

## THE ROLE OF THE COURTS IN FACILITATING CLIMATE CHANGE ADAPTATION

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Since the historic decision was made to adopt the *Paris Agreement* on 12 December 2015,<sup>1</sup> the overarching international framework for promoting and implementing climate change adaptation has undergone significant changes. For instance, the Green Climate Fund has joined the Global Environment Facility<sup>2</sup> as ‘an operating entity of the financial mechanism of the UNFCCC and of the Paris Agreement’ and, therefore, now shares the responsibility for assisting developing countries in making the ‘paradigm shift towards ... climate-resilient development pathways’.<sup>3</sup> The *Paris Agreement* itself encompasses numerous adaptation-related measures, including the resolution of member-states to ‘aim’ to provide US\$100 billion annually by 2020 for the implementation of mitigation and adaptation measures in developing countries.<sup>4</sup> However, given that the global cost of adapting to climate change alone has been estimated at between US\$140 to 300 billion per year by 2030,<sup>5</sup> it is highly unlikely that international financial mechanisms will bring about the degree of global adaptation necessary to make developing countries acceptably resilient. Notwithstanding international developments, it is incontrovertible that, in both developed and developing countries, each branch of domestic government – the legislature, executive and judiciary – will play a critical role in determining whether the societies they govern successfully adapt to climate change.

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<sup>1</sup> United Nations Framework Convention on Climate Change, Conference of the Parties 21, *Adoption of the Paris Agreement*, Decision 1/CP.21, UN Doc FCCC/CP/2015/10/Add.1 (29 January 2016) annex (‘*Paris Agreement*’).

<sup>2</sup> Global Environment Facility, *GEF Programming Strategy on Adaptation to Climate Change: July 2014 – June 2018* <<https://www.thegef.org/gef/node/10957>> 5.

<sup>3</sup> Green Climate Fund, *Report on the Development of the Draft Strategic Plan for the Green Climate Fund – Submission from the Ad Hoc Group of Board/Alternate Members* (GCF/B.12/06, 3 March 2016) 2.

<sup>4</sup> United Nations Framework Convention on Climate Change Conference of the Parties, *Adoption of the Paris Agreement*, Decision 1/CP.21, UN Doc FCCC/CP/2015/10/Add.1 (29 January 2016) [114].

<sup>5</sup> United Nations Environment Programme, *The Adaptation Gap Finance Report* (May 2016) UNEP xii <<http://web.unep.org/adaptationgapreport/sites/unep.org.adaptationgapreport/files/documents/agr2016.pdf>>.

In applying, implementing and enforcing compliance with the law, judiciaries across the world can make a meaningful contribution towards ‘mainstreaming’ adaptation programs, preventing maladaptive development and in addressing disputes that arise from adaptation measures (or lack thereof). Indeed, Peel and Osofsky have heralded ‘adaptation litigation’ as the next frontier of climate litigation.<sup>6</sup> It is well beyond the scope of this comment to comprehensively outline or examine the likely role of courts in facilitating climate change adaptation.<sup>7</sup> Rather, this comment will confine itself to concisely sketching two of the more significant ways in which the courts are likely to do so.

## A. COMPELLING ADAPTATION MEASURES

In many countries, the scope for the judiciary to compel the executive to implement adaptation measures and programs is constrained by, and dependent upon, legislation. However, in some countries, constitutional law and human rights law affords courts with considerably broader power to compel the implementation of climate change adaptation programs or measures. The pioneering adaptation related proceedings of *Leghari v Federation of Pakistan*,<sup>8</sup> before Pakistan’s Lahore High Court, foreshadows the likely future significance of the courts in adjudicating constitutional and human rights based actions that seek to compel governments to implement robust adaptation programs.

The proceedings of *Leghari* were brought by an agriculturalist petitioner seeking to redress the Pakistani Government’s alleged inaction in implementing the ‘Framework for Implementation of Climate Change Policy (2014-2013)’ (the ‘Framework’).<sup>9</sup> The Framework sets out an overarching national adaptation program with various ‘priority’ adaptation actions, such as action directed at the ‘water sector’, ‘forestry’, and the agriculture and

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<sup>6</sup> Jacqueline Peel and Hari Osofsky, ‘Sue to Adapt?’ (2015) 99(6) *Minnesota Law Review* 2177.

<sup>7</sup> See, eg, *Ibid*; Brian J Preston, ‘The Role of the Courts in Relation to Adaptation to Climate Change’ in Tim Bonyhady, Andrew Macintosh and Jan McDonald (eds), *Adaptation to Climate Change Law and Policy* (Federation Press, 2010); J.B. Ruth, ‘Climate Change Adaptation and the Structural Transformation of Environmental Law’ (2010) 40 *Environmental Law* 363; Justine Bell, *Climate Change and Coastal Development Law in Australia* (Federation Press, 2014); Nicola Durrant, *Legal Responses to Climate Change* (Federation Press, 2010).

<sup>8</sup> *Leghari v Federation of Pakistan* (‘*Leghari*’) (Lahore High Court, WP No 25501/2015) (31.8.2015), (4.9.2015), (14.9.2015), (5.10.2015), (18.11.2015), (7.12.2015), (18.1.2016), (29.2.2016) and (29.3.2016). See Lahore High Court, *Green Bench Orders*, Lahore High Court <[http://sys.lhc.gov.pk/?page\\_id=2050](http://sys.lhc.gov.pk/?page_id=2050)> (accessed 26 July 2016).

<sup>9</sup> *Leghari* (4.9.2015) at [1] and (14.9.2015) at [4].

livestock’ sector.<sup>10</sup> The petitioner founded his action on the basis that the Government’s alleged inaction infringed both his constitutional ‘right to life [including] the right to a healthy and clean environment’ and ‘right to human dignity’, as embodied in the constitutional principles of social and economic justice and various international environmental principles.<sup>11</sup>

On 4 September 2015, Judge Syed Mansoor Ali Shah held that the ‘delay and lethargy of the State in implementing the Framework offends the fundamental rights of the citizens’.<sup>12</sup> Moreover, the Court subsequently found on 14 September 2015 that no action had been taken to implement the Framework.<sup>13</sup> Consequently, the Court established a Climate Change Commission and charged this Commission with expediting the effective implementation of the Framework.<sup>14</sup> The Court also directed the relevant Ministries and Departments to identify and present to the Commission two or three ‘achievable items/targets out of the framework’.<sup>15</sup> On 18 January 2016, the Court observed that the Commission had made ‘modest progress’ in so doing<sup>16</sup> and directed the Punjab Government to both allocate a budget for climate change action<sup>17</sup> and achieve the ‘priority items under the Framework’ by June 2016.<sup>18</sup> On 29 March 2016, the Court directed both the Punjab Government and the Commission to prepare reports on the implementation of two of the water-related ‘priority items’ under the Framework intended ‘to address water related vulnerabilities induced by climate change’.<sup>19</sup>

Aside from *Leghari* - and in contrast to the increasingly substantial body of climate change mitigation case law<sup>20</sup> - there remains only scant case law directly concerning the obligations

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<sup>10</sup> *Leghari* (4.9.2015) at [2] and (14.9.2015) at [8]-[10].

<sup>11</sup> *Leghari* (4.9.2015) at [7] and (14.9.2015) at [4].

<sup>12</sup> *Leghari* (4.9.2015) at [8].

<sup>13</sup> *Leghari* (14.9.2015) at [11].

<sup>14</sup> *Leghari* (14.9.2015) at [11].

<sup>15</sup> *Leghari* (15.10.2015) at [3].

<sup>16</sup> *Leghari* (18.1.2016) at [3].

<sup>17</sup> *Leghari* (18.1.2016) at [5].

<sup>18</sup> *Leghari* (18.1.2016) at [4].

<sup>19</sup> *Leghari* (29.3.2016) (The last hearing date of the proceedings was 25 May 2016, where the proceedings were adjourned).

<sup>20</sup> See, eg, Jacqueline Peel and Hari Osofsky, *Climate Change Litigation: Regulatory Pathways to Cleaner Energy* (CUP, 2015); Brian J Preston, ‘Climate Change Litigation: Part 1’ (2011) 1 *CCLR* 3; Brian J Preston, ‘Climate Change Litigation: Part 2’ (2011) 2 *CCLR* 244; Michael B. Gerrard and J. Cullen Howe, Arnold & Porter LLP, ‘Climate Litigation: Filing: Graph of Cases by Year’ available at <<http://www.climatecasechart.com>> (accessed 26 July 2016).

of governments to implement climate change adaptation measures. However, it can be reasonably anticipated that the future role of the courts in adjudicating adaptation related constitutional law and human rights litigation will be analogous to the established role of some courts in adjudicating actions relating to air pollution. For instance, in the Asia-Pacific region, there is a growing number of cases<sup>21</sup> in which courts have ordered air pollution mitigation measures to be undertaken to remedy constitutional law and human rights violations such as, for example, the imposition and enforcement of minimum vehicle fuel and emission standards,<sup>22</sup> the banning of certain vehicles,<sup>23</sup> the creation and improvement of city bypass highways,<sup>24</sup> the levying of green taxes<sup>25</sup> and the expansion of forested areas around cities et cetera.<sup>26</sup> It is not a significant stretch to predict that such courts may also, in appropriate circumstances, compel governments to implement adaptation measures such as building sea-walls or flood levee banks and carrying out prescribed bushfire hazard reduction burns.

## B. PREVENTING MALADAPTIVE DEVELOPMENT

In order to successfully adapt to climate change, countries will not only need to implement and encourage adaptation measures. It will be equally critical that maladaptive development, which diminishes and impedes resilience, is properly prevented. In exercising their administrative law powers of judicial and (if applicable) merits review, the courts will play an instrumental role in preventing maladaptive development and, therefore, in facilitating climate change adaptation. For example, in the merits review case of *Rainbow Shores Pty Ltd v Gympie Regional Council*, development approval for a seaside development was refused partly on the basis that climate change induced changes in sea levels and storm surge would

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<sup>21</sup> See, eg, John Pendergrass, ‘Judicial Approaches to the Issue of Air Pollution in South Asian Cities’ (Environmental Law Institute Power Point Presentation) <<http://www.asianjudges.org/wp-content/uploads/2015/12/03-Mr.-Jay-Pendergrass-Judicial-Approaches-to-Air-Pollution.pdf>> (accessed 27 June 2016).

<sup>22</sup> See, eg, *Farooque v Government of Bangladesh* (2002) 22 BLD 345 Supreme Court of Bangladesh; *Mansoor Ali Shah v Government of Punjab* (2007) CLD 533 Lahore High Court.

<sup>23</sup> See, eg, *Smoke Affected Residents Forum v Municipal Corporation of Greater Mumbai* (2002) WP No 1762 of 1999 (Bombay High Court); *Mansoor Ali Shah v Government of Punjab* (2007) CLD 533 Lahore High Court.

<sup>24</sup> See, eg, *Vardhaman Kaushik v Union of India* Original Application No 21 of 2014 (National Green Tribunal of India) (4.12.2014) at 11-12; *M.C. Mehta v Union of India* Writ Petition No. 13029 of 1985 (Supreme Court of India) (9.11.2015).

<sup>25</sup> See, eg, *M.C. Mehta v Union of India* Writ Petition No. 13029 of 1985 (Supreme Court of India) (5.1.2016).

<sup>26</sup> See, eg, *Vardhaman Kaushik v Union of India* Original Application No 21 of 2014 (National Green Tribunal of India) (4.12.2014) at 13.

expose too great a proportion of the development site to the risk of inundation.<sup>27</sup> The Victorian Civil and Administrative Tribunal has also refused to grant development approval to residential development projects on the basis of the unacceptable vulnerability of the proposed development to climate change induced sea level rise and storm surge events.<sup>28</sup> Yet, maladaptive development need not be prohibited if development conditions can address unacceptable aspects of the development. For instance, the Land and Environment Court of New South Wales prevented a maladaptive coastal development from occurring in the merits review case of *Newton v Great Lakes Council* by imposing a development condition with stricter construction standards - to protect the development from 2033 sea level rise conditions.<sup>29</sup>

In judicial review proceedings, the courts may also indirectly prevent maladaptive development by overturning development consents granted by decision-makers without sufficient regard to an adaptation-related mandatory relevant consideration. For instance, in *Walker v Minister for Planning*, the Land and Environment Court held that the increased flood risk caused by climate change was an implied relevant matter - as part of the consideration of the principle of ecologically sustainable development - under the relevant legislation conditioning the power to approve a proposed residential development on a flood-prone coastal plain.<sup>30</sup> Thus, in supervising the merits and/or legality of governmental development approval decision-making, the courts can improve the resilience of built and natural environments to climate change and, thereby, facilitate climate change adaptation.

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<sup>27</sup> [2013] QPEC 26; (2013) QPELR 55 at [353]-[365].

<sup>28</sup> *Gippsland Coastal Board v South Gippsland Shire Council (No 2)* [2008] VCAT 1545; *Myers v South Gippsland Shire Council (No 1)* [2009] VCAT 1022; *Myers v South Gippsland Shire Council (No 2)* [2009] VCAT 2414.

<sup>29</sup> [2013] NSWLEC 1248 at [43]-[57].

<sup>30</sup> [2007] NSWLEC 741; (2007) 157 LGERA 124 at [156]-[167]. Decision reversed on appeal on application of principle but not on principle, *Minister for Planning v Walker* [2008] NSWCA 224; (2008) 161 LGERA 423 at [60].

## C. CONCLUSION

Judiciaries across the world will play an instrumental role in facilitating climate change adaptation. This comment has only briefly sketched two of the more significant ways in which courts will play such a role. However, the role of the courts in this respect will be by no means limited to adjudicating constitutional, human rights and administrative law actions. Rather, the courts will likely adjudicate: negligence actions concerning a failure to construct/undertake adaptation works/measures<sup>31</sup> or, conversely, the construction/undertaking of an adaptation work/measure that has adverse consequences;<sup>32</sup> actions concerning compensation for the compulsory acquisition of land for adaptation purposes;<sup>33</sup> public trust actions relating to alleged obligations to take measures to make natural and built (especially heritage) places sufficiently resilient to withstand climate change effects<sup>34</sup> and a myriad of other legal actions. Governments, judiciaries and academics would be well advised to proactively prepare for this forthcoming wave of adaptation litigation. As Judge Syed Mansoor Ali Shah observed in *Leghari*, ‘...climate change is no longer a distant threat – we are already feeling and experiencing its impacts .... These changes come with far-reaching consequences and real economic costs’.<sup>35</sup>

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<sup>31</sup> See, eg, Jan McDonald, ‘A risky climate for decision-making: The liability of development authorities for climate change impacts’ (2007) 24 *EPLJ* 405; Philippa England, ‘Heating up: Climate change law and the evolving responsibilities of local government’ (2008) 13 *LGLJ* 209; See also, by analogy, *Wohl v City of New York* (NY Supreme Court, Richmond County, No 103095/2012, 22 October 2014) slip op 51618(U).

<sup>32</sup> See, eg, Justine Bell-James, ‘Coastal defence structures – legal risks and legal opportunities’ (2016) 21 *LGLJ* 16 and see also, by analogy, *Ralph Lauren 57 v Byron Shire Council* [2016] NSWSC 169; *Positive Change for Marine Life Inc v Byron Shire Council (No 2)* [2015] NSWLEC 157; *Southern Properties (WA) Pty Ltd v Executive-Director of the Department of Conservation and Land Management* [2012] WASCA 79.

<sup>33</sup> See Jacqueline Peel and Hari Osofsky, ‘Sue to Adapt?’ (2015) 99(6) *Minnesota Law Review* 2177, 2202; See also, *Borough of Harvey Cedars v Karan* 70 A.3d 524 (N.J. 2013).

<sup>34</sup> Although only related to climate change mitigation see, eg, *Foster v Washington Department of Ecology* (Wash Super Ct, No 14-2-25295-1, 29 April 2016); *Chernaik v Brown*, No. 16-11-09273 (Or. Cir. Ct. opinion and order May 11, 2015); *Sanders-Reed v Martinez*, No 33,110 (NM Ct App Mar 12, 2015); *Kanuk v State of Alaska*, 335 P.3d 1088, 2014 (Sup Ct Alaska).

<sup>35</sup> *Leghari* (14.9.2015) at [3].