

Recent Global Trends in Environmental Law – Implications for Sri Lanka’s Judiciary

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This short paper (a) identifies recent global trends in environmental law, (b) focuses on global trends in climate change laws and litigation, (c) discusses legal doctrines, theories and principles in global climate change litigation, and (d) discusses future implications of climate change litigation for Sri Lanka’s judiciary.

Recent global trends in environmental law

An article entitled *The Top 10 Trends in International Environmental Law*, published in 2013 by Tseming Yang,² Professor of Law at the Santa Clara University Law School and former Deputy General Counsel for international law at the US Environmental Protection Agency, identified global trends in environmental law in the following areas:

1. Global climate change and energy policy;
2. Globalization of environmental law;
3. Sustainable development and law;
4. The rise of the developing world;
5. Environmental institutions, governance mechanism and the rule of law;
6. Human rights and the environment;
7. The growing role of the environment in international economic law;
8. Increased attention to biodiversity;
9. Chemicals and hazardous substance management; and
10. Oceans and fisheries.

Professor Yang readily admitted that the list is somewhat arbitrary, given the multitude of global environmental issues. Instead, he preferred to characterize the list as “overlapping sets of top issues that together make up the 10 issues at the top of the minds of environmental lawyers, diplomats and policy-makers”.³ There are several other lists of top global environmental and environmental law issues available in the public domain.

¹ Statements and Opinions in this paper are that of the author and are expressed in his personal capacity. They do not reflect the views of the Green Climate Fund (GCF), where the author is currently employed, nor are they in any way attributable to the GCF, its staff, consultants or other stakeholders.

² T. Yang, *The Top 10 Trends in International Environmental Law* (August 12, 2014). Forthcoming, Martella R. and Grosko B. (Eds.) *International Environmental Law: The Practitioner’s Guide to the Laws of the Planet* (American Bar Association 2014); Santa Clara Univ. Legal Studies Research Paper 22-13, accessible at <http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1769&context=facpubs>

³ *Ibid.*

Of these ten issue areas, I would rank the following four, as the top areas showing global trends in environmental law developments:

1. Global climate change and energy policy;
2. Human rights and the environment;
3. The growing role of the environment in international economic law;
4. Environmental institutions, governance mechanism and the rule of law;

Over the past 20 years, climate change has risen to the top as the major issue facing humanity today. During this time, the international community has struggled to address the issue, often mired in seemingly endless and frustrating debates. However, in 2015 there was a breakthrough in the form of the Paris Climate Change Agreement, where countries agreed to limit the “increase in the global average temperature to well below 2°C above pre-industrial levels” and further committed to pursue “efforts to limit the temperature increase to 1.5°C above pre-industrial levels.”⁴

Under the Paris agreement, over 140 ratifying countries have agreed to make an ambitious nationally determined contribution (NDC) in keeping with their economic growth, to reduce greenhouse gasses and adapt to climate change. Despite the recent withdrawal of the US from the Paris Agreement, all the other countries remain committed to it. It is our best chance yet of avoiding irreversible climate change and mitigating the far reaching and devastating effects of extreme weather events that we are already experiencing, and which are predicted to increase and intensify.

Global trends in climate change laws and litigation

All the lists of global trends on environment and environmental law agree on one matter; climate change gets top priority listing in all of them. For this reason, this paper focuses climate change. In this section, the paper examines global trends in climate change law – both legislation and litigation.

Since 2010, the Sabin Center on Climate Change Law at the Columbia Law School, the Centre for Climate Change Economics and Policy hosted by The University of Leeds and the London School of Economics and Political Science, the Grantham Research Institute on Climate Change and the Inter-Parliamentary Union have published a report taking an annual global stock-taking on climate legislation.⁵ In the 2017 report, they assessed litigation for the first time. This paper draws heavily on the information in the said report. The 2017 report covers the legislation of 164 countries and 250 litigation cases from 25 jurisdictions.⁶ The two databases from which the information was analysed are also publicly available. The 164 countries considered, represent varying economic contexts and regions of the world, including 48 least developed countries and 28 countries of the European Union.⁷ Using the World Bank’s 2017 classification, the 164 countries covered in the report include 42 high income, 44 upper-middle income, 47 lower-middle income and 30 low income countries.⁸

⁴ Clause 1(a) of the Paris Agreement, 2015, accessible at https://unfccc.int/files/essential_background/convention/application/pdf/english_paris_agreement.pdf

⁵ M. Nachmany, S. Fankhauser, J. Setzer & A. Averchenkova, *Global trends in Climate Change Legislation and Litigation*, (2017) accessible at <http://www.lse.ac.uk/GranthamInstitute/wp-content/uploads/2017/04/Global-trends-in-climate-change-legislation-and-litigation-WEB.pdf>

⁶ *Ibid*, p 6.

⁷ *Ibid*.

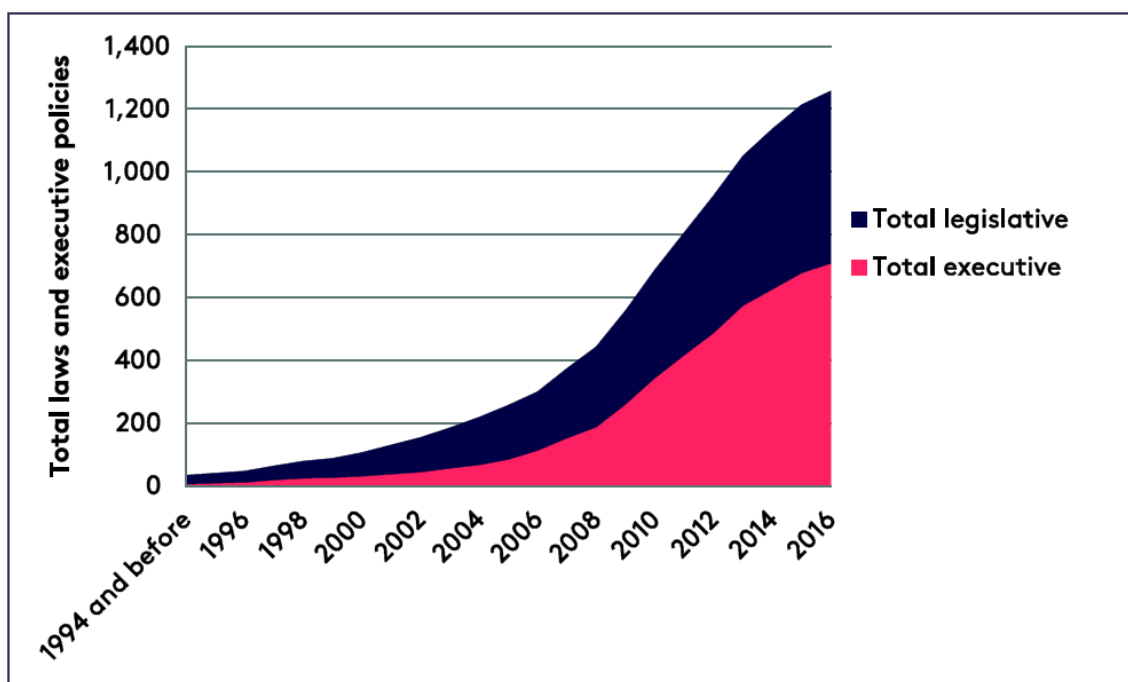
⁸ *Ibid*.

Global trends in climate change legislation

Climate change laws have been broadly defined in the report as including a “wide range of areas, including energy, transportation, land use and climate resilience, with a focus on climate action at the national level (as opposed to sub-national, provincial or municipal).⁹ Sri Lanka is included among these countries and the report counts 8 climate change laws and policies in Sri Lanka.

There has been an exponential rise in the number of climate change related laws since 1997.¹⁰ The number of climate change laws has doubled every four to five years over the past 20 years.¹¹

Figure 1. Legislative and executive acts up to 2016



Source: *Climate Change Laws of the World*

The report estimates that there are now over 1200 climate change laws in 164 countries with only a handful of countries without any direct climate change laws.¹² The report also estimates that 44 per cent of these climate change laws are Acts of parliament, while 56 per cent are executive policies.¹³ Sometimes, executive policies precede or lead the way to Acts of parliament, while in others they are the result of or mandated by Acts of parliament.

⁹ Ibid, p 6.

¹⁰ Ibid, p 9.

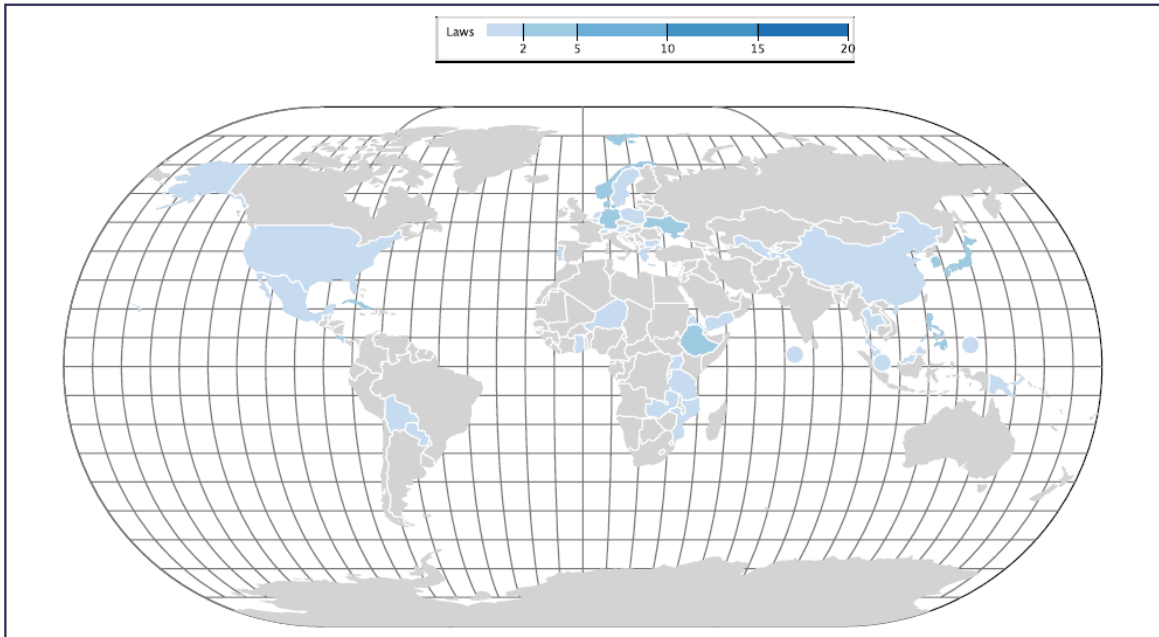
¹¹ Ibid, Figure 1, p 8, reproduced.

¹² Ibid, p 8.

¹³ Ibid. The report described “executive policies” as including, among others, executive orders, decrees, strategies, and development plans.

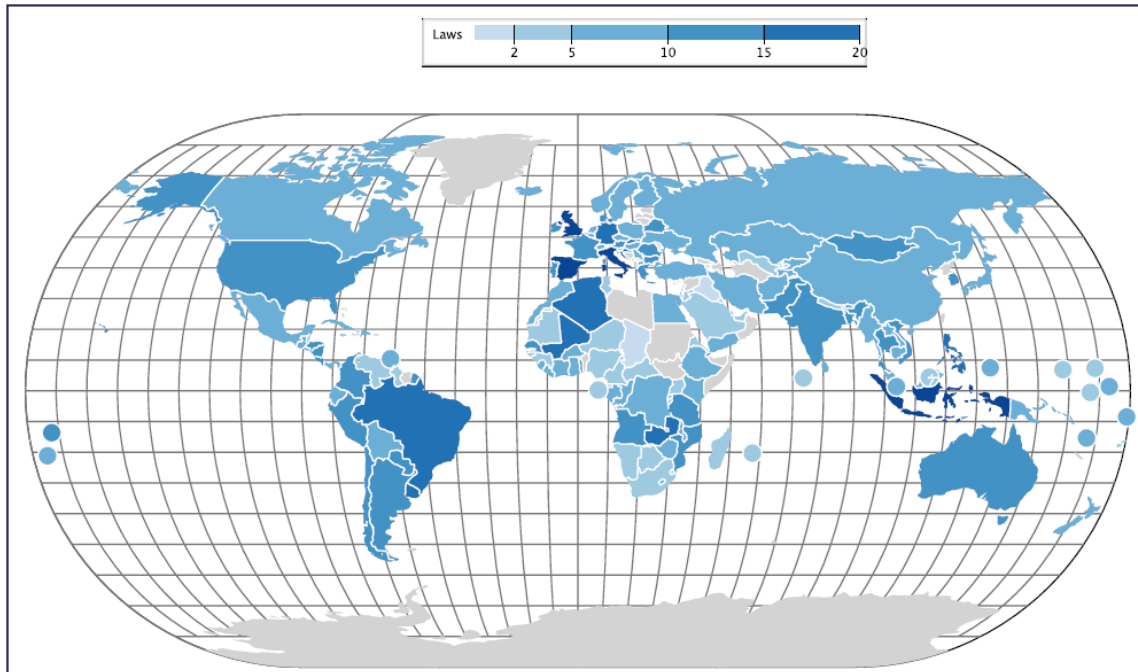
Below are two maps from the report that show the growth of climate change legislation in 1997 and 2017:

Figure 2. Climate legislation in 164 countries in 1997



Source: *Climate Change Laws of the World*

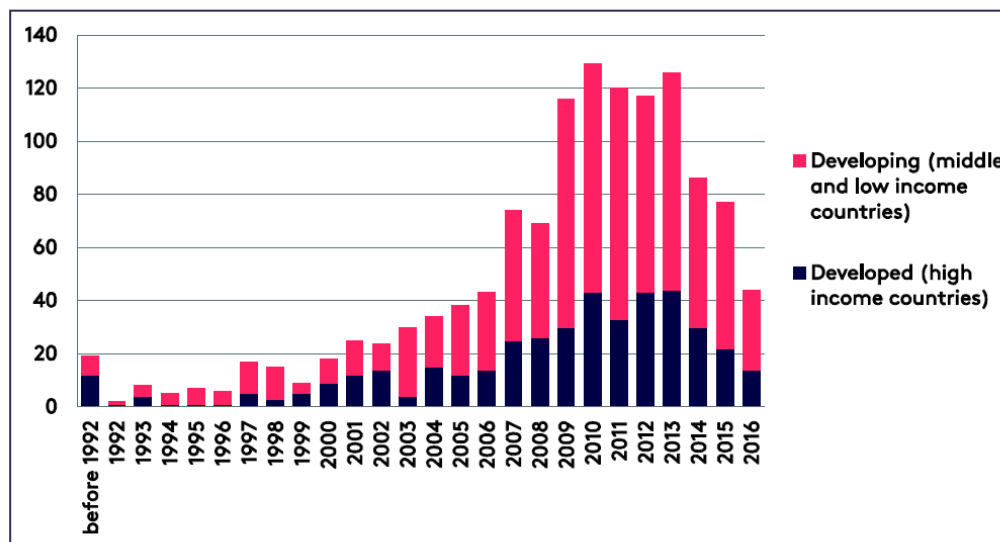
Figure 3. Climate legislation in 164 countries in 2017



Source: *Climate Change Laws of the World*

That report also recognizes that the growth of climate change legislation has slowed since 2017, after a major growth period between 2009-2013 (2009 Copenhagen to 2015 Paris UNFCCC¹⁴ Conferences of the Parties):

Figure 4. Annual legislative action up to 2016 (number of new climate change laws per year)



Source: *Climate Change Laws of the World*

According to the report, while the Copenhagen meeting was an eye opener to the world on the dangers of climate change, thus accelerating legislative and executive responses, uncertainty around the expectations leading up to the Paris meeting probably contributed to the slow down.¹⁵ The Paris Agreement has been ratified by 167 of 197 parties,¹⁶ obligating them to achieve carbon emissions reductions and adaptation measures as set out in their Nationally Determined Contributions (NDCs). They have also agreed to ratchet up these commitments over time. It is therefore more than likely that we will see another growth spurt over the next few years, in climate change laws and litigation across the world.¹⁷

Addressing climate change will require massive global reductions in carbon emissions (mitigation or low carbon economies) and major adaptation measures to minimize or eliminate climate change related loss and damage (adaptation or climate resilience). We can therefore expect to see a growth in laws across a wide variety of sectors such as energy, transport, industries, forests, biodiversity, land use, coast conservation, fisheries, agriculture, air quality, water quality and allocation, food security, public health, disaster preparedness-response-recovery, and poverty alleviation. It is more likely, that climate change policies and laws will be integrated into sectoral laws, institutions and regulatory measures, rather than be standalone pieces of legislation.

¹⁴ United Nations Framework Convention on Climate Change (UNFCCC), Rio de Janeiro, 1992, accessible at http://unfccc.int/key_documents/the_convention/items/2853.php

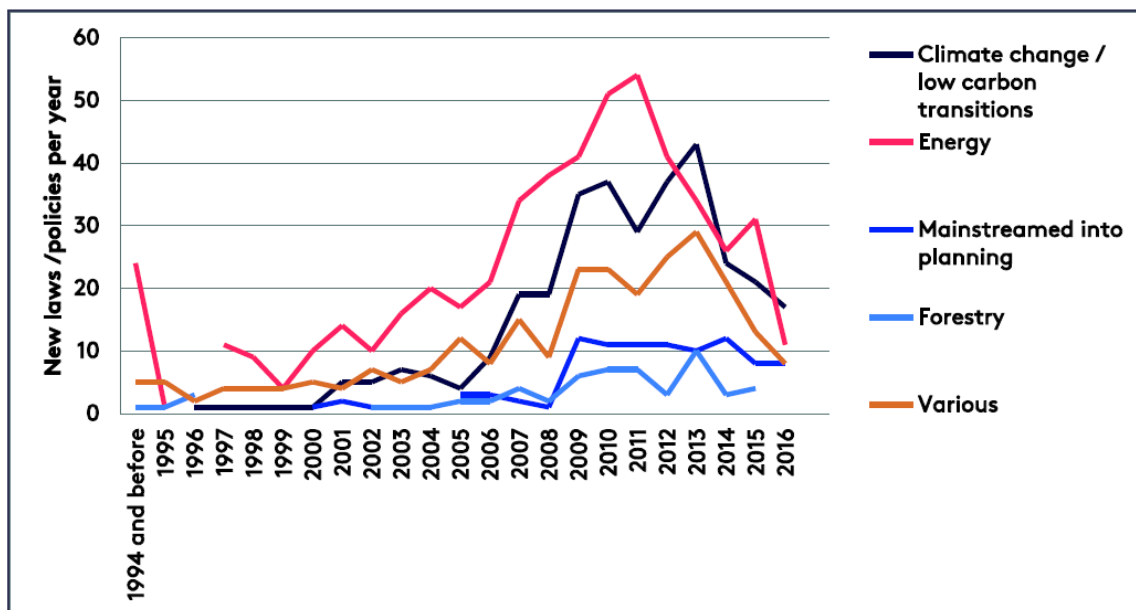
¹⁵ Supra ft. n 5, p 10.

¹⁶ http://unfccc.int/paris_agreement/items/9444.php

¹⁷ Supra ft. 5, p 10.

Here is a Table from the report showing the growth of laws in different sectors¹⁸:

Figure 5. Global laws and policies by focus areas, pre-1994 to 2016



Source: *Climate Change Laws of the World*

Global trends in climate change litigation

The 25 jurisdictions covered in the report for climate change litigation are in the Table below,¹⁹ though Sri Lanka is not among them. India and Pakistan are in the Table from the South Asian region as are several commonwealth countries with English common law traditions such as the UK, Australia, Canada, Ireland, New Zealand, Nigeria and South Africa.²⁰

Litigation (countries and number of cases per country)

Australia	77	Ecuador	1	Netherlands	2	Sweden	1
Austria	1	European Union	42	Nigeria	1	Switzerland	1
Belgium	1	France	4	Norway	1	Ukraine	2
Brazil	11	Germany	3	Pakistan	2	United Kingdom	49
Canada	12	India	9	Philippines	1		
Colombia	1	Ireland	1	South Africa	1		
Czech Republic	1	New Zealand	16	Spain	13		

The report identified nine climate change cases in India, two in Pakistan and collectively 168 cases in the nine commonwealth countries.²¹

¹⁸ Ibid, p 11.

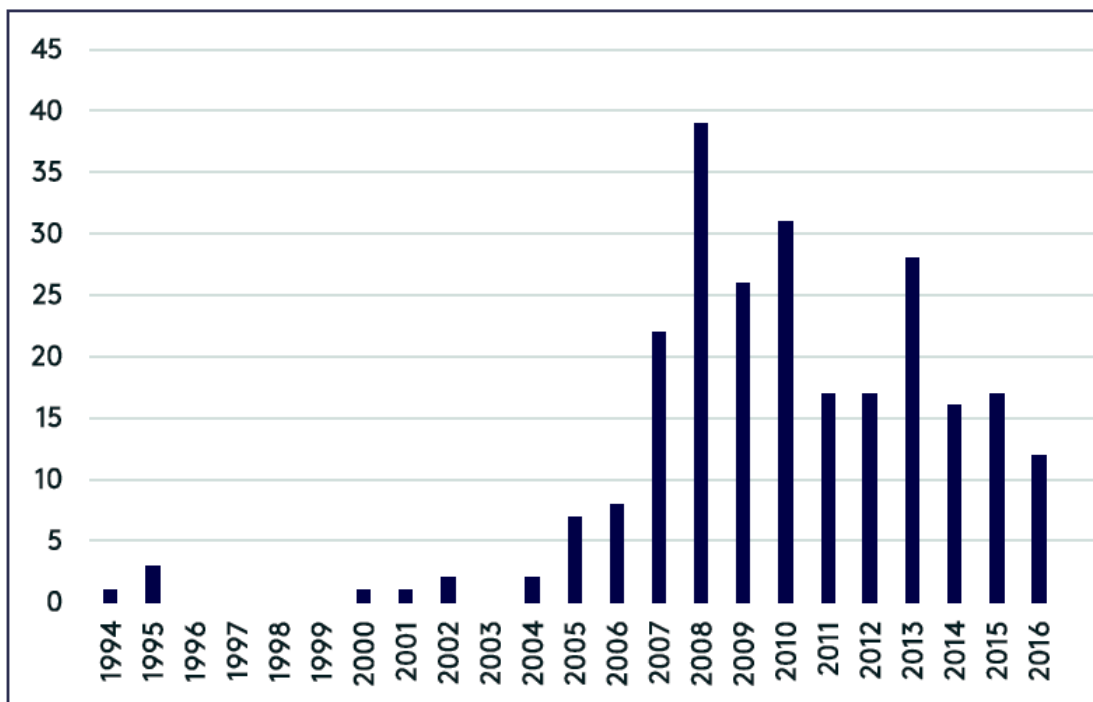
¹⁹ Ibid, p 24. Reproduced from the Table in the cited report.

²⁰ Ibid. p24.

²¹ Ibid, p 24 Table.

Mimicking legislative trends, climate change litigation has also increased, especially since 2007²²:

Figure 6. Number of litigation cases in 25 jurisdictions, 1994–2016



Source: *Climate Change Litigation of the World*

Around 240 climate change cases have been filed since 2005. The report states that climate change is not central to all these cases. In 77 per cent of cases filed, climate change is only peripheral to the main argument or merely one relevant factor in the main argument.

The report gives two good examples of climate change cases where climate change is either *central* and *peripheral* to the case:

Climate change on the *periphery* of litigation

An example of a court case where climate change is at the *periphery* is a decision made by the Brazilian Superior Court of Justice to prohibit the use of fire as a harvesting method for sugar cane. The court considered, among other environmental impacts, the negative effects of carbon emissions.

Climate change at the *centre* of litigation

A further example from Brazil, where climate change is *central* to the case, is a series of class actions brought by the Public Prosecutor Office against the airlines using São Paulo’s international airport. The court was called to order the reforestation of lands around the airport to offset greenhouse gas emissions and other pollutants.

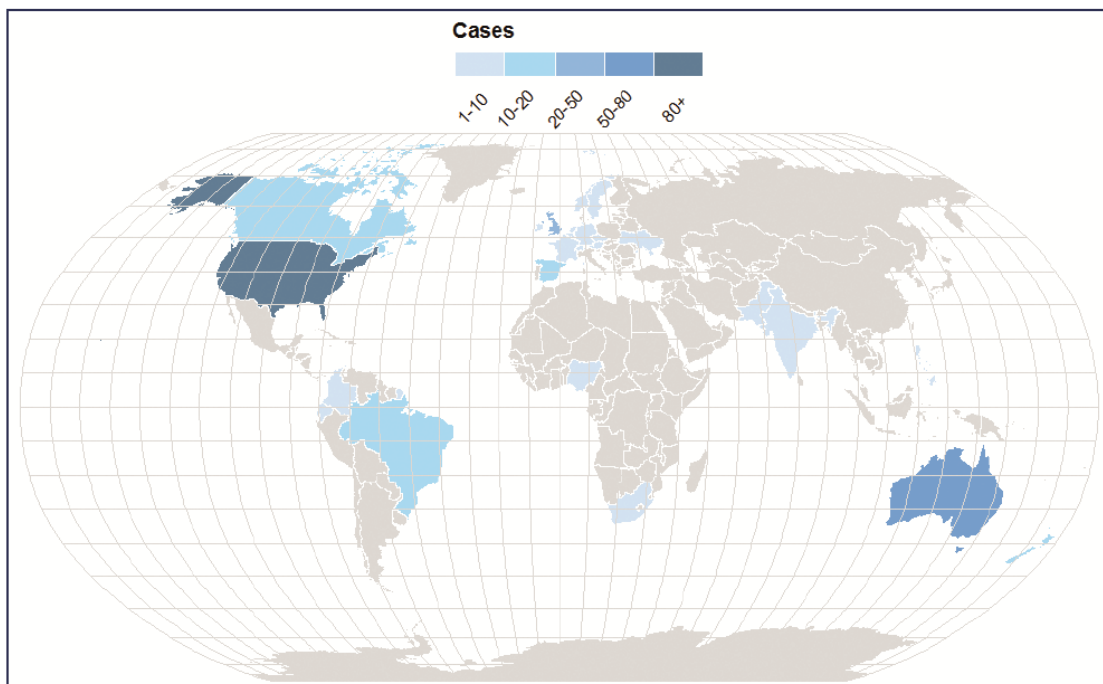
²² Ibid, p 13.

This is also the case in some environmental cases filed in Sri Lanka. Sri Lanka has not yet seen litigation where climate change is the central argument. Yet, the result is that the judiciary is increasingly exposed to climate change arguments. As with other litigation around liability for the harmful health impacts of tobacco and cigarettes or the side-effects of pharmaceuticals, peripheral arguments are the early symptoms of a growth area of litigation. Another early symptom of a growth area of litigation is the response of the insurance industry to potential risks from climate change and disaster related loss and damage. The insurance industry, has for at least a decade, listed and studied climate change as a top strategic risk to the industry.²³

There has been litigation around the world (including in Sri Lanka) where a fossil fuel power plant (like a coal power plant) has been challenged on environmental grounds, such as adverse air or water pollution impacts or impacts on fisheries or wildlife. Generally, these cases are formulated as regulatory challenges to environmental permits or environmental impact assessments. Not surprisingly, the report finds that in the last decade, climate change impacts are being included in such challenges brought to the courts.²⁴

Another interesting data point highlighted in the report is the geographical concentration of the 250 cases analyzed²⁵:

Figure 7. Litigation cases in all countries for which data is available, 1994–2017



Source: US climate litigation database and Climate Change Litigation of the World

Climate change litigation can have one or more objectives. The report also provides a useful analysis of these main objectives. Almost three fourths of cases concern administrative issues that are project or activity specific. These range from project or activity specific challenges to climate change based licensing decisions or climate change related challenges to environmental impact

²³ E. Mills, A Global Review of Insurance Industry Responses to Climate Change, The Geneva Papers on Risk and Insurance, V34 #1, (2009), Pp 323-59, accessible at <https://link.springer.com/article/10.1057/gpp.2009.14>.

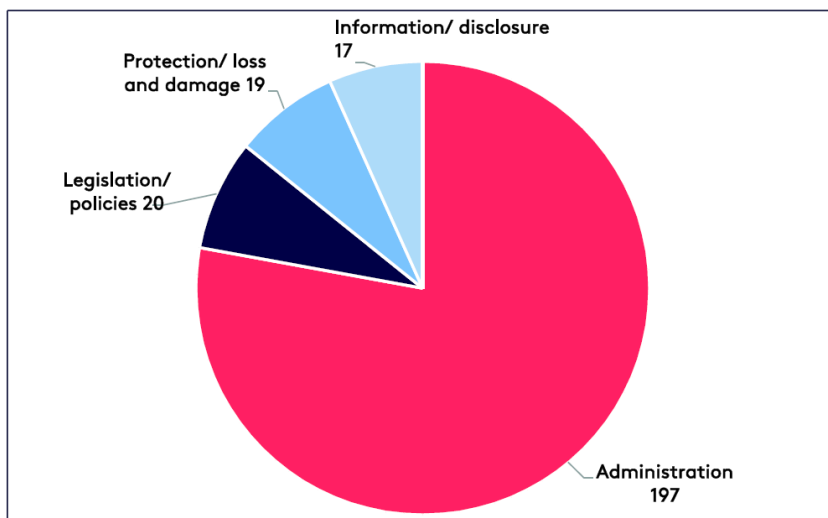
²⁴ Supra ft. 5, p 13.

²⁵ Ibid, p 14.

assessments. The balance one fourth of cases are approximately equally divided between cases brought to (a) drive climate change legislation/policy, (b) challenge information denial or non-disclosure and (c) recover loss or damage caused by climate change.²⁶

The report provides this useful figure:

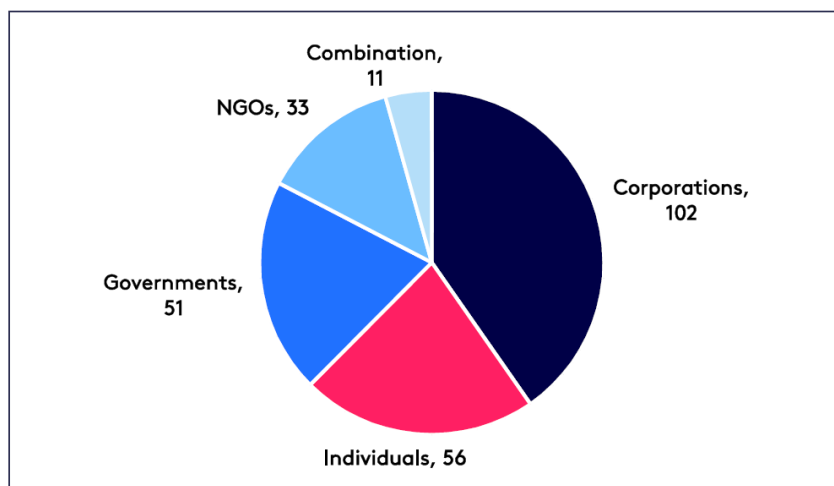
Figure 8. Number of cases by core objective



Source: *Climate Change Litigation of the World*. Note: The categorisation follows the literature on dominant litigation prototypes (Markell and Ruhl 2012; Wilensky 2015), with some adjustments.

The report also provides an analysis of parties to the litigation. Most climate change litigation has been filed by corporations, mostly filed against governments seeking to overturn adverse administrative decisions based on climate change.²⁷ Governments, individuals and NGOs, in that order, file the next most number of cases.²⁸ A small number of cases are filed by a combination of one or more of the above types of litigants.²⁹

Figure 9. The proportion of litigation cases in the database, by plaintiff type



Source: *Climate Change Litigation of the World*

²⁶ Ibid, p 15.

²⁷ Ibid, p 16.

²⁸ Ibid.

²⁹ Ibid.

The large majority of defendants/respondents in climate cases are governments/states (79%), mostly sued by corporations.³⁰ Individuals (42 cases), NGOs (24 cases) and government agencies (24 cases) also feature among the defendants/respondents.³¹

As the report states, litigation, as always, can be a double-edged sword.³² It can strengthen or weaken climate change regulations and laws.³³ However, on balance, the report concludes that “courts have so far tended to enhance, rather than hinder, climate regulation”.³⁴ The conclusion is based on an analysis of the 241 cases studied, where 132 cases (55 per cent) were categorized as enhancing climate regulation.³⁵ So far, litigation seems to have had a constructive and positive effect of climate regulation.

My last observation, based on this report, is the potential difference between the growth of climate change litigation in common law, as opposed to civil law countries. The report provides statistics of the growth of court cases and the number of laws over time. It provides graphs for five commonwealth countries and two civil law countries. In all the common-law countries litigation is growing significantly, whereas legislation has plateaued or is growing at a slower pace. In the civil law countries, legislation is growing as fast as court cases or cases have plateaued. This is consistent with the prevalent approach to addressing social and environmental issues in these jurisdictions. Common-law country legislation often leaves the details to be filled in by the executive via subsidiary legislation or through court interpretations, whereas, civil-law countries tend to produce detailed legislation (following codification practices) thereby leaving less to court interpretation or subsidiary legislation. Being a common law country, we can expect a growth pattern for Sri Lanka’s laws and litigation similar to the other commonwealth nations.

Legal doctrines, theories and principles in national climate change litigation

Several legal doctrines, theories and principles have emerged as popular choices in climate change litigation at the national level. Legal doctrines, theories and principles used in international or regional litigation are not covered in this paper, as they are of less direct relevance to a national judiciary.³⁶

The earliest initiatives in climate change litigation have generally been taken by concerned citizens or communities and public interest civil society organizations to force government action, where there has been little to none. Lamenting government lethargy, inertia and inaction, these litigants have sought **judicial review** (including *mandamus*) and other **administrative law remedies** to push governments to develop or implement climate change policies, enact regulations or perform international obligations under climate agreements or enforce and implement domestic climate

³⁰ Ibid.

³¹ Ibid.

³² Ibid, p 17.

³³ Ibid.

³⁴ Ibid.

³⁵ Ibid.

³⁶ For those interested in doctrines, theories and principles used in international/regional litigation, please see: International Bar Association, *Current Legal Challenges in Climate Justice*, in *Achieving Justice and Human Rights in an Era of Climate Disruption*, Climate Change Justice and Human Rights Task Force Report (2014), Chapter 2, accessible at <https://www.ibanet.org/PresidentialTaskForceClimateChangeJustice2014Report.aspx>. This chapter covers both international and domestic legal theories, doctrines and principle used for climate change litigation.

change laws.³⁷ The thrust of US climate litigation has been to advance climate policy actions whereas, in Europe and Australia, the thrust has been to enforce domestic climate legislation and force implementation by the government.³⁸ Much of this litigation has centered around the creative use of traditional theories, doctrines and principles of constitutional, administrative and public law. Broadly, US litigation has been based on statutory claims or claims based on common or public international law.³⁹ US statutory claims have been classified into four groups by the International Bar Association (IBA)⁴⁰ as follows:

- (i) litigation seeking to stop government action that contributes to climate change;
- (ii) litigation to force the government to act to mitigate the effects of climate change⁴¹;
- (iii) litigation to regulate private emitters directly; and
- (iv) litigation brought by emitting industries to resist regulation of GHGs.

Likewise, the Indian Supreme Court, High Courts and the new Green Tribunal of India have used **fundamental rights, judicial review and statutory redress procedures** to address environmental and even climate change cases.⁴² There are precedents in Sri Lanka for litigation to force government action on environmental issues using administrative, constitutional and human rights law. One such example, is the air pollution case that I filed in the Supreme Court in 1998 alleging violations of the fundamental right to equality and the right to life under the Sri Lankan Constitution.⁴³ A Sunday Times article on air pollution published several years later had this to say of the case:

“The story of air quality management in Sri Lanka goes back to 1998 when lawyer and Executive Director of the Environmental Foundation Ltd., Lalanath De Silva filed a fundamental rights petition in the Supreme Court stating that the Minister of Environmental Affairs had not taken steps to control the air pollution in Colombo and that he and his family were deprived of the basic right to breathe clean air. In his petition he suggested that there must be standards set for emissions from vehicles, improvement of fuel quality and regulations for the standards of imported vehicles. The Supreme Court ordered that the Minister bring in these regulations to effect by June 2000.”⁴⁴

³⁷ International Bar Association, *Current Legal Challenges in Climate Justice*, in *Achieving Justice and Human Rights in an Era of Climate Disruption*, Climate Change Justice and Human Rights Task Force Report (2014), Chapter 2, p 77 accessible at

<https://www.ibanet.org/PresidentialTaskForceClimateChangeJustice2014Report.aspx>.

³⁸ Ibid.

³⁹ Ibid.

⁴⁰ Ibid.

⁴¹ For example, *Massachusetts v EPA*, 549 US 497 (2007), Where several NGOs and States successfully sued the US Environmental Protection Agency (EPA) to regulate Greenhouse gases under the Clean Air Act. Subsequently the EPA classified greenhouse gasses as regulated under the Clean Air Act and issued regulations to control them for stationary sources and passenger vehicles.

⁴² L. Rajamani, *Rights Based Climate Litigation in the Indian Courts: Potential, Prospects and Potential Problems*, Working Paper (2013/May), Center for Policy Research Climate Initiative accessible at http://www.cprindia.org/sites/default/files/working_papers/Working%20paper%202013_LRajamani_Climate%20Litigation_5.pdf. For a comparative study of private claims based on climate change in the US and India see T.D Hester, *Private Claims for a Global Climate US and Indian Litigation Approaches to Climate Change and Environmental Harm*, Journal of the Indian Law Institute accessible at <https://www.law.uh.edu/faculty/thester/courses/Climate-Change-2012/Private%20Claims,%20Global%20Climate%20-%20ILI%20Paper.pdf>

⁴³ *Lalanath de Silva V Minister of Environment and Forests*, SC Fundamental Rights Application 569/98 (1998).

⁴⁴ Sunday Times Plus, accessible at <http://www.sundaytimes.lk/060312/plus/1.html>

Other landmark environmental cases include the Eppawala Phosphate mining case,⁴⁵ the Kandalama Hotel case,⁴⁶ the Colombo-Matara Expressway case,⁴⁷ Sand Mining case,⁴⁸ and the Galle Face Green case.⁴⁹ Many of these landmark Sri Lankan cases have been discussed and analyzed in the Handbook for the Sri Lankan Judiciary,⁵⁰ the publication of which was supported by the Sri Lanka Judges Institute, UNEP, a judicial editorial panel appointed by the institute and prefaced by a message from his Lordship J.A.N de Silva, CJ. As such, this paper does not discuss them in detail, other than to reference them when relevant. These cases are examples of environmental litigation forcing access to information, challenging government decision and, action or inaction under Sri Lankan environmental laws. They are based on judicial review, fundamental rights and constitutional provisions used in combination with other environment related laws. Similar theories, doctrines and principles can therefore also be legitimately used in climate change litigation and judicial decisions.

Climate and environmental litigation have also used the **public trust doctrine** (PTD). Common law climate change claims in the US based on the PTD have not been very successful as courts in the US have tended to hold that judicial intervention “would improperly interfere with the government’s legislative and regulatory authority”.⁵¹ However, these decisions may not be relevant in India or Sri Lanka, where the courts have, in several cases, held that the PTD is very much part of the law of the land and has applied it in environmental cases.⁵² His Lordship Dr. A.R.B. Amerasinghe went further than the PTD, in the Eppawala Phosphate mining case and enunciated an even broader doctrine – one I like to call the “**Earth Guardianship Doctrine**” (EGD). Having cited passages from historical texts to show how our ancestors viewed natural resources he stated:

“The public trust doctrine, relied upon by learned counsel on both sides, ...commencing with a recognition of public rights in navigation and fishing in and commerce over certain waters, has been extended in the United States on a case by case basis. Nevertheless, in my view, it is comparatively restrictive in scope and I should prefer to continue to look at our resources and the environment as our ancestors did, and our contemporaries do, recognizing a shared responsibility.”

The Constitution today recognizes duties both on the part of parliament and the President and the Cabinet of Ministers as well as duties on the part of “persons”, including juristic persons like the 5th and 7th respondents. Article 27(14) states that “The State shall protect, preserve and improve the environment for the benefit of the community”. Article 28(f) states that the exercise and enjoyment of rights and freedoms (such as the 5th and 7th respondents claimed in learned counsel’s submissions of their behalf to protection under Article 12 of the Constitution relating to equal protection of the

⁴⁵ *Bulankulama v Secretary, Ministry of Industrial Development* [2000] 3 Sri L.R. 243.

⁴⁶ *Environmental Foundation Limited v Land Commissioner* [1993] 2 Sri L.R. 41; (1994) 1 S.A.E.L.R. 53.

⁴⁷ *Heather Mundy v Central Environmental Authority et al*, SC Appeals 58-60/2003, SC minutes 20 Jan 2004.

⁴⁸ *Hettiarachchige Don Chrishan Priyadarshana Wijewardena Vs. Geological Survey and Mines Bureau*, SC.FR 81/2004

⁴⁹ *Environmental Foundation Limited v Urban Development Authority*, S.C.F.R. No. 47/2004, S.C. Minutes of 28.11.2005. Reported in ‘Some Significant Environmental Judgments in Sri Lanka’, pub. Environmental Foundation Limited at p.22.

⁵⁰ Environmental Foundation Ltd, M. Gomez (ed), Judges and Environmental Law, A Handbook for the Sri Lankan Judiciary, (2009), accessible at <http://efl.lk/v2/wp-content/uploads/2015/12/Judges-Environmental-Law-A-Handbook-for-the-Sri-Lankan-Judiciary-1.pdf>

⁵¹ *Supra* ft. 37, p 78.

⁵² For Sri Lanka See *Bulankulama v Secretary, Ministry of Industrial Development* [2000] 3 Sri L.R. 243; *Sugathapala Mendis Vs. Chandrika Bandaranayake Kumaranatunga* (Water’s Edge case) SC. Fr 352/2007, SC Minutes of 01.10.2008; *Heather Mundy v Central Environmental Authority et al*, SC Appeals 58-60/2003, SC minutes 20 Jan 2004; *Gunaratene V Ceylon Petroleum Corporation*, SC. FR 118/2004, SC Minutes of 05.04.2007, p 18.

law) is inseparable from the performance of duties and obligations, and accordingly it is the duty of every person in Sri Lanka to protect nature and conserve its riches”. (emphasis added)

The loose use of legal terms like “trust” and “trustee” is apt as this case has shown, to lead to fallacious reasoning. Any question of the legal ownership of the natural resources of the State being vested in the Executive to be held or used for the benefit of the people in terms of the Constitution is at least arguable. The Executive does have a significant role in resource management conferred by law, yet, the management of natural resources has not been placed exclusively in the hands of the Executive. The exercise of Executive power is subject to judicial review. Moreover, Parliament may, as it has done on many occasions, legislate on matters concerning natural resources, and the Courts have the task of interpreting such legislation in giving effect to the will of the people as expressed by Parliament.” (emphasis added)

It is submitted that the EGD has wider implications than the PTD. The EGD seems to recognize that irrespective of legal ownership of natural resources, it is the fundamental duty of the three organs of the state, and indeed, of the entire citizenry to protect, preserve and improve the environment for the benefit of the community. The EGD, it is submitted, provides a legal doctrine that would allow the courts to intervene by way of judicial review or appropriate interpretations of statutes when the facts show dereliction of this fundamental duty as a guardian of natural resources. It is submitted, that it is up to the Sri Lankan judiciary to clarify and breathe practical and legal meaning in to this doctrine in ways that make sense for each generation and the developmental and environmental contexts of the nation and the world at large. Arguably, climate change, may well present such an opportunity.

Public nuisance is yet another legal basis that has found favor with litigants and courts in addressing climate change cases. These cases are generally filed by victims of climate change impacts against corporations or firms or individuals responsible (as opposed to the State or state agencies).⁵³ The particular facts of each case may differ, but the general allegation in these cases is that climate change is caused by greenhouse gas emitters and climate change impacts constitute a “public nuisance” (as opposed to a private nuisance) as it unreasonably interferes with the use and occupation of land by innumerable members of the public (or a community). Litigation seeking damages or injunctions based on public nuisance in the US, have not been successful, largely because (a) the courts have held that the Clean Air Act had displaced the common law of nuisance as applicable to greenhouse gas emitters and (b) the plaintiffs have not been able to show adequate causation of the local climate change impacts from global emissions of greenhouse gasses.⁵⁴ Climate science is evolving at a fast pace, and it is becoming increasingly possible to extrapolate and predict local impacts/changes from the available climate data.

On the other hand, in Sri Lanka or perhaps, even in India, the situation of climate change litigation based on public nuisance, might have a different fate. Interestingly, the jurisdiction to deal with public nuisances in Sri Lanka, is vested by the Criminal Procedure Code in the Magistrates Courts, (with appeals to the High Court and the Supreme Court). While a public nuisance is an offence under the Nuisances Ordinance, the abatement (or removal) of public nuisances are dealt with under Section 98 (et seq) of the Criminal Procedure Code. In 1994, the Ministry of Environment in collaboration with the Inspector General of Police issued a police department circular, advising Police stations to file public nuisance cases, as appropriate, to address local environmental issues. Following this advice many such cases were filed and dealt with by Magistrates around the island.

⁵³ *Supra* Ft. 37, p 78.

⁵⁴ *Ibid*.

Public nuisance abatement procedures are straightforward. Proceedings begin with the filing of a report or information, either by the Police or by a private litigant alleging facts that constitute a public nuisance as described in Section 98 (et seq) of the Code. Evidence is then produced, either in the form of affidavits or through sworn testimony. If a *prima facie* case of public nuisance is made out, the Magistrate can issue a “conditional order” (similar to an order *nisi*). The conditional order (conditioned to take effect, unless cause is shown against it) ordering the removal of the nuisance, is then served on the respondent(s). The respondent can then comply with the order forthwith or show cause against the order within the stipulated time. If the respondent fails to show cause or if cause is shown but the court finds no merit in it, the court makes the conditional order absolute. If cause is shown and it succeeds, the conditional order is discharged. Most interestingly, pending the disposal of the matter, the Magistrate has the power under Section 104 of the Code to issue an injunction to “prevent imminent danger or injury of a serious kind to the public” or under Section 106 to issue an *ex parte* order absolute, in urgent cases. These are useful and far reaching powers which, no doubt, are arguably applicable to climate change based public nuisances as well.

In contrast, in South America, climate change litigation has sometimes been based on *Amaparo* actions (constitutional rights cases) and have been successful in several cases.⁵⁵ Many of these cases combine constitutional rights with various rights and procedures under national or local environmental laws.

Future implications of climate change litigation for Sri Lanka’s judiciary

Sri Lanka’s future climate impact outlook

Sri Lanka has seen a historical increase, in both the number and intensity of droughts, floods, geographic changes to vector borne diseases, coastal erosion, tropical storms, lightning, crop failures, landslides and siltation of reservoirs. Most of these are related to temperature and rainfall changes. Coastal erosion is partly the result of sea level rise and partly other causes, such as river-bed sand mining and unplanned coastal building activities. These events have devastating and adverse impacts on our citizens, infrastructure, national budget, and the environment.

The costs of climate change runs into millions, if not billions of US Dollars. For example, it has been estimated that the coconut industry in the wet zone will suffer major losses. “Without extra adaptation measures this is predicted to result in a loss to the industry of 4,795 Rs. Million annually by 2020, which is nearly 4.7 percent of the total value of the industry at equilibrium.”⁵⁶ A report from the Asian Development Bank and UK Aid stated “Tropical and subtropical regions of Bangladesh, Bhutan, India, and Sri Lanka are projected to be vulnerable to increasing temperature and CO2 level, with a decline in rice yield of as much as 23% by 2080”⁵⁷ By the end of this century,

⁵⁵ Ibid.

⁵⁶ E. Pathiraja, G. Griffith, W. Farquharson, R. Faggian, *The Economic Cost of Climate Change and the Benefits from Investments in Adaptation Options for Sri Lankan Coconut Value Chains*, proceedings in System Dynamics and Innovation in Food Networks 2017, accessible at <http://centmapress.ilb.uni-bonn.de/ojs/index.php/proceedings/article/download/1746/712>

⁵⁷ M. Ahmed & S. Suphachalasa, *Assessing the Costs of Climate Change and Adaptation in South Asia*, (2014), P xiv, ADB and UK Aid accessible at http://www.preventionweb.net/files/38999_assessingcostsclimatechangeandadapt.pdf

Sri Lanka is likely to see an increase of 2-3 C degrees average temperature rise.⁵⁸ There is likely to be significant inundation all around the coast, and particularly in places like Negombo and Galle.⁵⁹

A June 2017 World Bank report stated that “on average over the long term, annual losses for housing, infrastructure, agriculture, and relief from natural disasters are estimated at LKR 50 billion (or around USD 327 million), with the highest annual expected losses from floods (LKR 32 billion), cyclones or high winds (LKR 11 billion), droughts (LKR 5.2 billion) and landslides (LKR 1.8 billion). This is equivalent to 0.4 percent of GDP or 2.1 percent of government expenditure.”⁶⁰ The report also states “The execution of the budget is knocked off track continuously due to the impact of natural disasters, which seem to have increased in frequency, severity and economic impact as Sri Lanka’s economy has grown and has become more sophisticated. Although fewer people were impacted than in previous floods, the damage caused by the 2016 floods and landslides was more than twice as high in US dollar terms than the worst flood disasters between 1992 and 2011.”⁶¹

To overcome these challenges the report suggests that “it is of utmost importance for Sri Lanka to increase its physical resilience (to reduce impact of disasters) and financial resilience (to deal with the impact when the disaster happens). To improve physical resilience, the World Bank is supporting the Government’s Climate Resilience Improvement Project (CRIP) and recommends that the country:

1. Identify current climate risk, and implement immediate risk mitigation interventions
2. Identify future drivers of risk
3. Create basin-level long-term risk mitigation investment plans, followed by physical investments.”⁶²

Were these climate changes not known or predicted earlier? Sri Lankan scientists have been predicting such adverse impacts for at least 10-15 years. For example, a 2005 article stated that “The impacts of rainfall increases are predicted to be beneficial to the country as a whole in all five AOCGM [*Ocean and Atmospheric model*] scenarios, but temperature increases are predicted to be harmful. Nationally, the impacts vary from –11 billion rupees (–20 per cent) to +39 billion rupees (+72 per cent) depending on the climate scenarios. With warming, the already dry regions (the Northern and Eastern provinces), are expected to lose large portions of their current agriculture, but the cooler regions (the central highlands), are predicted to remain the same or increase their output. The paper reconfirms that climate change damages could be large in tropical developing countries, but highly dependent on the actual climate scenario.”⁶³ Since then both data, analysis and climate science has advanced significantly.

Sri Lanka has little choice but to prepare for and adapt to climate change. Sri Lanka’s greenhouse gas emissions are miniscule in comparison to those of developed nations, India or China. The rising cost of climate change is being, and will be, borne by the Sri Lankan public and by citizens and corporations who suffer damage. It is also being borne by future generations as the country

⁵⁸ Ibid, p 27.

⁵⁹ See the Sea Level Hazard Profiles prepared by Disaster Management Center, Ministry of Disaster Management, accessible at <http://www.dmc.gov.lk/hazard/hazard/Sea%20Level%20Rise.html>

⁶⁰ The World Bank, Sri Lanka development Update, June 2017, page 12 et seq, accessible at <https://openknowledge.worldbank.org/bitstream/handle/10986/27519/116949-WP-P153384-PUBLIC-Sri-Lanka-Development-Update-Spring-2017.pdf?sequence=5&isAllowed=y>

⁶¹ Ibid.

⁶² Ibid.

⁶³ S. Niggol-Seo, R. Mendelsohn, M. Munasinghe, *Climate change and agriculture in Sri Lanka: a Ricardian valuation*, 10 Environment and Development Economics (2005) Pp 581–596, Cambridge University Press accessible at <http://nersp.osg.ufl.edu/~vecy/LitSurvey/Seo.05.pdf>

increases its debt burden on this account. Likely, an inequitable proportion of these losses will be borne by poor and marginalized citizens, living along the banks of canals, rivers and along the coast or residing in landslide prone areas.

No doubt, the government of Sri Lanka is taking steps to adapt to climate change.⁶⁴ Sri Lanka has established a Climate Change Secretariat under the Ministry of Mahaveli Development and Environment.⁶⁵ A national Climate Change Policy has been adopted in 2012.⁶⁶ A National Adaptation Plan for Climate Impacts in Sri Lanka 2016-2025 was adopted.⁶⁷ Previous to this Plan, a National Climate Change Adaptation Strategy 2011-2016 was also adopted.⁶⁸ Sri Lanka has received a technical assistance grant from the Asian Development Bank for strengthening its adaptation capacity⁶⁹ and has received funding from the Green Climate Fund for a climate adaptation project in the north-central province.⁷⁰ The project seeks to strengthen the resilience of smallholder farmers in the Dry Zone to climate variability and extreme events through an integrated approach to water management.

One of the questions that is likely to be raised before the courts is whether these steps are timely, adequate and effective to meet the challenges of climate change. Another potential question that may be raised is whether the plans and strategies that have been adopted have been implemented? In most parts of the developing world, entrenched bureaucratic inertia and ineffectiveness, vested interests, lack of transparency and public awareness and participation, insufficient accountability, abuse, misuse and corruption and insufficient awareness and attention by policy makers and legislators, contribute to the growing cost of climate change and the slowness of adaptation efforts.

What can Sri Lanka’s judiciary expect by way of climate litigation?

In this context, the question I wish to raise for judges is this: Is there a constructive and positive role for the judiciary in the face of climate change? I venture to suggest that there is.

Following global trends, the Sri Lanka judiciary can expect to see the following trends in the future:

- a) A growth in climate change legislation mostly driven by the Paris climate change Agreement⁷¹;
- b) A growth in executive actions in the form of policies, strategies, budgets, institutional reforms, regulations and ministerial orders etc.;⁷²
- c) A significant growth in both general environmental laws and, laws and policies in the energy, low carbon economy, agriculture, coastal zone and forestry sectors; and
- d) A growth in climate change litigation, mostly brought by corporations and NGOs against government, government agencies, provincial governments and local authorities, with lesser numbers of cases brought by citizens and NGOs directly against corporation and corporations.

⁶⁴ For example, the Disaster Management center has mapped sea level rise hazard profiles (See Supra Ft. 59).

⁶⁵ http://www.climatechange.lk/About_us.html

⁶⁶ http://www.climatechange.lk/CCS%20Policy/CCS_Policy.html

⁶⁷ http://www.climatechange.lk/NAP/NAP%20For%20Sri%20Lanka_2016-2025.pdf

⁶⁸ <http://www.climatechange.lk/adaptation/Index.html>

⁶⁹ http://www.climatechange.lk/adaptation/index_adaptation.html

⁷⁰ <http://goo.gl/JX9kkQ>

⁷¹ For a list of climate change legislation in Sri Lanka, see <http://goo.gl/SjtssY>.

⁷² For a list of executive actions in Sri Lanka on climate change, see <http://goo.gl/T68SkK>.

Most of the litigation is likely to be filed by corporations challenging government decisions refusing environmental pollution licenses and development permission (environmental impacts assessment), based on climate change grounds. There is also likely to be litigation brought by NGOs and perhaps, concerned individuals, to push government and government agencies to accelerate the pace of climate change policy-, law- and regulation-making and enforcement or challenging the issue of licenses and development permits on climate change grounds. These types of litigation are likely to be based on constitutional, administrative, public and fundamental rights laws. They are likely to arise through judicial review, statutory procedures and fundamental rights applications. There is also a high probability that litigants would use public nuisance laws to hold foreign and local corporations accountable for loss and damage from climate change. There could also be damages claims for such losses by way of civil suites and strategic litigation against public participation (SLAPP suits), though these types of litigation are highly unlikely in the short to medium term.⁷³ The science of climate change causation is evolving and improving day by day and these types of suits will fare better, once climate change causation science becomes even more reliable.

From the above, all levels of courts in Sri Lanka, from the Magistracies, High Courts through to the Court of Appeal and the Supreme Court (with perhaps the immediate exception of District Courts) are likely to be engaged, from time to time, in one or other form of climate change litigation. Legal theories and arguments drawn from constitutional, public and administrative law, public and private nuisance, negligence and strict liability, public trust doctrine, earth guardianship doctrine, polluter pays principle, precautionary principle, the principle of non-regression, human rights law, corporate and commercial law, and access to information law are more than likely to be involved in the resolution of these cases.

Many of these cases are likely to raise interesting, yet challenging issues of interpretation, application of existing legal theories and doctrines and principles in the light of climate change related developments and facts. Cases are likely demand the balancing of competing interests and the application of climate science. The judiciary is likely to be called upon to perform its constitutional, legal and traditional functions and roles, within a fast-changing climate change scenario that is likely to bring vast scale damage and loss to Sri Lankan citizens, often involving facts that would give rise to strong emotional responses from all involved.

In conclusion, and as always, the strength of our judiciary lies in its ability to be impartial and independent and true to its constitutional role. That will require acute awareness of the realities of climate change and its certain impacts. It will also require careful research, sound understanding of climate change phenomenon, a good understanding of emergent and settled principle and theories of laws, including environmental law, and the courage to be fair and do justice, in every case.

Having described the growing environmental degradation in Sri Lanka, his Lordship Sarath Silva CJ, in the Handbook for judges on environmental law stated:

“It is in this context that I prevail on the judges to remind them of their fundamental duty to preserve and enhance the natural environment, making maximum use of the operative legal regime. The opportunity may not come in the form of ready-made cases since here are only a few public interest litigants. Judges must be vigilant and create new opportunities through the cases that come before the judiciary. It is a duty of judges to nudge the relevant authorities into action when there is a glaring example of pollution within their jurisdiction.”⁷⁴

⁷³ For a description of SLAPP suits see https://www.law.cornell.edu/wex/slapp_suit

⁷⁴ *Supra* ft. 50, p x.