Climate Change and the Courts:
A Global Perspective

Right Hon. Lord Carnwath CVO of Notting Hill Gate

former Justice of the UK Supreme Court

Georgetown, Guyana

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Justice Institute Guyana

GreenHeart

Commonwealth Lawyers Association

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Preface

Message from the Commonwealth Lawyers Association

"Humanity faces an urgent, global challenge;
one that is inextricably tied to human rights,
fundamentally impacting the right to life and health
which in turn depend on a healthy environment."

Steven Thiru, President

The keynote lecture by the Right Honourable Lord Carnwath CVO on "Climate Change Litigation – a Global Perspective" in Georgetown, Guyana on 15th February 2025 has highlighted the crucial role of the law and legal systems in shaping, and ultimately driving effective climate action. His thoughts are enlightening and in the best sense of the word, thought-provoking. Lord Carnwath has shown the decades-long efforts of the judiciary to ensure justice in the face of the existential threat posed by climate change and has brought us right up to date with recent cases.

This lecture has undoubtedly been a historic occasion. It is the first time that an event of this kind has been held in Guyana and the first time that the judiciary, magistracy, MPs, lawyers, and even litigants engaged in fighting fossil fuels, were able to be present and listen first hand to one of the most distinguished judges of our time.

It is clear that humanity faces an urgent, global challenge; one that is inextricably tied to human rights, fundamentally impacting the right to life and health which in turn depend on a healthy environment. It is equally clear that the judiciary of the Commonwealth has a critical role to play in ensuring that there is a healthy environment including a healthy climate. Lord Carnwath has shown that while global political leadership may not be where we want it to be, across the world judges are upholding the rule of law, are getting to grips with science and crucially are fashioning new remedies to deal with the existential threat posed by the breakdown of the global climate system.

The Commonwealth Lawyers Association (CLA) is dedicated to advancing climate and environmental justice. By participating in international efforts, such as our submission of a written statement to the International Court of Justice on the Obligations of States in respect of Climate Change, the CLA seeks to contribute to the development of international law and to strengthen the legal framework for addressing climate change.

We work to ensure that the principles of justice, equity and human rights, underpin the global response to the breakdown of the global climate system.

In February 2024, the CLA Climate Justice Committee and the Sabah Law Society held the Borneo Rainforest Law Conference at which participants adopted the Sabah Declaration on Climate Justice. The Declaration affirms the CLA's commitments to the Commonwealth Charter and international resolutions on climate justice, environmental and sustainable development principles. It underscores that, "*climate action must be founded on robust legal frameworks, aligning with the best available science, protection of human rights, adherence to the rule of law, and promotion of sustainable development and the intrinsic rights of nature.*" Lord Carnwath's keynote has shown that effective climate action also depends upon the judiciary.

The CLA are proud to have joined the Justice Institute Guyana, our local partner and Stanbrook Prudhoe, a regional law firm, for this climate change event in Guyana. We know that through collaborations such as these with both private and civil society actors, we can foster meaningful cross-border knowledge sharing, especially on issues of global significance, and learn from one another. In this regard I must commend Guyana for being one of the world's few carbon sinks.

The CLA stands as a premier international law organization. We are the representative body of the legal profession in the Commonwealth. Modern, vibrant and pluralistic, we span four regional hubs across 56 countries: Africa, the Americas, Australasia and Europe. Our members include distinguished members of the judiciary, legal professionals, and others in the legal and justice sectors from across the Commonwealth.

Though the geographical spread between us may be vast, challenges such as climate change reveal the interconnectedness of a shared humanity, underscoring the need for unified efforts, collective empowerment — and crucially, transformative leadership and action — at critical junctures such as that which we are facing today. I invite Commonwealth lawyers everywhere to join us.

Steven Thiru, President
Commonwealth Lawyers Association

Foreword

His Hon. Carl Singh, Former Chancellor of the Judiciary (ag)

"environmental law proceeds on the basis that the quality of the natural environment is of legitimate concern to everyone."

In the case of WALTON v SCOTTISH MINISTERS (2012) UKSC 44, Lord Hope at paragraph 152 of the report observed:

> *" ..... environmental law proceeds on the basis that the quality of the natural environment is of legitimate concern to everyone."*

The engagement in Georgetown, Guyana which brought Lord Robert Carnwath to our country and his presentation on the theme **"Climate Change and the Courts – A Global Perspective"** to a significant number of our legal community, lawyers and Judges, met that concern spoken of by Lord Hope, in good measure.

Lord Carnwath came to us with considerable experience in environmental law and litigation. His Lordship played a not insignificant role as co-chair, along with Judge Weeramantry of the International Court of Justice (ICJ) on a project promoted by the United Nations Environment Programme (UNEP), a key objective of which, was to strengthen judicial cooperation on a regional basis and to develop programmes aimed at improving judicial capacity in environmental law.

Historically, environmental issues did not frequently engage our courts in Guyana. However, with our country's changing economic landscape, there is emerging a growing consciousness among our people whose attention to environmental issues is becoming a focal point. Lord Carnwath's visit to Guyana in February of this year was, in that context, a timely one.

Climate change, driven largely by human activity, has widespread environmental impacts, including floods, droughts due to extreme weather and rising global temperatures, melting ice glaciers and a resulting rise in sea levels. Guyana has not been spared the experience of some of the damaging consequences of climate change, particularly on our agricultural production levels.

The executive director of the United Nations Environment Programme has noted that " People are increasingly turning to courts to combat the climate crisis, holding governments and the private sector accountable and making litigation a key mechanism for securing climate action and promoting climate justice."

And so, Lord Carnwath's focus in his presentation was to demonstrate what judges can and cannot do in the constant efforts at protection of the environment pursued through environmental litigation. His Lordship, in that endeavour, took his audience on an illuminating excursion through environmental case law from the United States, the Netherlands, Pakistan, Colombia and Switzerland explaining that two main themes flowed from the case law he referred to. First, His Lordship explained that in none of the cases on environmental law, was there "any challenge posed to the reality of climate change and its damaging consequences" and secondly, that the cases established " the affirmation by a variety of different legal tools, of the basic right of everyone to be protected from the damaging effects of climate change and of the duty of all parties, state, corporate, or individual to play their part in securing that protection."

In sum, Lord Carnwath's well researched and thorough presentation set the Guyanese legal community, particularly our judges, on a firm footing to consider and work towards one of the statements recorded as the Johannesburg Principles and adopted at a Global Judges Symposium at Johannesburg, South Africa in 2002, which reads:

"We emphasize that the fragile state of the global environment requires the Judiciary as the guardian of the Rule of Law, to boldly and fearlessly implement and enforce applicable international and national laws, which in the field of environment and sustainable development will assist in alleviating poverty and sustaining an enduring civilization and ensuring that the inherent rights and interests of succeeding generations are not compromised."

Carl A. Singh, OR;CCH
Former Chancellor of the Judiciary of Guyana (ag)

Keynote

Guyana – February 2025

Climate Change and the Courts – a Global Perspective

Lord Carnwath CVO
(former Justice of the UK Supreme Court)[1]

"Everyone has the right to an environment that is not harmful to his or her health or well-being"

Introduction

I am very grateful to have been invited to give this lecture, hosted by the Justice Institute of Guyana with the Commonwealth Lawyers Association and Stanbrook Prudhoe. I do so in particular by way of recognition of the grant to Melinda Janki, by the CLA, in conjunction with LexisNexis, of their 2023 Rule of Law Award. The citation noted "her sustained and resolute efforts to promote the rule of law within her home jurisdiction of Guyana and on the international stage", particularly in the context of climate change. That was at the 2023 CLA conference in Goa, where she and I shared a platform at a session on environmental law. I was very impressed by what I heard, and have followed her activities since then with great admiration.

I noted also her important contribution to the drafting of the strong environmental clauses in your constitution. It seems to me a model of its kind. It is not just about rights, but also about duties. It confirms that: "The well-being of the nation depends upon preserving clean air, fertile soils, water and the rich diversity of plants, animals and ecosystems" (art 36); that "Everyone has the right to an environment that is not harmful to his or her health or well-being" and that the State must "protect the environment, for the benefit of present and future generations,..." (art 149J), but also that "Every citizen has a duty to participate in activities designed to improve the environment and protect the health of the nation" (art 25). As we will see when we look at the cases, provisions of this kind can have real teeth when it comes to environmental litigation.

My only previous visit to Guyana was for a conference in September 2016, on that occasion organised by the Commonwealth Magistrates and Judges' Association. My subject was similar to today: "Climate Change after the Paris Agreement". I had an easy task. The agreement was fresh in everyone's minds and was soon to be

[1] Visiting Professor of Grantham Institute of Climate Change and the Environment (LSE); Honorary Professor of University College, London; Visiting Professor of Oxford University; Associate of Landmark Chambers, London.

ratified, and the US elections were two months away. President Obama was still in the White House. As it turned out, September 2016 was a highpoint for optimism on the ability of the world community to unite to meet the challenge of climate change. I wish we could say the same today.

I hope I will be forgiven for being a little self-indulgent in this lecture, given as I approach my 80th birthday next month. It gives me the opportunity to look back over the 20 years or so since I became actively involved in promoting the role of judges in environment law, and more recently in meeting the challenges of climate change. In this lecture I will draw some lessons for what judges can and cannot do to help combat one of the biggest challenges now facing mankind. I hope to show that in general the courts round the world have been able to respond creatively and effectively to the challenges within their different legal systems. Post-Paris in 2016, there has been a global consensus as to the urgent need for action, and the courts have been able to play their part without crossing the divide between the distinctive roles of the courts and the executive.

I will not be spending much time on my own country, the UK. Climate change has not been a political issue. We were the trailblazers in bringing in a dedicated statute, the Climate Change Act 2008, passed with all party support. It provides a strong legal framework for climate change action, in the form of successive 6-yearly carbon budgets, set in accordance with the advice of an expert committee, and approved by Parliament, leading to net zero in 2050. Such litigation as there has been has concerned the detail of the policies designed to achieve those budgets, rather than any issues of principle.

Nor will I be looking at the cases in this country. I am aware of course of the litigation around the oil activities of Exxon Mobil, in which Melinda has played an active role. But it would be wrong for me as an outsider to attempt to influence the course of those proceedings, or to tread on the toes of your own excellent judges.

Judges and the environment

Before coming back to the cases on climate change, let me say something about the role of judges and the environment more generally. The central role of the judiciary in protecting the environment received worldwide recognition in 2002 at the Global Judges' Symposium in Johannesburg. It brought together senior judges from around 60 countries at the invitation of the United Nations Environment Programme (UNEP). The "Johannesburg principles" adopted by the conference affirmed the vital role of an independent judiciary and judicial process, and called for a UNEP-led programme of judicial training and exchange of information on environmental law.

I was privileged to represent the UK judiciary on the judicial taskforce set up by UNEP based in Nairobi which oversaw the development of the programme. One early initiative was the preparation in 1995 of a Judicial Handbook on Environmental Law, under the supervision of a judicial committee which I co-chaired with Judge Weeramantry, the former Sri Lankan judge of the International Court of Justice. An important part of the

UNEP programme was to develop judicial co-operation on a regional basis. In 2004 I was one of a group of European judges who established the EU Forum of Judges for the Environment ("EUFJE"), to exchange knowledge and ideas on the practical application of the environmental law within the European Community. In September last year it celebrated its 20th anniversary with a conference in Budapest. Other judicial groups were established in different parts of the world. More recently we established the Global Judges' Institute on the Environment (GJIE), again with the support of UNEP, and under the leadership of the remarkable Brazilian judge, Antonio Benjamin.

My focus on climate change stemmed from a lecture I gave in October 2014 in Kuala Lumpur on the topic "Environmental law in a global society"[2]. This was part of the series of annual lectures by senior common law judges, invited by the Sultan of Perak in memory of his father, Sultan Azlan Shah, former Chief Justice of Malaysia. I took my theme from a lecture given by the Sultan himself in 1997, speaking of the role of the law in tackling environmental degradation:

> *"Legal principles and rules help convert our knowledge of what needs to be done into binding rules that govern human behaviour. Law is the bridge between scientific knowledge and political action."*[3]

That in essence is the theme of my lecture today. One of the crucial roles of judges is in forcing politicians to face up to scientific reality. That has never been more needed than today.

In the lecture I reviewed the development of environmental law in the UK and globally, starting from the role of the courts in the nineteenth century coping with the challenges of the industrial revolution. I ended the lecture by referring to the role of the law in response to climate change. I was particularly struck by a book by Clive Ponting, "A new Green History of the World - the Environment and the Collapse of Great Civilisations"[4] He showed how over the last 5,000 years some of the world's great civilisations have been destroyed by over-exploitation of their environment. They ranged from the Sumerians 3000 years before the Christian era, to the Maya in South America in the early centuries of our own era, and more recently the ill-fated inhabitants of Easter Island. He posed the question whether our civilisation is facing a similar fate on a global scale due to our failure to meet the challenges of climate change. I concluded my lecture:

> *"One cause for hope is that unlike those other civilisations we have the understanding or the means of understanding what is happening, and what we could do about it. On the science there is a remarkable degree of consensus. The problem is to translate that*

[2] Later published in [2015] Journal of Planning & Environmental Law 269

[3] HRH Sultan Azlan Shah *The New Millennium: Challenges and Responsibilities* Lecture to Universiti Kebangsaan Malaysia, Bangi, Selangor 23 August 1997

[4] Random House 2011

understanding into political action. Here above all we may find ourselves looking to the law to provide a bridge, and to the judges to offer at least some of the building blocks."

To give force to that idea, in September 2015, ahead of the COP 21 summit in Paris, I co-hosted an international judicial conference in London under the title "Adjudicating the Future: Climate Change and the Rule of Law"[5]. This was promoted by the court jointly with the Foreign Office legal team and Kings College, London. The object was to assemble a group of specialist judges from a number of different countries round the world, together with practitioners and academics, to look at the legal issues arising from climate change, and the role of the courts, national and international.

The importance of the judicial role was brought out by the cases we discussed at the conference. There had, by then, been some important judicial interventions in different parts of the world. We could look back in particular to the great case of *Massachusetts v EPA* (2007)[6] in the US Supreme Court, in which the majority decided that the EPA's powers under the Clean Air Act extended to greenhouse gas emissions, such as CO2 emissions from motor vehicles, and that the agency's failure to take any action to control those emissions was irrational and therefore unlawful.

There was no real issue in that case as to the reality of the climate change crisis or its causes. The majority judgment traced the history of climate awareness back to the late 1970s, when Congress enacted the 1978 National Climate Program Act, which required the President to establish a program to "assist the Nation and the world to understand and respond to natural and man-induced climate processes and their implications", recognising that "a wait-and-see policy may mean waiting until it is too late"; and the establishment in 1990 of the Intergovernmental Panel on Climate Change (IPCC), and in 1992 the United Nations Framework Convention on Climate Change (UNFCCC).

In his dissenting judgment Chief Justice Roberts thought that the majority were going beyond the court's proper constitutional role, and that the petitioners' victory would be little more than symbolic. But he was quite wrong. The decision had profound effects. After the election of President Obama in 2008, the majority judgment paved the way for a radical change in the approach of the EPA. In December 2009 the EPA issued a formal "endangerment finding" under the Act, highlighting the severe risks of climate change as a basis for stronger regulatory action. That led in turn to the Obama administration's launch in summer 2014 of new more restrictive limits of emissions of carbon-gases from power-plants. It was followed in November 2014 by the U.S.-China Joint Announcement on Climate Change, by which the two Presidents committed their

[5] The conference was organised by the Supreme Court in conjunction with Kings College, London and the UK Foreign Office. We had an opening address from (the then) HRH Prince of Wales. It was supported internationally by the UN Environment Programme and the Asia Development Bank.
See:https://www.kcl.ac.uk/archive/news/law/climate-courts/symposium-puts-focus-on-courts

[6] *Massachusetts v. Environmental Protection Agency*, 549 U.S. 497

countries to working together towards an agreed outcome with legal force applicable to all Parties at the Paris conference.

Commenting at our conference on the impact of that case, Scott Fulton, a distinguished American lawyer and later President of the Environmental Law Institute, stated:

> *"Mass v. EPA was unquestionably the turning point in the United States' reckoning with climate change. If that decision had gone the other way, much of what EPA has now put in place would likely not have occurred. With the stalemate on climate change in the Congress, climate change legislation would likely 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, and so on. It is impossible to overstate the importance of the Court's decision in Mass v. EPA, which stands as towering example of the difference that courts can make in the climate change arena."*

As it turned out, 2015 was something of an annus mirabilis for climate change law. In that year in the months before our conference, there were two other important judicial developments from very different legal systems - the *Urgenda* case in the Hague District Court in the Netherlands[7] and the *Leghari* case from the Lahore High Court in Pakistan[8]. Judges involved in both cases spoke of their experiences at our conference. In both cases, the national courts upheld challenges to their governments' failures to implement effective policies to counter climate change.

The Hague judgment was of great symbolic importance as the first successful case of its kind, although at that stage it turned on what seemed a rather esoteric point of Dutch tort law. Notably the court rejected arguments that the decision would not be effective on a global scale, as it would result in a very minor reduction of global greenhouse gas emissions. As the court said "climate change is a global problem and therefore requires global accountability" (4.78-9). The decision later acquired more general significance when it was affirmed in the Court of Appeal and Supreme Court by reference to articles 2 and 8 of the European Convention on Human Rights. As we shall see that conclusion has now been endorsed by the European Court of Human Rights in Strasbourg.

The *Leghari* case concerned an action by a farmer whose land had been damaged by flooding, due, as he argued, to the government's failure to implement effective climate change policies. In upholding the claim the court relied on the constitutional protection of the right to life, which had been held to include the right

[7] Urgenda Foundation v. The Netherlands [2015] HAZA C/09/00456689

[8] Leghari v Federation of Pakistan (2015) W.P. No. 25501/201

to a healthy environment. At our conference, the Judge, Mansoor Ali Shah (now in the Pakistan Supreme Court) told us how he had devised a new form of order to deal with the problem that the government simply was not implementing 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, government officials, and independent experts, reporting regularly to the court. There was no appeal against that unusual form of order. As he told us, the key to its success was that the court was not imposing solutions on the executive, but helping the executive to give practical effect to its own policies.

Another important development in September 2015 was a speech by the then Bank of England Governor Mark Carney (now better known as a Prime Minister of Canada), warning financial institutions of the risks and challenges of the transition to a carbon free economy. He spoke of the need for early action to manage the transition. As he said:

> *"We don't need an army of actuaries to tell us that the catastrophic impacts of climate change will be felt beyond the traditional horizons of most actors – imposing a cost on future generations that the current generation has no direct incentive to fix.... In other words, once climate change becomes a defining issue for financial stability, it may already be too late."*

As that passage anticipated, one of the developing themes in the legal response to climate change has been about the legal responsibilities of investment funds, and corporate entities of all kinds, and of their directors, to take proper account of the risks of climate change, and to be transparent about those risks.

The Paris Agreement of December 2015 was a truly monumental achievement. I visited Paris briefly during the conference period for a side-event on the role of the courts. I was struck first by the sheer scale of the operation. It is easy to forget now that it came only two weeks after the unprecedented terrorist atrocities in Paris, leading to 130 deaths. That had raised doubts as to whether the conference could go ahead at all. In spite of it, over 150 heads of state (more than at any climate COP before) gathered on the very first day of the COP. It may have been the fresh memory of those terrible events that helped to concentrate the minds of the participants and made failure unthinkable.

I will not spend time on the detail of the agreement. The objective is to hold "the increase in the global average temperature to well below 2°C above pre-industrial levels" and pursue efforts "to limit the temperature increase to 1.5°C above pre-industrial levels." The key obligations lie in the "nationally determined contributions" (NDCs), which each state party is legally required ("shall") to prepare, communicate and maintain. Although the content of the NDCs is left to the individual states, there is to be progressive improvement, so that each successive NDC is to "represent a progression", and reflects the

state's "highest possible ambition". The agreement also provides for adaptation to deal with the consequences of climate change, and for financial support for developing countries.

The momentum was carried into 2016. Almost as remarkable as the agreement itself was the speed with which it was brought into force. That required ratification by at least 55 parties representing at least 55% of global greenhouse gas emissions. The threshold was reached at the beginning of October, and the agreement came into effect a month later on 4 November – four days before the USA Presidential elections.

In November 2016 also came the ground-breaking decision of Judge Aiken in the US District Court of Oregon in *Juliana v USA*,[9] refusing to strike out the claim by a group of young citizens against the government for failing to protect them against the consequences of climate change. Citing authorities from round the world 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. I will come back to that case in the higher courts.

The new global consensus suffered a rude setback with the election as US President of Donald Trump, followed in summer 2017 by his announcement of intended withdrawal from the Paris agreement. Although under its terms that could not take effect until November 2020 (5 years from the date of the agreement), in the meantime he embarked on a series of executive orders evidently designed to unwind most of his predecessor's climate policies.

To me, as a legal observer, against the background of the apparently definitive *Massachusetts* judgment, and the global consensus in Paris, it was shocking that there was no serious attempt to justify this dramatic reversal of policy by reference to legal principle, or scientific evidence. Over the next four years I attempted at various times to discover from the EPA's website what its formal position now was. As far as I could see, on 20 January 2017 they had deleted the Climate Change section and all references to climate change. Instead there was a note under the heading "This page is being updated". As far as I could discover, nothing of significance was done to update the website, and no revised EPA policy was formulated during the Trump presidency – not even in November 2018, when the government itself published its Fourth National Climate Assessment, which left no apparent doubt as to the devastating social and economic effects of climate change on the USA and elsewhere, and the need for urgent global action to address them. The President's reported response was that he had read parts of the report but "didn't believe it".[10]

It is notable, however, that, even under the first Trump administration, there was no attempt to challenge the reality of climate change or its causes in the courts. Thus in 2019 (still during the first Trump presidency),

[9] Juliana v United States Case No. 6:15–cv–01517–TC

[10] Holden, Emily (November 26, 2018). "Trump on own administration's climate report: 'I don't believe it'". The Guardian. Retrieved November 26, 2018

the *Juliana* case from Oregon reached the Court of Appeals for the 9th Circuit leading to a decision in early 2020.[11] Although the decision of the lower court was reversed on procedural and constitutional grounds, both majority and minority judgments left no doubt as to the seriousness of the problem or of the government's role in creating it.

For the majority Judge Hurwitz said:

> *"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…"*

He noted that the government *"by and large had not disputed the factual premises of the plaintiffs' claims."*

The dissenting judgment of Judge Staton was even more vivid:

> *"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 defenses. Seeking to quash this suit, the government bluntly insists that it has the absolute and unreviewable power to destroy the Nation…"*

It seems therefore that, whatever the personal views of the then President, his lawyers had not felt able to support those views by any substantive evidence in the court. Unfortunately, the majority of the court felt unable to do anything about it within their constitutional role.

In 2021 a degree of rationality was happily restored to US climate change policy under the Biden administration, when the USA rejoined the Paris agreement and played a leading role in the COP process, including the most recent conference last November in Baku.

But now following the election of President Trump, we seem to be back where we were. He has again acted to take USA out of the Paris agreement, without any apparent basis in science or logic. (This was under an Executive Order entitled perversely "Putting America First in International Environmental Agreements".) It was done in spite, for example, of Darren Woods (CE of ExxonMobil) being reported at the Baku conference as advising against withdrawal, because of the uncertainty and inefficiency caused by having "the pendulum swinging back and forth as administrations change."

[11] Juliana v. United States, 947 F.3d 1159 (9th Cir. 2020)

So we are faced with the bizarre and frightening position that the President of the world's most important source of greenhouse emissions, flying in the face of all informed opinion, denies that there is a problem, and seems determined to make it worse.

Climate change litigation today

Since our conference in 2015, there has been a massive growth in climate litigation round the world. The case-law has been fully documented in databases maintained by the Sabin Centre in New York and the Grantham Research Institute in London. The most recent report of the Grantham notes that 233 new climate cases were filed in 2023, bringing the total number of cases recorded by the Sabin Centre to 2,666. I cannot do more than pick out some illustrations.

One case which may be of particular interest in this part of the world was the 2018 judgment of the Colombia Supreme Court in the *Future Generations* case,[12] which shows what a powerful legal tool can be found in constitutional protections of the environment. 25 young claimants complained that the Colombian State had failed to guarantee their constitutional rights to life and protection of the environment, in particular through deforestation in the Amazon. The Supreme Court agreed, relying in particular on the right to a healthy environment, enshrined in the Colombian Constitution.[13] The court held that the regulatory failure was causing:

> *"... short, medium, and long term imminent and serious damage to the children, adolescents and adults who filed this lawsuit, and in general, all inhabitants of the national territory, including both present and future generations, as it leads to rampant emissions of carbon dioxide (CO2) into the atmosphere, producing the greenhouse gas effect, which in turn transforms and fragments ecosystems, altering water sources and the water supply for population centres and land degradation."*

The Court issued an order to the President and the relevant ministries to create an "intergenerational pact for the life of the Colombian Amazon," with the participation of the plaintiffs, affected communities, and scientific organizations.

I turn to some of the most significant cases from the last year. Two main themes emerge. First, in none of the many cases round the world has anyone sought to call evidence challenging the scientific consensus on the reality of climate change and its potentially catastrophic consequences. It is generally taken as a given. The

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[12] Demanda Generaciones Futuras v. Minambiente STC 4360-2018. See: https://www.dejusticia.org/en/climate-change-and-future-generations-lawsuit-in-colombia-key-excerpts-from-the-supreme-courts-decision/

[13] Colombian Constitution 1991: right to life (arts 11, 1, 2), right to health (arts 44 and 49), right to nutrition (art 44), right to a healthy environment (art 71)

second is the affirmation, by a variety of different legal tools, of the basic right of everyone to be protected from the damaging effects of climate change, and of the duty of all parties, state, corporate or individual, to play their part in securing that protection.

I start with two important cases from very different parts of the world (Switzerland and India), given within a few days of each other last spring, which established that constitutional rights to the protection of life or of the home include the right to protection from the effects of climate change. This was done in spite of any specific reference to the environment or climate change in the relevant articles. In neither was there any dispute about the reality of the challenge.

The Climate Seniors case (ECHR 9/4/24)[14]

In 2016, an association known in English "Senior Women for Climate Protection Switzerland" filed a suit against multiple bodies of the Swiss Government, alleging that they had failed to uphold obligations under the Swiss Constitution and the European Convention on Human Rights by not adopting effective policies to achieve an emissions reduction trajectory consistent with the Paris goal of keeping global temperatures well below 2ºC above pre-industrial levels.

On 9 April 2024, the ECtHR Grand Chamber (of 17 judges,16 concurring, one partly dissenting), upheld the applicants' case. The ECtHR found that article 8 of the ECHR (right to respect to the home and family life) encompasses a right to effective protection for individuals by State authorities from the serious adverse effects of climate change on their lives, wellbeing and quality of life. The State had a duty under that article to adopt, and apply, regulations and measures capable of mitigating the existing and potentially irreversible, future effects of climate change, in line with the Paris Agreement and the scientific advice of the Intergovernmental Panel on Climate Change.

The Great Indian Bustard case[15] (Indian Supreme Court 21/3/24)

The Indian case affirms the importance of the state's responsibilities to combat climate change, but recognises the need to balance those responsibilities against other environmental objectives, such as the protection of endangered species. The Great Indian Bustard is one of the largest Indian birds, once common across most of north-western India, but now only in Rajasthan and Gujarat, down to around 200 birds. The recent decline is due partly to large-scale renewable energy infrastructure projects, including solar energy and windfarms. A particular danger was from collisions with high-level transmission lines. These projects were needed to fulfil India's commitment under the Paris agreement to rapid increases in non-fossil energy capacity by 2030 and net zero emissions by 2070.

[14] Verein KlimaSeniorinnen Schweiz and Others v Switzerland ECHR 087 (2024)
[15] MK Ranjitsinh et al. v. Union of India 2024 INSC 280

In 2021 MK Ranjitsinh, a conservationist, had obtained an interim order from the Supreme Court to protect the breeding grounds of the Great Indian Bustard. It defined large areas (c. 99,000 square kilometres) as priority habitats, and imposed restrictions on new overhead transmission lines in that area. Later the government applied successfully to modify the order, because of its damaging effect on the plans to achieve its climate change commitments. As the court accepted, the regions of Gujarat and Rajasthan "characterized by vast expanses of arid desert terrain and an abundance of sunlight" were prime areas for solar power generation and it would be uneconomic to require all the power-lines to be put underground.

The court affirmed that the right to life under the constitution implies a constitutional duty of the State "to take effective measures to mitigate climate change and ensure that all individuals have the necessary capacity to adapt to the climate crisis" (para 29). Here there was a direct clash between that duty and the duty to protect an endangered species. It was necessary, the court said, to adopt "a holistic approach which does not sacrifice either of the two goals at the altar of the other" (para 60). Rather as in the *Leghari* case, the court directed the setting up of a special expert commission to advise and report back to the court:

> *"This task is best left to domain experts instead of an a priori adjudication by the Court. Experts can assess the feasibility of undergrounding power lines in specific areas, considering factors such as terrain, population density, and infrastructure requirements..."* (para 62)

I turn to two recent cases, from UK and USA, which have emphasised the need to take full account of all the climate consequences of fossil fuel developments before granting permission.

Finch (Weald Action Group), R. (on the application of) v Surrey County Council & Ors[16]

This case concerned the decision of Surrey County Council to grant planning permission for an onshore crude oil extraction project. The proposed project would involve the extraction of oil from six wells over a period of 20 years. The application was required by statute to be accompanied by an environmental impact assessment assessing the "direct and indirect effects" of the development on the environment. The developer had limited the assessment to the impact of the direct releases of greenhouse gases from within the well site boundary during the lifetime of the project. It did not include an assessment of the greenhouse gas emissions that would occur when the oil extracted from the wells was ultimately burnt elsewhere as fuel ("Scope 3 emissions").[17] The council accepted this approach, and granted permission. The Supreme Court (by a majority) held that that approach was wrong in law.

[16] [2024] UKSC 20 (20 June 2024)

[17] "Scope 1 emissions are defined as direct GHG emissions that occur from sources that are owned or controlled by an entity. Scope 2 emissions are a special category of indirect emissions. This category consists of GHG emissions from the generation of purchased electricity consumed by an entity. Scope 2 emissions occur at the facility where

Lord Leggatt saw the issue in relatively simple terms:

> *"It is agreed that the project under consideration involves the extraction of oil for commercial purposes for a period estimated at 20 years in quantities sufficient to make an EIA mandatory. It is also agreed that it is not merely likely, but inevitable, that the oil extracted will be sent to refineries and that the refined oil will eventually undergo combustion, which will produce GHG emissions. It is not disputed that these emissions, which can easily be quantified, will have a significant impact on climate. The only issue is whether the combustion emissions are effects of the project at all. It seems to me plain that they are."* (paras 6-7)

The permission was quashed. The application will have to be reconsidered taking account of the full implications of the project for greenhouse gas emissions.

That decision has had important implications for other projects, notably for new oil fields in the North Sea. Consents for drilling in the Rosebank and Jackdaw oil fields had been granted under the previous government, but they had been subject to judicial review challenges on similar grounds to Finch. In January the Scottish court ruled that the existing consents are unlawful, again because of the failure to consider the full effects of the project for greenhouse gas emissions.[18] There is currently a lively political debate about whether grant of permission is compatible with the government's climate change commitments.

Held v State of Montana (Montana Supreme Court 12/24)[19]

A similar issue came up in the decision in December last year of the Montana Supreme Court. Montana is of particular interest in the USA context. It was in 2023 the fifth largest coal-producing U.S. state and the twelfth largest oil-producing state. Fossil fuels were a central part of its economy, and this had strongly influenced the development of state laws. On the other hand it is one of only seven US states with express constitutional protection for environmental rights.[20] A 1972 constitutional convention added language guaranteeing citizens "the right to a clean and healthful environment". The case shows again how important such constitutional rights can be.

The focus of this case was a provision in the Montana Environmental Policy Act that prohibited the state from considering greenhouse gas emissions as a factor when deciding whether to issue permits for energy-related

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the electricity is generated. Scope 3 encompasses all other indirect emissions. Scope 3 emissions are consequences of the activities of the entity but (like scope 2 emissions) occur from sources not owned or controlled by the entity. (para 40 per Lord Leggatt)

[18] *Petitions by Greenpeace LTD & Uplift for Judicial Review* (Court of Session) [2025] CSOH1 0 (29 January 2025)

[19] 2024 MT 312

[20] Hawaii, Illinois, Massachusetts, Montana, New York, Pennsylvania, Rhode Island

projects. The case was filed in March 2020 by an organisation called Our Children's Trust on behalf of sixteen young residents of Montana. They argued that the state's support of the fossil fuel industry had worsened the effects of climate change on their lives, and that this particular clause was thus depriving them of their constitutional rights.

In December 2024, the Supreme Court of Montana handed down its judgment, affirming the decision of the lower court in their favour. As the opening paragraphs of the judgment made clear, even in a state as supportive of fossil fuel extraction as Montana, there had been no attempt by the State to call evidence to challenge the "overwhelming scientific evidence and consensus" as to the scale of the challenge. Nor was the court impressed by arguments that Montana's permitted GHG emissions were relatively insignificant when evaluated against the total amount of global GHG emissions. It held that the public's right to a clean and healthful environment under Montana's constitution was violated when the state legislature passed a law removing the impacts of greenhouse gas emissions from environmental reviews under MEPA

Two other recent decisions, again from very different parts of the world, have explored the responsibility of fossil-fuel companies for combatting climate change.

Milieudefensie v Royal Dutch Shell (Hague Court of Appeal 12/11/24) [21]

This was a claim in the Hague District Court by the environmental group Milieudefensie and other parties alleging that Shell's contributions to climate change violate its duty of care under Dutch law and human rights obligations. In May 2021 the court upheld the claim and ordered Shell "to reduce its emissions by 45% by 2030, relative to 2019, across all activities including both its own emissions and end-use emissions (Scope 1, 2 and 3)." In November 2024 the Court of Appeal allowed Shell's appeal but only to a limited extent. It found that there was "insufficient scientific consensus" about a specific reduction percentage for an individual company such as Shell, to justify imposing a fixed obligation to cut its emissions by 45% by 2030. However it affirmed the legal responsibility of companies such as Shell to take action to combat climate change. I quote the conclusions:

> *"For the court, there is no doubt that the climate problem is the greatest issue of our time. The threat posed by climate change is so great that it could be life-threatening in several places on earth and will start to have a profound and negative impact on human and animal existence in many other places...*

[21] ECLI:NL:GHDHA:2024:2100

It is an established fact that fossil fuel consumption is largely responsible for creating the climate problem and that addressing climate change is something that cannot wait. To combat the danger posed by climate change, everyone has a responsibility. …

In summary, the Court of Appeal is of the opinion that companies like Shell, which contribute significantly to the climate problem and have it within their power to contribute to combating it, have an obligation to limit CO2 emissions in order to counter dangerous climate change, even if this obligation is not explicitly laid down in (public law) regulations of the countries in which the company operates. Companies like Shell thus have their own responsibility in achieving the targets of the Paris Agreement."

Smith v Fonterra Co-operative Group Limited (7/2/24)[22]

The *Milieudefensie* case may be said to have turned on particular features of Dutch law, for which there is as yet no direct parallel in the common law. However earlier in the year the New Zealand Supreme Court had opened the way for the development of the common law to respond to the new challenges. A claim had been brought by a Maori elder against seven high-emitting companies whose businesses either released greenhouse gases into the atmosphere or supplied products that released greenhouse gases when they burned. The plaintiff claimed that companies were liable in tort (public nuisance, negligence or a novel "climate change" duty of care) for their contribution to the damage caused by climate change. He sought a declaration that they were in breach of those duties and injunctions requiring them to effect staged reductions of their emissions, leading to net zero in 2050. The lower courts had struck out the claims as having no legal foundation. Early in 2024, the Supreme Court overturned the Court of Appeal, allowing all three causes of action to proceed to trial. There was no dispute as to the potentially devastating effects of climate change or its causes. The issue was whether private law could provide a remedy. The court observed that the common law had "not previously grappled with a crisis as all-embracing as climate change", but found parallels in the 19th and early 20th century cases in the UK facing the challenges of the industrial revolution (para 156). It remains to be seen how the lower courts will respond.

Conclusion

This has necessarily been a very cursory look at the cases. I hope it is enough to show how important a robust judiciary can be and has been in different parts of the world, in ensuring that governments and corporations face up to the reality of climate change and work together to develop effective solutions. The most glaring and depressing exception is the USA under the current President, whose policies seem to lack any basis in

[22] [2024] NZSC 5

science, reason or morals. So far, with very limited exceptions, the courts there seem to have been powerless to do anything about it.

However, I want to end on a more optimistic note. Happily there is a different story for the other major source of GHG – China. In November I was one of a group of senior judges from different parts of the world attending a training conference for Chinese Environmental Judges in Beijing. We were the guests of the Supreme People's Court, working with UNEP and the environmental NGO ClientEarth. Over the last 10 years there has been astonishing development of environmental courts throughout China, under the general guidance of the environmental division of the Supreme Peoples' Court. One of the issues we discussed was the court's response to climate change. We were shown the court's guidance to the lower courts on climate change, which makes clear that "achieving carbon peaking and carbon neutrality is a major strategic goal". That has the full support of the Communist leadership, which is also fully supportive of the Paris agreement.

It was ironic that it was during one of these sessions that we learned the result of the US elections. Some of the Chinese judges wanted to know what we thought would be the implications for climate change policy. Sadly we could not help them,

Fortunately among responsible governments and corporations, including the oil industry, there is no dispute as to the reality of the challenge. I conclude with a quote from ExxonMobil's 2024 report "Advancing Climate Solutions". They said:

> *"Getting the planet on a path to net zero requires unprecedented innovation and collaboration at immense scale…*
>
> *If you were to make a list of the biggest challenges facing humankind right now, addressing poverty and climate change would be at the top…"*

I profoundly agree. The Paris Agreement provides a strong basis for such collaboration. Indeed there is no realistic alternative. We all have our part to play, and the courts have a central role in that process.

Robert Carnwath
Georgetown 15 February 2025

Reflections

Lord Carnwath's lecture is undoubtedly significant. The Greenheart Institute have asked Melinda Janki who chaired the session to reflect on the lecture's implications looking to the future. Melinda is a Council Member At Large for the Commonwealth Lawyers Association and Director of the Justice Institute Guyana.

> *"Humanity is increasingly looking to the judiciary*
> *to protect those rights and to save the Earth,*
> *the only home this species has ever had."*
>
> Melinda Janki, Winner of the Commonwealth Lawyers Association Rule of Law Award 2023

Lord Carnwath's excellent lecture has shown how far climate change litigation has come, particularly in the last few years. His lecture also has significant implications for future litigation, for lawyers who represent claimants in climate change cases, and for judges whose role is to determine what the law is and what remedies, if any, are available. As Lord Carnwath stated, "One of the crucial roles of judges is in forcing politicians to face up to scientific reality." As I reflect on this statement, and without wishing to be dramatic, it seems to me that this is literally a matter of life and death. In 2021 health professionals made a call for emergency action in The Lancet stating that, "Indeed, no temperature rise is 'safe' ".[23] The danger to life on earth from fossil fuels is real, present and well-known. Despite their well-known denials the fossil fuel industry has known about that danger as far back as the 1970s when their research showed that carbon dioxide from burning fossil fuels causes global warming.[24] More than fifty years later, the science is clear that the earth will become even hotter[25] and the ocean will undergo warming and acidification[26] unless politicians change their policies and stop greenhouse gas pollution.

Elected governments, not judges, decide policy and act accordingly. But that is only the starting point. The executive cannot simply do what it likes but must stay within legal parameters and boundaries when exercising public power. The courts have a constitutional duty to ensure that the executive does so. Whether you are a head of state and whether you like it or not, you are subject to the law because "Be ye never so high, the law is above you".[27] That applies equally to the fossil fuel industry.

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[23] Published **Online** September 6, 2021 https://www.thelancet.com/article/S0140-6736(21)01787-6/fulltext
[24] See for example Exxon Research and Engineering https://insideclimatenews.org/wp-content/uploads/2015/09/James-Black-1977-Presentation.pdf and Shell https://s3.documentcloud.org/documents/4411090/Document3.pdf
[25] Bill McGuire Hothouse Earth An Inhabitant's Guide
[26] Hansen J, Sato M, Russell G, Kharecha P. 2013 Climate sensitivity, sea level and atmospheric carbon dioxide. Phil Trans R Soc A 371: 20120294. http://dx.doi.org/10.1098/rsta.2012.0294
[27] Tom Bingham The Rule of Law quoting Dr Fuller

The judiciary's basic function is to state clearly what the law is. This is especially important when the government does not agree with the judiciary. Judges must be, and must be seen to be, independent from executive influence. Indeed, as Judge Aiken pointed out in the *Juliana* case where young people alleged injury from the devastation of climate change, "Even when a case implicates hotly contested political issues, the judiciary must not shrink from its role as a coequal branch of government."[28]

As is clear from Lord Carnwath's lecture, global warming and its impacts are well understood by the judiciary.[29] Moreover the parties (including the executive which is often the party being challenged in court) increasingly agree on the science and the facts. The argument is about the law. Even fossil fuel companies admit the science and impacts when it suits them. In an action brought in 2020, Honolulu claimed that Chevron and other fossil fuel companies knowingly promoted fossil fuel products which they knew to be hazardous and knew would cause or exacerbate global warming and related consequences, such as sea level rise, drought, extreme precipitation events, extreme heat events, and ocean acidification. Honolulu also said that Chevron and the other defendants misled regulators and consumers about the risk.[30] Chevron's answer was startling. They said:

> *"Any allegation that the Chevron Defendants deceived or misled federal, state, or international regulators or the public at large about the potential impacts of increased greenhouse gases on the climate is belied by a historical record replete with public information, including scientific reporting, international, federal, and local policy discussions and lawmaking, and national and local media coverage. The vast and comprehensive study and discussion of climate change, as detailed below, clearly refutes Plaintiffs' allegations that the oil-and-gas industry had "secret" knowledge about the link between the combustion of fossil fuels and its impact on the global climate."*[31]

In other words, everybody knows and has known about climate change for some time. Nevertheless there will still be defendants who seek to deny climate change. What then must their lawyers do? Lawyers have a professional duty not to deceive or knowingly or recklessly mislead the court. Can lawyers ethically allow their clients to deny established scientific reality? What can or should a judge do when faced with the denial of what seems obvious to the reasonably informed person?

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[28] Juliana v United States Case No. 6:15–cv–01517–TC Order 10 November 2016

[29] See for example the strong statement in Ashgar Leghari v. Federation of Pakistan (W.P. No. 25501/2015) "Climate Change is a defining challenge of our time and has led to dramatic alterations in our planet's climate system."

[30] City and County of Honolulu v. Chevron, ExxonMobil et al. 1CCV-20-0000380;

[31] Chevron's answer 12 September 2022

To have a good understanding of scientific reality, courts must remain up to date. The existential threat posed by climate change increases every day and with every with every ton of greenhouse gas pollution. In *Gloucester Resources ltd. v Minister for Planning* the judge has said that it was the wrong time for a new coal mine:

> *"Wrong time because the GHG emissions of the coal mine and its coal product will increase global total concentrations of GHGs at a time when what is now urgently needed, in order to meet generally agreed climate targets, is a rapid and deep decrease in GHG emissions. These dire consequences should be avoided."*[32]

But how far can judges rely on the evidence adduced by the parties and when and how should they inform themselves? If judges rely on the evidence adduced by the parties then the claimants' lawyers in particular must understand and be fully up to date with the science in order to make out their case. Lawyers have tended to use the reports produced by the Inter-Governmental Panel on Climate Change to inform judges of the science. But as the Hague District Court has pointed out the IPCC itself does not conduct research: it assesses the latest scientific information produced worldwide and publishes reports about it.[33] This information includes studies funded by the fossil fuel industry. In addition, some IPCC authors are scientists working for companies such as ExxonMobil.[34] Thus, although the IPCC reports give grounds for serious concern and immediate action, the scientific reality may be worse. An amicus brief can help to bring a court right up to date. For example in his amicus brief for the Supreme Court of Justice of Colombia Dr James Hansen showed that it is no longer enough to cut greenhouse emissions (pollution) to zero[35]. It is now necessary to move to 'negative' emissions and to remove carbon from the atmosphere.

Judges can also resort to judicial notice to bring themselves up to date. As explained by Lord Sumner "Judicial notice refers to facts which a judge can be called upon to receive and to act upon either from his general knowledge of them, or from inquiries to be made by himself for his own information from sources to which it is proper for him to refer."[36] In a case involving claims for flood damage in New York in 2012, the judge held that,

> *"In any event, upon taking judicial notice of the climatological reports issued by the National Climatic Data Center in New Jersey, it has been proved to the satisfaction of this*

[32] Gloucester Resources Ltd. v Minister for Planning [2019] NSWLEC7
[33] Urgenda Foundation v State of the Netherlands C/09/456689 / HA ZA 13-1396
[34] "ExxonMobil's Four Decades of Climate Science Research," ExxonMobil, September 10, 2018: https://www.exxonmobil.co.uk/energy-and-environment/environmental-protection/climate-change/exxonmobil-four-decades-of-climate-science-research
[35] José Daniel Rodríguez Peña et al. v. Presidency of the Republic of Colombia et al. 2018
[36] Commonwealth Shipping Representative v. P and O Branch Services [1923] AC 191

Court that the City was subjected to inordinate rainfall on August 14 and August 27-28, 2011."[37]

Similarly in a case in Texas the court took judicial notice of climate science forecasts of heatwaves when granting relief to prisoners.[38]

An interesting approach was taken by Judge Alsup in 2018 in a case brought by California against oil companies.[39] The judge asked the parties to give him a tutorial on the science observing somewhat wryly that the court often had tutorials in technology cases, "so that the poor Judge can learn some science." One advantage of the tutorial, over the normal adversarial process in the USA (and other common law jurisdictions), was that it gave the judge a grounding in the relevant (and uncontested) physics and mathematics and enabled him to question and test the experts until he was satisfied that he understood and could find the common ground between the parties. The resulting order set out the science and impacts of global warming and interestingly stated that all parties (including the defendant oil majors), "agree that fossil fuels have led to global warming and ocean rise and will continue to do so…"

Judge Alsup decided to stay his hand in favour of solutions from the executive and legislative branches of government. It may once have been possible to treat global warming as a purely political issue best left to the executive but I suggest that time is over. Many Parliaments (especially those modelled on Westminster) are now under what Lord Hailsham called 'elective dictatorship' with a legislature that is controlled by the executive. As is clear from climate change litigation, accepting the science does not mean that the executive will properly consider scientific realities when setting and implementing policy

The fundamental legal rights of claimants across the globe are being violated by as a result of global warming. These include obvious rights such as the right to life and right to a healthy environment. But they also include less obvious rights such as rights to culture and indigenous ways of life.[40] Humanity is increasingly looking to the judiciary to protect those rights and to save the Earth, the only home this species has ever had.

Melinda Janki

[37] Wohl v. City of New York https://law.justia.com/cases/new-york/other-courts/2014/2014-ny-slip-op-51618-u.html
[38] Cole v Collier https://climatecasechart.com/case/cole-v-collier/
[39] City of Oakland and California v BP PLC, Chevron Corporation, ConocoPhillips Company, ExxonMobil Corporation, Royal Dutch Shell PLC Case 3:17-cv-06011-WHA
[40] See for example Held et al v Montana CV 2020 -307

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