



CLIMATE JUSTICE AND THE ROLE OF AN INTERNATIONAL ENVIRONMENTAL COURT

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PROFILE

Justice Preston is the Chief Judge of the Land and Environment Court in New South Wales. Prior to being appointed in November 2005, he was a senior counsel practising primarily in New South Wales in environmental, planning, administrative and property law. He has lectured in post-graduate, environmental law for over 23 years. He is the author of Australia's first book on environmental litigation and 86 articles, book chapters and reviews on environmental law, administrative and criminal law. He holds numerous editorial positions in environmental law publications and has been involved in a number of international environmental consultancies.

Since 2013, Justice Preston has been a member of the International Bar Association President's Climate Change Justice and Human Rights Task Force, which was established to support the IBA in assessing the challenges to the current national and international legal régimes on climate change. In July 2014, the Task Force set forth its analysis and recommendations in a report entitled *Achieving Justice and Human Rights in an Era of Climate Disruption*. Justice Preston has also presented papers on climate change litigation, the role of courts in adapting to climate change and climate change justice and human rights.

In 2010, he received an award by the Asian Environmental Compliance and Enforcement Network in recognition of his outstanding leadership and commitment in promoting effective environmental adjudication in Asia. He was made, in 2013, a Fellow of the Australian Academy of Law and in 2014 an Honorary Fellow of the Environment Institute of Australia and New Zealand.

INTRODUCTION

Where political action on climate change has not been forthcoming, individuals and groups have sought to achieve climate change justice through litigation. Such litigation involves answering difficult questions about what constitutes climate change injustice, the injuries suffered, the costs of these injuries, who has a legal right to claim redress, who is legally responsible, and what cause of action is available. The International Bar Association ('IBA') Climate Change Justice and Human Rights Task Force Report, *Achieving Justice and Human Rights in an Era of Climate Disruption* (July 2014) ('the IBA Task Force Report') made numerous recommendations for the clarification of human rights obligations relating to climate change in international and regional human rights law, and proposed further work to progress domestic and international action, specifically through consideration of a Model Statute on Legal Remedies for Climate Change.

ISSUES IN LITIGATION FOR CLIMATE CHANGE JUSTICE

The first step in climate change litigation involves identifying the injustice caused by climate change (e.g., what injustice has been suffered and by whom). The concepts of distributive justice and procedural justice are relevant to climate change injustice. Distributive injustice involves the unjust distribution of burdens and benefits. It is concerned with who suffers injury by reason of climate-change induced events, such as sea level rise and increased storm surge on coasts. Injury may be suffered by individuals, communities, the state, future

generations or non-human nature (such as individual species, populations, endangered ecological communities, ecosystems, and the biosphere). Examples of injuries that could be suffered include harm to individual health, damage to private property, damage to public property and infrastructure, damage to common natural resources (*res communes*) or unowned natural resources (*res nullius*), or damage to ecosystem services and functioning.

The second step involves quantification and monetarisation of these injuries. This can be a difficult task especially for injuries to non-human nature. Economics is concerned with the loss of utility to humans. Injury to non-human nature only has economic value in so far as it causes the diminution of utility of humans.

The third step involves identifying who has the legal right to claim redress for these injuries and costs, who is legally responsible to meet the claim for redress, and what is the cause of action that enables the victim to claim redress against the perpetrator. These questions are interdependent: the cause of action will differ depending on who the claimant alleges is legally responsible, and vice versa.

For a cause of action arising in tort (e.g., in trespass, public or private nuisance, or negligence), the defendant or wrongdoer could include those responsible for greenhouse gas emissions, those responsible for removing carbon sinks, or those approving these activities. Statutory actions could also be taken, including prosecution for environmental offences, or civil enforcement of environmental laws. In administrative law, claimants could seek merits review of decisions to approve strategic plans or policies, or specific activities, that increase greenhouse gas emissions or remove carbon sinks, or judicially review such decisions. Litigation could also be commenced invoking the doctrines of the public trust or *parens patriae* regarding injuries to certain common natural resources (such as the air, sea and seashores).

An abuse of human rights could also be litigated. Climate change might injure economic, social and cultural rights (such as a right to adequate food, water and health, and an adequate standard of living) or civil and political rights (such as a right to life, and right to respect for private life and family life).

Procedural justice is also relevant to climate change injustice. Procedural injustice can occur through the denial or diminution of access to information about climate change and its causes and effects including climate change induced events, public participation in decision-making regarding climate change mitigation and adaptation policies, approvals and actions, and access to justice to enforce substantive and procedural rights and to remedy wrongs.

ACHIEVING CLIMATE CHANGE JUSTICE

The IBA Task Force Report has recommended ‘greening’ existing human rights obligations, and the development of a freestanding right to a safe, clean, healthy and sustainable environment. The Task Force also recommended that an IBA Working Group on Climate Change Justice be designated to draft a Model Statute on Legal Remedies for Climate Change. In the long term, the Task Force encourages states to adopt domestic procedural and substantive laws incorporating the legal principles as set out in the Model Statute.

The Task Force recommended that the Model Statute address the following substantive and procedural issues:

- actionable rights* affected by climate change;
- clarification of the role and definition of *legal standing*. This includes addressing issues such as what right or interest needs to be affected, whether the claimant can be outside political borders, whether opt in or opt out mechanisms are more appropriate for class actions, whether gateway or leave provisions are appropriate, and whether guardians or trustees for future generations or non-human nature should have standing;
- issues regarding *causation*, including appropriate standards for proving a legally cognisable causal link between greenhouse gas emissions and relief sought. This involves considering the types of evidence that constitute sufficient proof of causation;
- whether *knowledge*, including foreseeability of harm, is relevant to liability or judicial relief;

development of methods for awarding *remedies and relief* as warranted by the circumstances, including uniform standards by which to apportion damages; and the provision of declaratory, interim and injunctive relief;

issues regarding standards of *liability*, including the appropriateness of no fault or strict liability, or joint and several liability;

the interrelationship of *competing claims* by nations, communities and individuals. This involves consideration of whether future claims by similarly harmed individuals and communities are precluded, whether claims by future generations are precluded, how defendants can be protected from paying excessive or duplicate damages, and the development of a claim-based system of distributing monetary compensation;

overcoming *limitation periods* fixed by statute for commencing action;

the availability of pre-trial and interim applications for *disclosure and discovery*;

guidelines on *costs* awards in climate change cases; and

guidelines for the *jurisdictional reach* of domestic and international courts to adjudicate climate change related claims.

INTERNATIONAL COURT FOR THE ENVIRONMENT

The IBA Task Force Report recommended, as a longer term goal, the creation of a new permanent formal judicial institution, an International Court for the Environment (ICE), to adjudicate environmental disputes. An ICE could ascertain and clarify environmental legal obligations of governments

and businesses, facilitate harmonisation of and complement existing legislative and judicial systems, and provide access to justice to a broad range of actors through open standing rules. The Report recommended that:

both states and non-state actors (organisations, individuals and corporations) should have standing before the ICE, so as to enable broad airing of the potential complexity of issues and multiplicity of parties involved in climate change related disputes;

the ICE's procedures should allow the parties to choose the location for constituting the court;

states should ultimately be bound by the decisions of the ICE;

in terms of remedies, the ICE should have broad powers to make findings of incompatibility between domestic legislation and multilateral environmental agreements ('MEAs'), to order provisional measures, and to make final judgments that encompass both monetary awards and performance of tailored orders of environmental rehabilitation or restoration; and

the ICE should be empowered to fulfil a judicial review role, to make international environmental law, to police legislation for compliance with MEAs, and to adjudicate disputes.

CONCLUSION

Climate change litigation involves numerous challenges. The IBA Task Force Report recommendations seek to clarify human rights obligations relating to climate change, and progress domestic and international action.