# Can lawyers and the law protect the right to a healthy environment?

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## Lord Carnwath, former Justice of The UK Supreme Court[1]


It took a long time for the right to a healthy environment to be recognised in terms in human rights conventions. The European Convention dating from 1950 does not mention the environment, and later attempts to expand it have been resisted.[2] Nor did the original version of the American Convention on Human Rights, dating from 1969. Article 26 merely imposed a general obligation for the progressive development of "economic, social and cultural rights". It was not until the El Salvador Protocol of 1989 that there was included a specific reference to the environment.

The more progressive courts have not found this a problem. For example, 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 conceming state obligations in relation to the environment. The court described a healthy environment as "a fundamental right for the existence of humankind". Although it relied principally on the El Salvador protocol, it also held that this right should be considered to have been implicitly included among the economic, social and cultural rights protected by Article 26.

Other courts have gone still further. 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 govemments 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".

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

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

In the same spirit, the courts of India and Pakistan have taken the lead in interpreting constitutional guarantees of the right to life to include environmental rights. In the words of the Pakistan Supreme Court, in the leading case of *Shehla Zia v WAPDA pld* (1994)[4], the right to life -

> "...does not mean nor can it be restricted only to the vegetative or animal life or mere existence from conception to death. Life indudes all such amenities and facilities which a person born in a free country is entitled to enjoy with dignity, legally and constitutionally."

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

The scope of this constitutional right is well illustrated by the now well-known case of *Leghari v Attorney-General*[5], in the Lahore High Court in 2015. The court was faced with a claim by a farmer whose land was suffering from the effects of climate change, and who charged the Government with failure to implement its own climate change policies. The court upheld the claim, relying again on the constitutional right to life. It ordered the setting up of a Climate Change Commission, to oversee the implementation of those policies under the supervision of the court. The Commission was chaired by the same Dr Hassan, with interested parties and experts (mostly working pro bono).

Coming back to Europe, the decisions of the Strasbourg court have to some extent filled a gap by the "greening" of articles 2 and 8.[6]. Cases under article 2 (right to life) tend to be at the more extreme end of the scale[7]. More relevant to ordinary life are the cases

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[4] Human Rights Case No.15-K of 1992

[5] WP No 25501/2015

[6] See Alan Boyle, *Human Rights and the Environment: Where Nex* in B. Boer (ed.), Environmental Law Dimensions of Human Rights (OUP 2015)

[7] See for example *Budayeva and Others v Russia* (2014) 59 EHRR 2, where a violation of article 2 was found following rhe death of eight people om a preventable mudslide.)

under article 8 (right to private life). The first significant case was *Lopez Ostra v Spain*[8] in which the court upheld a complaint of the government's failure to deal with smells, noise and fumes from a waste-treatment plant situated a few metres away from her home. She had withstood it for three years before having to move. There was a violation of Article 8, as the authorities had not struck a fair balance between the town's economic well-being and the applicant's private life.

In another early case *Guerra v Italy*[9] the emphasis was on the right to information. The applicants lived a kilometre away from a chemical factory producing fertilisers, where several accidents had occurred, including one in 1976 that allowed a serious escape of pollutants, as result of which 150 people suffered acute arsenic poisoning. The Court held that there had been a violation of Article 8, because the applicants had to wait until 1994 for essential information that would have enabled them to assess the risks they and their families might run if they continued to live in that town.

Later cases have underlined the limits of those principles. The leading Grand Chamber case remains *Hatton v United Kingdom* (2002) 34 EHRR 1. The court found that there was no violation of Article 8 where night flights at Heathrow caused regular sleep interruptions to the applicants. The Grand Chamber disagreed with the lower Chamber[10] which by a majority had held that there was a violation. The difference turned on the view taken of the state's margin of appreciation and whether the regulations reflected a "fair balance". The previous cases were distinguished on the basis that —

> "...the violation was predicated on a failure by the national authorities to comply with some aspect of the domestic regime. Thus, in *Lapez Ostra*, the waste-treatment plant at issue was illegal in that it operated without the necessary licence, and was eventually closed down... In *Guerra*, the violation was also founded on an irregular position at the domestic level, as the applicants had been unable to obtain information that the State was under a statutory obligation to provide ..."

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[8] (1995) 20 EHRR 277
[9] (1998) 26 EHRR 357
[10] [2001] ECHR 565 (Third Section)

(Interestingly my former colleague Lord Kerr, sitting as an adhoc judge, had dissented, for reasons very close to those of the Grand Chamber. As he observed, a central problem in such cases is to define the boundaries between the respective roles of policy-makers and the courts:

> "... If Convention standards are not met in an individual case, it is the role of the Court to say so, regardless of how many others are in the same position. But when, as here, a substantial proportion of the population of south London is in a similar position to the applicants, the Court must consider whether the proper place for a discussion of the particular policy is in Strasbourg, or whether the issue should not be left to the domestic political sphere."

That same issue of fair balance was highlighted in a case in 2018 the UK Supreme Court, in which I gave the leading judgment: *R(Mott) v Environment Agency* [2018] UKSC 10. It concerned the right to compensation for business losses caused by environmental measures. The claimant had a leasehold interest in a so-called "putcher rank" fishery on the banks of the Severn. In order to reduce exploitation of salmon stocks in the area, the Environment Agency placed severe restrictions on his catches, effectively putting him out of business, but without paying him compensation. The Supreme Court upheld the finding that failure to pay compensation led to a breach of Article 1 of Protocol 1. Although the restrictions were a proper exercise of the Environment Agency's powers in the interests of the protection of the environment, the authority had failed to consider the impact on Mr Mott, and to draw a fair balance. The restriction eliminated at least 95% of the benefit of his property right, thus making it closer to deprivation of property than control. As we emphasised in the judgment, it was an exceptional case "because of the severity and the disproportion (as compared to others) of the impact on Mr Mott".

It is also clear that article 8 is about the protection of people rather than of the environment for its own sake. In *Kyrtatos v Greece* (2005) 40 EHRR 16, the applicants challenged the Government's failure to demolish buildings where the permits to build on

a swamp had been ruled unlawful by the Greek Court. The First Section held that there was no violation of Article 8, as the applicants had not shown how damage to the birds and other protected species directly affected their private or family life rights. The Court observed (at [52]):

> "Neither Art.8 nor any of the other Articles of the Convention are specifically designed to provide general protection of the environment as such; to that effect, other international instruments and domestic legislation are more pertinent in dealing with this particular aspect."

As that passage implicitly recognises, environmental rights are not "human rights" in the ordinary sense. They are much more than that. They involve rights and duties. The rights are those of not just of humans, but of all living things. The duties are ours, as the species which has the unique ability to influence the environment for good or ill.

In this short contribution I have avoided being drawn into the vast subject of climate change litigation. The case-law is extensive and growing all the time. Important cases are currently pending in a number of jurisdictions, including the European Court of Human Rights. The case-law is fully documented in databases maintained, for example, by my own Grantham Research Institute at the LSE, and the Sabin Centre at Columbia University.

It is clear that the Paris Agreement, in spite of its importance, is no more than a first step in the right direction. As the pressures on policy-makers increase, we can expect the courts to be drawn increasingly into the arena. However, it should not be forgotten that it was the US Supreme Court in the great case of *Massachusetts v Environment Protection Agency* in 2007[11] which showed the way. As you know, the Supreme Court decided by 5-4 that the EPA's powers under the Clean Air Act extended to greenhouse gas emissions, such as C02 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.

It may be questionable whether the same result would have been reached by the present Supreme Court, and indeed how long the case will survive unchallenged. But it was

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

critically important at the time. After the change of administration in 2008, and in the face of political opposition to any new Federal legislation on this issue, it paved the way to the strong climate change programme initiated by President Obama under the existing Act, and to his effective participation in the Paris negotiations. It is fair to say that without that judicial decision, the Paris agreement would not have happened.

In conclusion, in answer to our session question, I hope these illustrations are enough to show that Judges have an important role in protecting the right to a healthy environment. They cannot do it alone. They depend on political support and workable legislation. But judges and courts are vital for that legislation to have real teeth. I am sure the judges in this audience are fully alive to that challenge.

Robert Carnwath 28.2.23