

Environment Protection Legal and Human Rights Perspective in India

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Abstract

Climate litigation is in its embryonic stage in India. Climate-related claims have nonetheless to be litigated in the courts. There are some cases during which global climate change has been stated however solely en passant. This example may be set to vary. Global climate change and its impacts are quickly capturing the popular imagination in India. There's a growing appreciation of the importance and significance of the climate challenge, and a swerve of climate policies and initiative at the national and state levels are launched in response. This means not simply that there are potential litigants waiting within the wings however conjointly that climate related claim is probably to be favorably amused by the judiciary. The rise within the range of global climate change judicial proceeding has return below the general public scanner in recent times. Global climate change judicial proceeding is tarnished by the scientific, economic, political queries that are thought of as vital impediments in production apt judicial proceeding strategy. This paper is a trial at distinctive the current legal position of global climate change judicial proceeding in India diagramming an overall probable future. The article argues that climate claims can have a powerful footing in India in years to come back relying upon figuring out legal strategy supported by a number of the common law principles like common nuisance and negligence. Although, for critiques global climate change judicial proceeding supported common law theory should still seem unsure, the potentiality of such suits can't be unnoted in providing a replacement dimension in entire global climate change discussion.

Keywords: Climate Change Litigation, Prospective future, Climate based claims, judicial activism

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INTRODUCTION

An appropriate legal strategy needs to be structured in order to deal with climate change problem and the same may prove to be a key assignment for the legal fraternity in years to come. The role of the judiciary is particularly important in interpreting the existing laws for formulating a new legal approach in the backdrop of growing impact of greenhouse gas emissions, and the ever-increasing economic activities affecting every facet of human productivity, daily life and ongoing global climate change negotiations. Although, the basic mechanism of how carbon dioxide and other greenhouse gases warm the planet has been well known to us for decades [1] climate change emerged as a firm international agenda only by the late 1980's [2]. Thereafter, it took the international community more than a decade to develop a comprehensive legal

framework to address the climate change issue globally. India's thriving economy and steadily growing emissions have made India one of the key players in climate change politics. This, truth be told, underplays a basic actuality, for example India's legitimate framework has still not woken up to the extent of environmental change suit. Besides, the powerlessness of the Indian legislature to deal with such issues is another zone of concern which must be tended to sufficiently. It very well may be contended that common law activities like nuisance or carelessness can be the compelling instruments in the hands of judges to address the environmental change issue in India especially without explained authoritative arrangements. A wide cluster of researchers, lawyers, and influenced individuals are investigating the feasibility of these activities now. This paper will initially

investigate nature for atmosphere suit, just as the potential, prospects, and potential issues that Constitutional rights-based traps - regardless of whether in connection to an ecological right or center rights to life and wellbeing – face in Indian courts. This article will likewise look to address the job that rights-based atmosphere prosecution could or should play (or not) in successfully tending to environmental change in India.

CLIMATE CHANGE LITIGATION: NEW OUTLOOK

Environmental change suit discovers its foundations in risk guarantees as common society is getting to be mindful of the way that human activities and the outflow of certain ozone harming substances into the air can prompt terrible ramifications for the earth, property and human wellbeing. It makes the likelihood of future suit against governments or enterprises occupied with business exercises.

In India, potential outcomes are as of now being investigated however in completely unique ecological settings and not as a feature of environmental change suit. Extensively, in India the native has a decision of the accompanying solutions for get change if there should be an occurrence of infringement of his/her ecological right:

1. A common law action against the polluter including nuisance and negligence;
2. A writ petition to compel the authority to enforce the existing environmental laws and to recover clean-up costs from the violator; or
3. Redressal under various Environmental Statues like Environment (Protection) Act, 1986, Water (Prevention and Control of Pollution) Act of 1974, Air (Prevention and Control of Pollution) Act of 1981 etc.; or
4. Compensation under Public Liability Insurance Act, 1991 or the National Environment Tribunal Act, 1995 in the event of damage from a hazardous industry accident [3].

POLICY CONTEXT: INDIA AND CLIMATE CHANGE

India is determined to create. Monetary development, and with it, neediness

destruction, vitality security, and arrangement of widespread access to vitality, are focal and persevering distractions of the Indian government. Legitimately so: India is set 134th on the Human Development Index, 41.6 percent of its populace lives on under 1.25 US\$ multi day and an expected 44 percent does not approach power. India's formative mission, as confined, be that as it may, may well leave vast carbon impressions, and at last debilitate its capacity to create. In the event that India's present development rate proceeds with vitality request will increment exponentially. Moreover, if India's objectives on destitution, joblessness, and education are to be met, and vitality gave to the about 500 million Indians without access to power, it will prompt a lot more noteworthy vitality use. India will before long be a noteworthy supporter of atmosphere change.⁸ India is anticipated by a few appraisals to wind up the third biggest producer by 2015. Notwithstanding, India is likewise a standout amongst the most helpless against environmental change. India's economy is additionally prone to be fundamentally impeded by the effects of environmental change. Environmental change, in this manner, is an issue that is progressively being considered important by India. India has taken various measures locally. It propelled its National Climate Change Action Plan in 2008 uniting existing and proposed endeavors at decarbonization under eight national missions: sun-oriented vitality; upgraded vitality effectiveness; manageable environments; water; the Himalayan biological community; economical horticulture; and vital information for environmental change. The important Ministries have created far reaching mission records specifying targets, systems, plans of activity, timetables, and observing and assessment criteria. State-level activity anticipates environmental change is additionally in readiness. Every one of these measures has started to tolerate natural product. Interests in clean vitality have become 600% since 2004, and an ongoing Pew Report has distinguished India as one of the best performing clean vitality economies on the planet.

This action both at the universal and local dimension, too an exponential development in the media reportage on environmental change,

has prompted consistently growing atmosphere awareness in India. An ongoing review of 4,031 Indian grown-ups, 75% urban and 25% country, uncovered that most of the respondents had a passing commonality with the issue of environmental change, a conviction that environmental change is going on, it is anthropogenic ally caused, it is hurtful to present and who and what is to come, and the Indian government ought to make a vast or moderate-scale exertion to lessen environmental change.

INTERNATIONAL PERSPECTIVE

In international forum, India, a party to the Framework Convention on Climate Change (FCCC) [4] and its Kyoto Protocol, [5] has consistently rejected legally binding quantitative GHG mitigation targets. 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. Nevertheless, in 2007 India promised that its per capita emissions would not exceed the levels of developed countries [6]. India also offered to embark on a path of decarbonization. In 2010, India crystallized its offer to decarbonize into a voluntary undertaking under the non-binding Copenhagen Accord [7] to 'endeavor to reduce the emissions intensity of its GDP by 20–25% by 2020 in comparison to the 2005 level'. This undertaking has been mainstreamed into the FCCC process through an information document taken note of by the Cancun Agreements, 2010. 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. This process, the Ad Hoc Working Group on the Durban Platform for Enhanced Action (ADP), is currently underway, and in 2013 Parties has agreed inter alia, to consider the 'application of the principles of the Convention' to the ADP [8].

LAW AS THEY STAND: AN UNREFINED QUARTER

Ecological law in India is an uneasy blend of "readiness to ensure condition and absence of

natural mindfulness", "overabundant administrative endeavors and slipshod implementation process", "steady gross infringement of essential human rights and serious dissent by the people in question and partners." These jural contrary energies, associated with oppositely contrasting rationalities of vote-based system and communism, give a dark picture of natural law in India. The legal executive had stayed as a spectator to natural raid for over two decades since the commencement of present-day environmentalism on Indian soil. In *M.C. Mehta v. Association of India*, the Court provided guidance to communicate and broadcast biology programs on the electronic media and incorporate ecological examination in school and school educational programs. The advancement of the locus standi in India accompanied the rise of Public Interest Litigation (PIL) which permits any open vivacious individual or foundation, acting in accordance with some basic honesty to move the Supreme Court and the High Courts for writs under Articles 32 and 226 of the Constitution separately for legal review out in the open enthusiasm for instance of infringement of principal privileges of a poor or underprivileged class who on account of destitution or inability can't approach the court. The legal executive has translated Article 21 generously to incorporate an unstated right, for example the directly to healthy condition and all the more accurately directly to appreciate contamination free water and air and the sky is the limit from there. The court has additionally incorporated a directly to a healthy situation with beginning however rising standards of universal natural law for example polluter pays rule, the preparatory rule, the guideline of between generational value, the rule of maintainable advancement and the thought of the state as a trustee of every characteristic asset.

Commenting on public nuisance further, it is known that it arises from an unreasonable interference with the general right of the public. Remedies against public nuisance are, therefore, available to every citizen.³² In India, public nuisance so far has covered issues ranging from sewage cleaning problems to brick grinding operations, from hazardous

waste management to untreated effluent discharges from factories. But climate change is still unexplored. It has to be further understood that in liability claims proceedings based on nuisance or negligence arising out of global warming, the plaintiff always faces problems establishing his standing because it is extremely difficult to set up a causal connection between the injury suffered by the plaintiff and defendant's emission of greenhouse gases. In United States, to establish standing in a Federal Court, a plaintiff must show that:

- (a) A particular injury has been suffered;
- (b) A causal connection exists between the injury and conduct complained of, so that the injury is fairly traceable to the challenged action of the defendant; and
- (c) It must be likely, as opposed to merely speculative, that a favorable court decision will relieve the injury complained of.

Also, remedies available in India for public nuisance, in general, are impressive. Section 268 of Indian Penal Code, 1860 provides the definition of public nuisance. According to the Section "a person is guilty of a public nuisance who does any act or is guilty of an illegal omission which causes any common injury, danger or annoyance to the public or to the people in general who dwell or occupy property in the vicinity, or which must necessarily cause injury, obstruction, danger or annoyance to persons who may have occasion to use any public right." It again provides in the same Section that "a common nuisance is not excused on the ground that it causes some convenience or advantage." Persons who conduct 'offensive' trades and thereby pollute the air or cause loud and continuous noises that affect the health and comfort of those dwelling in the neighborhood are liable to prosecution for causing public nuisance. This, however, is less attractive because the penalty for is merely Rs. 200, which makes it pointless for a citizen initiate a prosecution under Section 268 of Indian Penal Code, 1860 by a complaint to a magistrate [9].

THE CONSTITUTIONAL FRAMEWORK AND JUDICIAL ACTIVISM

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 [10]. The centerpiece of these fundamental rights is the right to life and liberty [11]. 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, [12] the right to livelihood, [13] the right to education, [14] the right to health and medical care of workers, [15] and most importantly for current purposes, the 'right of enjoyment of pollution-free water and air'.

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, [16] and provides for a strict timeline within which the information has to be provided [17]. Non-compliance with the timeline, without reasonable cause, can lead to individual liability of the concerned official [18]. 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, [19] and the rights-based climate claim that is in the pipeline also seeks to use the right to information regime in this fashion [20].

New Forums and Options

In addition to the High Court and Supreme Court, the newly constituted National Green Tribunal [21] may also offer climate litigants a forum in which they may raise climate 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 [22]. 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 [23]. In addition to the customary extension of 'person' to artificial juridical persons, [24] the NGT, has read 'aggrieved person' expansively to include 'any person, individual or group of individuals' as long their credentials have been verified and their motives are pure.

The Tribunal, while passing an order, is required to apply the principles of sustainable development, precaution and polluter pays [25]. 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 [26].

Rights-based Claims and Adaptation

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 Rights [27] and the International Covenant on Economic, Social and Cultural Rights [28]. India has an obligation under these treaties to respect, protect and fulfill 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.

SOCIAL AND ETHICAL DIMENSION

Climate litigation encompasses ethical, scientific, economic, social, and other complexities of the age. Lawyers bear the responsibility of making their clients aware of

how climate change may have an effect on their rights. At the same time, as citizens, we have responsibilities of our own [29]. We need to be more conscious about intergenerational equity and our present and future responsibility, social, ethical and legal that may determine the potential winners or losers in climate change litigation [30].

In India, reaction against environmental degradation is mainly influenced by unequal exchange, poverty and population growth [31]. Climate change as a recent phenomenon is yet to form a part of mainstream litigation here. It is undeniable that judicial activism of India in environmental matters actually has shaped the environmental law tremendously and owes its debt in many ways to the active social movements. This may be the reason why, in spite of possibilities, the nuisance or negligence or others yet to encompass climate change in them.

FINDINGS

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). The former is the legitimate domain of judges and the latter that of the legislature and its agents [32]. 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 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 affairs - 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.

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

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 [33]. 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 [34] 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). The former is the legitimate domain of judges and the latter that of the legislature and its agents. 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 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 affairs- 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

Since Stockholm Declaration, the propaganda relating to the dire need for development in Climate change for India has remained constant. Indeed, nobody would dare to argue that the will was unjust thirty or perhaps fifteen years ago. However, one will simply suggest a self-assessing question now: Has something modified in thirty-seven years? In the era of trade with an increasing market, India is one in every of the hubs for international economy. Climate awareness in India has accrued in leaps and bounds within the last 5 years. Once the limited preserve of diplomats and bureaucrats, national political and international positioning in relevance temperature change is currently the topic of a full of life national dialogue. The pressure so engendered has resulted in a very tranche of policies and practices in relevance temperature change. There's up to now no comprehensive legislation to handle temperature change mitigation or adaptation. The Supreme Court, High Courts and varied tribunals have acknowledged and even supported the relevancy of climate issues within the context of environment-development trade-offs and decision-making, however, a climate-centric rights-based or alternative claim is nonetheless to dropped at the portals of the Indian Courts. Given the increasing interest in and consciousness on climate impacts, the expansive interpretation of standing in Indian courts and tribunals on matters of public interest, and also the intensive enviro-legal and rights jurisprudence developed over the years, a rights-based climate claim is each quite possible to be brought before Indian courts, and to be favorably diverted.

In particular, in to this point intrinsically a claim relates to fastidiously circumscribed and argued adaptation-related basic rights violations. whereas such cases can possible

have tremendous narrative price, whether or not they can change state enlightened domestic legislation, address the many environmental governance issues that lie at the center of ineffective implementation, or result in a a lot of positive international stance, however, is uncertain.

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