



CENTRE FOR POLICY RESEARCH CLIMATE INITIATIVE

Working Paper 2013/1 (May)

RIGHTS BASED CLIMATE LITIGATION IN THE INDIAN COURTS: POTENTIAL, PROSPECTS & POTENTIAL PROBLEMS

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Abstract Climate litigation is in its infancy in India. Climate-related claims have yet to be litigated in the courts. There are a few cases in which climate change has been referred to but only in passing. This situation may well be set to change. Climate change and its impacts are rapidly capturing the popular imagination in India. There is a growing recognition of the importance and urgency of the climate challenge, and a slew of climate policies and initiative at the national and state levels have been launched in response. India has an engaged and proactive civil society, an activist judiciary, a progressive body of environmental legal jurisprudence, and an unparalleled culture of public interest litigation. This suggests not just that there are potential litigants waiting in the wings but also that climate-related claims are likely to be favorably entertained by the judiciary.

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Rights Based Climate Litigation in the Indian Courts: Potential, Prospects & Potential Problems

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Introduction

Climate litigation is in its infancy in India. Climate-related claims have yet to be litigated in the courts. There are a few cases in which climate change has been referred to but only in passing. This situation may well be set to change. Climate change and its impacts are rapidly capturing the popular imagination in India. There is a growing recognition of the importance and urgency of the climate challenge, and a slew of climate policies and initiative at the national and state levels have been launched in response. India has an engaged and proactive civil society, an activist judiciary, a progressive body of enviro-legal jurisprudence, and an unparalleled culture of public interest litigation. This suggests not just that there are potential litigants waiting in the wings but also that climate-related claims are likely to be favorably entertained by the judiciary.

This article will first explore the environment for climate litigation, as well as the potential, prospects, and potential problems that Constitutional rights-based hooks - whether in relation to an environmental right, or core rights to life and health – face in Indian courts. This article will also seek to address the role that rights-based climate litigation could or should play (or not) in effectively addressing climate change in India.

This article argues that although there is a favorable judicial environment for rights-based climate change litigation, rights-based claims relating to mitigation may both be less forthcoming and less well received than rights-based claims relating to adaptation. This is, arguably, due to the polarized north-south debate on climate change mitigation in the international climate change negotiations. The international community is yet to arrive, after two decades of negotiations, at a fair and effective burden sharing arrangement between nations. Many in Indian civil society identify with the Indian government's position in the negotiations - rooted in equity and the principle of common but differentiated responsibilities - and they are less likely, therefore, to undercut India's international negotiation position by challenging the Indian Government for inadequate mitigation action domestically. The Courts may also be reluctant to venture into this area for fear of jeopardizing India's negotiation position. Rights-based claims relating to adaptation, however, may fare better, as these will not have similar implications for India's international negotiating position. More generally, this article introduces a note of caution in relation to the role that Courts, notwithstanding the favorable environment they may provide for rights-based climate claims, can and should play in driving climate governance in India.

Policy Context: India & Climate Change

India is on a mission to develop. Economic growth, and with it, poverty eradication, energy security, and provision of universal access to energy, are central and enduring preoccupations of the Indian government. Justifiably so: India is placed 134th on the Human Development Index,¹ 41.6 per cent of its population lives on less than 1.25 US\$ a day,² and an estimated 44 per cent does not have access to electricity.³ India's developmental mission, as framed, however, may well leave large carbon footprints, and ultimately weaken its ability to develop. If India's current growth rate continues⁴ energy demand will increase exponentially.⁵ In addition, if India's targets on poverty, unemployment, and literacy⁶ are to be met, and energy provided to the nearly 500 million Indians without access to electricity, it will lead to much greater energy use.⁷ India will soon be a significant contributor to climate change.⁸ India is predicted by some estimates to become the third largest emitter by 2015,⁹

* Professor, Centre for Policy Research, New Delhi. This paper builds on the *India* Chapter by Lavanya Rajamani and Shibani Ghosh, in Richard Lord, Silke Goldberg, Lavanya Rajamani and Jutta Brunneé (eds) *Climate Change Liability: Transnational Law and Practice* 139 (CUP, 2011). That chapter focused on a range of climate litigation options across civil, criminal, public and private law, while this paper focuses on public law, in particular rights-based litigation, and delves into the small but growing case law relating to climate change in India. I am grateful to Shibani Ghosh, as ever, for her excellent research assistance. I am also grateful to the participants of the *Workshop on Climate Change Litigation, Policy and Mobilization* held at the British Academy in April 2012, and in particular to Hari Osofsky, Chris Hilson and Lisa Vanhala for constructive feedback on an earlier version of this paper. This paper is work in progress, and any constructive feedback would be gratefully received.

¹ UNDP, International Human Development Indicators, India Country Profile, 2011, available at <http://hdrstats.undp.org/en/countries/profiles/IND.html>

² Ibid.

³ Statistics, *Human Development Report: Fighting Climate Change*, 2007, available at <http://hdr.undp.org/en/reports/>

⁴ See *Economic Surveys*, Ministry of Finance, Government of India for current growth rate, available at <http://www.finmin.nic.in>. India's growth rate has declined from 8.4% in 2010-2011 to 6.5% in 2011-2012.

⁵ See India, Second National Communication to the UNFCCC, Ministry of Environment and Forests, Government of India, 2012, Executive Summary, iv, available at http://unfccc.int/national_reports/items/1408.php.

⁶ Planning Commission, Government of India, *Towards Faster and More Inclusive Growth: An Approach to the 11th Five Year Plan* (2006) 98, available at www.planningcommission.nic.in. An approach to the 12th Five Year Plan set to commence in 2012-13 is currently under preparation.

⁷ See Planning Commission, Government of India, *Integrated Energy Policy*, August 2006, xiii, and 18-32, noting that to sustain 8% growth through 2031 India would need to increase its energy supply by 3-4 times, and its electricity supply by 5 to 7 times, available at www.planningcommission.nic.in.

⁸ The rate of growth of GHG emissions in India is approximately 4.6% annually as compared to a world average of 2%. See Subhodh Sharma, Sumona Bhattacharya and Amit Garg, 'Greenhouse Gas Emissions from India: A Perspective' (2006) 90 *Current Science* 326-33.

⁹ Executive Summary, *World Energy Outlook*, 2007, 49, available at

and with the United States, European Union, China and Russia, to account for two-thirds of global greenhouse gases ('GHGs').¹⁰ India's energy use is currently, however, at a low per capita emissions rate of 1.5 metric tons annually,¹¹ and a cumulative share of 4.6 per cent.¹²

However, India is also one of the most vulnerable to climate change. In the words of India's former Environment Minister, Jairam Ramesh, 'no country in the world is as vulnerable, on so many dimensions, to climate change as India. Whether it is our long coastline of 7000 kms, our Himalayas with their vast glaciers, our almost 70 million hectares of forests (which incidentally house almost all of our key mineral reserves) – we are exposed to climate change on multiple fronts.'¹³ India's economy is also likely to be significantly impaired by the impacts of climate change.¹⁴ Climate change, therefore, is an issue that is increasingly being taken seriously by India.

www.iea.org/Textbase/npsum/WEO2007SUM.pdf.

¹⁰ Executive Summary, *World Energy Outlook*, 2008, 12, available at www.worldenergyoutlook.org/docs/weo2008/WEO2008_es_english.pdf.

¹¹ *India: Greenhouse Gas Emissions 2007*, Indian Network for Climate Change Assessment, Ministry of Environment and Forests, Government of India, May 2010, i. All Ministry of Environment and Forests documents on climate change are available at <http://moef.nic.in/modules/about-the-ministry/CCD/>.

¹² The global average is 4.5. India's per capita rate is low compared to most industrialized countries and less than half of China's 3.8 metric tons rate. The US has a per capita emissions rate of 20.6, Australia of 16.2 and Canada of 20, above n 3.

¹³ Indian Network for Climate Change Assessment, *Climate Change and India: A 4X4 Assessment - A sectoral and regional analysis for 2030s*, Ministry of Environment and Forests, Government of India, 16 November 2010, at 3. The Indian Network for Climate Change Assessment (INCCA), a network of 120 institutions and 220 scientists across India, predicts that: the annual mean surface air temperature in India is likely to rise by 1.7°C and 2.0°C in the 2030s; melting glaciers will increase flood risk and decrease water supply; sea level rise (rate of 1.3mm/year) will threaten coastal regions; monsoons, on which agriculture depends, will become more erratic and rain less plentiful; and incidence of malaria and other vector borne diseases will increase, as will heat-related deaths and illnesses. The INCCA also highlights prospective threats to food and water security: by 2080-2100, there is a probability of 10-40% loss in crop production, and before 2025 India is likely to reach a state of water stress. See *ibid*.

¹⁴ The Stern Review notes that even a small change in temperature could have a significant impact on the Indian monsoon, resulting in up to a 25 per cent reduction in agricultural yield. Executive Summary, *Stern Review on the Economics of Climate Change* (2006) 6, available at <http://www.hm-treasury.gov.uk>; See also 'Climate Change in South Asia: A Conversation with Sir Nicholas Stern', 14 February 2007, available at <http://www.web.worldbank.org>. See also J Roy, *A Review of Studies in the context of South Asia with a special focus on India: Contribution to the Stern Review*, 2006, available at <http://www.hm-treasury.gov.uk/media/5/0/roy.pdf>. (noting that a 2–3.5 °C temperature increase could cause as much as a 0.67 per cent loss in GNP, and a 100cm increase in sea level could cause a loss of 0.37 per cent in GNP). And, Ministry of Earth Sciences, Government of India, Press Release, 11 August 2010, available at <http://www.pib.nic.in/release/release.asp?relid=64577> (finding that the south-west monsoon rainfall had decreased by 4.7 per cent between 1965 and 2006, as compared to 1931–64). A quarter of the Indian economy is dependent on agriculture, and any impact on this sector will fundamentally impair India's ability to meet its development goals.

In international fora, India, a party to the Framework Convention on Climate Change (FCCC)¹⁵ and its Kyoto Protocol,¹⁶ has consistently rejected legally binding quantitative GHG mitigation targets.¹⁷ India is also opposed to establishing a quantitative long-term global goal or a peaking year, unless it is accompanied by an appropriate burden sharing arrangement based on equity and differential treatment for developing countries.¹⁸ Nevertheless, in 2007 India promised that its per capita emissions would not exceed the levels of developed countries.¹⁹ India also offered to embark on a path of decarbonisation. In 2010, India crystallised its offer to decarbonise into a voluntary undertaking under the non-binding Copenhagen Accord²⁰ to ‘endeavour to reduce the emissions intensity of its GDP by 20–25% by 2020 in comparison to the 2005 level’.²¹ This undertaking has been mainstreamed into the FCCC process through an information document taken note of²² by the Cancun Agreements, 2010.²³ India, after initial reluctance, also joined the consensus at the Durban Climate Change Conference, 2011, on the Durban Platform, that launched a process to adopt a ‘Protocol, another legal instrument, or an agreed outcome with legal force’ applicable to all in the post-2020 period.²⁴ This process, the Ad Hoc Working Group on the Durban Platform for Enhanced Action (ADP), is currently underway, and in 2013 Parties have agreed inter alia, to consider the ‘application of the principles of the Convention’ to the ADP.²⁵

¹⁵ United Nations Framework Convention on Climate Change, 29 May 1992, (1992) 31 *International Legal Materials* 849 [‘FCCC’].

¹⁶ Kyoto Protocol to the United Nations Framework Convention on Climate Change, 10 December 1997, (1998) 37 *International Legal Materials* 22 [the ‘Kyoto Protocol’].

¹⁷ See for a representative sample, *Climate Change Negotiations: India’s Submissions to the UNFCCC*, Ministry of Environment and Forests, Government of India, August 2009, available at <http://moef.nic.in/modules/about-the-ministry/CCD/>

¹⁸ See Letter by Jairam Ramesh, Minister of State for Environment and Forests, Letter to the Members of Parliament: Cancun Agreements, 20 December 2010, on file with the author.

¹⁹ PM’s Intervention on Climate Change at Heiligendamm, Meeting of G8 plus 5, Heiligendamm, Germany, 8 June 2007, available at <http://www.pib.nic.in>.

²⁰ Decision 2/CP.15 Copenhagen Accord, FCCC/CP/2009/11/Add.1 (30 March 2010), 4 [‘Copenhagen Accord’].

²¹ India – Letter to the Executive Secretary, 30 January 2010, available at www.unfccc.int/files/meetings/application/pdf/indiacphaccord_app2.pdf.

²² See Compilation of information on nationally appropriate mitigation actions to be implemented by Parties not included in Annex I to the Convention, FCCC/AWGLCA/2011/INF.1 (18 March 2011), 26.

²³ Decision 1/CP.16, ‘The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention,’ FCCC/CP/2010/7/Add.1 (15 March 2011), para 49.

²⁴ Decision 1/CP.17, ‘Establishment of an Ad Hoc Working Group on the Durban Platform for Enhanced Action,’ FCCC/CP/2011/9/Add.1 (15 March 2011) [‘Durban Platform’].

²⁵ Report of the Ad Hoc Working Group on the Durban Platform for Enhanced Action on the second part of its first session, held in Doha from 27 November to 7 December 2012, FCCC/ADP/2012/3 (7 February 2013), para 29.

India has taken numerous measures domestically. It launched its National Climate Change Action Plan in 2008 bringing together existing and proposed efforts at decarbonisation under eight national missions: solar energy; enhanced energy efficiency; sustainable habitats; water; the Himalayan ecosystem; sustainable agriculture; and strategic knowledge for climate change.²⁶ The relevant Ministries have developed comprehensive mission documents detailing objectives, strategies, plans of action, timelines, and monitoring and evaluation criteria.²⁷ State-level action plans on climate change are also in preparation.²⁸ All these measures have begun to bear fruit. Investments in clean energy have grown 600% since 2004, and a recent Pew Report has identified India as one of the top performing clean energy economies in the world.²⁹

All this activity both at the international and domestic level, as well as an exponential growth in the media reportage on climate change,³⁰ has led to ever expanding climate consciousness in India. A recent survey of 4,031 Indian adults, 75% urban and 25% rural, revealed that the majority of the respondents had a passing familiarity with the issue of climate change, a belief that climate change is happening, it is anthropogenically caused, it is harmful to current and future generations, and the Indian government should be making a large or moderate-scale effort to reduce climate change.³¹

Climate Litigation in Indian Courts?

Notwithstanding the burgeoning concern over climate impacts and increasing climate regulation in India, there is as yet no dedicated climate legislation either in place or in the

²⁶ National Action Plan on Climate Change, Prime Minister's Council on Climate Change, Government of India (2008), available at <http://www.pmindia.nic.in/Pg01-52.pdf>.

²⁷ National Action Plan on Climate Change, above n 26, at 2 and 47; See also Ministry of Environment and Forests Press Release, Finalization of the Eight National Missions, 11 August 2010. There are several noteworthy initiatives contained in these missions, including: the creation of a market – a perform, achieve and trade mechanism – in energy savings certificates; the adoption of a target to generate 20,000 MW of solar power by 2022; and a commitment to double the area to be afforested in the next 10 years, taking the total to 20 million ha. In addition, the Indian government has imposed a levy – a clean energy tax – of US\$1 per ton on coal. Ibid at 2.

²⁸ A list of State Action Plans on Climate Change are available at the Ministry for Environment and Forests' site at <http://moef.nic.in/modules/others/?f=sapcc-2012>. See also, ongoing research by Navroz K. Dubash and Anu Jogesh, Centre for Policy Research, on State Action Plans on Climate Change, available at <http://cprindia.org/seminars-conferences/4549-examining-state-action-plans-climate-change-india>.

²⁹ The Pew Charitable Trusts, *Who's winning the Clean Energy Race? 2011 Edition* 7 (2012).

³⁰ Centre for Science & Technology Policy Research, Media Coverage of Climate Change/Global Warming, India Media Coverage, July 2012, available at http://sciencepolicy.colorado.edu/media_coverage/india/index.html.

³¹ Anthony Leiserowitz and Jagdish Thaker, *Climate Change in the Indian Mind*, Yale Project on Climate Change Communication, 2012, Executive Summary, available at <http://environment.yale.edu/climate/publications/climate-change-indian-mind/>

pipeline, and climate litigation is still in its infancy. The term ‘climate litigation’ can be construed in a narrow or broad fashion. While there may be advocacy benefits to a broad framing of climate litigation, for purposes of conceptual clarity this article favours a narrow approach to defining climate litigation. Markell and Ruhl, for instance, define climate litigation as any litigation ‘in which the party filings or tribunal decisions directly and expressly raise an issue of fact or law regarding the substance or policy of climate change causes and impacts.’³² This definition brings productive clarity in that it helps identify cases in which climate change is at issue rather than merely referenced in the obiter. It is also helpful because the application of such a definition identifies cases that the parties to the litigation and/or the Court, rather than scholars or advocates, perceive and characterize as ‘climate litigation.’ Such a definition is not only more faithful to the motives for the litigation but also more likely to identify cases that have the desired knock-on policy, regulatory or advocacy impact. Defined in this narrow fashion, however, there is, as yet, no climate litigation in India. Climate change is yet to form the core subject matter of a legal dispute.

Climate Concerns Raised in the Indian Courts

Climate concerns have, however, begun to filter through to courts and tribunals at various levels, as the cases that follow will demonstrate. The existing case law relating, however tangentially, to climate concerns, can be divided into three broad categories: cases in which petitioners raise climate concerns, among others, to challenge what they perceive as ill-informed decision making on environmental matters; cases in which respondents raise climate concerns, among others, to justify, in the face of a challenge, what they perceive as environmentally sound decision making; and cases in which judges appear of their own volition to refer to climate concerns, albeit in passing and as obiter, as one among the reasons for their decision.

In the first category of cases, petitioners raise climate concerns, among others, to argue for more environmentally friendly decision-making. In such cases petitioners appear to be using ‘climate concerns’ as a sword to stimulate better-informed decisions and actions relating to the environment. For instance in *Manushi Sangthan, Delhi v. Govt. Of Delhi & Ors*³³ the petitioners challenged the limit set by the Delhi Municipal Corporation on the issuance of cycle rickshaw licenses, arguing, inter alia, that the IPCC’s Fourth Assessment Report, 2007, had emphasized the need for policies that encourage use of more fuel-efficient vehicles, hybrid vehicles, non-motorized transport, (such as cycling and walking), and better land-use and transport planning. Although not directly with reference to this argument, the Court held the limit imposed by the Delhi Municipal Corporation to be arbitrary, and ordered a more detailed study on urban transportation options. In *We the People v. Union of*

³² David Markell and J.B. Ruhl, ‘An Empirical Assessment of Climate Change in the Courts: a new Jurisprudence or Business as Usual?’ (2012) 64 *Florida Law Review* 15, 27.

³³ 168 (2010) DLT 168.

India³⁴ the petitioners argued that State authorities were cutting down old growth trees in the execution of development projects such as road expansions, thereby contributing to global warming, without planting oxygen-generating trees to compensate for the loss of such old growth trees. The Allahabad High Court found merit in this argument and ordered the Principal Chief Conservator of Forest to appear before the Court and provide details of compensatory tree planting measures. The Court heard details of trees, including varieties, felled and planted in the State of Uttar Pradesh in the context of road construction and expansion projects, and directed the government to make provision for sufficient space to plant trees, the majority of which should be old growth trees, while constructing roads.³⁵

In the second category of cases, respondents raise climate concerns to justify their actions. In such cases respondents appear to be using climate concerns as a shield to defend their actions. In *Nar Bahadur Bhandari and Ors v. the State of Sikkim and Ors*³⁶ the petitioners challenged the construction of a hydro electric power project on the Teesta River. The Court referred to a Ministry of Environment and Forests affidavit that had been filed in the Supreme Court in a related case before the T. N. Godavarman bench. In this affidavit, the Ministry of Environment and Forests justified their decision to permit the construction of this hydro electric power project. They argued *inter alia* that India suffered from a severe peak power shortage, and ‘this position needs to be corrected through execution of more and more hydro power projects to generate environment friendly and peak power and reduce dependence on power generation based on fossil fuels which are contributing enormously towards atmospheric pollution and global warming.’

In the third category of cases, judges, in so far as this can be inferred from the judgments, appear to refer *suo moto* to climate concerns, among others, in their judgments. This category can be further distinguished into two: those cases in which climate concerns are part of the rationale, albeit secondary, for the judgment; and those cases, in which climate is identified as one of many environmental concerns plaguing the planet. In deciding what legal value to ascribe to the latter set of judicial references to climate change, however, it is worth keeping in mind that in cases relating to social and environmental issues some Indian judges are given to writing meandering judgments replete with obiter invoking religion, nature, philosophy, literature and such like. Much can and is often read into such references but their overall legal impact is muted.

In the first and more interesting sub-category of cases is the Supreme Court’s decision in *Narmada Bachao Andolan v. Union of India*.³⁷ The Supreme Court while allowing the continued construction of the controversial Narmada Dam, noted as part of the rationale for favouring hydro electric power projects that ‘...thermal power projects use fossil fuels,

³⁴ Order of the Allahabad High Court in Misc. Bench No. 5750 of 2010, 16 June 2010, available at <http://www.indiankanoon.org/doc/1558452/>.

³⁵ *Ibid.*, 18 June 2010, available at <http://www.indiankanoon.org/doc/1172427/>

³⁶ [MANU/SI/0023/2010](http://www.indiankanoon.org/doc/1172427/).

³⁷ AIR 2000 SC 3751.

which are not only depleting fast but also contribute towards environmental pollution. Global warming due to the greenhouse effect has become a major cause of concern. One of the various factors responsible for this is the burning of fossil fuel in thermal power plants. ...On the other hand, the hydel power's contribution in the greenhouse effect is negligible and it can be termed ecology friendly.' A more recent case in a similar vein is *Tamil Nadu Newsprint And Papers Ltd. v. Tamil Nadu Electricity Regulatory Commission*.³⁸ In this case the Appellate Tribunal for Electricity upheld an order fixing a tariff for the purchase of power from non-conventional energy sources. The Tribunal observed in its order that, '[t]he danger [of climate change] needs to be averted by undertaking measures to curtail emission of green house gases. Though largely it is the developed countries which are major contributors of green house gases, we also need to regulate electricity sector for protection of environment in accordance with the spirit of the Constitution and the Electricity Act, 2003. Small steps in the first instance, to reduce dependence on fossil fuel to the extent possible, which does not impact the progress of electricity sector, can ultimately lead to generation of momentum for a giant leap in the development of technology for production of clean energy.'

There are numerous cases in the second sub-category. Climate change concerns have been taken note of, as one among many pressing environmental concerns, by the Supreme Court of India and various High Courts. In *Karnataka Industrial Areas Development Board v. Sri C. Kenchappa & Ors*³⁹ the Supreme Court, in ordering authorities to properly consider the adverse environmental impacts of development before acquisition of lands for development, referred to the devastating impacts of human intervention on the planet, including the impacts of climate change and ozone layer depletion. Similarly in *Bombay Dyeing and Mfg. Co. Ltd. v. Bombay Environmental Action Group and Ors*,⁴⁰ the Supreme Court noted to need to prioritise environmental issues, inter alia, due to climate change concerns. The Court has also acknowledged climate concerns in the context of considering the merits of different sources of energy. In *Reliance Natural Resources Ltd. v. Reliance Industries Ltd*,⁴¹ while describing the benefits of natural gas, the Court observed that 'Its low carbon content, relative to other fossil fuels, implies that its use may help in combating global warming problems'.

The Allahabad High Court in *Swami Parmanand Bhatta Company v. Union of India*,⁴² ruled that the government could regulate in the interests of the environment the petitioner's exercise of his right to operate his brick kiln. The Court noted in this context that the "adverse effect of environmental pollution are now felt, as evidenced, like global warming, recurring natural calamities and on health of people." The Delhi High Court in *Outdoors Communication v. PWD and Municipal Corporation of Delhi*,⁴³ a case relating to the tendering of outdoor advertising space, noted that '[t]he warnings of global warming have deserved scant attention.' The Bombay High Court in *Goa Foundation v. Goa State Coastal*

³⁸ 2007 ELR (APTEL) 157.

³⁹ (2006) 6 SCC 371.

⁴⁰ (2006) 3 SCC 434.

⁴¹ (2010) 7 SCC 1.

⁴² [MANU/UP/2765/2010](#).

⁴³ [MANU/DE/2913/2007](#).

Zone Management⁴⁴ refused to review a decision to allow the construction of a resort on Bagga beach on the grounds that their power of judicial review was limited. However, the Court observed that, '[a]s far as the State of Goa is concerned, the entire coastline is filled with sand dunes. Sand dunes do play a key role in protection of the hinterland, in as much as the sand dunes as sentinel against any destructive cyclones, rising water level of the sea due to global increase in temperature. ...Their protection is, therefore, absolutely necessary and they are rightly placed in CRZ I [Coastal Regulation Zone] category.'

This brief survey of the cases in which climate concerns have been raised, albeit a small sample, does demonstrate the following: first, that there is increasing climate consciousness among the participants in the judicial process; second, petitioners and respondents have begun to include climate-based rhetoric and arguments in cases relating to the environment; and third, judges appear both receptive to such rhetoric and arguments and willing to deploy these even perhaps when not urged to do so by petitioners/respondents. This seems to suggest that it is but a question of time before climate-based rhetoric and arguments move from the periphery to the core of the judicial process. However, it is also worth noting that the extent of climate-related knowledge displayed thus far is shallow. In most cases climate change is merely highlighted as one among other environmental concerns, and there is limited discussion of it in the context of the case.

Potential for Rights-based Climate Litigation

Although climate change concerns have yet to form the core subject matter of a dispute before the Courts, there is potential, in particular, given the filtering through of climate concerns to the courts, for the increasing use of litigation to further climate goals. Climate litigation, as is evident from jurisdictions such as the US and Australia where climate litigation is pervasive, can take many forms.⁴⁵ In India too, many hooks exist for climate litigation in public and private law. A full survey of these hooks is discussed in an earlier co-authored piece.⁴⁶ While there are some hooks, such as the environmental clearance regime, that offer an avenue for climate concerns to percolate into case law, the greatest potential for climate litigation in India lies in rights-based climate claims. This is not only because there is a rich culture of judicial activism and public interest litigation in India but also because this is complemented by an expansive indigenously-developed rights jurisprudence. There is also a liberal right to information regime that supports, through the availability of a government authenticated information base, the filing of such claims. Indeed, there is currently a rights-

⁴⁴ [MANU/MH/0964/2000](http://www.manu.org/india/mh/0964/2000).

⁴⁵ See Michael B. Gerrard and J. Cullen Howe, *Climate Change Litigation in the U.S.*, September 4, 2012, available at <http://www.climatecasechart.com/>; Michael B. Gerrard and J. Cullen Howe, *Non U.S. Climate Change Litigation Chart*, September 10, 2010, available at http://www.law.columbia.edu/null/download?&exclusive=filemgr.download&file_id=163021

⁴⁶ Lavanya Rajamani and Shibani Ghosh, in Richard Lord, Silke Goldberg, Lavanya Rajamani and Jutta Brunnée (eds) *Climate Change Liability: Transnational Law and Practice* 139 (CUP, 2011).

based claim in the pipeline that seeks to harness the power of these unique features of the Indian judicial system.⁴⁷

Judicial Activism and Public Interest Litigation

The Indian judiciary, unlike in societies more deferential to separation of powers, is a dynamic actor that shapes law, evolves policy, and plays a central determinative role in the governance of modern India. The Court plays this role primarily through the exercise of its self-fashioned public interest jurisdiction. It is this jurisdiction that the Court is most likely to exercise in a rights-based climate change claim.

The origins of public interest jurisdiction in India can be traced to the late 1970s, early 1980s, and in particular the case of *S.P. Gupta v. Union of India* in which Justice Bhagwati relaxed the rule of locus standi, and opened up the doors of the Supreme Court to public-spirited citizens – both those wishing to espouse the cause of the poor and oppressed (representative standing) and those wishing to enforce performance of public duties (citizen standing).⁴⁸

Public interest litigation in India can be pursued either in the High Court or Supreme Court. If the complaint is of a legal wrong, Article 226 of the Constitution permits recourse to the High Court of the State. If the complaint alleges a violation of fundamental rights, Article 32 of the Constitution permits direct recourse to the Supreme Court. For violations of fundamental rights, the Supreme Court may issue an order, direction or writ, including a writ in the nature of habeas corpus, quo warranto, mandamus, prohibition or certiorari.⁴⁹ The High Courts can pass similar orders for enforcement of fundamental rights as well as other legal rights.⁵⁰

At the behest of public-spirited individuals, the Courts have passed (and continue to pass) orders in a range of cases. In the environmental field the Supreme Court, for instance, has passed hundreds of orders inter alia to protect the Taj Mahal from corrosive air pollution,⁵¹ rid the river Ganges of trade effluents,⁵² address air pollution in Delhi and other

⁴⁷ See Anandi Sharan, Blog, <http://anandisharan.wordpress.com/> (containing both a draft petition dated 30 May 2012, and a timetable for submission).

⁴⁸ *S.P. Gupta v. Union of India*, 1981 Supp SCC 87, at 233.

⁴⁹ Articles 32, Constitution of India, 1950.

⁵⁰ Articles 226, *ibid.*

⁵¹ *M.C. Mehta v. Union of India* (Taj Trapezium Case), Writ Petition Number 13381 of 1984.

⁵² *M.C. Mehta v. Union of India* (Ganga Pollution Case), Writ Petition Number 3727 of 1985.

metropolitan cities,⁵³ protect the forests and wildlife of India,⁵⁴ and clear cities of their garbage.⁵⁵

The power of public interest litigation in India lies in its freedom from the constraints of traditional judicial proceedings. Public interest litigations in India have come to be characterised by a collaborative approach, procedural flexibility, judicially-supervised interim orders and forward-looking relief. Judges in their activist avatar reach out to numerous parties and stake-holders, form fact-finding, monitoring or policy–evolution committees, and arrive at constructive solutions to the problems flagged for their attention by public-spirited citizens. Judges have tremendous power, in particular in public interest litigations, to design innovative solutions, direct policy changes, catalyse law-making, reprimand officials and enforce orders.

The Supreme Court is constitutionally empowered to ‘make such order as is necessary for doing complete justice in any cause or matter pending before it.’⁵⁶ Judges are not hesitant to exercise this power in what they perceive as the public interest. The discretion and flexibility that the Courts have arrogated to themselves in the context of public interest jurisdiction will enable them, when faced with a climate case, to tailor solutions to problems, evolve policy where a vacuum exists, and govern when it perceives a governance deficit. The case of *T.N. Godavarman v. Union of India* is a case in point. The Supreme Court defined a ‘forest’ in the absence of a definition in the Forest (Conservation) Act, 1980,⁵⁷ and in so doing, the Court extended the protective framework of the statute to all forests, irrespective of the nature of its ownership or classification.⁵⁸ It has since taken over the governance of all the forests in India.

In the recent past, the judiciary, has, however, struck a cautionary note. In *Divisional Manager, Aravalli Golf Club and Anr v. Chander Hass*, the Court chastised the judiciary for overreach, and advocated judicial self-restraint.⁵⁹ In *State of Uttaranchal v. Balwant Singh*, the Supreme Court directed the High Courts to formulate rules to encourage genuine public interest litigations, and discourage those filed for extraneous reasons.⁶⁰ Although some limits to the use of public interest litigations may be in the offing, these will likely only weed out those claims that are filed for private reasons, personal gain and such like. The public interest culture, although straining the judicial system to its limits, is still alive and well.

⁵³ *M.C. Mehta v. Union of India* (Delhi Vehicular Pollution Case) Writ Petition Number 13029 of 1985, and *M.C. Mehta v. Union of India* (Delhi Industrial Relocation Case) Writ Petition Number 4677 of 1985.

⁵⁴ *T.N. Godavarman Thirumulkpad v. Union of India* Writ Petition Number 202 of 1995.

⁵⁵ *Almitra Patel v. Union of India* Writ Petition Number 888 of 1996.

⁵⁶ Article 142, Constitution of India, 1950.

⁵⁷ (1997) 2 SCC 267, at 269.

⁵⁸ *Ibid.*

⁵⁹ (2008) 1 SCC 683.

⁶⁰ *State of Uttaranchal v. Balwant Singh Chaufal* (2010) 3 SCC 402.

*The Constitutional Framework & Environmental Rights*⁶¹

The extensive public interest jurisdiction the Courts have arrogated to themselves, is complemented by an expansive set of Constitutional rights. The Constitution of India, in Part III, titled 'Fundamental Rights,' creates a regime of protection for a privileged set of rights. Laws inconsistent with or in derogation of these rights are void to the extent of their inconsistency.⁶² The centrepiece of these fundamental rights is the right to life and liberty.⁶³ This right has over the years been extended through judicial creativity to cover unarticulated but implicit rights such as the right to live with human dignity,⁶⁴ the right to livelihood,⁶⁵ the right to education,⁶⁶ the right to health and medical care of workers,⁶⁷ and most importantly for current purposes, the 'right of enjoyment of pollution-free water and air'.⁶⁸

Although, thus far, no climate related claim has been brought before the Supreme Court, it is likely, should such a claim be brought, given the Court's jurisprudence and its expansionist proclivities,⁶⁹ that it would either interpret the environmental right to include a right to climate protection or apply a human rights optic to climate impacts.

There are many different formulations of the constitutionally-protected environmental right in India. Some of these formulations are expansive in that they can readily encompass protection against new forms of environmental harm. Other formulations are more limiting. The less expansive definitions define the environmental right in the context of either pollution or health. So, for instance, in relation to pollution, the environmental right has been characterized as the right to 'pollution-free air and water',⁷⁰ 'fresh air, clean water',⁷¹ 'pollution-free environment',⁷² and 'clean environment'.⁷³ It has been defined in the

⁶¹ This sub section draws from 'The Right to Environmental Protection in India: Many a Slip between the Cup and the Lip?' (2007) 16 (3) *Review Of European Community and International Environmental Law* 274.

⁶² Article 13 (2), The Constitution of India, 1950.

⁶³ Article 21, *Ibid.*

⁶⁴ *Francis Coralie Mullin v. The Administrator, Union Territory of Delhi*, (1981) 1 SCC 608, at paras 7 and 8.

⁶⁵ *Olga Tellis v. Bombay Municipal Corporation* (1985) 3 SCC 545, at para 32.

⁶⁶ *Mohini Jain v. State of Karnataka* (1992) 3 SCC 666, at para 12 and *J.P. Unni Krishnan v. State of Andhra Pradesh*, (1993) 1 SCC 645, at para 166 before the introduction of Article 21A.

⁶⁷ *Consumer Education and Research Centre v. Union of India* (1995) 3 SCC 42, at paras 24 and 25.

⁶⁸ *Subash Kumar v. State of Bihar* (1991) 1 SCC 598, at para 7 See also *M.C. Mehta v. Union of India* (1992) 3 SCC 256, at para 2, and *Virender Gaur v. State of Haryana* (1995) 2 SCC 577, at para 7.

⁶⁹ To take a recent example, the Supreme Court expanded Article 21 (right to life) to include the right to sleep. See *Ramlila Maidan Incident v. Home Secretary, Union of India* [MANU/SC/0131/2012](#).

⁷⁰ *Charan Lal Sahu v. Union of India* (1990)1 SCC 613, at para 137.

⁷¹ *Narmada Bachao Andolan v. Union of India* (2000) 10 SCC 664, at para 244.

⁷² *Vellore Citizens Forum v. Union of India* (1996)5 SCC 647, at paras 16 and 17.

⁷³ *Ibid.*

context of human health, as for instance, the right to a ‘humane and healthy environment’⁷⁴ a ‘hygienic environment’⁷⁵ and ‘sanitation’.⁷⁶ It may be difficult in the context of these formulations to argue for an expansion of the environmental right to include climate protection, given that GHGs are not generally considered pollutants⁷⁷ and do not typically contribute to localized pollution resulting in identifiable health impacts.

However, the constitutionally-protected environmental right has also been characterised as the right to: ‘environmental protection and conservation of natural resources’;⁷⁸ ‘live in a healthy environment with minimal disturbance of [the] ecological balance’;⁷⁹ a ‘decent environment’;⁸⁰ and, a ‘living atmosphere congenial to human existence.’⁸¹ These formulations leave ample scope for value judgments and judicial discretion, and hence admit the possibility of protecting against threats to the climate. Climate change will undoubtedly disturb the ecological balance, however that term is defined. It will also render the atmosphere less ‘congenial’ to human existence. The inhabitants of the Sunderbans, at the frontline of climate change, can testify to this.

Even if the Supreme Court is reluctant to extend the environmental right to cover climate protection, it will likely be impressed with an approach that applies a human rights (in the Indian context, a ‘fundamental rights’) optic to climate impacts. A host of rights and progressive realisation towards them, such as the rights to life, health and water, among others will be at risk from climate impacts. There is a burgeoning and ever-persuasive literature arguing the case.⁸² These rights – to life, health and water – are, as we have seen, constitutionally protected in India. The Supreme Court would need but little persuasion to read climate impacts as threatening these rights.

⁷⁴ *K.M. Chinnappa and T.N. Godavarman Thirumalpad v. Union of India* (2002)10 SCC 606, at para 18, and *State of MP v. Kedia Leather and Liquor Ltd* (2003)7 SCC 389, at para 9.

⁷⁵ *Virender Gaur and Ors. v. State of Haryana and Ors* (1995) 2 SCC 577, at para 7.

⁷⁶ *K.M. Chinnappa and T.N. Godavarman Thirumalpad v. Union of India* (2002)10 SCC 606, at para 18.

⁷⁷ Although of course, the US Environment Protection Agency, following the landmark case of *Massachusetts v EPA* (*Massachusetts v. E.P.A.*, 549 U.S. 497 (2007)) found that GHG emissions from moving vehicles are ‘reasonably likely’ to threaten public health and welfare, therefore certified six GHGs as pollutants, and proceeded to regulate these under the Clean Air Act, 1970.

⁷⁸ *Intellectuals Forum, Tirupathi v. State of AP* (2006) 3 SCC 549.

⁷⁹ *Rural Litigation and Entitlement Kendra v. State of UP* (1985) 2 SCC 431, at para 12. See also *Narmado Bachao Andolan v. Union of India* (2000) 10 SCC 664, at para 120 and *Virender Gaur and Ors. v. State of Haryana and Ors* (1995) 2 SCC 577, at para 7.

⁸⁰ *Shantistar Builders v. Narayan Khimala Totame and Ors* (1990) 1 SCC 520, at para 9.

⁸¹ *Virender Gaur and Ors. v. State of Haryana and Ors* (1995) 2 SCC 577, at para 6.

⁸² See eg Stephen Humphreys, *Climate Change and Human Rights: A Rough Guide*, The International Council on Human Rights Policy, 2008; C. Bals, S. Harmeling and M. Windfuhr, *Climate Change, Food Security and the Right to Adequate Food*, 2008; *Climate Wrongs and Human Rights: Putting People at the Heart of Climate Change*, OXFAM Report, 2008; and *Protecting Health from Climate Change*, World Health Organization, 2008.

The environmental right is complemented by relevant provisions of the Directive Principles of State Policy,⁸³ in particular Articles 47⁸⁴ and 48A⁸⁵ that articulate the duties of the State with respect to public health and environmental protection. Although the Directive Principles of State Policy are not intended to be ‘enforceable by any court’, they are nevertheless ‘fundamental in the governance of the country’ and it is ‘the duty of the State to apply these principles in making laws.’⁸⁶ In addition to the relevant Directive Principles of State Policy the Constitutional schema also includes Article 51A (g) which imposes a duty on citizens to protect and improve the environment.⁸⁷

Principles of International Environmental Law

In addition to the ‘extensive and innovative jurisprudence on environmental rights’⁸⁸ the Indian courts have fostered, the Courts have also fleshed out the environmental right by integrating into Indian environmental jurisprudence numerous principles of international environmental law.⁸⁹ Such integration of international environmental principles will also likely support rights-based climate litigants.

The principles that have been read into Indian law include the polluter pays principle,⁹⁰ the precautionary principle,⁹¹ the principle of inter-generational equity,⁹² the principle of sustainable development⁹³ and the notion of the state as a trustee of all natural resources.⁹⁴ The Court has held these principles to be ‘essential features of sustainable development’⁹⁵ ‘imperative for preserving ecology’,⁹⁶ and ‘part of environmental law of

⁸³ Part IV, Articles 36-51, The Constitution of India, 1950.

⁸⁴ Article 47, *ibid.*

⁸⁵ Article 48A, *ibid.*

⁸⁶ Article 39, *ibid.*

⁸⁷ Article 51A (g), *ibid.*

⁸⁸ Michael R. Anderson, ‘Individual Rights to Environmental Protection in India,’ in A. Boyle and M. R. Anderson (eds.), *Human Rights Approaches to Environmental Protection* 199 (OUP, Oxford, 1996).

⁸⁹ For instance see Principles 3, 4, 15, and 16, Rio Declaration on Environment and Development, 1992.

⁹⁰ *Indian Council for Enviro-legal Action v. Union of India* (Bichhri Case) 1996) 3 SCC 212. See also *M.C. Mehta v. Kamal Nath*, (2000) 6 SCC 213, at 220.

⁹¹ *Vellore Citizens’ Welfare Forum v. Union of India* (1996) 5 SCC 647. See also *Narmada Bachao Andolan v. Union of India* (2000) 10 SCC 664, at 727.

⁹² *State of Himachal Pradesh v. Ganesh Wood Products* (1995) 6 SCC 363. See also *Indian Council for Enviro-legal Action v. Union of India* (CRZ Notification case), (1996) 5 SCC 281.

⁹³ *M.C. Mehta v. Union of India* (Taj Trapezium Case) (1997) 2 SCC 353, 381. See also *Narmada Bachao Andolan v. Union of India* (2000) 10 SCC 664, at 727.

⁹⁴ *M.C. Mehta v. Kamal Nath* (1997) 1 SCC 388.

⁹⁵ *Vellore Citizens’ Welfare Forum v. Union of India* (1996) 5 SCC 647, at para 11.

⁹⁶ *Karnataka Industrial Areas Development Board v. C Kenchappa and Ors* (2006) 6 SCC 371, at para 32.

India'.⁹⁷ The Court requires these principles to be 'applied in full force for protecting the natural resources of this country'.⁹⁸ The constitutionally protected environmental right complemented by these principles of international environmental law provides a fertile breeding ground for ambitious rights-based climate claims.

The principles, in particular, of precaution and inter-generational equity, and the doctrine of public trust, as interpreted by the Indian courts, will prove useful to prospective rights-based climate claimants. The precautionary principle requires the state to take environmental measures 'to anticipate, prevent and attack' the causes of environmental degradation.⁹⁹ It posits further that, 'where there are threats of serious and irreversible damage, lack of scientific certainty should not be used as a reason for postponing measures to prevent environment degradation'.¹⁰⁰ Finally, it lays the onus of proof on the actor or the developer/industrialist to demonstrate that the proposed action is 'environmentally benign',¹⁰¹ an unusual and controversial interpretation of the principle. Climate change falls neatly into the category of threats that it would be wise to take early action on. This principle could be used to argue the case for ambitious mitigation and adaptation intervention, and to challenge state action that falls short.

The doctrine of public trust would add further weight to the argument.¹⁰² This doctrine places an affirmative duty on the state as a trustee of certain public resources to protect resources like air, sea, water and the forests for the enjoyment of the general public.¹⁰³ The Court envisages that this doctrine would be equally appropriate 'in controversies involving air pollution, the dissemination of pesticides, the location of rights of ways for utilities, and strip mining of wetland filling on private lands in a state where governmental permits are required'.¹⁰⁴ The issue of climate change could well engage the duty of a state as trustee to protect the atmosphere from indiscriminate GHG emissions.¹⁰⁵

⁹⁷ *Research Foundation for Science Technology & National Resource Policy v. Union of India and Anr* (2005)13 SCC 186, at para 24.

⁹⁸ *Intellectuals Forum v. State of A.P.* (2006) 3 SCC 549, at para 63.

⁹⁹ *Vellore Citizens' Welfare Forum v. Union of India* (1996) 5 SCC 647, at para 11, and *S. Jagannathan v. Union of India* (1997) 2 SCC 87, at para 41. See also *Karnataka Industrial Areas Development Board v. C Kenchappa and Ors* (2006) 6 SCC 371, at para 32.

¹⁰⁰ *Ibid* at para 11.

¹⁰¹ *Ibid*.

¹⁰² See generally for an analysis of the public trust doctrine in India, Shibani Ghosh, *The Deconstruction – and Reconstruction – of the Public Trust Doctrine in India*, work-in-progress (CPR, 2013)

¹⁰³ *M.C. Mehta v. Kamal Nath* (1997) 1 SCC 388, at para 25; See also *Intellectuals Forum v. State of A.P.* (2006) 3 SCC 549, at paras 59 and 60 and *Karnataka Industrial Areas Development Board v. C Kenchappa and Ors* (2006) 6 SCC 371, at paras 32 to 37.

¹⁰⁴ Citing Joseph Sax, in *M.C. Mehta v. Kamal Nath*, *ibid* at para 22.

¹⁰⁵ For a discussion of this doctrine as applicable to the atmosphere in the American context see Mary Christina Wood, 'Atmospheric Trust Litigation' in William C. G. Burns and Hari M. Osofsky (eds), *Adjudicating Climate Change* 99 (CUP, 2009).

The principle of inter-generational equity may also be of assistance.¹⁰⁶ The principle, formulated originally in the context of forest resources, holds that ‘the present generation has no right to deplete all the existing forests and leave nothing for the next and future generations.’¹⁰⁷ Climate change presents the ultimate ‘inter-generational’ problem. Current generations inherited the problem, are exacerbating it, and will likely leave a legacy that imposes severe burdens of protection and sacrifice on future generations. All three principles – precaution, public trust and inter-generational equity – are to varying degrees recognized in the FCCC as well.¹⁰⁸ These principles offer powerful building blocks in a rights-based claim seeking more aggressive state action on climate change. The Indian Courts would likely provide a nurturing environment for such claims.

The Supportive Right to Information Regime

The Right to Information Act, 2005, permits citizens to file Right to Information applications seeking information from public authorities,¹⁰⁹ and provides for a strict time line within which the information has to be provided.¹¹⁰ Non-compliance with the timeline, without reasonable cause, can lead to individual liability of the concerned official.¹¹¹ The Right to Information Act, 2005, can be used by prospective litigants to secure information on climate actions (or reasons for lack thereof) of government agencies, on decisions taken by such agencies that may result in GHG emissions or reduction in carbon sink, etc. Such information will enable prospective litigants to create a solid and irrefutable base of information on which their actions can be founded. Climate advocates have begun to use the Right to Information Act, 2005, to seek climate-related information,¹¹² and the rights-based climate claim that is in the pipeline also seeks to use the right to information regime in this fashion.¹¹³

New Fora and Options

In addition to the High Court and Supreme Court, the newly constituted National Green Tribunal¹¹⁴ may also offer climate litigants a forum in which they may raise climate

¹⁰⁶ *State of Himachal Pradesh v. Ganesh Wood Products* (1995) 6 SCC 363, at para 46.

¹⁰⁷ *Ibid.* See also *Indian Council for Enviro-legal Action v. Union of India* (1996) 5 SCC 281, at para 26; *A.P. Pollution Control Board v. M.V. Nayudu and Ors* (1999) 2 SCC 718, at para 52; *T.N. Godavarman Thirumulkpad v. Union of India and Ors* (2006)1 SCC 1, at paras 88 and 89.

¹⁰⁸ Article 3, FCCC.

¹⁰⁹ Section 2(h), the Right to Information Act, 2005.

¹¹⁰ Section 19(1) and 19(3), *ibid.*

¹¹¹ Section 20(1) & (2), *ibid.*

¹¹² The Right to Information Initiative of Climate Revolution, a Gurgaon-based organisation, has filed several applications with the Ministry of Environment and Forests, the Prime Minister’s Office and other government departments seeking information relating to the government’s policy on climate change. The information received is publicly available at <http://climaterévolution.net/rti/>.

¹¹³ See above n 47.

¹¹⁴ For an analysis on the National Green Tribunal, see S Ghosh, ‘Environmental Litigation in India,’ *Hindu Business Line*, 1 February 2012, available at

claims in relation to legal rights. No such claim has yet been brought before the Tribunal in its early years of operation, but it offers an additional avenue for climate litigants. The National Green Tribunal has jurisdiction over ‘all civil cases where a substantial question relating to environment (including enforcement of any legal right relating to environment) is involved’ and arises in the context of a defined set of environmental laws.¹¹⁵ The Tribunal is empowered to hear appeals brought by ‘any person aggrieved’ by the decisions or orders of authorities under the Air, Water, Biodiversity, Environment and Forest legislations.¹¹⁶ In addition to the customary extension of ‘person’ to artificial juridical persons,¹¹⁷ the NGT, has read ‘aggrieved person’ expansively to include ‘any person, individual or group of individuals’ as long their credential have been verified and their motives are pure.¹¹⁸ A range of actors will in theory be able to approach the National Green Tribunal. It is worth noting, however that the National Green Tribunal (Practices and Procedures) Rules, 2011, impose various burdensome procedural requirements, which may in practice, deter claimants from appearing in person.¹¹⁹ Nevertheless, dedicated climate litigants are likely to bring their claims before the Tribunal. Appeals lie from this Tribunal to the Supreme Court.¹²⁰

The Tribunal, while passing an order, is required to apply the principles of sustainable development, precaution and polluter pays.¹²¹ These principles, discussed earlier, have been fleshed out in case law, and are considered part of the law of the land. The application of the precautionary principle, in particular, may prove beneficial to climate litigants. The Tribunal also has far ranging powers to order relief and compensation to victims of pollution or environmental damage, for restitution of damaged property, and even for restitution of the damaged environment.¹²²

Prospects for Rights-based Claims

Rights-based Claims & Mitigation

<http://www.thehindubusinessline.com/opinion/article2848051.ece>, and Kanchi Kohli and Manju Menon, ‘The Nature of Green Justice’, (14 April 2012) xvii (15) *Economic and Political Weekly* 19-22.

¹¹⁵ Section 14, National Green Tribunal Act, 2010. The environmental laws in question include the Environment Protection Act, 1986, the Air (Prevention and Control of Pollution) Act, 1981, and the Forest (Conservation) Act, 1980.

¹¹⁶ Section 16, National Green Tribunal Act, 2010.

¹¹⁷ Section 2(j), *ibid.*

¹¹⁸ *Vimal Bhai & Ors v. Ministry of Environment and Forests*, Appeal No. 5 of 2011, Order dated 14 December 2011.

¹¹⁹ See e.g. Rules 8 and 13, National Green Tribunal (Practices and Procedures) Rules, 2011, available at <http://moef.nic.in/modules/recent-initiatives/NGT/>

¹²⁰ Section 22, National Green Tribunal Act, 2010.

¹²¹ Section 20, *ibid.*

¹²² Section 15, *ibid.*

Rights-based claims relating to mitigation, however, may prove difficult to sustain. The principal hurdle in sanctioning state action relating to mitigation as insufficient or requiring the state to take further action will be in identifying benchmarks. How much action is appropriate for a country like India, given its, thus far, limited contribution to the problem, and its limited ability, on its own, over time, to resolve the problem? If the international regime had reached an equitable and effective burden sharing agreement, and the Indian government were falling short of its just share of the burden, a claim may lie. However, in the absence of such an agreement, the Court would need to substitute its judgment for that of the international community, as well as that of the executive, which it may be reluctant to do. The reluctance may stem from concerns about intervening in an intensely political and polarized north-south climate debate as well as, albeit less so, stepping on the executive's toes. In the Court's jurisprudence, '[a]n excessively political role identifiable with political governance betrays the court into functions alien to its fundamental character, and tends to destroy the delicate balance envisaged in our constitutional system between its three basic institutions'.¹²³ In a recent case relating to state decision-making on the utilization of natural resources, the Supreme Court introduced the notion of a 'margin of appreciation' in favour of the decision-maker.¹²⁴ Assuming the decision is fair and fully informed, based on the correct principles, and free from any bias or restraint, a 'margin of appreciation' would apply in favour of the decision-maker.¹²⁵

That the climate debate in India - in so far as it relates to mitigation - is largely framed as an intensely political north-south tussle is borne out by studies conducted on media reportage on climate change issues in India. For instance, one study on media reportage in popular English language dailies in the lead up to and after the high profile Copenhagen Climate Conference 2009, found that 57% of the articles related to 'global politics,' and of these the largest number allocated responsibility for climate change to industrialized countries.¹²⁶ The spectrum of views across the policy-influencing class, of which the judges form an integral part, is likely to be similarly aligned. The excerpt from the *Tamil Nadu Newsprint And Papers Ltd.* case provided above, attributing primarily responsibility for GHG emissions to developed countries, is a case in point.¹²⁷ This is also true for many domestic environmental advocacy groups – they are critical of the Indian government's actions in the sustainable development field yet remain sceptical of the industrialized world and the ability of the international community to deliver an equitable and effective agreement.¹²⁸ Such a

¹²³ *Bandhua Mukti Morcha v. Union of India* (1984) 3 SCC 161, at 232.

¹²⁴ *Lafarge Umiam Mining Ltd. v Union of India* (2011) 7 SCC 338.

¹²⁵ *Ibid.*

¹²⁶ Anu Jogesh, 'A change in climate? Trends in climate change reportage in the Indian print media,' in Navroz K. Dubash (ed), *Handbook of Climate Change and India: Development, politics and governance* 266 (OUP, India, 2011).

¹²⁷ See above n. 44.

¹²⁸ Navroz K. Dubash, 'Climate Politics in India: Three Narratives,' in Navroz K. Dubash (ed), *Handbook of Climate Change and India: Development, politics and governance* 197 (OUP, India, 2011) (identifying this view as being the dominant perspective of Indian development and environment NGOs).

view may hamper their desire to file a mitigation-related rights-based claim in Indian courts against the government. Mitigation related rights-based claims, therefore are more likely to be unleashed and received in Indian courts if the international regime moves towards a more effective and equitable agreement in 2015.

Rights-based Claims & Adaptation

While India media reportage paints the responsibility for climate change as primarily belonging to the industrialized countries, the risks of climate change are represented and perceived as being of immediate relevance to India.¹²⁹ Rights-based claims relating to adaptation, therefore, may fare better. A claim may lie for instance where the government is not taking the necessary action to adapt to predicted climate change in particularly vulnerable areas such as the Sunderbans, and the resulting climate impacts breach the claimant's protected rights to life, health, water etc.¹³⁰ In the case of adaptation, since core human rights are implicated, rather than the right to environment, which is subject to limits in the service of development, claims may prove more successful.

Rights-based claims relating to adaptation may also be able to press international law into service. Article 51 (c) of the Indian Constitution, requires the State to 'foster respect for international law and treaty obligations'.¹³¹ Implicit in this Article, according to the Supreme Court, is that '[a]ny International Convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into these [Article 21 etc] provisions to enlarge the meaning and content thereof, to promote the object of the constitutional guarantee.'¹³²

The core human rights threatened by climate impacts are protected under several human rights treaties that India is a Party to. This includes the International Covenant on Civil and Political Rights¹³³ and the International Covenant on Economic, Social and Cultural Rights.¹³⁴ India has an obligation under these treaties to respect, protect and fulfil the rights contained in these treaties. This obligation is binding on every state Party, India included, and must be given effect to in good faith.¹³⁵ India is, also, as we have seen, a Party to the FCCC and its Kyoto Protocol.

¹²⁹ See S. Billett, 'Dividing climate change: global warming in the Indian mass media,' (2010) 99(1-2) *Climatic Change* 1–16.

¹³⁰ See e.g. 'Sunderbans' stoic settlers bear witness to climate change', *The Pioneer*, 25 April 2011.

¹³¹ Article 51(c), The Constitution of India, 1950.

¹³² *Vishaka v. State of Rajasthan* (1997) 6 SCC 241, at para 7.

¹³³ International Covenant on Civil and Political Rights, 1966, reprinted in *International Legal Materials* 6 (1967), 368.

¹³⁴ International Covenant on Economic, Social and Cultural Rights, 1966, reprinted in *International Legal Materials* 6 (1967), 360.

¹³⁵ Article 26, Vienna Convention on the Law of Treaties, 1969, reprinted in *International Legal Materials* 8 (1969), 679. See also CCPR General Comment 31, CCPR/C/21/Rev.1/Add.13.

India's treaty commitments read together arguably require it to approach climate change not just as a global environmental problem but also as a human rights issue. Such an approach would have substantive and procedural implications. Substantively, India may be required to devote greater resources to adaptation so as to lessen the human cost of climate impacts. Procedurally, India may be required to integrate the human rights implications of climate impacts into its planning and policy-making processes. India's treaty obligations could be thus interpreted by the Supreme Court to 'enlarge the meaning and content' of the constitutional guarantees *inter alia* to life, health and water.

Potential Problems

Although the rights-based claims, in particular adaptation related ones are likely to be favorably received by the Courts, the judicial route in delivering effective climate governance in India is problematic.

Indian Courts have over the years come to acquire and assume policy evolution functions. Political, social and economic questions, not usually put to judges in other countries, are decided as a matter of course by the Indian Supreme Court.¹³⁶ If a rights-based climate claim were to be brought before them, their inclination, borne out by their pattern of intervention in public interest environmental litigations, would be to demand explanations from relevant Ministry officials, create an ad-hoc committee or appoint a commissioner to examine the issue, and to use the device of 'continuing mandamus' orders to first direct the government to take particular actions, and then continuously monitor their implementation. The Courts would, as they have in numerous environmental rights-based public interest cases, assume policy prescription and governance functions. These are roles, however, that the Courts are ill-equipped to play.

Courts lack the institutional competence, for instance, to assess the credibility of the relevant climate science, judge the relative merits of different policy measures on adaptation/mitigation, or determine the appropriate balance between mitigation and adaptation measures as well as between climate change and development concerns. The judiciary also lacks the democratic accountability necessary for policy prescriptions on complex and all encompassing issues such as climate change. Ronald Dworkin in *Taking Rights Seriously* drew a persuasive distinction between principle (involving moral rights against the state) and policy (involving utilitarian calculations of the public good).¹³⁷ The former is the legitimate domain of judges and the latter that of the legislature and its agents.¹³⁸ Effective climate policy can only be built on a re-assessment of current developmental models, resource use patterns, and lifestyle choices. And, it will have

¹³⁶ George H. Gadbois Jr, 'The Supreme Court of India as a Political Institution,' in Rajeev Dhavan et al (eds), *Judges and the Judicial Power: Essays in Honour of Justice V. R. Krishna Iyer*, 250, 257 (N. M. Tripathi, Bombay, 1985).

¹³⁷ Ronald Dworkin, *Taking Rights Seriously*, 22 (Duckworth, London, 1977).

¹³⁸ *Ibid.*, at 82-86.

implications for India's energy security, economic growth, and geo-political aspirations. Courts have neither the mandate nor the ability to generate effective policy on such an all-encompassing issue. What they can and will likely do is engage in the 'jurisprudence of exasperation' - where the function of law is to express frustration with the state of affairs¹³⁹ - and proceed to prescribe an ad hoc, reactive and temporary solution driven either by the judges' inarticulate major premises or by the views of the parties and lawyers before them. This will have the unfortunate effect of converting particular strains of opinion into policy, while at the same time endless judicial oversight will paralyze the Executive and distort existing processes and policy evolution channels on climate change.

Conclusion

Climate consciousness in India has increased in leaps and bounds in the last five years. Once the exclusive preserve of diplomats and bureaucrats, national policy-making and international positioning in relation to climate change is now the subject of an active national debate. The pressure thus generated has resulted in a raft of policies and practices in relation to climate change. There is as yet no comprehensive legislation to address climate change mitigation or adaptation. A private member's bill, 'Climate Change Bill, 2012,' was introduced to fill this gap, but it is unlikely to be passed.¹⁴⁰ There is also as yet no litigation in which climate concerns have been at issue. The Supreme Court, High Courts and various tribunals have acknowledged and even endorsed the relevance of climate concerns in the context of environment-development trade-offs and decision-making, however, a climate-centric rights-based or other claim is yet to be brought to the portals of the Indian Courts. Given the rapidly increasing interest in and consciousness on climate impacts, the expansive interpretation of standing in Indian courts and tribunals on matters of public interest, and the extensive enviro-legal and rights jurisprudence developed over the years, a rights-based climate claim is both quite likely to be brought before Indian courts, and to be favourably entertained. In particular in so far as such a claim relates to carefully circumscribed and argued adaptation-related fundamental rights violations. While such cases will likely have tremendous narrative value, whether they will catalyze progressive domestic legislation, address the numerous environmental governance concerns that lie at the heart of ineffective implementation, or lead to a more proactive international stance, however, is unclear.

¹³⁹ Pratap Bhanu Mehta, 'Just Impatient – Can a jurisprudence of exasperation sustain the Court's authority?' *The Telegraph*, 17 October 2005.

¹⁴⁰ 'Private Members Bill presented' *The Economic Times*, 12 April 2012. The Bill was introduced on 7 December 2012. It is currently pending in the Lok Sabha and will lapse when the Lok Sabha is dissolved next year. The Bill is available at <http://164.100.24.219/BillsTexts/LSBillTexts/asintroduced/1748LS.pdf>.