Climate Change: A matter of concern globally today

by Lord Carnwath, Former Justice of UK Supreme Court

I look back with great appreciation to my visit to Chandigarh last year. I am sorry that it is not possible for the moment to repeat it. Since then I have retired from the UK Supreme Court on March 15. Lockdown followed almost immediately, since when I have been enjoying an unfamiliar period of enforced mental inactivity. Perhaps no bad thing after 50 years in the law.

I had been hoping to play a part in the preparations for the COP26 conference due to take place in Glasgow in November this year. That is a crucial event– 5 years on from Paris. It is critically important for the future of the world that we improve on that agreement, which as everyone recognised was not good enough. The national commitments must be brought rapidly into line with objective of a maximum increase of 1.5 C by 2100. Although the conference has had to be put off till November 2021, the issues are no less urgent. As I will explain in this short talk, I want to ensure that a central part of the discussions will be the role of law – both legislation and litigation - in giving substance to the national commitments.

As Justice Kumar and Judge Lavrysen will remember, in summer 2015 I helped organise in London an international conference on Climate Change and the Law ahead of the Paris meeting. We had judges, practitioners and academics from many parts of the world. I hope we may be able to do something similar next year in connection with Glasgow 2021, but perhaps more ambitious and wide-ranging with the benefit of international on-line participation such as this.

You will recall that under the Paris agreement (article 4.2), state parties were required not only to prepare and maintain successive "nationally determined contributions", geared to the overall objective of reducing emissions, but to "pursue domestic mitigation measures with the aim of achieving the objectives of such contributions".

There seems to have been little discussion of what is required for effective "domestic… measures" under this article. To my mind this must involve an effective overall legislative framework, supplemented by detailed laws across the different sectors, and effective means of judicial enforcement.

The UK has a leading role in this debate – not just because we are hosting the COP26 conference, but also because of our special position in the

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common law world. Our own Climate Change Act 2008 was I think a world leader in setting a mandatory target for reduction of emissions, now set at zero-emissions by 2050 – and with detailed machinery for successive five year carbon budgets, set on the advice of an independent Climate Change Committee. But we need to be able to show that these statutory rules are being converted into effective action.

So far five carbon budgets have been set taking us to 2032. In recent reports the CCC has said that the UK is on course to meet the first three carbon budgets up to 2022, but not the fourth or fifth up to 2032. By the end of the year we will have the Committee's proposals for the 6th budgetary period (2033-2037), to which the government will be obliged to respond with firm proposals to show how it will be achieved. The Committee has called on Ministers to "seize the opportunity to turn the COVID-19 crisis into a defining moment in the fight against climate change", adding:

> "Strong domestic action will provide the basis for the UK Government's vital international leadership in the coming year as it takes on the presidency of the COP26 climate summit in 2021. The UK's international credibility is on the line…"

I believe this applies as much to the law as it does to political action. It is time for us as lawyers to be thinking what we can do to assist the development and improvement of effective laws and legal institutions here and elsewhere, and how we can feed that thinking into the COP26 process.

I hope that we can look also to the Indian legal community – whether judges, practitioners or academics - as partners in this endeavour. Perhaps Chandigarh University may help to take a lead. Your country is of course a primary exemplar of the common law tradition. And your courts have an unmatched reputation for developing and using the law in a practical way to protect and enhance the environment.

In relation to the effects of climate change, India is of course a key player on both sides of the balance sheet - both in terms of its existing and potential contribution to greenhouse gas emissions, and the potential impact of climate change.

I note that the Indian government has recently published its first-ever climate change assessment report[1], which warns of the dramatic changes

[1] Assessment of Climate Change over the Indian Region prepared by the Union Ministry of Earth Sciences or MoES: https://link.springer.com/content/pdf/10.1007%2F978-981-15-4327-2.pdf

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forecast from rapid changes in temperature including increasing stress on India's "natural ecosystems, agricultural output, and freshwater resources" and "escalating damage to infrastructure." In the worst case scenario India's average temperature is expected to rise by approximately 4.4 degree C by the end of 2100.

On the positive side, India has emerged as a global leader in renewable energy, where investments top those into fossil fuel. On the negative side I understand there are still plans for significant expansion in coal production, which may be more difficult to reconcile with the Paris Agreement commitments.[2]

As far as I can ascertain, there has as yet in India been no framework legislation, equivalent to our Climate Change Act 2008, and little litigation directly related to climate change. I have been referred to an excellent paper by Shibani Ghosh of the Centre for Policy Research, New Delhi (in the American Journal for International Law) under the title Litigating Climate Change Claims in India[3]. It concludes (I quote):

> "The Indian contribution to the Global South climate litigation docket is likely to grow in the coming years. The constitutional and statutory powers of Indian courts are broadly worded and allow them to exercise jurisdiction in innovative ways in situations that are not necessarily governed by black letter law. Indian courts have not shied away from using this discretionary space in adjudicating environmental disputes, and they are likely to extend this proactive approach to climate claims as well. The framework of environmental rights and legal principles that the Indian judiciary has developed over the past three decades is well placed to support climate litigation. At the same time, India is witnessing a massive decline in all environmental quality indicators, such as air, water, and forests, and severe conflicts exist over a range of natural resources. It is also a growing economy with real developmental concerns. In this scenario, in the near future climate change is likely to remain a peripheral, albeit an important, issue in most cases that raise and address more 'mainstream' environmental concerns."

That may be a fair assessment for the moment, but climate change may well move quickly to centre stage if the government is not seen to be taking

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[2] https://climateactiontracker.org/countries/india/

[3] American Journal of International Law AJIL UNBOUND Vol. 114

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effective action to meet the challenges from climate change described in its recent report.

In that connection I might mention that yesterday I took part in an on-line seminar, organised by the LSE and the Gresham Institute, along with James Thornton, founder of the very effective campaigning group ClientEarth,. He told us of their success in using litigation to stop new investment in fossil fuels in Europe, most recently in Poland. Interestingly they have been able to rely on private rather than public law, basing action on the fiduciary duties of directors in company law, by showing that investment in fossil fuels as compared to renewables no longer makes economic sense, and that directors are failing in their individual duties to shareholders by supporting it. He also told us that ClientEarth are planning to extend their activities to Asia, and to work with local NGOs with similar interests. So watch this space.

One of the issues we discussed in yesterday's seminar was the problem under traditional common law principles of devising effective and enforceable court orders. This came to the fore in the recent *Juliana* case in the USA. As you may recall, in Autumn 2016[4] Judge Aiken in the US District Court of Oregon had refused to strike out the claim by a group of young citizens against the government for failing its constitutional duty to protect them against the consequences of climate change. After Judge Aitken's ruling and the exchange of pleadings, the case had become embroiled in procedural wranglings which found their way to the Supreme Court, and eventually came back to the Court of Appeals for the 9th Circuit, leading to a decision earlier this year[5].

Although the claim was dismissed by the majority on procedural grounds, there was emphatic endorsement by all the judges of the threat of climate change.

The minority judgment of Judge Staton records this factual consensus in unusually striking terms:

> "In these proceedings, the government accepts as fact that the United States has reached a tipping point crying out for a concerted response—yet presses ahead toward calamity. It is as if an asteroid were barreling toward Earth and the government decided to shut down our only defences. Seeking to quash this suit, the government

[4] Juliana v United States Case No. 6:15–cv–01517–TC
[5] is Juliana v United States No. 18-36082 D.C. No. 6:15-cv-01517- AA

> bluntly insists that it has the absolute and unreviewable power to destroy the Nation."

Even the majority judgment of Judge Hurwitz opens in strong terms:

> "A substantial evidentiary record documents that the federal government has long promoted fossil fuel use despite knowing that it can cause catastrophic climate change, and that failure to change existing policy may hasten an environmental apocalypse…"

The majority's reasons for refusing relief had nothing to do with the merits. They were about practicality and procedure. Central to the reasons for refusing a coercive order was the sheer complexity of the decision-making processes involved:

> "There is much to recommend the adoption of a comprehensive scheme to decrease fossil fuel emissions and combat climate change, both as a policy matter in general and a matter of national survival in particular. But it is beyond the power of an Article III court to order, design, supervise, or implement the plaintiffs' requested remedial plan. As the opinions of their experts make plain, any effective plan would necessarily require a host of complex policy decisions entrusted, for better or worse, to the wisdom and discretion of the executive and legislative branches…"

He concluded that "the plaintiffs' impressive case for redress must be presented to the political branches of government…" This was in spite of the evidence, as he acknowledged, that the political branches had shown no intention of doing anything about it:

> "That the other branches may have abdicated their responsibility to remediate the problem does not confer on Article III courts, no matter how well-intentioned, the ability to step into their shoes."

I suspect that the Indian courts would not have felt the same difficulty. The case-law of your Supreme Court, and later of the National Green Tribunal under Justice Kumar, would have allowed a more interventionist approach.

Certainly in Pakistan, Judge Mansoor Ali Shah felt no such inhibition in the *Leghari* case in the Lahore High Court. Relying on the constitutional protection of the right to life, he held that the government had not done enough to implement its own climate change policies. He ordered the setting up of an independent Climate Change Commission, chaired by a senior lawyer, bringing together all the interests involved including NGOs

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and government, and reporting regularly to the court. It proved remarkably effective.

I suspect, that if and when the need arises, the Indian courts and tribunals will prove no less imaginative. That remains to be seen. But in the meantime, in the run-up to COP26, there is a real debate to be had about the most effective ways in which the law – legislation and litigation – can back up national commitments under the Paris agreement. I look forward to your help in advancing that debate.

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