

2009 RUNNER UP ESSAY BY MATTHEW HUNT

“THE LAW IS USELESS AS A TOOL TO DEAL WITH CLIMATE CHANGE”

In the 11th century, King Canute famously attempted to halt the incoming tide. Ten centuries later the scenario has changed: no longer are we fighting tides, but a permanent rise in sea level. Whereas Canute was defeated by elements outside human control, the world's population potentially holds the power to prevent sea level change – one probable consequence of global warming. Unfortunately other effects are also likely, including an increase in extreme weather conditions, shortages in food and water, species extinction or relocation.

The best approach in combating these potential problems would seem to be prevention; most efforts appear focussed on this aim. Though necessary, these measures don't target absolute prevention, rather damage limitation¹. Preparation is therefore equally essential in dealing with the problems that climate change may instigate.

The Law: A Limited Force in Preventing Climate Change

The soft, but persuasive touch of international law

In Rio de Janeiro, in 1992, a generation of hopes were born with the signature of the UN Climate Change Convention. With the drafting of its Kyoto Protocol in 1997, these dreams matured. As is the way with most environmental issues, action on climate change was initiated and encouraged in international treaties.

However, such international environmental law is characterised by its diplomatic foundations: it lacks genuine obligations, contains few effective and enforceable sanctions, and is largely inapplicable by and to individuals. Its lack of force naturally limits its use, a sentiment further compounded by the fact that the Kyoto Protocol exempted some of the major producers of greenhouse gases from any meaningful action² and was not ratified by a number of the others³.

Nevertheless, it would be unjust to discount the value of such legal instruments. They serve two principal purposes: firstly, in encouraging the implementation of national measures; secondly, in providing a statement of intent to the world and adding weight to political debate.

¹ Currently, efforts are centred on keeping the average global temperature increase at or under 2°C.

² Such as China and India

³ However, Australia has now ratified (2007) and the newly-elected President of the USA has pledged to follow suite.

The encouraging role of domestic law

National parliaments have translated numerous proposals aimed at reducing greenhouse gas emissions into domestic law. These include emissions trading schemes, “green” taxes, and renewable energy targets. A particularly interesting approach was adopted by the Canadian parliament with the passing of the Kyoto Protocol Implementation Act 2007 requiring the government to comply with the Protocol and reinforcing the interaction between international and domestic law⁴. In October 2008, the federal court ruled that the law was not justiciable and could not be invoked before the judge: an appeal is pending...⁵ The United Kingdom has since passed the Climate Change Act 2008, which appears to serve a similar purpose.

In general, climate change legislation seems to fall into two main categories: providing incentives to reduce emissions, and laying down procedural rules. The 2008 Act concerns predominantly the latter, requiring “carbon budgets” to be established and action plans to ensure compliance.

Such measures are aimed at providing encouragement to make more environmentally-friendly choices, promoting transparency in decision-making, and ensuring rational and proportionate decisions are then taken. They are not designed to grant substantive rights to individuals or impose substantive obligations on decision-makers. Due to the lack of binding constraints, any gains made seem rapidly effaced by major decisions elsewhere: for instance, reduced emissions brought about by individuals choosing less polluting cars seem more than counter-balanced by governmental decisions to construct new coal-fired power stations⁶ and to build a third runway at Heathrow Airport.

Furthermore, no matter how effective various laws may be in reducing emissions, developing countries are undoubtedly more than off-setting those gains. Indeed this appears to be the crux of the problem; climate change is a global phenomenon and isolated, national measures seem ultimately doomed to insignificance. It is clear that if only one country enacts strict rules on preventing climate change, the global competitiveness of its industries will be greatly reduced in relation to those from other areas.

⁴ The Act required the drafting of action plans and regulations to help Canada respect its obligations.

⁵ <http://www.ecojustice.ca/cases/kyoto-protocol-implementation-act-lawsuit>

⁶ For example the Kingsnorth power station in Kent.

The Law: Unprepared to Deal with Climate Change

We have seen that the law has a use, albeit limited, in preventing climate change. It is accepted that global warming is likely to occur, hopefully under 2°C, but even this level of increase worries many scientists. Numerous potential effects have been highlighted, such as extreme weather conditions, food shortages, and enforced human emigration from coastal areas and low-lying island states due to the rising sea level.

The law appears largely silent on dealing with these issues, which is perhaps unsurprising when considering that it is traditionally reactive and does not often address hypothetical situations (for example maritime pollution controls were improved after the Torrey Canyon disaster (and again after the Exxon Valdez oil slick), industrial regulation was enhanced after the Seveso accident...).

Nevertheless, it is in anticipating the effects of global warming that the law can prove the most useful in dealing with climate change. Likely problems have been identified, and should be addressed. To take the example of human relocation, numerous issues can be foreseen: compensating individuals for land lost to the sea, providing alternative homes for “climate change refugees”, or preparing advanced coastal defences in appropriate areas.

The law could be used to establish a process through which to construct responses to such delicate questions. Procedures could be developed to ensure balanced analysis of the issues and proportionate action, rights could be created for certain individuals, and obligations imposed on others.

An interesting article by David Grossman considers the possible tortious claims of relocated people against such entities as fossil fuel extractors, car manufacturers and energy companies⁷; it would surely be more effective to prepare for climate change by anticipating its effects and providing for appropriate measures to combat these, however. This would also give people help when they needed it most and not potential (but somewhat unlikely) damages years later.

⁷ Grossman, David; “Warming up to a not-so-radical idea: tort-based climate change litigation”; *Columbia Journal of Environmental Law*, vol. 28.1; 2003; p.1

In conclusion, it would be wrong to claim that the law is useless in dealing with climate change. Even though international law lacks the necessary force to prevent global warming and domestic laws seem unlikely to produce truly significant global effects, such measures serve some use and must be encouraged. The most important use the law could serve, however, would be in anticipating the challenges that global warming may bring about and in facilitating fair and proportionate responses.