

# Can we catch up? How the UK is falling behind on environmental law

## The United Kingdom Environmental Law Association Annual Garner Lecture 2015\*

**James Thornton**

*Chief Executive Officer, ClientEarth\*\**

### Introduction

This is a lecture that has been given by the most senior judges and some of the finest legal minds from Brussels and London. And today it is my turn, as a former aggressive American litigator from New York who ended up in Hackney, as a solicitor no less, to deliver it to you! My working life has largely been dedicated to starting a project, then an office and now a global organisation, which practises public interest environmental law. It started when as a young lawyer – a much younger lawyer – I noticed that Ronald Reagan had decided to stop enforcing environmental laws. I was a lawyer at the Natural Resources Defense Council (NRDC) and we decided to see if citizens could make a difference.

We looked at the Clean Water Act. Before Reagan's administration, the government brought about 350 prosecutions a year under this law but under him it fell to zero. We did systematic research and brought 60 cases in six months in federal court, winning all of them, getting court orders to clean up the pollution, penalties that went to other charities and fees to bring more cases. We went on to bring scores more cases, again winning them, and embarrassing the government to get into the enforcement business again. In California we protected 350,000 acres of unspoilt country by threatening to sue on behalf of a little bird called a gnatcatcher, which risked being destroyed if developers built on swathes of coastal land. The threat of litigation started a negotiation that created the model for multi-species protection plans in the United States. And much else.

However, when I came to Europe almost 15 years ago I found there was no pan-European organisation of lawyers dedicated to protecting the environment. An academic did a study comparing the number of practising lawyers inside environmental groups in the US and Europe. He counted around 500 in the US and only around two dozen in Europe. It seemed obvious there was a niche to fill – let us call it an eco-niche – and so I started up ClientEarth with the help of the McIntosh Foundation.

We are an organisation that has grown from the corner of my bedroom to one with a staff of 80 people working across Europe, Africa and – soon – Asia. We see ourselves as lawyers who work together with scientists and policy experts to create practical solutions to key environmental challenges. We believe in the equal right of all to live and work in a healthy environment. We work to enforce laws when governments fail to do so and we will use the law in a diligent way to enforce environmental rights. Importantly, we aim to use the power of the law strategically, to achieve systemic change.

Before starting ClientEarth, I talked to many lawyers and activists in Europe. I heard a number of things repeatedly. There was a view that aggressive litigation was not needed to protect the environment. There was a view that more conciliatory means were better. Several UK lawyers told me to trust the common law and to wait for cases to percolate up, so that effective environmental law would eventually arise.

However, I believe these views are wrong. I believe the law can be and should be used in a strategic way to make big structural changes. I would like to make the case that legal strategies to prevent the dying of the planet are not only of value but are vital and compelling because of our present circumstances. I would like to do this by sharing a perspective on what public interest environmental law does, how it is moving from the USA to the EU to China, and point out some further changes in our UK system that need to be made to bring it up to global standards and allow public interest environmental law to flourish.

Let me start by saying this. I believe when you pass an environmental law – indeed, when you pass any law – and you do not enforce it, then in effect you authorise the conduct you originally sought to prohibit. You permit something by turning a blind eye to laws that ban it.

In the EU there has been a history of scoffing at laws. There is a modern Italian proverb which says: '[o]ne goes to Brussels to make the law and one comes home to find a way around it'. In France it was regarded as a badge of national pride to ignore EU law. However, before we think we in the UK are so much better, let us pause and think again.

### Our European case

This year ClientEarth took the UK Government to the Supreme Court over air pollution laws. The government's

\* Professor Jack Garner was a leading environmental lawyer and one of the founders of the UK Environmental Law Association (UKELA). He gave one of two introductory addresses (with the late Andrew Lees) at the opening conference of UKELA in September 1986. He is remembered every year at UKELA's Garner Lecture. The 2015 lecture was held on 11 November 2015 and kindly hosted at the offices of Freshfields Bruckhaus Deringer, London.

\*\* <http://www.clientearth.org/>.

view was very clear. It recognised there was a European law which said that air pollution had to be cut to levels suitable for the protection of human health by 1 January 2010. However, the argument put to the Supreme Court was that domestic courts should not sanction the UK Government for non-compliance. In response, the UK Government said – and remember this was not decades ago but this year, in 2015 – that no action by the court was – and I quote – ‘necessary or appropriate’. Clearly, the government wanted to be left alone to its own plans and devices.

We knew of no details of the planned government action. We had no evidence it would be effective. We were simply told that action to enforce the current law was unnecessary because our executive would take care of it in its own sweet time, 2030 at the earliest.

Forget for a moment the impact on human health of air pollution remaining at dangerously high levels for decades after the deadline. Forget for a moment this was environmental law. This could be securities law, or contract law, public or private law. Think of the consequences of a government picking and choosing what laws it should comply with and what laws not to. Think of the consequences of a government deciding when it has to comply with the laws and when it does not.

I would suggest that is not a democracy; neither is it government under the rule of law. Happily, however, we won. On 29 April 2015 the UK Supreme Court ordered the government to take ‘immediate action’ on air pollution. The Supreme Court Justices were unanimous in their decision, saying: ‘The new government, whatever its political complexion, should be left in no doubt as to the need for immediate action to address this issue’. It was an historic ruling, which was the culmination of a five-year legal battle fought by ClientEarth for the right of the British people to breathe clean air.

There is a good, non-environmental reason for supporting the result. It should be welcomed by anyone who believes in the rule of law as opposed to the arbitrary exercise of power. If we are to protect and embellish democracy, power must be governed by law. The corollary of that is that the courts are the final arbiter of what the law says.

Going back in time and across the pond to the US case of *Marbury v Madison*,<sup>1</sup> decided in 1803, it was established that it was the Supreme Court, not another branch of government, which has the power ultimately to decide what the law is and, in turn, to enforce it. For what was a relatively new American Supreme Court, this decision was pivotal. If the other branches accepted the judgment, the inter-governmental relations would be clear going forward. In the event, the US Supreme Court did establish itself as the ultimate authority. The case is known by every American lawyer as a foundation stone of the rule of law in the United States.

Here in the UK, *ClientEarth v Defra*<sup>2</sup> has some of the quality of *Marbury v Madison*. Here, too, the Supreme

Court is a new institution, which grew out of the House of Lords. It is still defining its powers, especially in relation to the European Commission and the Human Rights Act. It is doing so in a legal system in which we all recall the *dictum* ‘the Queen can do no wrong’. In our legal system courts do not lightly write injunctions against the government. However, in *ClientEarth v Defra*, the Supreme Court has asserted its authority to order the government to comply with its legal duty, and created a kind of continuing *mandamus*, fashioning a role for the courts to supervise compliance with the court’s order.

The second good reason to support this result is because we need to protect the environment and human health. The healthy functioning of natural systems is a public good. So there were two solid strategic gains from this case and the citizen – the citizen in this case in the form of ClientEarth – was vital for this process. This is important. I want to argue that in each strategic success – making democracy work and protecting our ecosystems – the role of the citizens was crucial.

In the past, and still today, governments too often see industry as clients, whom the government must serve. This is often because of so-called ‘regulatory capture’, where powerful industries, because of their huge financial stakes in an outcome, can control a regulator; whilst members of the public with only a tiny financial stake cannot or do not. There are, for instance, an estimated 30,000 business lobbyists in Brussels, backed by billions of Euros, working on behalf of their industries and organisations. There are perhaps 700 environmental lobbyists. There are obviously very few – if any – ordinary citizens who can use their spare time and money lobbying for environmental causes in Brussels. It would be a strange pastime.

However, the real clients of government should be the people they govern. Their clients should be the citizens who have put them in power for the common good. For that common good to flourish, it requires citizen participation and citizen supervision.

## Access to justice

Let me explain what I mean by using environmental law. Environmental law starts with science. It develops policy that captures what science says, before proceeding to legislation, implementation and enforcement. All five stages are vital to protect the environment. At ClientEarth we work at all five of these stages. However, it is in enforcement where the citizen has an especially visible role and it is in enforcement where there has been a gap in the UK and the EU.

Citizens must be able to enforce the law. Our air pollution case was an example. We originally took this case to court in December 2011 to stop the government breaking air quality laws. However, the High Court and later the Court of Appeal refused to take action. We appealed to the Supreme Court to show that citizens could and should act and to show that when there is a breach of EU law it cannot be left solely to the European Commission to deal with it.

1 5 US 137, 1 Cranch 137, 2 L Ed 60 (1803).

2 *ClientEarth v Secretary of State for the Environment, Food and Rural Affairs* [2015] UKSC 28 (29 April 2015).

However, significant barriers remain for citizens seeking to gain access to justice. Let me start with the barriers that exist in Brussels. Europe has shown a complete disregard for democracy and the rule of law by consistently failing to respect the right of people to bring its institutions to court. The treaty allows it; the Aarhus Convention, which the EU signed, requires it. ClientEarth has brought the European Commission before the Aarhus Convention Compliance Committee, the UN committee charged with upholding the Aarhus Convention.

The point is simple: when EU institutions violate EU environmental laws, citizens may not sue the EU for such violations anywhere. They may not sue it in Member State Courts because the EU will not condescend to such jurisdiction. Nor can citizens sue the EU in EU Courts because the EU Courts will not acknowledge their standing. The only exception is that you can sue for access to information. In reply, the European Commission has been arguing that EU citizens have access to justice because people can indirectly question the validity of EU actions through their national courts, which can pass the questions on to the EU Court. However, there is no guarantee that a national court will refer a question. The EU simply refuses to ensure access to justice in environmental matters when the EU violates its own laws.

Frustratingly, the Commission adopted a proposal for a directive to guarantee this access in 2003 but the process stalled in the European Council because of a lack of political will. Under pressure from national governments the proposal was withdrawn in 2014. We believe the European Union is clearly and flagrantly breaking its treaty obligations and we are now waiting for the Aarhus Compliance Committee to decide whether it agrees with us. We do not expect the EU to welcome a decision which puts it in the wrong. However, ironically, such a decision would prove we live in a democratic Europe, which brings me on to the barriers in the UK.

In Britain we have treasured a rule since the 13th century, which says that if a person goes to court and loses, that person has to pay all of the costs of the defendant. That could mean, even in a relatively simple case, costs running into the hundreds of thousands of pounds, or more. Unsurprisingly, that meant even big environmental groups could rarely bring cases.

This rule had to be challenged and ClientEarth did so, again by way of the Aarhus Compliance Committee in Geneva. We won and, partly as a result of that win, the rule was changed. Adverse costs in England and Wales in environmental cases are now capped at first instance at £5000, where the claimant is an individual. For other claimants, they are capped at £10,000.

This was a small victory – but only a small one. The government's liability to pay costs is capped at £35,000. Lest you think this reasonable, consider the following: you bring a clean air case against the government, and after five years you win a Supreme Court injunction. Even with much of the work done by in-house lawyers on charity wages, the case costs you several hundred thousand pounds. It establishes that the government is violating its mandatory duty, with some 50,000 citizens a year dying as a result.

Losing, the government is protected from paying the actual costs. What is more, the £10,000 cost cap for a charity applies only in the first instance. So if you go to the appeals court, or to the Supreme Court, you must request cost caps. You may get them or you may not; the only limits are at the discretion of the court.

On top of all this, the government has failed to put any caps on environmental cases against companies and other private parties. Claimants bringing environmental cases against such parties still face unlimited liability. So some small improvements have been made, but it is important to understand that this costs system we have is still by far the most punitive of any country in the EU.

Unfortunately, it is also moving in the wrong direction. In revisions pushed through this year to the Criminal Justice and Courts Act 2015, the UK Government introduced deterrents to judicial review (JR). Lord Woolf has written that the changes were unnecessary and ill-drafted. He has expressed his fear that the changes may impede JR in a way that damages the rule of law in our country.

Under the changes, any claimant that is a corporate body – and that would include ClientEarth and other environmental organisations – pursuing JR and seeking the cost protection provided for in the Aarhus Convention – will have to disclose the names, addresses and interest in the charity of all their members. If the charity has received – or is *likely* to receive – more than £1500 from an individual or funder to cover the legal costs of a case, then those contributors and the size of their contribution must also be declared to the court. The members and funders could then be called upon to pay the court costs should the charity lose its case – judges are directed that they must consider this option.

The charity leaders' network ACEVO (the Association of Chief Executives of Voluntary Organisations) has said the 'overwhelming effect of the reforms [will] be to introduce a massive chilling effect on charities' ability or willingness to seek judicial review' and that the reforms will 'severely damage the confidence of individuals and organisations in becoming members or donating funds in the first place'. I agree.

The government, having succeeded in this mischief, is working along another parallel track to increase costs for claimants in environmental cases. In a consultation open until 10 December 2015, the government is considering raising the cost caps. Exposure will double for claimants. Again, a new cap must be requested at each level. If there are multiple claimants, each is exposed to the full amount. Meanwhile, the government's liability goes down. It will drop to £25,000. Even worse is this: the government proposes letting the defendant ask the court to remove all cost protection, exposing the claimant, just like in the good old days, to *unlimited* cost liability.

Why is the government working so hard to prevent citizens from using the courts? Our country has no written constitution. In our system, JR is the main check on government abuse of power. But what is the government so afraid of? Why does the rule of law seem so threatening? Why must citizens be prevented from talking to judges?

I hope to have clearly made the point that in the UK and Europe access to justice is not what it should be.

### The cost of access to justice

Compare this to the situation in the US. In the 1970s, the United States introduced a series of environmental laws that have served as the foundation of modern environmental regulation. A number of these laws, such as the Clean Air and Clean Water Acts, have what is known as a 'private attorney general' provision. Citizens can go to court to enforce the law, standing in the shoes of the attorney general, once they have met certain criteria. The notion is that enforcement of the law is a public good, and enforcing environmental laws is in the public interest.

Here it is important to understand what a public interest case is: a public interest case is one in which the interest the claimant asserts is not the claimant's personal interest but, rather, that of the public. The successful claimant in a public interest case does not benefit from her victory any more than another member of the public. The cleaner air or water that results from a victory is broadly shared.

To encourage such public-spirited litigation, these laws have a fee structure which assists claimants to bring cases to court. If a citizen brings a case and wins, she recovers all her costs and fees. If she loses, she pays no costs or fees to the defendant. There are over 200 such federal laws in areas including environment, civil rights and consumer protection. These laws allow true one-way cost shifting. This approach to fee recovery has led to greater citizen involvement in enforcing the law, when the government fails to enforce it against companies, or where the government fails in its own duties under the law.

True one-way cost shifting of this kind had a moment in the sun in the UK. In 2009, Lord Justice Jackson published his 'Preliminary Review of Civil Litigation Costs in the UK'. He said that, and I use his words, 'radical reform' would be needed if the UK were to meet its Aarhus obligations. One of the options he examined was true one-way cost shifting. His 23-page learned analysis of the virtues of the US system made my heart sing. I still remember thinking that radical reform might happen here upon reading Lord Justice Jackson's Preliminary Review. However, by 2010, when the Final Review was published, the sunny spell was over. The American rule of one-way cost shifting as an appropriate – if radical – reform had been dropped.

### Access to justice in China

Lest I be accused of typical American arrogance and a lack of understanding of the quieter and more nuanced customs of my UK brethren, let us also compare the UK situation with that in China. There has been a sea change in the attitude to environmental laws and enforcement in Beijing. Whilst China has had environmental law for decades, there has been weak and ineffective enforcement.

That is changing for three reasons. First, the problems are manifest – the equivalent of the smog in London in the

1950s. As recently as September 2015 a group called Berkeley Earth<sup>3</sup> released a study based on data collected by a network of sensors across China, which said that more than 80 per cent of Chinese people are regularly exposed to pollution that far exceeds levels deemed safe by the US Environmental Protection Agency. The report said that air pollution in China kills about 4000 people – not every year or every month – but every day.

The second reason is that the pollution is so severe that it will affect the economic sustainability of the country. A recent assessment carried out by the Chinese Academy of Science took account not only of air and water pollution, but also of resource consumption and ecological degradation. The estimated total resource and environmental costs amounted to 13.5 per cent of GDP in 2005. The figure is considerably higher than that of the United States, the United Kingdom, Germany, Japan and other developed economies and on a par with countries such as Mexico, Ghana and Pakistan.

The third reason is that people are taking to the streets on the issue. There are an estimated 8000–10,000 demonstrations a year in China about environmental problems. In April 2015 thousands of people in China's southern Guangdong province protested against the expansion of a coal-fired power plant.

The Communist Party knows it must tackle the issue. It must deliver a public good. The harmony of the country, to use the Chinese phrase, depends on cleaning up the environment. So the Communist Party is tightening laws and improving enforcement. The Chinese Government has made real time emissions data from polluting factories available online to the public.<sup>4</sup> The desire to tackle the problem goes to the top of the Chinese Communist Party. Premier Li Keqiang has pledged to wage a 'war on pollution'. Around Beijing, where air pollution is famously bad, all major coal-fired power stations will be closed down by the end of next year.<sup>5</sup>

However, most importantly, Chinese citizens are being enlisted into the war on pollution. A law came into effect in January of this year; the Environmental Protection Law 2015, which allows non-governmental organisations to bring cases against polluting companies for the first time. Premier Li Keqiang described China's new law as a secret weapon in the war against pollution.

Around 500 Chinese environmental groups have the power to act, and more groups gain standing each year. Several have quickly taken action – we know of 36 enforcement actions that have already been filed, with more on the way. The Chinese authorities have taken the situation so seriously that they invited an American litigator living in London – me, together with several other European experts – to advise the Chinese Supreme People's Court on how to make the new law allowing citizen enforcement

<sup>3</sup> See <http://berkeleyearth.org/>.

<sup>4</sup> [http://switchboard.nrdc.org/blogs/lgreer/china\\_fights\\_back\\_against\\_airpocalypse\\_embarking\\_on\\_a\\_new\\_air\\_pollution\\_initiative\\_that\\_just\\_might\\_work.html](http://switchboard.nrdc.org/blogs/lgreer/china_fights_back_against_airpocalypse_embarking_on_a_new_air_pollution_initiative_that_just_might_work.html).

<sup>5</sup> <http://www.reuters.com/article/2015/03/20/us-china-pollution-beijing-idUSKBN0MG1D120150320>.

work. They want us to help draft better laws and regulations. They want us to train the judges who will be deciding these cases. They recognise the need to build the capacity of the NGOs to bring cases against polluting companies.

This is a real game changer where citizens can sue companies in Chinese courts. It is an amazing change for China and we have much to learn from the new Chinese attitude. The Chinese Government is trialling seven versions of an emissions trading scheme in seven provinces, with the intention of crafting the best system for national use. The Chinese Government has data openness and environmental panels on all courts from the Supreme Court on down.

I should also mention three other ways in which the new Chinese environmental legal regime has now moved ahead of ours here in the UK. First, Chinese NGOs are now able to sue polluters directly. This includes polluting companies owned by the government. In the UK we cannot challenge corporate polluters unless they break laws that lead to criminal offences or private law claims.

Secondly, returning to costs in environmental cases, the Chinese are a practical people. The Chinese Government now wants to encourage citizens to bring enforcement cases. That brief ray of sunshine brought to us by Lord Justice Jackson's Preliminary Report on the UK cost regime, recognising the value of the US system, has blazed in China. Chinese courts have adopted the American rule on true one-way cost shifting. If a Chinese NGO wins its case against a polluter, it gets all its costs and fees, and if it loses, it pays the other side nothing. The first of these 36 citizen cases I mentioned reached judgment several weeks ago. Not only did the court impose significant fines on the defendant; it also awarded the claimants all their costs and fees.

I hope we will be able to help empower Chinese NGOs to use their Environmental Protection Law well.

Thirdly, the Chinese courts now have very broad remedial powers to enjoin pollution, to shut facilities, to write and implement detailed environmental remediation plans, and so on. They are asking for advice on using these powers wisely. They want to understand the best global models for court-ordered compliance and remediation. I plan to assist them. Where there is such a strong desire to use the courts' powers in the best way for protecting the environment and human health, there is much to hope for.

So let us pause here and reflect on how the situation in Britain compares with those in the US and China. We have a tendency as UK lawyers to look to our own national traditions and see how far we have come. It is true: we have made progress in Britain in environmental law. However, it is also important to look to the best examples globally and see how we compare with the rest of the world.

This is my principal concern. Whilst we have moved slowly, others like the US have moved far ahead of us. Also, to be frank, the Chinese have overtaken us in terms of making it easier for citizens to use the courts to redress environmental harms by polluting companies.

We led the way in establishing the rights of citizens through the Magna Carta. We were an example to the

world in the abolition of slavery and extending suffrage to women. The British Isles were the first to develop common law, including the system of binding precedent, parliamentary sovereignty, *habeas corpus*, the first trial of a monarch. As humbly as an ex-American litigator can, who has shifted perspective by becoming a solicitor in England and Wales, I would suggest that the British people would not want us playing catch-up when it comes to protecting the planet: they would want us to lead.

## Remedies

So what do we need to do to meet the standards of our Chinese colleagues? First, there must be further reform of costs. True one-way cost shifting dropped between the first and second drafts of Lord Justice Jackson's review of civil costs. Secondly, we must be able to sue polluting companies, similar to the right that already exists in the USA, China and our EU allies. I personally have seen how beneficial this is, particularly if a government tilts too far away from its responsibilities, as Ronald Reagan did.

The one action the Chinese have not yet introduced is a JR where the government has an environmental duty. However, it is on their radar. I met not long ago with Chinese academics, judges and officials. They are now discussing the need for such remedies. On our side in the UK, as I pointed out earlier, this most important remedy for government abuse of power is under increasing threat.

As we speak of remedies, let us consider how we could use injunctions differently. Entertain a hypothetical case for a moment. In our UK Supreme Court air case the Court took the important steps, and perhaps historically important steps, as I noted earlier, of enjoining the government to comply with the law, and extending a kind of continuing *mandamus*, to supervise the lawfulness of the government's compliance.

What happens, however, if the government does not take the Supreme Court's order seriously? The government told the Court that, although the law required compliance with NO<sub>2</sub> limitations by 2010, it had no intention of complying with it any time soon. The Court, referring to the statutory language, ordered the government to write a plan that will bring it into compliance 'as soon as possible'. The government's draft plan, written under the injunction, still says it will not comply before 2025, which is exactly what it said to the Supreme Court before the injunction was granted. This raises the question of whether the government accepts the power of the Court to enjoin it to comply with what are, after all, mandatory duties.

Let us reason together. The duty is mandatory. The Court has enjoined compliance. The government itself publishes statistics showing that the period of non-compliance between 2010 and 2025 means that tens of thousands of people in the UK will die of air pollution because they are forced to breathe dirty air. What can a court do when a government is recalcitrant? One obvious answer is to hold the government in contempt. However, where the recalcitrance is hardened and systematic, courts in other jurisdictions have been creative about crafting effective remedies.

In India, for example, the Supreme Court has become famous for its specific and detailed environmental injunctions. In the United States, the so-called 'structural injunction' has been developed. It came into being in the civil rights arena, where state and local governments had entrenched themselves in a position of non-compliance, and were willing to ignore orders of the court. What the American courts did was to write highly detailed injunctions, requiring precise actions to bus school children and so on. In some cases, US courts assumed the administration of prisons until they met appropriate standards.

In Pakistan recently, a very interesting injunction was issued by the High Court in Lahore. The national law required formation of a climate change commission made up of representatives of various ministries, with the obligation of making policy recommendations on climate change. A claimant alleged that the government had failed in its duty to create such a commission. The court in Lahore called in the ministries, which indeed had done nothing, and intended to do nothing. The court then got the job done. It wrote an injunction which created the commission, appointed its members and set out the timeline for their recommendations to be published.

I would like to draw a general rule about the specificity of injunctions against governments. It runs this way: *the specificity of an injunction is directly proportional to the recalcitrance of the government actor.* That is to say that the need for the court to enjoin specific remedial steps increases to the same degree as the government's refusal to fulfil its mandatory duty. Looking at it this way, the government's bad faith authorises the court's remedy.

However, someone has to protect the public interest, and when the government abdicates a mandatory duty, only the court can bring about compliance with the law. What happens if the Government of the UK insists, while its citizens are dying, that 2025 is 'as soon as possible' for it to clean up the air? We know the claim would be factually false. Paris showed in October 2015 that a mandated reduction in traffic dramatically reduces air pollution – literally overnight. Were the government to commit itself to a hard-nosed confrontation with the Court, taking a position that it has the right to let its own citizens die until it is convenient to comply with the law – a proposition many governments around the world would agree with, but in whose jurisdiction many people might not want to raise their children – would it be appropriate for the Court to learn from the experience of other courts facing hostile central authorities? Could our courts write a more specific injunction requiring action to clean up the air? For me the answer is a resounding yes.

So that courts can have the right pleadings before them, let me ask for help from all the lawyers here today. We need to be more creative, more focused and more demanding in the remedies we seek from our courts. Our environmental problems will get worse before they get better.

Let us not fall into our cultural default mode of being afraid to ask the courts for novel remedies. We are, after all, dealing with novel problems. If our intention is to use the law to improve things, we need to be strategic. So, for

example, in order to address climate change, biodiversity loss, air quality and so on, using existing law will require us to assist the courts in moving further more quickly.

By way of my own example, I picked air quality as an area that would be impossible to lose as a case if it is argued well and the EU environmental law regime worked at all. It appears to be working.

It was not difficult. It is just like planning sixty chess moves ahead along whatever dimension of the law you are using to serve the common good. It is a matter of being thoughtful: what do the courts need from lawyers to be able to deliver the right result? How many cases between here and there need to be envisaged, brought and won so that the ultimate decision in a domain is ineluctable? Armed with the answers to those questions, then the cases can be designed and won, thereby building a series of judgments and a body of new case law enabling the benefits to be implemented in the real world.

### The way forward

I recently spent an inspiring two days in a meeting in London with Supreme Court judges from around the world, including from our own local jurisdiction. It was clear that judges are eager to do justice in environmental cases. Let us promise to bring them the right facts and demands for them to be able to grant us new and powerful remedies. The courts are open for business. They will respond if asked. They will go further if the case demands it of them. If we do not ask we will not receive and the losers will be people and the natural world.

Taking a broad assessment of the legal climate, I have come to the belief that piecemeal improvements to environment law are not enough. What I would like to see is the evolution of a new generation of environmental laws, which can comprehensively protect our planet and all the plants and animals living upon it. That would include keeping climate change within smart limits and reversing biodiversity loss. For, consider this: if all the laws to protect the environment we now have at international, national and local level were enforced – and that is a big if – we would still not stop global warming, biodiversity loss or the rest of it.

I call this next stage in the evolution of environmental law, which we need more than ever, Environment Law 2.0. It will mean working on the legislation as well as the litigation to get things right. It is a long-term goal but one which is definitely within our sights. While we are building this new system of law, I and my colleagues at ClientEarth will keep enforcing the laws we have and keep working with legislators to get the new laws right, because if we fail to enforce what we now have, new laws will be meaningless. Unless we enforce the laws we have, governments will stand up in Supreme Courts and say they can pick and choose.

I remain a huge optimist. We have made vast strides, positive strides. Our success in the air quality case put a requirement on the government to act. It created a space for our policy-makers to come up with clean, sustainable transport solutions which protect our health. We hope to

match our success in tackling air pollution in the UK courts in courts across Europe.

We have successfully challenged the right of energy companies to build highly-polluting coal power stations in Poland. We are reducing deforestation in Africa by helping countries to develop their forest laws and ensuring that legally-harvested timber has a market in Europe.

### Conclusion

Finally, speaking as a former aggressive American litigator who came from New York and ended up in Hackney as an English activist lawyer working on behalf of the planet, I am going to leave you with these thoughts:

- It is time to realise that getting citizens enforcing environmental law is a hugely positive act.
- It is a positive act to remove the barriers to going to court.
- It is a positive act to see who in the world is in the lead and then working to match the best of our international colleagues.
- It is a positive act to grow the rule of law because it protects the environment and protects the planet and protects all those people who live upon it.

In that spirit of positivity, I thank you for your patience in listening to me.