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The Paris Agreement – a Judges' Perspective

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A lot has happened since the excitements of December 2015. The Paris Agreement on Climate Change was an extraordinary event. As I said then, "the global consensus on the reality and urgency of climate change…accepted by… virtually the whole of the world community, (was) surely unprecedented". The recent report by the UN Intergovernmental Panel on Climate Change was all too clear. The Guardian of 8 October, citing this "landmark report by the UN (IPCC)" reported:

> "The world's leading climate scientists have warned there is only a dozen years for global warming to be kept to a maximum of 1.5C, beyond which even half a degree will significantly worsen the risks of drought, floods, extreme heat and poverty for hundreds of millions of people…."

So today the scientific consensus remains as strong as ever. But the political will to take up the challenge is looking more fragmented. President Trump decision to take USA out of the Paris Agreement in 2020 was a potentially serious setback, and there is the possibility of a

similar turn of events in Brazil. Judges may find themselves reluctantly drawn into the arena. It is perhaps timely to look at some of the legal tools that may be available to them, It is useful to start by reminding ourselves of the main features of the Paris Agreement (see the Annex to this paper).

By a happy coincidence the day following the UN report the Hague Court of Appeal published its long awaited appeal decision in the Urgenda case. The court confirmed the decision of the lower court (given in summer 2015) before the Paris Agreement that the Dutch Government was not doing enough to fulfil its responsibilities to counter climate change. The lower court had relied on a duty it found implied in domestic Dutch law. That was symbolically important, but of little relevance to other legal systems. The Court of Appeal took a different approach relying on human rights grounds under the European Convention.

The legal basis was found in article 2 (protection of right to life) and article 8 (protection of private and family life). The court held:

> "In short, the State has a positive obligation to protect the lives of citizens within its jurisdiction under Article 2 ECHR, while Article 8 ECHR creates the obligation to protect the right to home and private life. This obligation applies to all activities, public and non-

public, which could endanger the rights protected in these articles, and certainly in the face of industrial activities which by their very nature are dangerous. If the government knows that there is a real and imminent threat, the State must take precautionary measures to prevent infringement as far as possible…" (para 43)

The court was unimpressed by the State's argument that the doctrine of separation of powers required such issues to be left to the Administration:

"… the Court acknowledges that, especially in our industrialised society, measures to reduce CO2 emissions are drastic and require financial and other sacrifices but there is also much at stake: the risk of irreversible changes to the worldwide ecosystems and liveability of our planet. The State argues that for this reason the system of the separation of powers should not be interfered with, because it is not up to the courts but to the democratically legitimised government as the appropriate body to make the attendant policy choices. This argument is rejected in this case, also because the State violates human rights, which calls for the provision of measures, while at the same time the order to reduce emissions gives the State sufficient room to decide how it can comply with the order."

That decision is subject to possible appeal to the Highest Dutch Court.

Although based on the European Convention, the court's reliance on human rights grounds, and in particular the right to life, brings the case closer to the approach of courts in other parts of the world, notably South Asia, relying on the constitutional protection of the right to life. The best known recent example is the *Leghari* case in 2015 in the High Court of Lahore,[1] in the case of Mr Leghari. He was a farmer whose land was threatened by flooding attributable to climate change. He claimed that the government had failed to implement its own climate change policies. The judge agreed. Having heard evidence from representatives of the relevant Ministries and Provincial Departments, he held that it was clear that nothing had been done on the ground. He founded his jurisdiction on the court's constitutional obligation to protect the fundamental rights of the people to life, health and property. He ordered the establishment of a Climate Change Commission, under the control of the court, to oversee assist the implementation of the policies. The decision was not appealed, and the Government co-operated in the work of the Commission.

[1] *Leghari v Federation of Pakistan* WP 25501/2015

It may be objected that, in so far as the Paris agreement contains legal obligations, they take effect in international not domestic law. In principle that is true. But international commitments are not irrelevant to the development of domestic law, even in common law systems in which treaties do not automatically become part of national law. That idea was given powerful expression in a quite different context by Chief Justice Mason in a famous Australian case, *Minister of State for Immigration v Teoh*[2] concerning obligations under the United Nations Convention on the Rights of the Child. He said:

> "ratification by Australia of an international convention is not to be dismissed as a merely platitudinous or ineffectual act. Rather, ratification of a convention is a positive statement by the executive government of this country to the world and to the Australian people that the executive government and its agencies will act in accordance with the Convention. That positive statement is an adequate foundation for a legitimate expectation, absent statutory or executive indications to the contrary, that administrative decision-makers will act in conformity with the Convention…"

That approach may have particular resonance in the context of the Paris agreement, where the emphasis within a global pact is on national commitments to be supported by domestic measures (see Article 4.2).

[2] (1995) 183 C.L.R. 273 para 34. Its treatment in later English cases is reviewed by Lord Kerr in *R (SG) v Secretary of State for Work and Pensions* [2015] UKSC 16 [2015] 1 WLR 1449, paras 243-6. [2015] 4 All ER 939.

The *Urgenda* and *Leghari* cases show how such commitments can be given effect in national courts through the route of human rights law. In the famous *Oposa* case[3] in 1993, the Philippines Supreme Court described rights to a balanced and healthful ecology as "basic rights" which "predate all governments and constitutions" and "need not be written in the Constitution for they are assumed to exist from the inception of humankind". The court memorably upheld a challenge to the state's policies for granting consents to fell in the countries' virgin forests, brought by some 43 children from all over the Philippines, on behalf of themselves and "generations yet unborn".

More 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". (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.[4])

[3] *Oposa v Factoran* GR No 101083 (SC 30 July 1993

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

What is particularly interesting about the decision is its breadth. Article 11 of the San Salvador Protocol to the Convention 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, and including cross-border liabilities. I quote the official summary:

> "… the Court found that, to respect and ensure the rights to life and personal integrity:
>
> a. States are obligated to prevent significant environmental damages within and outside their territory.
>
> b. To comply with this obligation of prevention, States must regulate, supervise and monitor the activities under their jurisdiction that could cause significant damage to the environment; carry out environmental impact assessments when there is a risk of significant damage to the environment; prepare contingency plans in order to establish safety measures and procedures to minimize the possibility of major environmental disasters, and mitigate any significant environmental

damage that could have occurred, even when this happened despite preventive actions by the State.

c. States must act in keeping with the precautionary principle to protect the rights to life and to personal integrity in the event of possible serious and irreversible damage to the environment, even in the absence of scientific certainty.

d. States are obligated to cooperate, in good faith, to protect against environmental damage.

e. To comply with the obligation of cooperation, when States become aware that an activity planned under their jurisdiction could generate a risk of significant transboundary damage and in cases of environmental emergencies, they must notify other States that could be affected, as well as consult and negotiate in good faith with the States potentially affected by significant transboundary damage.

f. States have the obligation to ensure the right of access to information recognized in Article 13 of the American Convention in relation to possible damage to the environment.

g. States have the obligation to ensure the right to public participation of the persons subject to their jurisdiction, as established in Article 23(1)(a) of the Convention, in the decision-making process and in the issuing of policies that may affect the environment.

h. States have the obligation to ensure access to justice, regarding the state obligations for the protection of the environment previously indicated in this Opinion."

Key aspects of the case are highlighted in the article I have mentioned. The authors comment[5]:

> "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…) 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 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 -

[5] *Op cit* p 2

> "… 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 …"

There are signs also of a similar approach to these issues finding its way into the USA courts, through the so-called "public trust" doctrine. Proponents of this line of thinking were given a boost by a fully-reasoned judgment handed down more than a year ago by the US District Court of Oregon in *Juliana and others v USA* (Case No. 6:15-cv-01517-TC). The plaintiffs were a group of young people aged between 8 and 19, supported by a body called Earth Guardians. They each alleged specific harm due to the effects of climate change. They challenged the Federal Government's failure to take adequate steps to protect them. Judge Aiken dismissed the government's attempt to have the case struck out as disclosing no arguable case. She rejected government arguments that these were "political questions" under the principles set out by the Supreme Court in *Baker v Carr* 369 US 186, 210; or that the plaintiffs lacked standing. As she put it:

> "if the plaintiffs can show as they have alleged, that defendants have control over a quarter of the planet's

> greenhouse gas emissions, and that a reduction in those emissions would reduce atmospheric CO2 and slow climate change, then the requested relief would redress their injuries".

Citing authorities including *Oposa* she held that "the right to a climate system capable of sustaining human life is fundamental to a free and ordered society", and thus protected by the Due Process clause of the Constitution, and by the Public Trust doctrine. A year on attempts by the government to have the case struck out by the appeal court have so far failed, but we are now awaiting a ruling from the Supreme Court.

Meanwhile, it should not be forgotten that it was the US Supreme Court in the great case of *Masschusetts v Environment Protection Agency* in 2007[6], which paved the way to the strong climate change programme initiated by President Obama, and for USA's crucial participation in the Paris negotiations. The Supreme Court decided by 5-4 that the EPA's powers under the Clean Air Act extended to greenhouse gas emissions, such as CO2 emissions from motor vehicles. In the face of unchallenged evidence of a "strong consensus" that global warming threatens a precipitate rise in sea levels by the end of the century, and "severe and irreversible changes to natural ecosystems", the EPA's failure to take any action was held to be "arbitrary and capricious" and therefore unlawful.

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

President Trump may not like the Paris Agreement, but the Supreme Court's ruling for the moment still stands, and with it the holding that failure by the EPA to address the issue of climate change would be a breach of its statutory duties.[7] There are perhaps indications that things may be changing and that the political rhetoric should not always be taken at face-value. The EPA website from January 2017 until very recently had said nothing about its policy on climate change or greenhouse gases, claiming that that part of the site was under reconsideration in the light of the policies of the new administration. That has now changed. It cites a statement by the Acting Administrator Andrew Wheeler dated 17.10.18, welcoming a recent report showing a 2.7% reduction in greenhouse emissions between 2016-2017, said to be due "not to the heavy hand of government" but to "technological breakthroughs in the private sector". The statement added:

> "The Trump Administration has proven that federal regulations are not necessary to drive CO2 reductions. While many around the world are talking about reducing greenhouse gases, the U.S. continues to deliver, and today's report is further evidence of our action-oriented approach."

[7]." https://www.epa.gov/newsreleases/data-shows-decrease-us-greenhouse-gas-emissions-during-trumps-first-year-office

We await further developments in US government policy with interest, and not without some optimism.

Robert Carnwath 29.10.18

Main features of the Paris Agreement

Article 2 states the headline objective of limiting global average temperature to "well below 2°C above pre-industrial levels" and "to pursue efforts to limit the temperature increase to 1.5°C" (art 2). Article 4.1 states the "aim" to achieve this long-term goal through "global peaking of greenhouse gas emissions as soon as possible" and "rapid reductions thereafter in accordance with best available science", so as to achieve "a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century" (art 4.1). In other words, no net increase in greenhouse gases after 2050.

The key individual obligations begin at article 4.2. Each party "*shall* prepare, communicate and maintain successive nationally determined contributions that it intends to achieve", and "*shall* pursue domestic mitigation measures with the aim of achieving the objectives of such contributions" (art 4.2). The language is unequivocally that of a legal duty, but it is a duty of process rather than substance. The content of the NDCs is left to the individual states, not pre-determined. But there is to be progressive improvement and no backsliding. Thus each successive

NDC "will represent a progression beyond the Party's then (NDC)" and "will… reflect its highest possible ambition" in the light of different national circumstances (art 4.3). For developed countries the duty is more specific: they "shall continue taking the lead by undertaking economy-wide absolute emission reduction targets" (art 4.4). Submission of NDCs is to be repeated every five year in accordance with decisions of the Conference of the Parties, and informed by the "global stocktake" under article 14.

In relation to finance, the primary obligation is again placed on developed countries. Again the language of duty. Developed country parties "*shall* provide financial resources to assist developing country parties with respect to both mitigation and adaptation in continuation of their existing obligations under the Convention" (art 9.1); and they "shall biennially communicate indicative quantitative and qualitative information" relating to finance (art 9.5). The agreement itself does not give any figures. But the accompanying decision of the Conference was more specific (para 53). It provided that prior to 2025 the Conference "shall set a new collective quantified goal from a floor of USD 100 billion per year, taking into account the needs and priorities of developing countries".

The agreement also dealt in less peremptory terms with adaptation, recognised as "a key component" of the long-term global response, but where the language uses words like "should" rather than "shall" (art 7)

Critically important are the provisions governing transparency. Here again we return to the language of duties. When communicating their NDCs all parties "*shall* provide the information necessary for clarity, transparency and understanding… (4.8). Article 13 fills in the detail of what is described as "an enhanced transparency framework", designed to feed into the five-yearly "global stocktake" to be undertaken by the Conference of the Parties under article 14, assessing the collective progress towards achieving the long-term goals of the agreement. The first stocktake is to be in 2023.