcox AO QC, who is honoured by this seminar, has long been an advocate for a constitutionally entrenched Australian Charter of Rights. In 1991, Murray Wilcox took extended leave from the Federal Court to spend three months at Harvard University researching this topic. The result of this research was his 1993 book, *An Australia Charter of Rights*, in which he recommended the introduction of a right to life, liberty and security in Australia.<sup>2</sup>

More recently, Murray Wilcox has contributed as a member of the Australian Panel of Experts on Environmental Law (APEEL). In its 2017 report, ‘Blueprint for the Next

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\* Chief Judge, Land and Environment Court of New South Wales.

<sup>1</sup> *Greenpeace Australia Ltd v Redbank Power Company Pty Ltd and Singleton Council* (1994) 86 LGERA 143.

<sup>2</sup> Murray R Wilcox, *An Australia Charter of Rights* (The Law Book Company Limited, 1993).

Generation of Australian Environmental Laws',<sup>3</sup> APEEL called for Commonwealth environmental law reform, including the introduction of a statutory right to a safe, clean and healthy environment. APEEL advocated for Australian law that reflects "the role of humanity as a trustee of the environment and its common resources".<sup>4</sup>

### **Rights under public trust doctrine**

Public rights to access and use common natural resources and the duty of governments to protect these common resources and public rights have formed the basis of several international cases on climate change, which have sought to enforce the doctrine of the public trust.

The public trust doctrine has its origins in Roman law, specifically in the property concept of *res communis*. These are things which, by their nature, are part of the commons that all humankind has a right in common to access and use, such as the air, running water, the sea and the shores of the sea, and that cannot be appropriated to private ownership. Ownership of these common natural resources is vested in the state as public trustee of a public trust for the benefit of the people. The state, as trustee, is under a fiduciary duty to deal with the trust property, being the communal natural resources, in a manner that is in the interests of the general public, who are the beneficiaries of the trust.<sup>5</sup> The source of this duty can be the common law, statute law or constitutional law.

Climate change litigants have sought to rely upon the public trust doctrine as a foundation for enforcing an obligation on governments and enterprises to mitigate greenhouse gas emissions. To do so, litigants have had to argue that the common natural resources held in trust on behalf of the public include the natural resource of the atmosphere.

Much of the atmospheric public trust litigation has been in the United States. The first was *Kanuk v State of Alaska*.<sup>6</sup> The plaintiffs, Alaskan children, claimed that the State of Alaska had violated the public trust doctrine under the Alaskan Constitution (Article VIII) by failing to take steps to protect the atmosphere from the effects of climate change. The Court upheld the plaintiffs' standing to bring the proceedings and the justiciability of the plaintiffs' claims for a declaratory judgment that the atmosphere was a public trust resource. However, the Court found these claims failed to present an actual controversy appropriate for judicial determination. The Court noted that "past application of public trust principles has been as a restraint on

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<sup>3</sup> APEEL, 'Blueprint for the Next Generation of Australian Environmental Law' (Report, August 2017).

<sup>4</sup> APEEL, 'Blueprint for the Next Generation of Australian Environmental Law' (Report, August 2017) 15.

<sup>5</sup> See J L Sax, "The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention" (1970) 68 *Michigan Law Review* 471.

<sup>6</sup> 335 P 3d 1088 (Sup Ct Alaska, 2014).

the State's ability to restrict public access to public resources, not as a theory for compelling regulation of those resources".<sup>7</sup>

In *Sanders-Reed v Martinez*,<sup>8</sup> the New Mexico Court of Appeal affirmed the trial court decision and ruled that courts could not require the State of New Mexico to regulate greenhouse gas emissions based on the public trust doctrine. The common law doctrine was not an available cause of action because a public trust obligation to protect natural resources, including the atmosphere, had been incorporated into the New Mexico Constitution (Article XX, Section 21) and the State *Air Quality Control Act*, and the common law must now yield to the governing statutes.

In *Chernaik v Brown*,<sup>9</sup> the youth plaintiffs argued that the public trust doctrine compelled the State of Oregon to take action to establish and enforce limitations on greenhouse gas emissions to reduce carbon dioxide in the atmosphere. The Oregon Circuit Court ruled that the State's public trust doctrine applied only to submerged and submersible lands and not the atmosphere. The Court questioned "whether the atmosphere is a 'natural resource' at all, much less one to which the public trust doctrine applies". The Court further declared that the State does not have a "fiduciary obligation to protect submerged and submersible lands from the impacts of climate change", but rather the public trust doctrine restricts the ability of the State to entirely alienate such lands. The plaintiffs appealed the decision. The appealed decision is still pending.

The breakthrough in atmosphere public trust litigation came in the case of *Juliana v USA*. The plaintiffs, including Juliana, were children organised by an environmental non-governmental organisation, Our Children's Trust. The plaintiffs sued the US government in the US District Court for the District of Oregon in 2015. The plaintiffs sought relief from government action and inaction in regulating carbon dioxide pollution, allegedly resulting in catastrophic climate change and causing harm to the plaintiffs. The action was founded upon the alleged violation of the plaintiffs' explicit and implicit constitutional rights and the public trust doctrine. The US government and various industry interveners sought to summarily dismiss the action on various grounds, including that the public trust doctrine "does not provide a cognizable federal cause of action" because the Supreme Court had foreclosed such actions against the Federal government. A magistrate judge in the District of Oregon recommended that the Court decline to dismiss the action. The magistrate judge found that given the Environment Protection Agency's duty to protect public health from airborne pollutants and the Federal government's deeply engrained public trust duties, there was a sufficient possibility that the public trust doctrine provided "some

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<sup>7</sup> *Kanuk v State of Alaska* 335 P 3d 1088 (Sup Ct Alaska, 2014) 1102; Sabin Center for Climate Change Law, "Kanuk v. Alaska" (Climate Change Litigation Database, 2014) <<http://climatecasechart.com/case/kanuk-v-alaska/>>.

<sup>8</sup> *Sanders-Reed v Martinez* 350 P 3d 1221 (NM Ct App, 2015).

<sup>9</sup> (Or Cir Ct, 16-11-09273, 11 May 2015).

substantive due process protections for some plaintiffs within the navigable water areas of Oregon”.<sup>10</sup>

On 10 November 2016, the District Court declined to summarily dismiss the action. In so doing, the Court adopted the findings and recommendation of the magistrate judge on 8 April 2016. The Court rejected the defendant’s four arguments that the public trust doctrine was inapplicable. The Court held that:

- (1) it was unnecessary to determine whether the atmosphere is a public trust asset because the plaintiffs also alleged public trust violations in connection with the territorial sea;
- (2) the public trust doctrine is not limited to State governments, the fFederal government also holds public assets in trust for the people;
- (3) public trust obligations cannot be legislated away; and
- (4) the plaintiffs’ public trust rights both predate the Constitution and are secured by it (in particular, the Fifth Amendment provides the right of action).<sup>11</sup>

The federal defendants and the interveners both filed a motion for the Court to certify an interlocutory appeal of the order of 10 November 2016. The federal defendants also filed a motion to stay the litigation. The motions were denied on all of the six grounds of appeal.<sup>12</sup> On the political question, the Court “emphatically rejected” the suggestion that the topic of climate change is a non-justiciable political question. On the breadth of claims and vast scope of relief sought, the Court held that this is hypothetical and ignores the trial court’s ability to fashion reasonable remedies based on evidence. On due process, the Court held that any appeal would be premature, because the taking of evidence will flesh out the issues, and the case involves a mixed question of law and fact that mandates an opportunity to develop the record. On the public trust, the Court held that the federal public trust doctrine has not been extinguished (despite being relatively dormant since the 19<sup>th</sup> century). On standing, the Court held that the defendants admitted that anthropogenic climate change is harming the environment, making it increasingly less habitable and causing deleterious effects on physical and mental health. These are concrete, particularised, actual or imminent injuries to the plaintiffs and the fact that vast numbers of people will suffer these injuries does not negate standing. On the controlling question of law, the Court noted that this ground applies to purely legal questions. It does not apply in the present case where there is a mixed question of law and fact.

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<sup>10</sup> *Juliana v USA* (D Or, 6:15-cv-1517-TC, 8 April 2016).

<sup>11</sup> *Juliana v USA* 217 F Supp 3d 1224 (D Or, 2016).

<sup>12</sup> *Juliana v USA* (D Or, 6:15-cv-1517-TC, 1 May 2017).

The District Court granted motions by three trade groups to withdraw from the lawsuit and set the trial to begin on 5 February 2018.<sup>13</sup> This did not occur because of an appeal by the Federal government.

In June 2017, the Federal government petitioned the Ninth Circuit of the Court of Appeals for a writ of mandamus to review the District Court's denial of the motions to dismiss the plaintiffs' case. On 7 March 2018, the Court of Appeals denied the petition, finding: "The issues that the defendants raise on mandamus are better addressed through the ordinary course of litigation".<sup>14</sup> The Court rejected the defendants' argument that mandamus was their only means of obtaining relief from potentially burdensome discovery because there had not been any discovery orders or motions compelling discovery in the case thus far.<sup>15</sup> The Court also found that holding the trial would not threaten the separation of powers as it would not unreasonably burden President Trump or executive branch officials and agencies who were listed as parties to the proceeding.<sup>16</sup>

Another case upholding the atmospheric public trust is *Foster v Washington Department of Ecology*.<sup>17</sup> A group of eight children, including Foster, petitioned the Washington Department of Ecology to adopt a proposed rule mandating a particular State greenhouse gas emission cap that was consistent with current scientific assessments of the measures required to prevent global warming, on the basis that such a rule would better protect their rights to a healthy climate and atmosphere. The Department denied their petition and refused to change the way it made its decisions on greenhouse gas emission targets. The petitioners brought proceedings to judicially review the Department's denial of their petition.

In November 2015, the Washington Superior Court recognised that climate change is a threat to the survival of the children and future generations and that it is necessary to reduce the emission of greenhouse gases which contribute to global warming.<sup>18</sup> The Court reaffirmed that the Washington State Constitution imposes a "constitutional obligation to protect the public's interest in natural resources held in trust for the common benefit of the people of the State".<sup>19</sup> The Court rejected the Department's argument that the public trust doctrine was restricted to "navigable waters" and did not apply to the atmosphere. "The navigable waters and the atmosphere are intertwined and to argue a separation of the two...is nonsensical".<sup>20</sup>

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<sup>13</sup> *Juliana v USA* (D Or, 6:15-cv-1517-TC, 28 June 2017).

<sup>14</sup> *Juliana v USA* (9<sup>th</sup> Cir No. 17-71692, 7 March 2018) 9-10.

<sup>15</sup> *Juliana v USA* (9<sup>th</sup> Cir No. 17-71692, 7 March 2018) 10.

<sup>16</sup> *Juliana v USA* (9<sup>th</sup> Cir No. 17-71692, 7 March 2018) 13.

<sup>17</sup> (Wash Super Ct, 14-2-25295-1-SEA, 19 November 2015) 5.

<sup>18</sup> *Foster v Washington Department of Ecology* (Wash Super Ct, 14-2-25295-1-SEA, 19 November 2015) 5.

<sup>19</sup> *Foster v Washington Department of Ecology* (Wash Super Ct, 14-2-25295-1-SEA, 19 November 2015) 8.

<sup>20</sup> *Foster v Washington Department of Ecology* (Wash Super Ct, 14-2-25295-1-SEA, 19 November 2015) 8.

The Court recognised a right to the preservation of a healthful and pleasant atmosphere.<sup>21</sup>

Nevertheless, the Court held that the Department was fulfilling its public trust obligations because it was engaging in rulemaking to address greenhouse gas emissions. Because the Department had begun considering a cap on emissions, although after the suit was brought, the Court could not rule that the Department was failing to fulfil its duty to exercise the statutory authority to establish greenhouse gas emission standards. As its process of rulemaking in this respect was not arbitrary or capricious, it was beyond the Court's judicial review power to assess the merits of the Department's approach.<sup>22</sup> In particular, the Court could not order the Department to use the best science available.<sup>23</sup>

In February 2016, however, the Department withdrew its proposed rule for mitigating greenhouse gas emissions. The plaintiff relisted the matter before the Court. Given these "extraordinary circumstances", the Court vacated parts of its earlier order and ordered the Department to both establish a greenhouse gas emission rule by the end of 2016 and recommend this rule to the legislature in 2017.<sup>24</sup> The Court noted "the reason I'm doing this is because this is an urgent situation. This is not a situation that these children can wait on. Polar bears can't wait, the people of Bangladesh can't wait. I don't have jurisdiction over their needs in this matter, but I do have jurisdiction in this court, and for that reason I'm taking this action".<sup>25</sup>

On 1 June 2016, the Department released a draft rule setting limits on greenhouse gas emissions. The applicants argued that the draft rule was contrary to the Court's order because it was based on old emissions data and did not require sufficient greenhouse gas emission reduction.

On 15 June 2016, the Department filed a notice of appeal.<sup>26</sup> On 5 September 2017, the Washington Court of Appeals upheld the Department's appeal. The Court of Appeals held that the Superior Court had abused its discretion in revising its own judgment and granting the applicants' motion for relief from the November 2015 judgment for three reasons. First, the "extraordinary circumstance" relied upon to do so, the Department's inaction on climate change, was already considered in the

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<sup>21</sup> *Foster v Washington Department of Ecology* (Wash Super Ct, 14-2-25295-1-SEA, 19 November 2015) 9.

<sup>22</sup> *Foster v Washington Department of Ecology* (Wash Super Ct, 14-2-25295-1-SEA, 19 November 2015) 6, 9-10.

<sup>23</sup> *Foster v Washington Department of Ecology* (Wash Super Ct, 14-2-25295-1-SEA, 19 November 2015) 4.

<sup>24</sup> *Foster v Washington Department of Ecology* (Wash Super Ct, 14-2-25295-1, 29 April 2016) 19 and *Foster v Washington Department of Ecology* (Wash Super Ct, 14-2-25295-1, 16 May 2016) 2.

<sup>25</sup> *Foster v Washington Department of Ecology* (Wash Super Ct, 14-2-25295-1, 29 April 2016) 20.

<sup>26</sup> Sabin Center for Climate Change Law, "Washington Department of Ecology Said It Would Appeal Order Requiring Final Greenhouse Gas Rule by End of Year" (Climate Law Update No 89, 16 September 2017) <<http://blogs.law.columbia.edu/climatechange/2016/09/16/updates-to-the-climate-change-litigation-charts-august-and-september-2016/>>.

original judgment.<sup>27</sup> Second, the Court of Appeals held that the Superior Court had not found any violation by the Department of its statutory obligations to adopt rules establishing air quality standards.<sup>28</sup> Third, the Superior Court improperly applied the rule that provides the power to revise its previous judgment as the Court impermissibly granted affirmative relief in addition to the relief in the earlier order which is not allowed under the rule.<sup>29</sup>

In *Funk v Wolf*,<sup>30</sup> the youth plaintiffs challenged the alleged failure of the Commonwealth of Pennsylvania and its various departments and agencies to develop and implement a comprehensive plan to regulate greenhouse gas emissions consistent with its obligations under the Environmental Rights Amendment of the Pennsylvania Constitution (Article 1, Section 27). The plaintiffs alleged that the Commonwealth, as public trustee of Pennsylvania's public natural resources under the Environmental Rights Amendment, had failed in its fiduciary duty to conduct various studies, investigations and other analysis relating to "how the Commonwealth's obligations as trustee of the public trust are to be fulfilled in 'light of climate change and/or increasing concentration of CO<sub>2</sub> and GHGs in the atmosphere'".<sup>31</sup> The plaintiffs also alleged that the Commonwealth had failed to exercise its duty of promulgating regulations or issuing executive orders to limit greenhouse gas emissions in a comprehensive manner.

The Pennsylvania Commonwealth Court found that the Environmental Rights Amendment does not disturb the legislative scheme and the actions requested by the plaintiffs had to be required by legislation. The plaintiffs did not identify any legislation or regulation that mandated the Commonwealth of Pennsylvania to perform the specific actions sought in the writ. The Court held that under the existing legislative scheme, there was no mandatory duty to conduct the requested studies, promulgate or implement the requested regulation or issue the requested executive orders. Instead, such decisions are either discretionary acts of government officials or a task for Parliament. Accordingly, mandamus did not lie to compel the Commonwealth to make those decisions.

There has also been some litigation based on the atmospheric public trust in other countries. In *Environment People Law v The Cabinet of Ministers of Ukraine*,<sup>32</sup> administrative law proceedings were brought challenging the alleged failure of the Ukrainian government to adequately regulate greenhouse gas emissions. The applicant alleged that the government had failed to uphold its obligation to effectively regulate "air", as a natural resource constitutionally recognised as being owned by the Ukrainian people, "on behalf of and for the people of Ukraine". The Court partially

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<sup>27</sup> *Foster v Washington Department of Ecology* (Wash Ct Apps, 75374-6-1, 5 September 2017) 13.

<sup>28</sup> *Foster v Washington Department of Ecology* (Wash Ct Apps, 75374-6-1, 5 September 2017) 9.

<sup>29</sup> *Foster v Washington Department of Ecology* (Wash Ct Apps, 75374-6-1, 5 September 2017) 15.

<sup>30</sup> 144 A 3d 228 (Penn Comm Ct, 2016).

<sup>31</sup> *Funk v Wolf* 144 A 3d 228, 237 (Penn Comm Ct, 2016).

<sup>32</sup> (District Administrative Court of Kyiv, 2011).

upheld the applicant's claim by directing the government to prepare and release information on its progress in realising Ukraine's Kyoto Protocol obligations. However, the Court declined to grant the other relief sought by the applicant and this was confirmed on appeal.

In *Segovia v Climate Change Commission*,<sup>33</sup> amongst other causes of action, the applicants alleged that the government of the Philippines "violated" its obligation, as public trustee of "the life-source of land, air and water", to the people of the Philippines by failing to adequately mitigate climate change and by "using [an] immodest amount of fossil fuel". Key issues included whether or not the petitioners had standing and whether a writ of Kalikasan (a remedy available for the violation of the constitutional right to a balanced and healthy ecology) and/or continuing mandamus should be issued. The petition was dismissed. The Supreme Court held the petitioners had standing under the Rules of Procedure for Environmental Cases as citizens and taxpayers, applying *Oposa v Factoran*.<sup>34</sup> However, the Court held that the petitioners had failed to demonstrate that the respondents unlawfully refused to implement or neglected relevant laws, executive or administrative orders. The petitioners also failed to demonstrate that there was a causal link between the alleged unlawful acts or omissions of the government and a violation of the constitutional right to a balanced and healthful ecology of the magnitude required by petitions of this nature.

In *Ali v Federation of Pakistan*,<sup>35</sup> amongst other causes of action, the applicant alleges that the government of Pakistan has, in permitting the development of a particular coalfield and the consequent greenhouse gas emissions, violated the "doctrine of public trust". The applicant argues that carbon dioxide pollution "not only harms and continuously threatens their [Pakistani children's] mental and physical health, quality of life and wellbeing, but also infringes upon their constitutionally guaranteed 'Right to Life' and the inalienable 'Fundamental Rights'" of future generations. Although the Registrar of the Supreme Court initially dismissed the petition, the Supreme Court overturned this decision and the decision on the substantive hearing of the petition is pending.

In *Pandey v India*,<sup>36</sup> a nine year old applicant has petitioned the National Green Tribunal of India to order the Indian government to make directions on climate change. The applicant submits that "without action by governments around the world to immediately start reducing carbon dioxide (CO<sub>2</sub>) emissions and other greenhouse gases (GHGs) that cause climate change, in line with achieving global climate stabilisation, children of today and the future will disproportionately suffer the

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<sup>33</sup> (GR No. 211010, 7 March 2017, Supreme Court of the Philippines).

<sup>34</sup> (1993) 296 Phil 694.

<sup>35</sup> (Supreme Court of Pakistan, Constitutional petition filed 5 April 2016).

<sup>36</sup> (National Green Tribunal of India, Original Application No. 187 of 2017, Petition filed 25 March 2017).



dangers and catastrophic impacts of climate destabilisation and ocean acidification".<sup>37</sup> The applicant argues that the Indian government was obliged to take greater action to mitigate the adverse effects of climate change pursuant to the public trust doctrine and India's commitments under the Paris Agreement, and domestic environmental laws and climate change policies. The petition also cites principles of intergenerational equity, the precautionary principle and sustainable development. The applicant argues that while the Indian government had announced several initiatives to combat climate change, no effective action has been taken. The petition has yet to be heard.

### **Constitutional environmental rights**

Constitutions or statutes may provide for certain rights, such as a right to life or right to a clean and healthy environment. Such rights may provide a basis for climate change litigation.

In his book, *An Australian Charter of Rights*, Murray Wilcox recommended the introduction of a right to life, liberty and security in Australia.<sup>38</sup> He suggested that the wording of this right should be similar to Section 7 of the Canadian Charter of Rights and Freedoms, which Canadian Courts have used to strike down legislation that unacceptably infringed these rights.<sup>39</sup> As I will discuss, in cases litigating climate change and air pollution, plaintiffs have frequently invoked the right to life as the basis of their claim.

### ***Rights affected by climate change***

A recent climate change litigation based on human rights was *Asghar Leghari v Federation of Pakistan*.<sup>40</sup> Pakistan had adopted two climate related policies, the National Climate Change Policy 2012 and the Framework for Implementation of Climate Change Policy (2014-2030). However, the Pakistan government had not implemented those policies. The petitioner submitted to the Lahore High Court that the government's inaction offended his fundamental rights (the right to life, including the right to a healthy and clean environment, the right to human dignity, the right to property and the right to information), which are to be read with the constitutional principles of democracy, equality, social, economic and political justice, and the international environmental principles of sustainable development, the precautionary principle, environmental impact assessment, inter- and intra-generational equity and the public trust doctrine.

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<sup>37</sup> *Pandey v India* (National Green Tribunal of India, Original Application No. 187 of 2017, Petition filed 25 March 2017) page 2-3.

<sup>38</sup> Murray R Wilcox, *An Australia Charter of Rights* (The Law Book Company Limited, 1993) 260.

<sup>39</sup> *Canada Act 1982* (UK) c 11, sch B pt I; see, eg, *Re B. C. Motor Vehicle Act* [1985] 2 SCR 486 and *Morgentaler v The Queen* [1988] 1 SCR 30.

<sup>40</sup> (Lahore High Court, WP No 25501/2015, 4 September 2015) and *Asghar Leghari v Federation of Pakistan* (Lahore High Court, WP No 25501/2015, 14 September 2015).

The Court upheld the petitioner's claim that the government's inaction in implementing the Policy and the Framework offended his fundamental human rights. By way of remedy, the Court ordered on 14 September 2015 the establishment of a Climate Change Commission to effectively implement the Policy and the Framework. The Court assigned 21 members to the Commission from various government Ministries and Departments and ordered that it file interim reports as and when directed by the Court. The Court said that: "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 Commission submitted to the Court a report dated 16 January 2016, which included 14 findings and 16 major recommendations. In the orders of 18 January 2016, the Court commended the work of the Commission; observed that through the Commission's process of examining and reporting on the Policy and the Framework, "modest progress" had been made in achieving their objectives and goals;<sup>41</sup> ordered that the "priority items under the Framework" be achieved by the Punjab government by June 2016;<sup>42</sup> tasked the Commission with investigating further achievable "short term actions" under the Framework;<sup>43</sup> directed the Punjab government to seriously investigate the funding requirements of climate change action and "allocate a budget for climate change in consultation with" the Commission;<sup>44</sup> and directed the relevant media regulatory authority to consider "granting more prime time for the awareness and sensitisation on the issue of climate change".<sup>45</sup>

The Commission submitted a supplemental report on 24 February 2017, recommending various actions including priority actions, and a further supplemental report on 24 January 2018 on the implementation of priority actions. The Commission submitted that 66% of the priority items of the Framework had been completed due to the effort made by the Commission.<sup>46</sup> The Commission recommended that, in this circumstance, responsibility for implementing the balance of the Framework could be left to the government. On 25 January 2018, the Lahore High Court agreed and dissolved the Climate Change Commission and instead

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<sup>41</sup> *Asghar Leghari v Federation of Pakistan* (Lahore High Court, WP No 25501/2015, 18 January 2016) [3].

<sup>42</sup> *Asghar Leghari v Federation of Pakistan* (Lahore High Court, WP No 25501/2015, 18 January 2016) [4].

<sup>43</sup> *Asghar Leghari v Federation of Pakistan* (Lahore High Court, WP No 25501/2015, 18 January 2016) [4].

<sup>44</sup> *Asghar Leghari v Federation of Pakistan* (Lahore High Court, WP No 25501/2015, 18 January 2016) [5].

<sup>45</sup> *Asghar Leghari v Federation of Pakistan* (Lahore High Court, WP No 25501/2015, 18 January 2016) [6].

<sup>46</sup> Recorded in *Ashgar Leghari v Federation of Pakistan* (Lahore High Court, WP No 25501/2015, 25 January 2018) [13]-[19].

constituted a Standing Committee on Climate Change to assist and ensure the continued implementation of the Policy and Framework.<sup>47</sup>

In *Juliana v USA*, the atmospheric public trust litigation referred to earlier, the plaintiffs' also sought declaratory relief that government action and inaction in regulating carbon dioxide pollution is resulting in catastrophic climate change and violating the plaintiffs' constitutional rights to life and equal protection and the implicit constitutional right to a stable climate. The plaintiffs sought an order that the government prepare and implement an enforceable national greenhouse gas emissions reduction plan. The US government and various industry interveners sought to summarily dismiss the action on the grounds that the action was non-justiciable and constituted an invalid constitutional claim. A magistrate judge recommended that the Court decline to dismiss the action, because it had not been shown that the issues in the proceedings raised non-justiciable political questions or that the constitutional grounds of challenge had insufficient basis in law or fact.<sup>48</sup>

On 10 November 2016, the US District Court confirmed the magistrate judge's recommendation to decline to summarily dismiss the proceedings. In rejecting the defendants' argument that the proceedings raised non-justiciable issues, the Court held that the critical issue in the proceedings – whether the defendants have violated the plaintiffs' constitutional rights – was “squarely within the purview of the judiciary”.<sup>49</sup> The plaintiffs challenged affirmative government action, such as leasing land and issuing permits allowing fossil fuel development, under the due process clause of the Fifth Amendment to the US Constitution, which bars the Federal government from depriving a person of “life, liberty or property” without “due process” of law.

The Court noted that the applicable level of judicial scrutiny of affirmative government action under the due process clause depends on the right affected. “The default level of scrutiny is rational basis, which requires a reviewing court to uphold the challenged governmental action so long as it ‘implements a rational basis of achieving a legitimate governmental end’”.<sup>50</sup> Where however, the government infringes a “fundamental right” a reviewing court applies strict scrutiny. “Substantive due process ‘forbids the government to infringe certain “fundamental” liberty interests *at all* no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest’”.<sup>51</sup> The parties noted, and the Court agreed, that the government's affirmative actions would survive rational basis review. The plaintiffs' case therefore depended on whether the government's actions infringed a fundamental right. The Court noted that: “[f]undamental liberty rights include both

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<sup>47</sup> *Ashgar Leghari v Federation of Pakistan* (Lahore High Court, WP No 25501/2015, 25 January 2018) [24]-[26].

<sup>48</sup> *Juliana v USA* (D Or, 6:15-cv-1517-TC, 8 April 2016) 14.

<sup>49</sup> *Juliana v USA* 217 F Supp 3d 1224, 1241 (D Or, 2016).

<sup>50</sup> *Juliana v USA* 217 F Supp 3d 1224, 1248 (D Or, 2016).

<sup>51</sup> *Juliana v USA* 217 F Supp 3d 1224, 1248-1259 applying *Reno v Flores* 507 US 292, 302 (1993).

rights enumerated elsewhere in the constitution and rights and liberties which are either (i) 'deeply rooted in this Nation's history and tradition' or (2) 'fundamental to our scheme of ordered liberty'.<sup>52</sup>

The Court found that: "the right to a climate system capable of sustaining human life is fundamental to a free and ordered society. Just as marriage is the 'foundation of the family', a stable climate system is quite literally the foundation 'of society, without which there would be neither civilization nor progress'".<sup>53</sup> Such a stable climate system is a necessary condition to exercising other rights to life, liberty and property.<sup>54</sup> The Court was cautious in how it framed the fundamental right. It was not a right to freedom from any pollution or any climate change. Rather, it is a right to a climate system capable of sustaining human life. The Court stated:

"In framing the fundamental right at issue as the right to a climate system capable of sustaining human life, I intend to strike a balance and to provide some protection against the constitutionalization of all environmental claims. On the one hand, the phrase 'capable of sustaining human life' should not be read to require a plaintiff to allege that governmental action will result in the extinction of humans as a species. On the other hand, acknowledgment of this fundamental right does not transform any minor or even moderate act that contributes to the warming of the planet into a constitutional violation. In this opinion, this Court simply holds that where a complaint alleges governmental action is affirmatively and substantially damaging the climate system in a way that will cause human deaths, shorten human lifespans, result in widespread damage to property, threaten human food sources, and dramatically alter the planet's ecosystem, it states a claim for a due process violation. To hold otherwise would be to say that the Constitution affords no protection against a government's knowing decision to poison the air its citizens breathe or the water its citizens drink. Plaintiffs have adequately alleged infringement of a fundamental right".<sup>55</sup>

As noted earlier, on 7 March 2018, the Ninth Circuit Court of Appeals denied the defendants application for a writ of mandamus to review the District Court's decision. The District Court will fix in April 2018 a date for the final hearing of the proceedings.

In *Re Application of Maui Electric Company*,<sup>56</sup> the Sierra Club challenged the Hawai'i Public Utilities Commission's decision to deny the organisation the right to participate in proceedings before the Commission on an application for a power purchase agreement between an electric utility company and an electricity provider. The

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<sup>52</sup> *Juliana v USA* 217 F Supp 3d 1224, 1249 (D Or, 2016).

<sup>53</sup> *Juliana v USA* 217 F Supp 3d 1224, 1250 (D Or, 2016) citing amongst others *Minors Oposa v Secretary of the Department of Environment and Natural Resources* 22 ILM 173, 187-188.

<sup>54</sup> *Juliana v USA* 217 F Supp 3d 1224, 1250 (D Or, 2016).

<sup>55</sup> *Juliana v USA* 217 F Supp 3d 1224, 1250 (D Or, 2016).

<sup>56</sup> 408 P 3d 1 (Haw Sup Ct, 2017).

agreement was with an energy producer that relied on the burning of coal and petroleum in its operations and has been charged with violations of the State's visible emissions standards.<sup>57</sup> Article XI, Section 9 of the Hawai'i Constitution guarantees "the right to a clean and healthful environment, as defined by laws relating to environmental quality". Article I, Section 5 of the Constitution states "[n]o person shall be deprived of life, liberty or property without due process of law". The Sierra Club submitted that under Article XI, Section 9 of the Constitution it had a protectable property interest in a clean and healthful environment, that the Commission's decision to approve the power purchase agreement affected this property interest and that, in accordance with Article I, Section 5 of the Constitution, it should have been afforded a due process hearing due to the risk of deprivation of this property interest.<sup>58</sup> The Intermediate Court of Appeals dismissed Sierra Club's petition for lack of jurisdiction. However, on appeal, the Supreme Court of Hawai'i (with two Judges dissenting) determined to grant the petitioners a writ of certiorari, remanding the case to the Intermediate Court for further proceedings.

The Court held that a protectable property interest, under the due process clause, is simply "a benefit to which the claimant is legitimately entitled",<sup>59</sup> or "a benefit – tangible or otherwise – to which a party has 'a legitimate claim of entitlement'".<sup>60</sup> The Court held that the right to a clean and healthful environment relied on by the Sierra Club is a substantive right guaranteed by Article XI, Section 9 of the Constitution. Article XI, Section 9 is "is self-executing, and it establishes the right to a clean and healthful environment 'as defined by laws relating to environmental quality'".<sup>61</sup> The Court held "[t]his substantive right is a legitimate entitlement stemming from and shaped by independent sources of state law, and is thus a property interest protected by due process".<sup>62</sup> The Court noted that the substantive right under Article XI, Section 9 "is defined by existing laws relating to environmental quality". The Court considered that Chapter 269 of the Hawai'i Revised Statutes (HRS), which includes the duties and operations of the Commission in regulating public utilities, is a law relating to environmental quality within the meaning of Article XI, Section 9. The Court observed that HRS § 269-6b makes it mandatory for the Commission, when exercising its duties, to recognise the need to reduce reliance on fossil fuels and explicitly consider the levels and effect of greenhouse gas emissions. HRS § 269-27.2 concerns the utilisation of electricity generated from non-fossil fuels and Part V prescribes renewable portfolio standards. The Court found that "[t]hese regulations

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<sup>57</sup> *Re Application of Maui Electric Company* 408 P 3d 1, 17 (Haw Sup Ct, 2017).

<sup>58</sup> *Re Application of Maui Electric Company* 408 P 3d 1, 5 (Haw Sup Ct, 2017).

<sup>59</sup> *Re Application of Maui Electric Company* 408 P 3d 1, 12 (Haw Sup Ct, 2017), applying *Pele Def. Fund v Puna Geothermal Venture* 881 P 2d 1210, 1214 (1994).

<sup>60</sup> *Re Application of Maui Electric Company* 408 P 3d 1, 12 (Haw Sup Ct, 2017), applying *Board of Regents of State Colleges v Roth* 408 US 564, 577 and *Sandy Beach Def. Fund v City Council of Honolulu* 773 P 2d 250, 260 (1989).

<sup>61</sup> *Re Application of Maui Electric Company* 408 P 3d 1, 13 (Haw Sup Ct, 2017), applying *City of Hawai'i v Ala Loop Homeowners* 235 P 3d 1103, 1127 (2010).

<sup>62</sup> *Re Application of Maui Electric Company* 408 P 3d 1, 13 (Haw Sup Ct, 2017).

would appear to be precisely the type of ‘laws relating to environmental quality’ that article XI, section 9 references”.<sup>63</sup> The Court concluded: “[w]e therefore conclude that HRS Chapter 269 is a law relating to environmental quality that defines the right to a clean and healthful environment under article XI, section 9 by providing that express consideration be given to reduction of greenhouse gas emissions in the decision-making of the Commission. Accordingly, we hold that Sierra Club has established a legitimate claim of entitlement to a clean and healthful environment under article XI, section 9 and HRS Chapter 269”.<sup>64</sup>

The Court then considered what procedures due process required the Commission to follow in determining whether to approve the power purchase agreement. The Court found the Commission’s approval of the power purchase agreement would adversely affect the Sierra Club’s member’s interest in a clean and healthful environment as defined by HRS Chapter 269.<sup>65</sup> The Court disagreed that only those members adjacent to the fossil fuel plant would be able to demonstrate a protectable property interest: “those who are adversely affected by greenhouse gas emissions produced by the burning of fossil fuels may not necessarily be limited to those who live in the areas immediately adjacent to the source of the emissions”.<sup>66</sup>

Accordingly, the Commission should have afforded the Sierra Club the opportunity to participate by way of a contested case hearing by the Commission to consider the impacts of approving the power purchase agreement on the Sierra Club’s member’s right to a clean and healthful environment.<sup>67</sup>

In *Greenpeace v Norwegian Ministry of Petroleum and Energy*,<sup>68</sup> Greenpeace and Nature and Youth brought proceedings against the Norwegian government seeking review of the government’s decision to grant oil drilling licences in the Arctic. The applicants argued that the grant of drilling licences was contrary to the government’s obligations under the Paris Agreement and the right to a healthy and safe environment for future generations granted by the Norwegian Constitution. The Oslo District Court found that the right to a healthy environment is protected by the Norwegian Constitution, and that the government must protect that right. However, the Court found that the government had not breached the Constitution in granting the licences because it had fulfilled the necessary duties required before making its

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<sup>63</sup> *Re Application of Maui Electric Company* 408 P 3d 1, 14-15 (Haw Sup Ct, 2017).

<sup>64</sup> *Re Application of Maui Electric Company* 408 P 3d 1, 16 (Haw Sup Ct, 2017).

<sup>65</sup> *Re Application of Maui Electric Company* 408 P 3d 1, 18 (Haw Sup Ct, 2017).

<sup>66</sup> *Re Application of Maui Electric Company* 408 P 3d 1, 20 (Haw Sup Ct, 2017).

<sup>67</sup> *Re Application of Maui Electric Company* 408 P 3d 1, 18, 21 (Haw Sup Ct, 2017).

<sup>68</sup> (Oslo District Court, No. 16-166674TVI-OTIR/06, 4 January 2018); the judgment in Norwegian is available here: Greenpeace, “Decision made in case against Arctic Oil in Norway: Right to a healthy environment acknowledged” (Press Release, 4 January 2018)

<<https://www.greenpeace.org/international/press/11705/decision-made-in-case-against-arctic-oil-in-norway-right-to-a-healthy-environment-acknowledged/>>;

decision.<sup>69</sup> Greenpeace announced on 5 February 2018 that it is appealing the decision to the Supreme Court.<sup>70</sup>

In *Friends of the Irish Environment CLG v Fingal County Council*,<sup>71</sup> an environmental non-governmental organisation challenged the Fingal County Council's decision to approve a five year extension to the planning permission it had granted to the Dublin Airport Authority to construct a new runway. The plaintiff argued that the runway would cause an increase in greenhouse gas emissions and hasten climate change. The High Court found that the plaintiff lacked standing to participate in the extension decision in order to bring the claim. However, the Court recognised the "personal constitutional right to an environment" under the Irish Constitution: "A right to an environment that is consistent with the human dignity and well-being of citizens at large is an essential condition for the fulfilment of all human rights. It is an indispensable existential right that is enjoyed universally, yet which is vested personally as a right that presents and can be seen always to have presented, and to enjoy protection, under Article 40.3.1 of the Constitution. It is not so Utopian a right that it can never be enforced. Once concretised into specific duties and obligations, its enforcement is entirely practicable".<sup>72</sup>

The Court went on to say that although concrete duties and responsibilities were yet to be defined, the recognition of the right, as in this case, was the first step in its enforcement. Nevertheless, the Court found that the County Council did not breach the right to an environment by extending the planning permission.

In *Salas, Dino and others v Salta Province*,<sup>73</sup> indigenous communities in Argentina challenged the issuing of logging permits for native forests on the basis that the decision to issue these permits contravened constitutional rights, including the right to a healthy and balanced environment (Article 41). In upholding the *amparo* action, the Argentinian Supreme Court of Justice held, inter alia, that the clearing of one million hectares of forest posed a threat of serious damage "because it may substantially change the climate of the entire region, thus affecting not only current inhabitants, but also future generations".

On 29 January 2018, a group of 25 plaintiffs, between 7 and 26 years old, filed a tutela, a special action under the Colombian Constitution used to protect

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<sup>69</sup> A summary of the judgment in English is available here: Sabin Center for Climate Change Law, "Greenpeace Nordic Ass'n and Nature and Youth v. Ministry of Petroleum and Energy" (Climate Change Litigation Database, 2018) <<http://climatecasechart.com/non-us-case/greenpeace-nordic-assn-and-nature-youth-v-norway-ministry-of-petroleum-and-energy/>>

<sup>70</sup> Greenpeace, "Greenpeace and Nature and Youth take the Norwegian Government to the Supreme Court" (Press Release, 5 February 2018) <<https://www.greenpeace.org/international/press/14527/greenpeace-and-nature-and-youth-take-the-norwegian-government-to-the-supreme-court/>>.

<sup>71</sup> (High Court of Ireland, No 344 JR, 21 November 2017).

<sup>72</sup> *Friends of the Irish Environment CLG v Fingal County Council* (High Court of Ireland, No 344 JR, 21 November 2017) [264].

<sup>73</sup> (CSJN (Arg), S1144.XLIV, 26 March 2009).

fundamental rights, before the Superior Tribunal of Bogota. The plaintiffs come from 17 cities and municipalities in Colombia, all of which are significantly threatened by climate related impacts. The plaintiffs demanded that the relevant Colombian Ministries and Agencies protect their rights to a healthy environment, life, food and water. They claimed that rampant deforestation in the Colombian Amazon and climate change are threatening these rights. They sought orders that the government halt deforestation in the Colombian Amazon. The Colombian Amazon is the region with the highest deforestation rate in the country, which contributes to climate change by releasing carbon dioxide into the atmosphere. In 2016, deforestation in Colombia increased by 44%, 39% of which was concentrated in the Amazon. The plaintiffs argued that all ecosystems are connected. For example, the Amazonian rainforest directly relates to the drinking water enjoyed by the 8 million inhabitants of Bogota because rainfall from the Amazon feeds the páramo, an alpine tundra ecosystem that provides most of Colombia's drinking water. The plaintiffs claimed that deforestation is threatening the fundamental human rights of the plaintiffs who are young today and who will face the impacts of climate change for the rest of their lives.<sup>74</sup>

On 12 February 2018, the Tribunal denied the plaintiffs' claim.<sup>75</sup> The plaintiffs appealed this decision to the Supreme Court of Justice which, on 5 April 2018, upheld the appeal.<sup>76</sup> The Supreme Court held that deforestation in the Amazon poses an "imminent and serious" threat to current and future generations due to its impact on climate change.<sup>77</sup> The Court found that this impact attacks the plaintiffs' fundamental rights to life, water, clean air and a healthy environment as well as the human rights of future generations. The Court found that the Amazon is an "entity subject of rights" and that the Colombian government has a duty to "protect, conserve, maintain and restore" the Amazon.<sup>78</sup> The Court made orders across three level of government. The Court ordered the Federal government to propose a plan to reduce deforestation in the Colombian Amazon and to establish an "intergenerational pact for the life of the Colombian Amazon" with the plaintiffs, scientists and

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<sup>74</sup> Dejusticia, "Colombian Youth File the First Climate Change lawsuit in Latin America" (29 January 2018) <<https://www.dejusticia.org/en/colombian-youth-file-first-climate-change-lawsuit-latin-america/>>;

<sup>75</sup> Dejusticia, "Colombian Youth File the First Climate Change lawsuit in Latin America" (29 January 2018) <<https://www.dejusticia.org/en/colombian-youth-file-first-climate-change-lawsuit-latin-america/>>; Superior Tribunal of Bogota, no. 11001-22-03-000-2018-00319-00.

<sup>76</sup> Dejusticia, "In historic ruling, Colombian Court protects youth suing the national government for failing to curb deforestation" (5 April 2018) <<https://www.dejusticia.org/en/en-fallo-historico-corte-suprema-concede-tutela-de-cambio-climatico-y-generaciones-futuras/>>; Supreme Court of Justice of Colombia, no. 11001-22-03-000-2018-00319-01.

<sup>77</sup> Dejusticia, "In historic ruling, Colombian Court protects youth suing the national government for failing to curb deforestation" (5 April 2018) <<https://www.dejusticia.org/en/en-fallo-historico-corte-suprema-concede-tutela-de-cambio-climatico-y-generaciones-futuras/>>.

<sup>78</sup> Dejusticia, "In historic ruling, Colombian Court protects youth suing the national government for failing to curb deforestation" (5 April 2018) <<https://www.dejusticia.org/en/en-fallo-historico-corte-suprema-concede-tutela-de-cambio-climatico-y-generaciones-futuras/>>.



community members with the aim of reaching zero deforestation.<sup>79</sup> The Court ordered municipal governments to update their Land Management Plans and to propose a plan for reaching zero deforestation. The Court also ordered regional environmental authorities to put forward a plan for reducing deforestation.

### ***Rights affected by air pollution***

Courts may order governments to take air pollution mitigation measures to remedy contraventions of environmental and public health related constitutional rights. Strong parallels can be drawn between the approach taken by courts in adjudicating constitutional law based air pollution proceedings and the role of courts in adjudicating climate change litigation. In particular, the history of court orders directing governments to implement air pollution mitigation measures may foreshadow similar court orders in future climate change litigation. Additionally, air pollution mitigation related court orders can have ancillary benefits for climate change mitigation: the action taken to reduce other air pollutants may also reduce greenhouse gases. It is instructive, therefore, to consider air pollution litigation based on violation of constitutional rights.

In *Farooque v Government of Bangladesh*,<sup>80</sup> a public interest lawyer claimed that, while the Bangladesh government had legislated to regulate industrial air pollution, there was no evidence to show “any” effective implementation of the legislation. The failure of the government to implement the law contravened the constitutional right to a “qualitative life among others, free from environment hazards”.<sup>81</sup> Consequently, the Bangladesh Supreme Court ordered the government to “adopt adequate and sufficient measures to control pollution”.<sup>82</sup> In a subsequent case, *Farooque v Government of Bangladesh*,<sup>83</sup> the same petitioner challenged the failure of government to adequately regulate vehicle generated air pollution. While the government had both legislated and taken some policy action to control vehicular air pollution, the petitioner submitted that the government had failed to safeguard the “fundamental rights guaranteed under the Constitution”<sup>84</sup> of citizens by allowing vehicular pollution to pose a “deadly threat... to city dwellers”.<sup>85</sup> The Supreme Court ordered the government to undertake “urgent preventative measures” to control the

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<sup>79</sup> Dejusticia, “In historic ruling, Colombian Court protects youth suing the national government for failing to curb deforestation” (5 April 2018) <<https://www.dejusticia.org/en/en-fallo-historico-corte-suprema-concede-tutela-de-cambio-climatico-y-generaciones-futuras/>>.

<sup>80</sup> (Supreme Court of Bangladesh, WP No 891 of 1994, 15 July 2001).

<sup>81</sup> *Farooque v Government of Bangladesh* (Supreme Court of Bangladesh, WP No 891 of 1994, 15 July 2001) 17.

<sup>82</sup> *Farooque v Government of Bangladesh* (Supreme Court of Bangladesh, WP No 891 of 1994, 15 July 2001) 19.

<sup>83</sup> *Farooque v Government of Bangladesh* (2002) 22 BLD (HCD) 345 (Supreme Court of Bangladesh).

<sup>84</sup> *Farooque v Government of Bangladesh* (2002) 22 BLD (HCD) 345 (Supreme Court of Bangladesh)

[5].

<sup>85</sup> *Farooque v Government of Bangladesh* (2002) 22 BLD (HCD) 345 (Supreme Court of Bangladesh)

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“emission of hazardous black smoke” including phasing out “2 stroke 3 wheelers” and enforcing international petroleum standards.<sup>86</sup>

In *Prakash Mani Sharma v HMG Cabinet Secretariat*,<sup>87</sup> the Supreme Court of Nepal held that the Nepal government had a constitutional public health obligation to reduce vehicular air pollution. To remedy the inadequate implementation of air pollution reduction measures, the Court ordered the government to “enforce essential measures” within two years for the protection of public health from smoke emitting from buses, minibuses, tractors and trucks, including small tempos and taxis, in the Kathmandu Valley. In a later case brought by the same petitioner, *Prakash Mani Sharma v HMG Cabinet Secretariat*,<sup>88</sup> the Supreme Court of Nepal held that the government’s constitutional obligations to “protect the health of the people”<sup>89</sup> and work towards “a pollution-free environment”<sup>90</sup> required the government to address brick kiln generated air pollution. Thus, the Court directed the government to close brick kilns proximate to tourist areas and schools and ensure the installation of pollution controlling devices in kilns elsewhere.

In *Gbemre v Shell Petroleum Development Company Nigeria Limited*,<sup>91</sup> the Nigerian Federal High Court ordered Shell to cease polluting by way of gas flaring on the basis that this gas flaring contravened the constitutional right to a “clean, poison-free, pollution-free healthy environment”.

In *Mansoor Ali Shah v Government of Punjab*,<sup>92</sup> it was uncontested that the constitutional right to life required the Punjab government to protect citizens in Lahore from vehicular air pollution. The Punjab government submitted that it was, however, “making all efforts to cure air pollution”.<sup>93</sup> In earlier proceedings, the Lahore High Court had ordered the establishment of a commission to report on how to address vehicular pollution. The parties consented to the Court directing the government to implement a suite of air pollution reduction measures recommended by the Commission, including the phasing out of “dirty” buses and “Autocab Rickshaws”, the creation of bus lanes, the enforcement of the ban on registering “two stroke” rickshaws and the establishment of air quality and fuel standards.

In *Smoke Affected Residents Forum v Municipal Corporation of Greater Mumbai*,<sup>94</sup> in order to safeguard the constitutional right to health of the residents of Mumbai, the

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<sup>86</sup> *Farooque v Government of Bangladesh* (2002) 22 BLD (HCD) 345 (Supreme Court of Bangladesh) [15].

<sup>87</sup> (Supreme Court of Nepal, WP No 3440/2053, 11 March 2003).

<sup>88</sup> (Supreme Court of Nepal, WN No 3027/2059, 10 December 2007).

<sup>89</sup> *Prakash Mani Sharma v HMG Cabinet Secretariat* (Supreme Court of Nepal, WN No 3027/2059, 10 December 2007) 10.

<sup>90</sup> *Prakash Mani Sharma v HMG Cabinet Secretariat* (Supreme Court of Nepal, WN No 3027/2059, 10 December 2007) 7.

<sup>91</sup> (2005) AHRLR 151 Federal High Court of Nigeria.

<sup>92</sup> (2007) CLD 533 Lahore High Court.

<sup>93</sup> *Mansoor Ali Shah v Government of Punjab* (2007) CLD 533 Lahore High Court [4].

<sup>94</sup> 2003 (1) Bom CR 450 (Bombay High Court).

Bombay High Court ordered the City of Mumbai to implement air pollution mitigation measures “to protect future generations”, including phasing out, or converting, a particular taxi model and old three wheeler vehicles.

In *Vardhaman Kaushik v Union of India*,<sup>95</sup> the National Green Tribunal of India made many orders directing the Indian government to take particular actions to address air pollution. The Tribunal held that the orders were a necessary intervention to uphold the constitutional right of citizens to a decent and clean environment and to correct the “casual approach which all concerned stakeholders are dealing with the air pollution of Delhi”. The Tribunal stated that it “cannot permit” the people of Delhi to be exposed to air pollution that causes “serious environmental pollution and public health hazard”. The Tribunal, amongst other orders, directed the government to: “ensure free flow of traffic in Delhi”, “enhance public transport facilities”, “install air filters” in “public places”, prioritise bypass highways, install “catalytic convertors” in government vehicles, “increase the forest area” around Delhi, prohibit the burning of garbage and ensure that construction materials in trucks are covered. In making orders on 10 November 2016 to address unprecedented levels of air pollution in Delhi and surrounding areas, the National Green Tribunal observed that the level of air pollution “[v]iewed from any rational angle...is disastrous”.<sup>96</sup> To ensure the proper implementation of previous air pollution orders in these and related proceedings, the Tribunal ordered the constitution of a centralised committee (consisting of various departmental secretaries) and state level committees. The Tribunal charged these committees with preparing a “complete action plan for environmental emergency as well as prevention and control of air pollution” to implement previous air pollution judgments and orders of the Court.<sup>97</sup> Moreover, the Tribunal ordered that if air pollution reaches a certain “environmental emergency threshold”, the government must take seven emergency measures, including the measure of stopping all “construction, demolition activities and transportation of construction material”.

In *Court (on its own motion) v State of Himachal Pradesh*,<sup>98</sup> the National Green Tribunal made a series of orders directing the State government to take action to redress the environmental degradation of the ‘Crown Jewel’ of Himachal Pradesh – the eco-sensitive Rohtang Pass – caused by inadequately regulated tourism related development and activities, including vehicular air pollution. Of the various tourism related impacts, the Tribunal noted that Black Carbon (primarily unburnt fuel, including from vehicular pollution) has been “the major causative factor for rapid melting of glacier in the north-western Himalaya” and a significant contributor to global warming. On 6 February 2014, the Tribunal, after articulating the importance

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<sup>95</sup> (National Green Tribunal of India, Original Application No 21 of 2014, 4 December 2014).

<sup>96</sup> *Vardhaman Kaushik v Union of India* (National Green Tribunal of India, Original Application No 21 of 2014, 4 December 2014) p. 9.

<sup>97</sup> *Vardhaman Kaushik v Union of India* (National Green Tribunal of India, Original Application No 21 of 2014, 4 December 2014) p. 17.

<sup>98</sup> (National Green Tribunal of India, Original Application No 237 of 2013).

of the constitutional right to a clean environment, ordered the government to take various actions to reduce vehicular pollution, such as enforcing emissions standards for vehicles and phasing out vehicles more than ten years old. On 9 May 2016, the Tribunal directed the government to submit to the Tribunal a comprehensive status/compliance report relating to the various environmental orders of the Tribunal.<sup>99</sup>

In *M.C. Mehta v Union of India*,<sup>100</sup> there is a 30 year history of court orders compelling Indian governments to take air pollution mitigation measures to comply with public health and environmental constitutional obligations. For example, the Supreme Court of India ordered on 5 April 2002 that diesel buses in Delhi be converted from diesel to cleaner natural gas.<sup>101</sup> On 16 December 2015, the Supreme Court made further orders including, for example, the prohibition of the registration of “luxury” diesel cars and SUVs (with a diesel capacity of 2000 cc and above) in Delhi and requiring the imposition of green taxes/toll-based measures to stop diesel trucks entering, rather than bypassing, Delhi.<sup>102</sup> On 5 January 2016, the Supreme Court ordered that all taxis operating in the National Capital Region be converted to natural gas.<sup>103</sup> On 10 May 2016, the Court prohibited the registration of diesel city taxis.<sup>104</sup> On 12 August 2016, the Court lifted the prohibition it had ordered on 16 December 2015 on the registration of certain diesel cars on the condition that an “environment protection charge” (of 1% of the ex-showroom price of diesel vehicles, with capacity of 2000 cc or greater, sold in Delhi) is levied on the registration of such cars.<sup>105</sup>

## Human rights

Human rights under international conventions and instruments may provide a source for climate change litigation. To date, litigation under the European Convention for the Protection of Human Rights and Fundamental Freedoms has not expressly focused on the impact of climate change on human rights, but rather more generally on the environmental impact of projects and activities on human rights. The European Court for Human Rights (ECtHR) has upheld rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms including the right to life, the right to a fair trial and the right to respect for family and private life. Four cases before the European Court of Human Rights concern the infringement of human rights by air pollution.

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<sup>99</sup> *Court (on its own motion) v State of Himachal Pradesh* (National Green Tribunal of India, Original Application No 237 of 2013, 9 May 2016).

<sup>100</sup> 1987 SCR (1) 819.

<sup>101</sup> *M.C. Mehta v Union of India* 2002 (2) SCR 963.

<sup>102</sup> *M.C. Mehta v Union of India* (Writ Petitions No 817 of 2015, 116 of 2013 and 728 of 2015, 16 December 2015).

<sup>103</sup> *M.C. Mehta v Union of India* (2016) 4 SCC 269.

<sup>104</sup> *M.C. Mehta v Union of India* (Writ Petition No 13029/1985, 10 May 2016)

<sup>105</sup> *M.C. Mehta v Union of India* (Writ Petition No 13029/1985, 12 August 2016).

In *Fadeyeva v Russia*,<sup>106</sup> the applicant alleged that the operation of a steel plant (the largest iron smelter in Russia) in close proximity to her home endangered her health and wellbeing due to the State's failure to protect her private life and home from severe environmental nuisance from the plant, in violation of Article 8 of the Convention. The ECtHR held that while the Convention does not contain a right to nature preservation as such, Article 8 could apply if the adverse effects of the environmental pollution had reached a certain minimum level. This threshold had been reached as the average pollution levels were way over the safe concentrations of toxic elements and local courts had recognised the applicant's right to resettle.<sup>107</sup> The ECtHR held Russia to be in breach of Article 8 and awarded damages and costs.<sup>108</sup> The Court also ordered the Russian government to "take appropriate measures to remedy" her situation. The Court observed that it was not its role to "dictate precise measures which should be adopted by States in order to comply" with their human rights obligations. Nevertheless, in 2007, the ECtHR Department for Execution of Judgments found that Russia had not provided evidence that any appropriate measures had been taken, despite Russia's claims to that effect.<sup>109</sup>

In *Okyay v Turkey*,<sup>110</sup> the applicants sought to stop the operation of three thermal power plants situated in the Aegean region of Turkey. The plants used low quality lignite coal. Sulphur and nitrogen emissions from the sites affected the air quality of a large area, while activities incidental to the plant's operation adversely affected the region's biodiversity. The applicants brought proceedings in local courts seeking to stop the operation of the plants, arguing that the plants did not have the required licences to function lawfully. They relied on the right to a healthy, balanced environment in Article 56 of the Turkish Constitution, as well as provisions of the Environment Act requiring authorities to prevent pollution or ensure its effects are mitigated. The local courts upheld their appeal, finding that the plants did not have the required licences and ordered the plants to stop operating. The Turkish authorities refused to enforce the local courts' decisions. The applicants complained to the ECtHR that their right to a fair hearing under Article 6 of the Convention had been breached by the authorities' failure to enforce the local courts' decisions to halt the operation of the power plants. The ECtHR found Turkey had violated Article 6 and awarded the applicants compensation.<sup>111</sup>

*Giacomelli v Italy*<sup>112</sup> involved a complaint about noise and emissions from a waste treatment plant that processed hazardous waste. The applicant, who lived 30 metres from the plant, sought damages and to have the facility closed down. She

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<sup>106</sup> [2005] ECHR 376; (2007) 45 EHRR 10.

<sup>107</sup> *Fadeyeva v Russia* [2005] ECHR 376; (2007) 45 EHRR 10 [80], [84], [86].

<sup>108</sup> *Fadeyeva v Russia* [2005] ECHR 376; (2007) 45 EHRR 10 [134], [138], [149]- [150].

<sup>109</sup> Business & Human Rights Resource Centre, "Fadeyeva v Russia" <<http://business-humanrights.org/en/fadeyeva-v-russia-re-severstal-smelter>>.

<sup>110</sup> (Application No 36220/97, ECHR 2005-VII).

<sup>111</sup> *Okyay v Turkey* (Application No 36220/97, ECHR 2005-VII) [74] – [75], [79].

<sup>112</sup> (Application No 59909/00, ECHR 2006-XII).

complained that the persistent noise and harmful emissions from the plant constituted a severe disturbance of her environment and a permanent risk to her health and home in breach of Article 8 (Right to respect for private and family life) of the Convention.<sup>113</sup> The company operating the plant had been granted an operating licence in 1982 to treat non-hazardous waste and then a further authorisation in 1989 to treat harmful and toxic waste. Neither of these decisions was preceded by appropriate environmental investigation and the company was not required to carry out an environmental impact assessment until 1996. On two occasions the Ministry of the Environment found that the plant's operations were incompatible with environmental regulations. In addition, a Regional Administrative Court had held that the plant's operation had no legal basis and should be suspended immediately. However, the administrative authorities did not at any time order the closure of the facility.<sup>114</sup>

The ECtHR held that Article 8 may apply in environmental cases whether the pollution is directly caused by the State or whether State responsibility arises from the failure to properly regulate private-sector activities. The Court must ensure that a fair balance is struck between the interests of the community and the individual's right to respect of the home and private life.<sup>115</sup> The ECtHR held that this individual right is not confined to concrete or physical breaches, such as unauthorised entry into a person's home, but also those that are not concrete or physical, such as noise, emissions, smells or other forms of interference.<sup>116</sup> After considering the actions of the administrative authorities, the ECtHR concluded that the State did not succeed in striking a fair balance between the interest of the community in having a plant for the treatment of toxic industrial waste and the applicant's effective enjoyment of her right to respect for her home and private and family life.<sup>117</sup> The ECtHR therefore found a violation of Article 8.

In another air pollution case, *MFHR v Greece*,<sup>118</sup> the European Commission of Social Rights held that the Greek government had violated Article 11 of the European Social Charter – the right to protection of health – in failing “to strike a reasonable balance between the interest of persons living in the lignite mining areas and the general interest” in managing and regulating air pollution from lignite mining operations.<sup>119</sup>

Litigation under the American Convention on Human Rights has directly raised the impact of climate change on human rights. In 2005, the Inuit, indigenous people in the Arctic region, filed a petition against the United States alleging human rights

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<sup>113</sup> *Giacomelli v Italy* (Application No 59909/00, ECHR 2006-XII) [68].

<sup>114</sup> *Giacomelli v Italy* (Application No 59909/00, ECHR 2006-XII) [89] – [92].

<sup>115</sup> *Giacomelli v Italy* (Application No 59909/00, ECHR 2006-XII) [82].

<sup>116</sup> *Giacomelli v Italy* (Application No 59909/00, ECHR 2006-XII) [76].

<sup>117</sup> *Giacomelli v Italy* (Application No 59909/00, ECHR 2006-XII) [97].

<sup>118</sup> (European Commission of Social Rights, No 30/05, 6 December 2005).

<sup>119</sup> *MFHR v Greece* (European Commission of Social Rights, No 30/05, 6 December 2005).

violations resulting from the United States' failure to limit its emissions of greenhouse gases and therefore reduce the impact of climate change. The petitioners invoked the right to culture, the right to property, and the right to the preservation of health, life and physical integrity. The Inter-American Commission for Human Rights rejected the petition in 2006 without giving reasons. However, on the request of the petitioners, the Commission agreed to afford the petitioners a hearing of the matter in 2007 but no further judgment has been given.<sup>120</sup>

In 2016, the Colombian government requested the Inter-American Court of Human Rights to issue an opinion on State obligations to the environment arising under Article 1(1) (Obligation to Respect Rights), Article 4(1) (Right to Life) and Article 5(1) (Right to Humane Treatment) of the American Convention of Human Rights, including the obligation of State Parties to prevent environmental harm occurring outside their territory.<sup>121</sup> Of particular concern was the trans-boundary environmental impact of proposed major infrastructure projects in the Caribbean, such as the proposed Nicaraguan canal.

In February 2018, the Court published its opinion of 15 November 2017.<sup>122</sup> The Court found that there is an “irrefutable relationship” between the protection of the environment and human rights because environmental degradation and climate change affect the enjoyment of human rights.<sup>123</sup> The Court found that Article 1 of the Convention obliges State Parties to prevent human rights violations of persons within their territory and outside their territory, where these persons are within the State’s “effective authority or control”.<sup>124</sup> This obligation includes ensuring that actions occurring within a State’s boundaries do not result in human rights violations from environmental harm occurring outside the State’s territory.<sup>125</sup> On State obligations arising under the rights to life and personal integrity in the Convention, the Court concluded that:

- States have the obligation to prevent significant environmental damage, within or outside their territory;
- States must act in accordance with the precautionary principle, for the purposes of protecting the right to life and personal integrity, against possible

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<sup>120</sup> Earthjustice, “Nobel Prize Nominee Testifies about Global Warming”, 1 March 2007, <<http://www.earthjustice.org/news/press/007/nobel-prize-nominee-testifies-about-global-warming.html>>; Hari M. Osofsky, ‘Inuit Petition as a Bridge? Beyond Dialectics of Climate Change and Indigenous Peoples’ Rights’ (2007) 31 *American Indian Law Review* 675.

<sup>121</sup> Republic of Colombia, Request for Advisory Opinion of the Inter-American Court of Human Rights (14 March 2016).

<sup>122</sup> Inter-American Court of Human Rights (Advisory Opinion OC-23/17 of 15 November 2017)

<sup>123</sup> Inter-American Court of Human Rights (Official Summary of Advisory Opinion OC-23/17 of 15 November 2017) 2; Inter-American Court of Human Rights (Advisory Opinion OC-23/17 of 15 November 2017) 21-22.

<sup>124</sup> Inter-American Court of Human Rights (Official Summary of Advisory Opinion OC-23/17 of 15 November 2017) 3.

<sup>125</sup> Inter-American Court of Human Rights (Official Summary of Advisory Opinion OC-23/17 of 15 November 2017) 3.

serious or irreversible damage to the environment, even in the absence of scientific certainty;

- States must regulate, and supervise the activities under their jurisdiction that may cause significant damage to the environment; carry out environmental impact studies when there is a risk of significant damage to the environment; establish a contingency plan, in order to have security measures and procedures to minimize the possibility of major environmental accidents; and mitigate significant environmental damage that would have occurred, even if it had occurred despite preventive actions by the State;
- States have the obligation to cooperate, in good faith, for protection against damage to the environment;
- States must notify the other potentially affected States when they become aware that a planned activity under their jurisdiction could generate a risk of significant transboundary damage and in cases of environmental emergencies, as well as consult and negotiate, in good faith, with States potentially affected by significant transboundary harm;
- States have the obligation to guarantee the right to access information related to possible effects on the environment;
- States have the obligation to guarantee the right to public participation of the persons under their jurisdiction; and
- States have the obligation to guarantee access to justice, in relation to the State obligations for the protection of the environment that have been previously stated in the Opinion.<sup>126</sup>

The emission of greenhouse gases, causing climate change, is a form of transboundary damage.

Human rights commissions in countries can also investigate the impact of climate change on human rights. In *National Inquiry on the Impact of Climate Change on the Human Rights of Filipino People*,<sup>127</sup> a public interest petition was lodged on 12 May 2015 with the Philippines Commission on Human Rights requesting that it investigate the responsibility of 50 large multinational, publicly traded fossil fuel producing corporations for contributing to climate change and thereby allegedly violating various fundamental human rights of the Filipino people. It is alleged that these 50 corporations account for 21.71% of total cumulative carbon dioxide emissions between 1751 and 2010. The petitioners are human rights groups, typhoon victims and other concerned citizens.<sup>128</sup>

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<sup>126</sup> Inter-American Court of Human Rights (Advisory Opinion OC-23/17 of 15 November 2017) 95-96.

<sup>127</sup> (Commission on Human Rights – Philippines, CHR-NI-2016-0003).

<sup>128</sup> Philippines Commission on Human Rights, 'CHR to conduct first hearing investigating possible contribution of carbon to climate change and its impact on human rights' (online) 26 March 2018 <<http://chr.gov.ph/chr-to-conduct-first-hearing-investigating-possible-contribution-of-carbon-to-climate-change-and-its-impact-on-human-rights/>>.



On 4 December 2015, the Commission announced the commencement of the above inquiry and, by 27 July 2016, the Commission had furnished these 47 “carbon majors” with the petition seeking a response within 45 days.<sup>129</sup>

Hearings in the Philippines commenced on 28 March 2018. In his opening statement, the Chairperson of the Commission, Jose Luis Martin “Chito” Gascon, remarked: “Among those who are suffering the most from the effects of climate change is the Philippines. Nowhere has it been more dramatically demonstrated than in November of 2013, when our country was visited by Typhoon Haiyan or Yolanda”.<sup>130</sup> The Commission is expected to release its resolution in early 2019, which may contain recommendations for local and international agencies and a model law to address climate change that could be applied globally. According to Commissioner Roberto Cadiz, who is the Chair of this inquiry, damages cannot be awarded in the course of the inquiry, however the results may be relied on as a foundation for filing subsequent cases.<sup>131</sup>

## Conclusion

At the heart of much of the recent climate change litigation is a call for climate justice. Climate change affects everyone, but it disproportionately affects those who have contributed the least to climate change and those least well placed to respond to the impacts of climate change, including those in developing countries and vulnerable peoples everywhere. In contrast, those who have contributed most to climate change – the enterprises and people with the largest carbon footprints, mostly in the developed countries – are most insulated from climate change and its consequences by their wealth and access to resources.<sup>132</sup>

The response to climate change involves both the mitigation of greenhouse gas emissions that contribute to climate change (by reducing sources and increasing sinks) and adaptation to the impacts of climate change. Striking the right balance between mitigation and adaptation is itself a justice issue. To take strong mitigation now is to limit the need for adaptation in the future. To be weaker on mitigation now is to increase the need for future adaptation. At each end, and along, this mitigation-adaptation spectrum are issues of justice in terms of the distribution of environmental

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<sup>129</sup> John Vidal, ‘World’s largest carbon producers face landmark human rights case’ *Guardian* (online) 28 July 2016 <<https://www.theguardian.com/environment/2016/jul/27/worlds-largest-carbon-producers-face-landmark-human-rights-case>>.

<sup>130</sup> Philippines Commission on Human Rights, ‘PHL at the forefront of seeking climate justice with CHR’s landmark inquiry on the effects of climate change to human rights’ (online) 28 March 2018 <<http://chr.gov.ph/phl-at-the-forefront-of-seeking-climate-justice/>>.

<sup>131</sup> Nicole-Anne C Lagrimas, ‘CHR sets 2019 target for results of landmark rights-based climate change probe’ *GMA News* (online) 12 December 2017 <<http://www.gmanetwork.com/news/news/nation/636263/chr-sets-2019-target-for-results-of-landmark-rights-based-climate-change-probe/story/>>.

<sup>132</sup> International Bar Association, *Achieving Justice and Human Rights in an Era of Climate Disruption* (2014), 2.

benefits and burdens, the procedure for policy and decision making and the recognition given to different people and communities.<sup>133</sup>

Climate change and the responses to it adversely affect environmental and human rights, including rights under the public trust doctrine, constitutional and statutory environmental rights and other human rights. This exacerbates existing inequities and injustices. Climate change litigation is increasingly invoking environmental and human rights to expose and remedy these inequities and injustices. This trend is likely to continue.

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<sup>133</sup> Brian J Preston, 'The adequacy of the law in achieving climate justice – some preliminary comments' (2016) 34(1) *Journal of Energy & Natural Resources Law* 45.