

Recent climate litigation concerning environmental rights

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Justice Brian J Preston
Chief Judge, Land and Environment Court of NSW



Overview

- Rights under public trust doctrine
- Constitutional environmental rights
- Human rights



Image source: <http://www.greenpeace.org/seasia/multimedia/photo/ASEAN-urged-to-protect-environmental-rights-within-a-strong-human-rights-framework/ASEAN-Environmental-Rights--Human-Rights3/>

Rights under public trust doctrine

- 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 GHG emissions.
- To do so, litigants have had to argue that the natural resources held in trust on behalf of the public includes the 'natural resource' of the atmosphere.

Rights under public trust: Alaska



- *Kanuk v State of Alaska*, 335 P 3d 1088 (Sup Ct Alaska, 2014):
 - Alaskan children’s claim that State had violated public trust doctrine under Alaskan Constitution (Art VIII) by failing to take steps to protect the atmosphere from effects of climate change.
 - Standing and justiciability upheld.
 - Claim seeking declaratory judgment that atmosphere was public trust resource failed to present actual controversy appropriate for judicial determination.
 - Court noted, “past application of public trust principles has been as a restraint on the State’s ability to restrict public access to public resources, not as a theory for compelling regulation of those resources”.

Martinez: New Mexico



Image source: <https://www.ourchildrenstrust.org/meet-the-youth-plaintiffs/>

Rights under public trust: New Mexico

- *Sanders-Reed v Martinez*, 350 P 3d 1221 (NM Ct App, 2015):
 - Affirmed 2013 trial court decision and ruled that Courts could not require the State to regulate GHG 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 New Mexico Constitution (Art XX, s 21) and Air Quality Control Act, and the common law must now yield to the governing statutes.

Rights under public trust:

Oregon

- *Chernaik v Brown* (Or Cir Ct, No. 16-11-09273, 11 May 2015):
 - Action arguing that the public trust doctrine compelled the State of Oregon to take action to **establish and enforce limitations on GHG emissions** to reduce CO₂ in atmosphere.
 - Court ruled that the State's public trust doctrine applied only to submerged and submersible lands, and not to the atmosphere.
 - Court **questioned** “**whether the atmosphere is a ‘natural resource’** at all, much less one to which the public trust doctrine applies”.
 - Court further declared that the State does not have “fiduciary obligation to protect submerged and submersible lands from the impacts of climate change”, only that the public trust doctrine restricts the ability of the State to entirely alienate such lands.
 - The plaintiffs appealed the decision on 7 July 2015. The hearing commenced on 13 September 2016.

Juliana: Oregon



Rights under public trust:

Oregon

- *Juliana v USA* (D Or, No. 6:15-cv-1517-TC, 8 April 2016)
 - Action seeking relief from government action and inaction in regulating CO₂ pollution allegedly resulting in catastrophic climate change and causing harm to the plaintiffs.
 - Action founded upon the alleged violation of the plaintiffs' explicit and implicit constitutional rights and the public trust doctrine.
 - The US government and various industry intervenors 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 has foreclosed such actions against the Federal Government.
 - In recommending that the Court **decline to dismiss the action**, the Judge held that given the EPA's **duty to protect the public health** from airborne pollutants and the government's **deeply ingrained public trust duties**, there was a sufficient possibility that the public trust doctrine provided “some substantive due process protections for some plaintiffs within the navigable water areas of Oregon”.

Rights under public trust: Oregon

- *Juliana v USA* 217 F Supp 3d 1224 (D Or, 2016)
 - The District Court **declined to summarily dismiss the action**, adopting the findings and recommendation of the Magistrate Judge of the Court on 8 April 2016.
 - The Court rejected the defendants four arguments that the public trust doctrine was inapplicable:
 - 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 Federal Government 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).

Rights under public trust: Oregon

Juliana v USA (D Or, No. 6:15-cv-1517-TC, 1 May 2017)

- The Federal Defendants and the Intervenors both filed a motion for the Court to certify an interlocutory appeal of the Order of 10 November 2016. The Federal Defendant also filed a motion to stay this litigation.
- The motions were denied on all of the six grounds of appeal.

Juliana v USA (D Or, No. 6:15-cv-1517-TC, 28 June 2017)

- The federal government appealed the District Court's denial of the motions. The decision is reserved. The trial will not commence until a decision on the petition is made.
- (Source: Our Children's Trust, "Groundbreaking Constitutional Climate Lawsuit Heard Today by Ninth Circuit Court of Appeals" (Press Release, 11 December 2017)
<<https://static1.squarespace.com/static/571d109b04426270152febe0/t/5a2f0729419202739b837643/1513031465995/17.12.11+Juliana+v+US+Press+Release.pdf>>)

Youth Plaintiffs: Washington



Image source: <https://www.ourchildrenstrust.org/washington/>

Rights under public trust: Washington

Foster v Washington Department of Ecology (Wash Super Ct, No. 14-2-25295-1, 19 November 2015)

- Judicial review proceedings challenging the Department's refusal of a public interest petition appealing for it to adopt a proposed rule mandating a particular State GGE cap consistent with scientific assessments of required mitigation.
- The Superior 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'.

Rights under public trust: Washington

- 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.'**
- The Court held that the Department was fulfilling its public trust obligations because it was engaging in rulemaking to address GGEs. 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.
- A subsequent revision of the ruling by the Superior Court to compel rulemaking was overturned on appeal (*Foster v Washington Department of Ecology* (Wash Ct App, 75374-6-1, 5 September 2017)).

Rights under public trust: Pennsylvania

- *Funk v Wolf* 144 A 3d 228 (Penn Comm Ct, 2016)
 - Judicial review proceedings challenging 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 so as to address climate change.
 - The applicants alleged that the Commonwealth, as **public trustee of Pennsylvania's public natural resources** under the Pennsylvania Constitution (Article 1, Section 27) 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 CO₂ and GHGs in the atmosphere”.
 - The applicants also alleged that the Commonwealth had failed to exercise its duty of promulgating regulations or issuing executive orders to limit GHG emissions in a comprehensive manner.

Rights under public trust: Pennsylvania

- The applicants did not identify any legislation or regulation that mandated the Commonwealth 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.

Rights under public trust: Ukraine

- *Environment People Law v The Cabinet of Ministers of Ukraine* (District Administrative Court of Kyiv, 2011)
 - Administrative law proceedings 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 upheld the applicant’s claim by directing the Government to prepare and release information as to the progress made by the Government in realising Ukraine’s Kyoto Protocol obligations.
 - However, the Court declined to grant the other relief sought by the applicant (confirmed on appeal).

Rights under public trust: Philippines

- *Segovia v Climate Change Commission* (GR No. 211010, 7 March 2017, Supreme Court of the Philippines)
 - Amongst other cause of action, the applicants allege 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 include whether or not (1) the petitioners have **standing**; and (2) a **writ of Kalikasan** and/or **continuing mandamus** should be issued.
 - Held: the petition was dismissed:
 - The petitioners had standing under the Rules of Procedure for Environmental Cases as citizens and taxpayers : applied *Oposa v Factoran* (1993)296 Phil 694.
 - The petitioners failed to demonstrate that the respondents unlawfully refused to implement or neglected relevant laws, executive or administrative orders.
 - The petitioners failed to demonstrate that there was a causal link between the alleged unlawful acts or omissions and a violation of the constitutional right to a balanced and healthful ecology of the magnitude required by petitions of this nature.

Rights under public trust: Pakistan

- *Ali v Federation of Pakistan* (Supreme Court of Pakistan, Constitutional petition filed 5 April 2016)
 - 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**”.
 - Applicant argued that CO₂ 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.
 - The Registrar of the Supreme Court initially dismissed the petition however, the Supreme Court overturned this decision and the decision on the substantive hearing of the petition is pending.

Constitutional environmental rights

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

Constitutional environmental rights: Court orders to take climate adaptation action: Pakistan

Asghar Leghari v Federation of Pakistan (Lahore High Court, WP No 25501/2015)

- Pakistan had two climate-related policies for which on-ground implementation had not taken place:
 - *National Climate Change Policy, 2012*
 - *Framework for Implementation of Climate Change Policy (2014-2030)*
- A petitioner submitted to the Lahore High Court that the 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 which include the **international environmental principles** of sustainable development, the precautionary principle, EIA, inter and intra-generational equity and the public trust doctrine (WP No 25501/2015).

Constitutional environmental rights: Court orders to take climate adaptation action: Pakistan

- In order to uphold a constitutional human right, the Lahore High Court ordered the **establishment of a Climate Change Commission** to effectively implement the *National Climate Change Policy* and the *Framework for Implementation of the Climate Change Policy (2014-2030)*. 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.
- “For Pakistan, climate change is no longer a distant threat – we are already feeling and experiencing its impacts across the country and the region.”

Constitutional environmental rights: Court orders to take climate adaptation action: Pakistan

- The Commission submitted to the Court a report dated 16 January 2016, which included 14 findings and 16 major recommendations.
- In his orders of 18 January 2016, Justice Syed Mansoor Ali Shah:
 - commended the work of the Commission and observed that through its process of examining and reporting on the national climate change policy and framework, “modest progress” had been made “in achieving the objectives and goals” of “the Policy and the Framework” (at [3]);
 - ordered that the “priority items under the Framework” be achieved by the Punjab Government by June 2016 (at [4]);

Constitutional environmental rights: Court orders to take climate adaptation action: Pakistan

- (Continued)
 - tasked the Commission with investigating further achievable “short term actions” under the Framework (at [4]);
 - 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 (at [5]);
 - directed the relevant media regulatory authority to consider “granting more prime time for the awareness and sensitisation on the issue of climate change” (at [6]).

Constitutional environmental rights: Court orders to take climate adaptation action: Pakistan

- 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 reporting on **implementation of priority actions**. The Commission submitted that 66% of the priority items of the Framework have been completed due to the effort made by the Commission.
- 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 **constituted a Standing Committee on Climate Change** to assist and ensure the continued implementation of the Policy and Framework.
 - (Recorded in *Ashgar Leghari v Federation of Pakistan* (Lahore High Court, WP No 25501/2015, 25 January 2018) [13]-[19], [24]-[26]).

Constitutional environmental rights: Court orders to take climate mitigation action: Oregon

Juliana v USA (D Or, No. 6:15-cv-1517-TC, 8 April 2016)

- As mentioned above, action seeking declaratory relief that government action and inaction in regulating CO₂ pollution allegedly resulting in catastrophic climate change violating the plaintiffs' constitutional **rights to life** and **equal protection** and **implicit constitutional right to a stable climate**.
- Plaintiffs also sought an order that the government prepare and implement an enforceable national GHG emissions reduction plan.
- The US government and various industry intervenors 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 could not be resolved “without expressing ... [the] respect due to the executive branch in conducting its rule-making authority” or that the constitutional grounds of challenge had insufficient basis in law.

Constitutional environmental rights: Court orders to take climate mitigation action: Norway

Greenpeace v Norwegian Ministry of Petroleum and Energy (Oslo District Court, No. 16-166674TVI-OTIR/o6, 4 January 2018)

- 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.



Image source: <https://newint.org/blog/2017/06/26/green-groups-sue-norway-over-arctic-oil-drilling>

Constitutional environmental rights: Court orders to take climate mitigation action: Norway

Greenpeace v Norwegian Ministry of Petroleum and Energy (cont.)

- The 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 did not find that the government had breached the constitution in granting the licences.
- Greenpeace announced on 5 January 2018 that it would be appealing the decision to the Supreme Court.
- (Sources: 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/>>; 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/>>).

Constitutional environmental rights: Court orders to take climate mitigation action: Argentina

- *Salas, Dino and others v Salta Province* (CSJN (Arg), S1144.XLIV, 26 March 2009):
 - 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”.

Constitutional environmental rights: Court orders to take climate mitigation action: Colombia

- 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 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 action demands that the relevant Colombian Ministries and Agencies protect their rights to a healthy environment, life, food and water. They claim that the rampant deforestation in the Colombian Amazon and climate change are threatening these rights.

Constitutional environmental rights: Court orders to take climate mitigation action: Colombia

- The plaintiffs argued that all ecosystems are connected.
- E.g. the Amazonian rainforest directly relates to the water that 8 million living in the city of Bogota drink since the rainfall that feeds a local ecosystem known as Paramos.
- The plaintiffs claim that **deforestation is threatening the fundamental human right** of the plaintiffs who are young today and who will face the impacts of climate change for the rest of their lives.
- On 12 February 2018, the Superior Tribunal denied the plaintiffs' claim. The plaintiffs plan to appeal the decision.
- (Sources: 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/>> and Uclia Wang, "International Court Ruling: a Safe Climate Is a Human Right" (Climate Liability News, 13 February 2018) <<https://www.climateliabilitynews.org/2018/02/13/inter-american-climate-rights-colombia/>>).

The Colombian Amazon



Image source: <http://www.telegraph.co.uk/travel/destinations/south-america/articles/the-amazon-travel-guide/>

Constitutional environmental rights: Court orders to take climate mitigation action: Ireland

Friends of the Irish Environment CLG v Fingal County Council (High Court of Ireland, No 344 JR, 21 November 2017)

- The applicant challenged the Fingal County Council's decision to approve a five year extension to the planning permission it granted to the Dublin Airport Authority to construct a new runway. Friends of Irish Environment 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.

Constitutional environmental rights: Court orders to take climate mitigation action: Ireland

- The Court said:
 - **“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 Art. 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.”** (at [264])
- 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.
- The High Court held that the County Council did not breach the right to an environment by extending the planning permission.

Constitutional environmental rights: Court orders to mitigate 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: **reducing other air pollutants may also reduce greenhouse gases**.

Constitutional environmental rights: Court orders to mitigate air pollution: Bangladesh

Farooque v Government of Bangladesh (Supreme Court of Bangladesh, WP No 891 of 1994, 15 July 2001)

- While the Government had legislated to regulate industrial pollution, there was no evidence to show “any” effective implementation of this legislation. This failure of the Government to implement the law contravened the **constitutional right to a “qualitative life among others, free from environment hazards”**.
- Consequently, the Court ordered the Government to “adopt adequate and sufficient measures to control pollution”.

Air pollution in Dhaka



Constitutional environmental rights: Court orders to mitigate air pollution: Bangladesh

Farooque v Government of Bangladesh (2002) 22 BLD (HCD) 345 Supreme Court of Bangladesh:

- Public interest proceedings challenging failure of government to adequately regulate vehicle generated air pollution.
- While the Government had both legislated and taken some policy action to control vehicle air pollution, it was submitted that the Government had **failed to safeguard the “fundamental constitutional rights”** of citizens by allowing vehicular pollution to pose a “deadly threat to city dwellers”.
- The Court ordered the Government to undertake “urgent preventative measures” to control the “emission of hazardous black smoke” including phasing out “2 stroke 3 wheelers” and enforcing international petroleum standards.

Constitutional environmental rights: Court orders to mitigate air pollution: Nepal

Prakash Mani Sharma v HMG Cabinet Secretariat (Supreme Court of Nepal, WP No 3440 of 1996, 11 March 2003):

- The Court held that the 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” to reduce vehicular pollution in Kathmandu Valley.

Air pollution in Kathmandu Valley



Constitutional environmental rights: Court orders to mitigate air pollution: Nepal

Prakash Mani Sharma v HMG Cabinet Secretariat (Supreme Court of Nepal, WN 3027 of “2059”, 10 December 2007)

- The Court held that the Government’s **constitutional obligations to “protect the health of the people”** and work towards “a pollution-free environment” required the Government to address brick kiln generated air pollution.
- Thus, the Court directed the Government, for example, to close brick kilns proximate to tourist areas and schools and ensure the installation of pollution controlling devices in kilns elsewhere.

Constitutional environmental rights: Court orders to mitigate air pollution: Nigeria

Gbemre v Shell Petroleum Development Company Nigeria Limited (2005) AHRLR 151 Federal High Court of Nigeria

- The 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”**.



Constitutional environmental rights: Court orders to mitigate air pollution: Pakistan

Mansoor Ali Shah v Government of Punjab (2007) CLD 533
Lahore High Court

- It was uncontested that the **constitutional right to life** required the Government to **protect citizens in Lahore from vehicular pollution**. The Government submitted that it was, however, “making all efforts to cure air pollution”.
- In earlier proceedings, the 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**.

Constitutional environmental rights: Court orders to mitigate air pollution: India

Smoke Affected Residents Forum v Municipal Corporation of Greater Mumbai (Bombay High Court, WP No 1762 of 1999, 2002)

- In order to safeguard the constitutional right to health of the residents of Mumbai, the 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.

Constitutional environmental rights: Court orders to mitigate air pollution: India

Vardhaman Kaushik v Union of India (National Green Tribunal of India, Original Application No 21 of 2014, 14 December 2014)

- In these ongoing proceedings, the Tribunal has made many orders directing the Government to take particular actions to address air pollution.
- These orders have been justified by the Tribunal as 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 has stated that it “cannot permit” the people of Delhi to be exposed to air pollution that causes “serious environmental pollution and public health hazard”.

Constitutional environmental rights: Court orders to mitigate air pollution: India

- The Tribunal has, 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, ensure that construction materials in trucks are covered etcetera.

Constitutional environmental rights: Court orders to mitigate air pollution: India

- 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 “viewed from any rational angle ... is disastrous”.
- To ensure the proper implementation of previous air pollution orders in these and related proceedings, the NGT ordered the **constitution of a centralised committee** (consisting of various departmental secretaries) and **state level committees**.
- The NGT 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 judgements and orders of the Court.
- Moreover, the NGT ordered that if air pollution reaches a certain “**environmental emergency threshold**”, the government shall take 7 emergency measures, including the measure of stopping all “construction, demolition activities and transportation of construction material”.
 - (The Supreme Court also made orders on 10 November 2016 ordering the Central Pollution Control Board to devise an air pollution monitoring strategy – See *The Hindu*, “SC, NGT orders need of the hour, say experts’ (11.11.2016) <http://www.thehindu.com/news/cities/Delhi/sc-ngt-orders-need-of-the-hour-say-experts/article9331582.ece>)

Constitutional environmental rights: Court orders to mitigate air pollution: India

Court (on its own motion) v State of Himachal Pradesh (National Green Tribunal of India, Original Application No 237 of 2013)

- In these ongoing proceedings, the Tribunal has made a series of orders directing the 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 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.
- Most recently, 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.

Melting glacier in Rohtang Pass



Constitutional environmental rights: Court orders to mitigate air pollution: India

M.C. Mehta v Union of India (1987) SCR (1)819 (Sup Ct India)

- 30 year history of Court orders compelling Indian governments to take air pollution mitigation measures to comply with public health and environmental constitutional obligations.
- The Court ordered on 5 April 2002 that **diesel buses** in Delhi be **converted from diesel to cleaner natural gas**.
- On 16 December 2015, the 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.

M. C. Mehta: India



Image source: <http://swachhindia.ndtv.com/a-32-year-old-fight-ganga-crusader-mahesh-chandra-mehtas-quest-to-curb-pollution-and-save-the-river-10251/>

Constitutional environmental rights: Court orders to mitigate air pollution: India

- On 5 January 2016, the Court ordered that all **taxis** operating in the National Capital Region be **converted to natural gas**.
- On 10 May 2016, the Court prohibited the registration of diesel city taxis.
- 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**.

Human rights

- Human rights under international conventions and instruments may provide a source for climate change litigation.
 - European Convention for the Protection of Human Rights and Fundamental Freedoms and European Court for Human Rights (ECtHR)
 - **Right to life:** *Öneryildiz v Turkey* No 48939/99, ECtHR 2004-XII and, by analogy, *MFHR v Greece* No 30/05, ECSR (6 December 2005)
 - **Right to a fair trial:** *Okyay v Turkey* No 36220/97, ECtHR 2005-VII
 - **Right to respect for family & private life:** *Giacomelli v Italy* No 59909/00, ECtHR 2006-XII; *Fadeyeva v Russia* No 55723/00, ECtHR 2005-IV; *Guerra and Others v Italy*, ECtHR 1998-I (19 February 1998); *Lopez Ostra v Spain*, ECtHR judgment of 9 December 1994, Series A no 303.
 - American Convention on Human Rights: *Inuit v USA* and Inter-American Court of Human Rights (Advisory Opinion OC-23/17 of 15 November 2017)

Human rights: Russia

- *Fadeyeva v Russia* No 55723/00, ECtHR 2005-IV
 - The Court held that the Russian Government's **failure to enforce environmental standards or take measures to protect Fadeyeva from steel plant generated air pollution, violated her right to respect for her home and private life**. The Court awarded Fadeyeva damages of €6000 and ordered the Government to **'take appropriate measures to remedy'** her situation. The Court also 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.

Human rights: Russia

- *Fadeyeva v Russia*
 - In 2007, the ECtHR Department for the Execution of Judgments confirmed that Russia had not provided evidence that any appropriate measures had been taken, despite Russia's claims to that effect.
- (Source: Business & Human Rights Resource Centre, 'Fadeyeva v Russia' < <http://business-humanrights.org/en/fadeyeva-v-russia-re-severstal-smelter>>).



Human rights: Greece

MFHR v Greece No 30/05, ECSR (6 December 2005)

- The European Commission of Social Rights held that the Greek Government had **violated** art 11 of the European Social Charter – **the right to protection of health** – **by failing** “to strike a reasonable balance between the interests of persons living in the lignite mining areas and the general interest” **in managing and regulating air pollution** from lignite mine operations.

Human Rights: Inter-American Court of Human Rights: Colombia

- The Inter-American Court of Human Rights (Advisory Opinion OC-23/17 of 15 November 2017) was asked to issue an opinion on a question put to it by the Colombian government asking **whether human rights law applies to large scale infrastructure projects** in the Caribbean.
- In February 2018, the Court published its opinion of 15 November 2017 providing guidance on the role of governments in protecting the environment and human rights.
- The Court cited the Paris Agreement in its decision and the effects of climate change.

Human Rights: Inter-American Court of Human Rights: Colombia

Inter-American Court of Human Rights, Advisory Opinion OC-23/17 of 15 November 2017:

- The Court held that in order to respect and guarantee the rights to life and integrity:
 - 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 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;

Human Rights: Inter-American Court of Human Rights: Colombia

- (Continued):
 - States have the **obligation to cooperate, in good faith, for protection against damage to the environment**;
 - The 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;
 - The States have the **obligation to guarantee the right to public participation** of the persons under their jurisdiction; and
 - The 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 this Opinion.
- The emission of greenhouse gases, causing climate change, is a form of transboundary damage.
- Sources: Uclia Wang, “International Court Ruling: a Safe Climate Is a Human Right” (Climate Liability News, 13 February 2018) <<https://www.climateliabilitynews.org/2018/02/13/inter-american-climate-rights-colombia/>>; Inter-American Court of Human Rights, Advisory Opinion OC-23/17 of 15 November 2017 at pp. 95-96.

Human rights: Philippines

National Inquiry on the Impact of Climate Change on the Human Rights of Filipino People (Commission on Human Rights - Philippines)

- On 12 May 2015, a **public interest petition** was lodged with the Commission 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.
- On 4 December 2015, the Commission announced the commencement of the above inquiry and, on 27 July 2016, the Commission has furnished these 47 “carbon majors” with the above petition seeking a response within 45 days. (Source: John Vidal, ‘World’s largest carbon producers face landmark human rights case’ *Guardian* (online) (28 July 2016)).
- Hearings in the Philippines, North America and Europe will take place in 2018, and the Commission will release its resolution in early 2019, which will contain recommendations for local and international agencies and a model law to address climate change that could be applied globally. According to the chair of the inquiry, Roberto Cadiz, damages cannot be awarded in the course of the inquiry, however the results may be relied on as a foundation for filing subsequent cases. (Source: GMA News, ‘CHR sets 2019 target for results of landmark rights-based climate change probe’ (12 December 2017)).

Conclusion

- As the above survey has revealed, climate change litigation is increasingly invoking environmental and human rights as foundations for the claims.
- This trend is likely to continue.

