CLIMATE CHANGE AND THE LAW

Lord Carnwath JSC
Islamic Leaders’ Declaration (August 2015)

“This current rate of climate change cannot be sustained, and the earth’s fine equilibrium (mīzān) may soon be lost. As we humans are woven into the fabric of the natural world, its gifts are for us to savour. But the same fossil fuels that helped us achieve most of the prosperity we see today are the main cause of climate change...”
Kyoto and after

- Specific legally binding emissions targets for the 40 developed countries but not for other major emitters like China.
- USA refuses to ratify, and Canada withdrew.
UK Climate Change Act 2008

- Passed with only five votes against.
- Duty on the Secretary of State to ensure that emissions of greenhouse gases in 2050 80% lower than the 1990 baseline
- Statutory “carbon budgets” for successive five year periods
- Independent expert Climate Change Committee
Adjudicating the future: Climate Change and the Rule of Law

- Conference London September 2015
- Specialist judges from a number of different countries round the world, together with practitioners and academics
- Supported by HM Government, and internationally by the UN Environment Programme, and the Asia Development Bank.
- Details on Kings College website http://www.kcl.ac.uk/law/newsevents/climate-courts/index.aspx
Copenhagen - “A most successful failure”

“At Copenhagen we tried to take a big cathedral dome and dropped it down on to the absence of pillars… obviously the dome crashes. This time we have very strong pillars…” (Christiana Figueres, UNFCCC chief negotiator)
Paris – the way forward

- Planned agreement to cover all (195) countries in the world to limit greenhouse gas emissions to hold global average temperature at no more than 2 degrees above pre-industrial levels.

- A different approach - bottom-up rather than top-down.

- Based on “intended nationally determined contributions” (INDCs), rather than imposed targets.

- Reporting and review mechanisms
Grounds for cautious optimism

- Widespread consensus on the reality of climate change and the need for urgent action to avoid global catastrophe
- Greater business understanding of economic potential or investment in climate-friendly energy within a clear policy framework
- Powerful scientific evidence from IPCC
- Strong lead from the two largest emitters, USA and China
Submitions received from more than almost 180 states, accounting for some 90% of global emissions

Still some way from the reductions necessary to achieve the 2 degree target, but a major step forward
The “Devilish Detail”

- “a protocol, another legal instrument or an agreed outcome with legal force…”
- Room for “legal force from domestic rather than international law”
- Binding limits under international law, or a simple record of the INDCs, with obligation to review and report?
- Critical issues of financial assistance for developing countries
Different ideas

- John Kerry (USA) the agreement is “definitely not going to be a treaty”.
- President Hollande - an agreement without legal force is no agreement at all.
- US State Department briefing – legally binding elements possible, but no legally binding targets for climate emissions.
- Obama administration anxious to avoid anything which could be interpreted as a treaty requiring ratification by a hostile US Senate.
Key cases – *EPA v Massachusetts* (US 2007)

- Held (5-4) that EPA duties to regulate “air-pollutants” under Clean Air Act include greenhouse gases, such as CO2 emissions from motor vehicles.
- Global warming “the most pressing environmental challenge of our time”.
- EPA’s failure to take action “arbitrary and capricious” and therefore unlawful.
- Rejects arguments that US traffic is a small contributor to global emissions.
Mass v EPA “the turning point for USA” (Scott Fulton, President EPI)

- With the stalemate on climate change in the Congress, climate change legislation would have remained elusive.
- With no legislation and no CAA rulemaking, there would have been no cornerstone for the President's climate initiative, no basis for a bilateral deal with China, no foundation for Paris COP commitments.
- “A towering example of the difference that courts can make in the climate change arena”
Urgenda (Hague June 2015)

- Dutch commitment to limit 2020 emissions by 25-40%, compared to 1990
- State’s evidence shows reduction under current plans no more than 14 to 17%
- Court held government’s failure amounted to “unlawful hazardous negligence”
- Climate change “a global problem and requiring global accountability”
- Under appeal - judicial interference with the discretionary power of the government
Leghari v Pakistan (Lahore HC 2015)

- Failure of the government to implement its own National Climate Change Policy
- Jurisdiction based on constitutional obligation to protect the fundamental rights of the people to life, health and property
- Establishment of Climate Change Commission under court control
- Purpose not “adversarial” nor to “put officials on the mat” but to “jump-start” the government’s efforts when they had been “totally dead”
INDCs - the role of the courts

- Nationally determined contributions – unprecedented statements by at least 90% of nations of collective global commitment to tackle climate change
- Ideally embodied in national legislation
- Cases show how, even without legislation, policy commitments can be enforced by the courts
Legitimate expectation?

- Cf Australia ratification of UN Convention on Rights of the Child
- "... a positive statement... to the world and the Australian people that the Executive Government and its agencies will act in accordance with convention. That positive statement is an adequate foundation for a legitimate expectation, absent statutory or executive indications to the contrary..." (Minister for Immigration –v- Teoh [1995] 183 CLR 273)
Risks of judicial activism

- “Courts lack the institutional competence to judge the merits of different policy measures on adaptation/mitigation…”
- Judiciary lacks democratic accountability
- Risks of “jurisprudence of exasperation” responding to executive failure, but resulting in “adhoc, reactive and temporary solutions” which may “paralyse the executive” (Lvanya Rajamani)
Conclusion

- Courts have central role in democratic society governed by the rule of law.
- No single formula. National courts have to develop their own responses to legitimate demands for action, within their own constitutional and legal frameworks.
- Where politicians fail, the public will look to the courts, national and international, to fill the gap.