Where planetary boundaries and legal boundaries coincide

I write as the world holds its breath awaiting the results of the election in the USA. Whoever wins, there will be significant consequences for legal regulation of many details of the physical and living world; whatever regulatory policies are pursued will affect greenhouse gas (GHG) levels, environmental pollution, biodiversity, marine ecosystems and all aspects of our planetary home.

By Abigail Holt, Barrister, Garden Court Chambers

Thinking about climate change, biodiversity loss and connected destabilisation is terrifying. Nonetheless, increasing numbers of lawyers and activists are dealing with the existential angst involved and seeing what legal tools can be deployed to address the changes to human behaviour, ultimately, which are needed to reorganise human societies at a local and international level so as to rapidly reverse global warming. This needs to occur whilst protecting what remains of the living world at the same time as lifting millions of people in the developing world out of poverty without a phase of carbon-based industrialisation.

Students are increasingly studying climate justice as part of their law degrees, whilst some Universities and advanced legal institutions are devising post-graduate courses for legal practitioners, encouraging established lawyers to learn the relevant science and legal developments of climate change law so as to develop new skills relevant to their particular area of law. BIICL (British Institute of International and Comparative Law) has been running an eight-session introductory course on Climate Change Law. Hughes Hall at Cambridge University has devised a very sophisticated series of online courses "Democratising Education for Global Sustainability and Justice"[1]. Some of the courses are free. The Cambridge University courses are based around the United Nations' 17 Sustainable Development Goals. These courses include an overview of the network of International Treaties forming the blueprint for global regulation, which, when translated into national law, would be a massive step towards remedying the climate crisis and so-called "wicked" connected problems. Lead by the indefatigable Professor Dr Marie-Claire Cordonier Segger, the courses not only aim to educate anyone based anywhere in the world involved in relevant climate and biodiversity policy areas (not just legal professionals), Hughes Hall is equipping an army of informed course graduates. They will leverage their knowledge to influence change locally in their home countries and also at international meetings in which they are encouraged to actively participate, for example the recent Convention on Biological Diversity held in Cali, Columbia (October 2024) and the 29th United National Climate Change Conference (COP) at Baku, Azerbaijan (November 2024).

Judges are starting to get in on the education action too. I recently participated in a course devised by t The Climate Judiciary Project at the Environmental Law Institute in Washington DC and facilitated by the Bloch Judicial Institute of Duke Law School has designed a course to help judges understand the relevant scientific principles underlying climate change and the wealth of data contained within the reports of the Intergovernmental Panel on Climate Change (IPCC), as well as the science behind possible remedies, such as carbon capture technology and alternative hydrogen-based energy sources.

For many practitioners unfamiliar with these legal education projects, or unaware of the small but increasing numbers of climate justice and environmental cases, the vibe is often professional scepticism. Law forms the scaffolding which supports our carbon-based global wealth and commerce, which relies in turn on planetary-resource-depleting extractive activities, swathes of methane-producing agriculture and the pursuit of economic growth. So how on earth can litigation that costs the earth do anything to help preserve the earth?; this especially in the light of the increasingly harsh sentences that have been handed down to climate protesters by the criminal courts (eg Roger Hallam & others) and which have attracted the attention of Michel Frost UN Special Rapporteur on Environmental Defenders under the Aarhus Convention[2], as well as the draconian civil injunctions against "persons unknown"[3]used to stymie climate activists.

Against this sad background, for those who are determined to use the law to confront arguably the most urgent "triple planetary crisis of climate change, biodiversity loss and pollution" 2024 has actually brought glimmers of hope in the UK and overseas. Here I seek to sketch some of the new jurisprudence that is evolving, and which is particularly exciting as lawyers adopt a collaborative international comparative law approach to address physical world phenomena for which the niceties of national jurisdiction and boundaries are irrelevant.

June 2024 saw the landmark decision of R (Finch on behalf of the Weald Action Group) v Surrey County Council and others[4]. Local resident Sarah Finch applied for judicial review of the Surrey County Council's decision to grant planning permission for oil extraction at Horse Hill without assessing the likely (scope 3) emissions from *burning* the to-be extracted crude oil. Ms Finch argued that the Environmental Impact Assessment (EIA) should cover both direct and indirect environmental effects, including climate impacts from GHG emissions. By a 3-2 majority, the Supreme Court found the Council's decision unlawful and the majority judgment, delivered by Lord Leggatt, emphasised that it is not merely likely but *inevitable* that the crude oil produced from the site would be refined and would eventually undergo combustion producing GHG emissions.

One practical result of the Finch decision was that, on 30 October 2024, the new government announced a consultation on supplementary EIA guidance for assessing the impact on climate of scope 3 emissions from oil and gas projects[5]. Other practical

consequences are that the Secretary of State for Housing, Communities and Local Government has accepted that the decision to approve a controversial coal mine in Whitehaven, Cumbria is legally flawed, and on 29 August 2024 the government also announced that they no longer intend to oppose appeals in relation to the proposed Rosebank and Jackdaw oil fields in the North Sea.

It is thought that the Finch decision could influence the decision in the Greenpeace Nordic case currently before the ECtHR[6] where 6 Norwegian young people are arguing that the Norwegian Government's decisions to issue new licences for oil and gas exploration in the Arctic (Barents Sea) to extract hydrocarbon fuels violates the claimants' article 2 and 8 rights under the ECHR.

The Greenpeace Nordic case also seeks to build on the successful Strasbourg Verein KlimaSeniorinnen Schweiz v Switzerland[7] decision and where a majority of 16 judges to one decided that there had been a violation of the Article 8 and Article 6 rights of a group of older Swiss women who were concerned about the effect of global warming on their living conditions and health. They successfully argued that the Swiss authorities were not taking sufficient action to mitigate the effects of climate change on their demographic, despite the Swiss authorities' obligations to do so for the benefit of their citizens and as a result of their international commitments. The ECtHR found that the Swiss Confederation had failed to comply with its positive obligations under the ECHR by failing to put in place an adequate regulatory framework to limit national GHG emissions and meet reduction targets. Whilst the judges of the ECtHR recognised that national authorities enjoy wide discretion regarding how they go about meeting their obligations, they had not demonstrated that they had acted quickly enough or in an appropriate way to implement a regulatory framework to meet their international obligations, particularly under the UN Framework Convention of Climate Change (UNFCCC) and the Paris Agreement 2015.

On a different issue, in February 2024 the Privy Council applied UK jurisprudence to decide an appeal relating to the Eastern Caribbean Island of Barbuda brought by Barbudan residents Mr John Mussington (Marine Biologist) and Ms Jacklyn Frank (former School Principal). They brought a successful judicial review challenge regarding the decision of the Antigua and Barbuda Development Control Authority to grant a permit for the construction of an airport and associated infrastructure on the Island of Barbuda following catastrophic damage caused by Hurricane Irma in 2017 and at a time when a majority of the islanders had been evacuated from their homes to a neighbouring island and so were unaware of what was unfolding in their absence.

In that appeal a central issue was the issue of "standing" in judicial review claims. What were the features of the special "interest" that a person connected to the case had to demonstrate so as to qualify them to act in the public interest and to be accorded "standing" in an environmental case? In the earlier case of Walton v Scottish Ministers[8] the Supreme Court had held that a person with a genuine interest in the aspect of the environment that they seek to protect, and sufficient knowledge of the subject in question to qualify them to act in the public interest, may be accorded standing in an environmental case, even though the challenged decision does not *directly* affect their own rights or interests. In John Mussington and another v Development Control Authority and others[9] the Privy Council expanded the Walton principle in a way which is poetic and tantalising in its possibilities. At paragraph 57 judges deciding similar cases are given the following guidance:

> *'Where an application for judicial review involves issues of environmental concern it is not necessary that the applicant demonstrates an expertise in the subject matter. All that is required is that they demonstrate some knowledge or concern for the subject. So an amateur ornithologist or bird-watcher might raise a concern about the potential loss of a bird's habitat; or a fisherman about the effect of a hydro-electric scheme on fish; or a local historian about the effect on an archaeological or historical site; or a local resident on the loss of a local beauty spot frequented by the local community. In Walton Lord Hope in effect asked the rhetorical question, "Who speaks for the ospreys?". The answer is whoever can demonstrate a genuine interest in their fate.'*

And so the doors of the courts have been unlocked to allow for those who can demonstrate "a genuine interest" to advocate for birds, fish, sites of historic and cultural interest and valued places of beauty. The irony is, of course, that human beings are part of the living world which they need, along with an understanding of history and exposure to beauty, for their very survival and to thrive. These are very exciting developments in a constant slew of bad news and a call to action for all lawyers to advocate for planetary homeostasis and to weave respect for all forms of life into the DNA of lawfulness, as if our collective lives depend on it. Because they do.

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[1] Democratising Education for Global Sustainability and Justice - Hughes Hall
[2] Aarhus_SR_Env_Defenders_statement_following_visit_to_UK_10-12_Jan_2024.pdf dated 23.01.24
*[3] Ineos Upstream v Persons unknown [2019] EWCA Civ 55, UKOG v Persons Unknown [2019] *** and as further defined by Wolverhampton City Council v London Gypsies and Travellers [2023] UKSC 47*
[4] [2024] UKSC 20
[5] Consultation on draft supplementary EIA guidance - GOV.UK
[6] Greenpeace Nordic and others v Norway – filed 2021 Application no 34068/21
[7] application no 53600/20 – decision announced 9 April 2024
[8] [2012] UKSC 44, [2013] 1 CMLR 28
[9] [2024] UKPC 3