

# Legal Control & Enforcement over National Energy Plans



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# Roadmap



1. Climate Change Litigation
2. What is Enforcement (also) About
3. Predicting on Natural Gas
4. Discussion



# 1. Climate Change Litigation



## SETTING THE STAGE

*URGENDA*

*LEGHARI*

*OUR CHILDREN'S TRUST*

*GREENPEACE NORDIC AND NOU V  
M PETROLEUM AND ENERGY*

*ALI V. FEDERATION OF PAKISTAN*

*PANDEY V. INDIA*

# 1.a Setting the Stage



Transnational law litigation we are occupied with:

- ✓ actions brought by individuals and/or NGOs;
- ✓ in national courts;
- ✓ on the ground of international law;
- ✓ against the source State / *forum* state;
- ✓ For changes in energy plans / carbon intensive projects *et al.*

# 1.b *Urgenda* (the Netherlands, 2015)



**Ruling:** emission reduction target of at least 25% instead of approximately 17%, which was the emission reduction target set under the ETS Directive, in comparison to 1990 levels.

- Standing:
  - Book 3, Section 303 of the Dutch Civil Code;
  - Sustainable development;
  - Intergenerational equity.
- Reasoning:
  - Tort law (Book 6, Section 162, Dutch Civil Code) and the Dutch Constitution (Article 21);
  - no harm principle, intergenerational equity (“fairness”), the precautionary principle, the principle of sustainable development, and Art. 191(1) TFEU; Arts. 2 and 3 UNFCCC;
  - IPCC science and high risk; UNFCCC in general; economic analysis.

# 1.c *Leghari* (Pakistan, 2015)



**Ruling:** order for the establishment of a Climate Change Commission (CCC) tasked with implementing Pakistan's Climate Change Policy and Framework for the effective enforcement of the people of Punjab's fundamental rights  
+ ongoing orders.

- **Jurisdiction:**
  - No analysis because human rights litigation worth of constitutional jurisdiction.
- **Standing:**
  - No analysis because human rights litigation worth of constitutional jurisdiction.
- **Reasoning:**
  - Pakistani Constitution (1973): security of person and the right to life (Article 9), the right to human dignity (Article 14), to property (Article 23) and the right to information (Article 19A);
  - sustainable development, the precautionary principle, the principle of environmental impact assessment (EIA), inter and intra-generational equity;
  - the public trust doctrine.

## 1.d *Our Children's Trust* (Oregon, US, 2015-2016)



### **Ruling on motions to dismiss (Fed. R. Civ. Proc. 12(b)(1)) and on motion to strike (Fed. R. Civ. Proc. 12(f)): denied**

- Jurisdiction:
  - Justiciable claim over which subject-matter jurisdiction.
- Standing:
  - Actual injury of a constitutional magnitude.
- Claim upon which relief can be granted:
  - substantive due process rights: life and liberty (5<sup>th</sup> Amendment);
  - public trust doctrine;
  - inter-generational equity.

1.e *Greenpeace Nordic Ass'n and Nature & Youth v Norway Ministry of Petroleum and Energy* (Norway, 2016)



- Article 112 of the Constitution;



- “the Climate Convention, the Paris Agreement and international human rights and environmental principles” → precautionary principle, non-discrimination principle, no harm principle.



# 1.f *Ali v. Federation of Pakistan* (Pakistan, 2016)



- Supreme Court of Pakistan;
- Fundamental rights, Constitution of Pakistan:
  - Article 9– Security of person and Right to life
  - Article 4(2)(a) – Right of individuals
  - Article 5(2) – Obedience to the constitution and law
  - Article 14(1)– Inviolability of dignity of man
  - Article 19A– Right to information
  - Article 23– Right to property
  - Article 24(1) – Protection of property rights
  - Article 25(1) – Equality of citizens
- Public trust doctrine;
- Pakistan’s environmental laws;
- Principle of sustainable development, the precautionary principle, the obligation to undertake an environmental impact assessment as well as the principle of inter-generational equity;
- Petitioner cites Principle 15 Rio Declaration, the 1971 Ramsar Convention, the 1972 Convention on Protection of World Cultural and Natural Heritage, the 1979 Convention on the Conservation of Migratory Species of Wild Animals, the 1985 Convention on the Protection of the Ozone Layer, the 1992 United Nations Convention on Biological Diversity, the 1992 United Nations Framework Convention on Climate Change, the 1997 Kyoto Protocol, as well as the **2015 Paris Agreement**.

# 1. *e Pandey v. India* (March 2017)



- National Green Tribunal (Principal Bench, Delhi);
- National environmental legislation;
- principle of sustainable development and precautionary principle, as envisaged under Section 20 of the National Green Tribunal Act;
- Paris Agreement (Article 2);
- inter-generational equity principle (within which, right right to a healthy environment);
- the Public Trust Doctrine;
- the best climate science.

# 2. What is Enforcement (also) About



**HOW TO MAKE PARIS WORK  
INSTRUMENTS OF THE DOMESTIC JUDICIARY**

## 2.a How to Make Paris Work



- Article 4(1): “In order to achieve the long-term temperature goal set out in Article 2, Parties aim to reach global peaking of greenhouse gas emissions as soon as possible, recognizing that peaking will take longer for developing country Parties, and to undertake rapid reductions thereafter in accordance *with best available science*, so as to achieve a *balance* between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century, on the basis of *equity*, and in the *context of sustainable development* and efforts to eradicate *poverty*.”

## 2.a How to Make Paris Work



- International law concepts in legislation and policies;
- Global Environmental Constitutionalism;
- Procedural Environmental Rights.

## 2.b Instruments of the Domestic Judiciary



- Direct application
- **Indirect application / Consistent Interpretation / *Charming Betsy* Canon**
- Reparations
- Comparative international law
- But.. Territorial sovereignty! (Contours: intergenerational justice and social justice but no outcome dictated, Nollkaemper 2009)

# 3. Predicting on Natural Gas



**NATURAL GAS AS A BRIDGE FUEL?  
WILL COURTS RULE IT OUT?**

## 3.a Natural Gas as a Bridge Fuel?



- Historically:
  - Limited infrastructure;
  - Limited competition;
  - Strong ties between the natural gas industry and governments.
- Currently:
  - New LNG technologies (FSRUs);
  - Increase in gas-exporting and gas-importing States  
→ gas glut → part in the competitive market.



## 3.b Will Courts Rule it Out?



- Natural gas portrayed by the industry as a ‘clean’ fossil fuel.
- Progressive carbon reduction policies through natural gas **and** renewable sources?
- Intermittent sources – solution with natural gas?
- Different approach US (even with Obama)/EU; emerging markets.

**>> Mixed solutions for electricity and heat supply, supported with schemes of financing and leasing?**

# 4. Discussion



**COURTS AND ENERGY PLANS  
NATURAL GAS AND CLIMATE CHANGE**

**Thank you!**