Strengthening Capacity for Environmental Law in the Asia-Pacific: Developing Environmental Law Champions
Second Regional Roundtable
29–30 May 2017, Cebu, Philippines

Recent innovative environmental litigation
Associate Professor Karen Bubna-Litic
University of South Australia
https://www.youtube.com/watch?v=tx2kD1lett0
“Our government seems to care more about money for the fossil fuel industry than our futures. But money isn’t going to matter if we can’t fix our planet.”

Jayden Foylelin, 13
Rayne, LA

“Climate change is the defining issue of our time. The actions those in power take and decisions they make today will determine the kind of world future generations will inherit.”

Xiuhtezcatl Martinez, 16
Boulder, CO

“Climate change is a pressing issue that is causing noticeable changes around us. There is a lack of awareness that the benefits of preventing and slowing the change will highly exceed any present costs.”

Levi Draheim, 9
Indialantic, FL

“Climate change isn’t just about temperatures and weather, it’s about people. Our earth will be here for millennia, it’s up to us to decide if humanity will be too.”

Nathan Baring, 15
Fairbanks, AK

“The courts have the ability to impact the lives of future generations and our lives in the future. I am speaking for the future generations, and they want to have a livable planet as they grow up.”

Sophie Kivlehan, 17
Allentown, PA

“I know climate change is going to have the biggest impact on my generation and generations to come. Our government isn’t taking action and we have a very small window to turn this around. I feel a sense of responsibility to take action.”

Nick Venner, 15
Lakewood, CO

“I am disappointed in my government. Things are continuing to get worse, with more and more people being impacted by climate change. When will the U.S. government pay attention and stand up for our lives?”

Tia Hatton, 19
Bend, OR

“It’s important to spread awareness about climate impacts. I’m suing the federal government because they need to be doing a lot more to protect our futures.”

Victoria Barrett, 17
White Plains, NY

“Our federal government has not been held accountable for their gross failure to protect life and the future of life on this earth, forcing us children to take drastic actions to procure the needed motivation in order to save life on this planet.”

Isaac Vergun, 14
Beaverton, OR

“We need to take action because our government isn’t protecting our future. I want my children and future generations to be able to live safely on our planet.”

Journey Zephyr, 16
Kaua‘i, HI

“I am suing the Federal Government because it’s the right thing to do. Our future survival depends on our leaders taking dramatic action on climate change NOW, for the sake of future generations and all life on Earth.”

Jaime Butler, 14
Flagstaff, AZ

“Zest Bell, 11
Eugene, OR

“It’s important to spread awareness about climate impacts. I’m suing the federal government because they need to be doing a lot more to protect our futures.”

Aji Piper, 15
Seattle, WA

“We need to reduce carbon emissions now in order to avoid the worst impacts of global warming. Building new fossil fuel infrastructure is fundamentally inconsistent with that goal.”

Sahara Valentine, 11
Eugene, OR

Alex Loznak, 19
Oakland, OR

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Our children’s trust

“[I believe that climate change is the most pressing issue my generation will ever face, indeed that the world has ever faced. This is an environmental issue and it is also a human rights issue.”

Kelsey Juliana, 20
Eugene, OR

“I am telling my government to stop aiding and turning a blind eye to corporations who profit off destroying our resources, climate, and environment and start acting in the interest of its people. Our lives may depend on it.”

Jacob Lebel, 19
Roseburg, OR

“Our government refuses to protect our basic rights to life. If those we have put in power aren’t protecting our necessities, what purpose are they serving?”

Kiran Oommen, 19
Eugene, OR

“As a teen, I can tell you this is our future we’re talking about. We have to stop going about our lives as if nothing is happening.”

Miko Vergun, 15
Beaverton, OR

“We need to protect our land, water, air, and wildlife. Our government is turning a blind eye to our planet and our future.”

Hazel Van Ummersen, 11
Eugene, OR

“I want my government to understand that climate change is real, changes are happening right now, and things aren’t going to get better on their own. Climate change should be the government’s first priority.”

Avery McRae, 10
Eugene, OR

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Rights for the rivers – 2017 decisions

• Ganges and Yamuna Rivers – March 20, 2017
  – “Thus, to protect the recognition and the faith of society, Rivers Ganga and Yamuna are required to be declared as the legal persons/living persons.”

• Whanganui River (Te Awa Tupua) – March 15, 2017
  – Te Awa Tupua Bill gives effect to Ruruku Whakatupua (Deed of Settlement)(2014)
  – establishes Te Pa Auroa as a legal framework that is centred on the legal recognition of the Whanganui River as Te Awa Tupua.
  – 7 principle elements. These include recognition of the river as a legal person; the rivers values; setting up 2 people (one from the Crown and one appointed by the Iwi) as guardians of Te Awa Tupua; the river strategy; a group to develop the river strategy; vesting the Crown owned parts of the bed in Te Awa Tupua;
Whanganui River (Te Awa Tupua)

• To support the legal framework, the Crown will provide:
  – a $30m contestable Te Awa Tupua fund.
  – $200,000 per year for 20 years as a contribution to the costs associated with the guardian functions
  – $430,000 to the regional council for the development of the river strategy.

• Second part of the agreement is to provide for cultural and financial redress and to further develop the relationship between the Whanganui Iwi and Te Awa Tupua
  – This includes: acknowledgment and apology for past wrongs; statutory recognition of the relationship between the Iwi and the river; the carrying out of authorised customary activities; assignment of official geographic names
  – Financial redress of $80m
  – Additional payment of $1m for transitional and implementation relating to the establishment of the legal framework.
Climate litigation

- Netherlands –
  - *Urgenda Foundation v The State of the Netherlands (Ministry of Infrastructure and the Environment)* case No.C/09/456689/HA ZA 13-1396
  - State had breached its duty of care to Urgenda and Dutch society
  - Article 21 of the Dutch Constitution imposes a duty of care on the State relating to the liveability of the country and the protection and improvement of the living environment.

- Pakistan –
  - *Leghari v Federation of Pakistan, W.P. No.25501/2015* – 4 September 2015
  - Court held climate inaction had violated the fundamental constitutional right to life and dignity.

- Philippines –
  - Human rights commission – Dec 6 2016
Our children’s trust -
https://www.ourchildrenstrust.org/

- ATL – atmospheric trust litigation
- Our Children’s Trust – state and federal.
  - Zoe and Stella Foster v Washington Dept of Ecology
  - Juliana v US
- Our Children’s Trust –
  - India – Ridhima Pandey: 22 March 2017
  - Norway – 18 October 2016
Zoe and Stella Foster v Washington Dept of Ecology
– June 23 2015

• Petition for rulemaking submitted for Washington State agency to mandate ghg emission reductions on the basis that 350ppm of carbon dioxide is the max level for a safe climate system.
• Ordered to report back by July 2015. Dept again refused.
• The youths argued to the court that further delay will lock in the infringement of their fundamental rights and that they want a remedy that would require science based climate action in a timeframe that mattered for their future. Back in Court on November 3.
• November 19, Judge Hill of the King County Supreme Court confirmed that “[t]he state has a constitutional obligation to protect the public’s interest in natural resources held in trust for the common benefit of the people.”
• on April 29th, the court again ordered them to promulgate the rule by the end of 2016 and make recommendations to the state legislature on science-based greenhouse gas reductions in the 2017 legislative session.
• June 1, Inslee administration issued an inadequate Clean Air Rule requiring only a 1.7% reduction based on inadequate science. This defied the May 16 court order issued by King County Superior Court Judge Hollis R. Hill, and failed the children of Washington. Governor Islee then called for a community meeting on July 14 for feedback on the rule.
Zoe and Stella Foster v Washington Dept of Ecology  
– June 23 2015

- Nov 22 plaintiffs went back to court for a hearing where Gov. Inslee’s administration must show why it is not in contempt of the court’s prior order to protect the constitutional rights of the youth from climate pollution.
- Dec 19, court allowed the case to continue joining governor Islee as a defendant. It is going to give them their day in court rather than getting the Department to issue a new rule.
**Juliana v the US: Case No. 6:15-cv-01517-TC, Opinion and Order (10 November 2016)**

- D’s actions violate their substantive due process rights to life, liberty, and property and that D have violated their obligation to hold certain NR in trust for the people and for future generations.
- They seek
  - 1) a declaration their constitutional and public trust rights have been violated
  - 2) an order enjoining defendants from violating those rights and directing defendants to develop a plan to reduce CO2 emissions
- D seek a motion to dismiss, refused by Magistrate Judge Coffin and referred to Oregon District Court for review.
- Decision confirmed by Justice Aitken.
No ordinary lawsuit

• Questions
  – Is D responsible for some of the harm from CC? – qu. of proof
  – Can D’s climate policy be challenged in Court?
  – If Ct orders D to change policy, is this a breach of separation of powers doctrine?
• Justiciability
  – Claims of statutory and constitutional rights – not a political question
• Standing
  – Concrete, particular, actual or imminent
  – Causation
  – redressability
• Due Process
  – Infringement of a fundamental right?
  – ‘Danger creation’ exception to inaction
• Public Trust
  – 4 challenges – all addressed
Juliana’s case

• The plaintiffs argued that the defendants have violated their obligation to hold certain natural resources in trust for the people and for future generations.
• Judge Anne Aitkin:
  • acknowledged the fundamental premise that "air, running water, the sea, and consequently the seashore" are public trust assets imposing upon the trustee a fiduciary duty to "protect the trust property against damage or destruction,“
  • Under the public trust doctrine, no government can legitimately abdicate certain powers and obligations without diminishing the power of future legislatures to promote the general welfare. Here, the resources vital to ensure public welfare are at stake because they are threatened by rising CO2 levels which contribute to climate change and threaten the general welfare.
  • held the defendants responsible for failing to mitigate climate change.
  • explained that "]his action is of a different order than the typical environmental case. It alleges that defendants' actions and inactions--whether or not they violate any specific statutory duty--have so profoundly damaged our home planet that they threaten plaintiffs' fundamental constitutional rights to life and liberty."
Juliana’s case – ‘the trial of the Millennium’

• Judge Aiken articulated a new fundamental right, the right to a climate system capable of sustaining human life.

• "Judge Aiken wrote a blockbuster opinion in Juliana v. United States holding that there is a constitutional right to a safe climate for the youth of America and the world." .............."[t]his has set the stage for the trial of the century in summer 2017 featuring some of the world's foremost climate scientists and putting the incoming Trump administration under scrutiny to justify its announced intentions to repeal the Obama administration's clean power plan and withdraw from the Paris climate treaty signed by nearly 200 nations."

• Patrick Parenteau, Vermont Law School

• [Source](https://static1.squarespace.com/static/571d109b04426270152febe0/t/5824e85e6a49638292ddd1c9/1478813795912/Order+MTD.Aiken.pdf)
Thank you.

Questions?

https://www.youtube.com/watch?v=jllyl8vWo3U