

Climate Change and the Role of the Law

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Stephen Tromans QC's article begins with a statement; "We all know what is neededto avert the climate change catastrophe..."

There is no cautioning about the need for more scientific research or analysis, to establish whether climate change is occurring and if so, what is causing it. His statement reflects current scientific thinking. The language of each successive report of the IPCC (the body established in 1990 to review the scientific data related to climate change and anthropogenic interference) has demonstrated an ever growing confidence in man's role in altering our climate; leading to the unwavering certainty of the latest report of 7th August 2021[1] which provides; "It is unequivocal that human influence has warmed the atmosphere, ocean and land."

It is also clear that the course charted by the world's governments in the last 30 years from the adoption of the United Nations Framework on Climate Change in May 1992, when the world first collectively acknowledged the climate change problem, has been one of insufficient action. The treaty set as its ultimate goal, "stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system". Furthermore, it acknowledged so many of the challenges which need to be reconciled; it recognised the threat to the poorest and most exposed states; it accepted the duty owed to future generations and it conceded the differential responsibilities of nations based on their historic emissions and their differing economic and technological capacities. All this was accepted as far back as 1992 and yet still little has been achieved to avert the looming crisis. In the near 30 years since 1992 the CO₂ we have emitted is broadly equivalent to the emissions in the preceding 240 years from the start of the Industrial Revolution; in effect they have nearly doubled.

It is also clear, as Stephen states, that there are actions we, as individuals, can take which will make a difference; such as eating less meat; moderating our travel schedules; turning our thermostats down and using less plastic and more besides, but ultimately the big game changers will not occur without Government intervention. Government intervention to encourage positive activity (as with the very successful pump priming of the wind power industry in the UK) and to prohibit and penalise damaging behaviour, such as the burning of coal in power stations; the construction of poorly insulated buildings and the driving of polluting petrol and diesel cars. In the pursuit of these grander measures the law has a central role to play in implementing policies effectively.

Building on Stephen's belief in the role the law can play in this global drama, I would highlight three areas in particular. First, well crafted domestic laws can help by provide an effective framework for the development and implementation of such policies. The Climate Change Act 2008 is a good example of this. The Act was heralded as the first overarching climate legislation which imposes legally binding obligations regarding emissions reductions. It imposes on the Secretary of State a duty to meet long term targets (now Net Zero by 2050) and intermediate 5 yearly carbon budgets. [2]It also contains some valuable checks and balances through the use of an independent body, the climate change committee, who advise and monitor the Secretary of States' progress annually. The legislation has much to commend it. However, the efficacy of

this legislation and the much-vaunted use of legally binding targets may be about to be tested, as it seems possible, if not likely, that the 4th and 5th budgets will not be achieved. This will establish whether Lord Denning was right when he said, in 1973 'We live in an age when Parliament has placed statutory duties on government departments and public authorities – for the benefit of the public – but has provided no remedy for the breach of them'. [3] That remains true today; perhaps now is a time to put this right.

The second area the law can play a crucial role in is in combatting Government inaction. Despite an understandable reluctance shown by courts around the world to be drawn into creating policy in areas they regard as the province of the executive, there is a pressing need to find ways to force Governments to meet their commitments to their citizenry, including under the Paris Agreement. Exactly how such access should be secured will vary from country to country: in some cases, it will be through enforcing statutory obligations, in others through the invocation of human rights legislation or resort to constitutional rights, as witnessed in the recent cases in the Netherlands and Germany. In the Urgenda case in the Netherlands, the Supreme Court held that the failure of the Government to take sufficient measures to cut carbon emissions was a breach of human rights under the European Convention on Human Rights.[4] In April of this year the German Federal Constitutional Court found that the newly enacted Climate Change Act was unconstitutional, as it failed to provide for emissions targets beyond 2030. By, in effect, deferring reductions beyond 2030 it would reduce the options available to meet the required reductions to reduce climate change and place a higher burden on those generations. This would constitute a limiting of the freedoms in general of the plaintiffs enshrined in the German Constitution, including the right to life and health.[5] Whatever is the appropriate basis for challenge, the barriers of standing, justiciability (objections to involvement based on grounds of impinging on policy) and the financial costs of litigating, all of which in differing ways have hindered the ability of the ordinary man and woman in the street from holding their governments to account, need to be tackled to enable the rule of law to play this vital role in the climate change drama. [6]

But the biggest challenge the law faces is in the public international law arena and the timescale for finding solutions makes this area the most intractable. The nature and scale of the problems to which climate change gives rise, call for unprecedented cooperation between states; to reduce emissions and to unlock the necessary finance to develop and deploy the requisite technology. The absence of an effective body to bring forward 'legislation' and the lack of sanctions in the climate related treaties, to ensure commitments that have been made, are adhered to, has been cruelly laid bare in the last 30 years. What the world needs now is first, much stronger commitments, particularly from the biggest emitters and richest countries, both to reduce emissions and to provide the finance and technology to those who need it and secondly, for stronger sanctions, to ensure those commitments become a reality. If the international community fail to achieve this, we are all condemned (and most tragically, future generations) to a gloomy future- with large parts of the earth resembling the site of Ozymandias' statue – "Nothing beside remains. Round the decay of that colossal wreck, boundless and bare the lone and level sands stretch far away." [7]

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[1] IPCC's Sixth Assessment Report WG1-A1

[2] Climate Change Act 2008; sections 1 and 4

[3] Attorney-General, ex rel McWhirter v Independent Broadcasting Authority [1973] QB 626 [646].

[4] Urgenda Foundation v. State of the Netherlands

[5] Neubauer, et al. v. Germany

[6] 'Achieving Justice and Human Rights in an era of Climate Disruption'; 2014

IBA Model Statute for Proceedings Challenging Government Failure to Act on Climate Change; 2020

[7] Ozymandias-Percy Bysshe Shelley, 1818

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