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India's Progressive Environmental Case Law: A Worthy Roadmap for Global Climate Change Litigation

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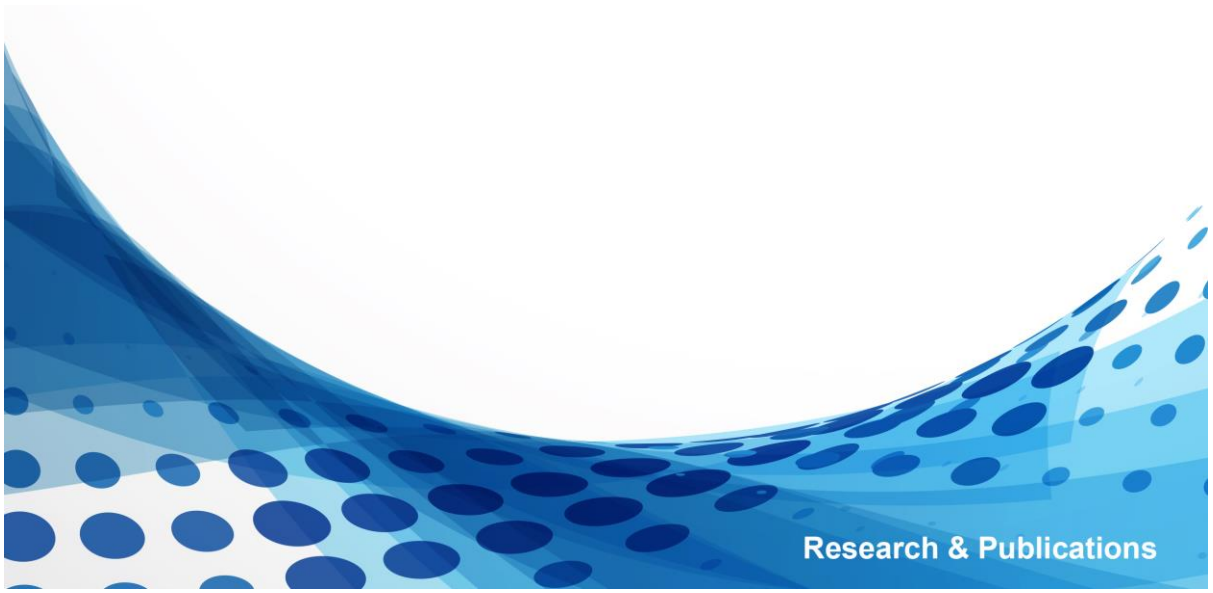

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Abstract

This paper explores how the long-standing tradition of common law countries such as India, which have acknowledged the fundamental right to a healthy and pollution free life for many decades, can assist Judges in other jurisdictions and inform global climate governance. More specifically, many other common law and civil law jurisdictions are faced for the first time with having to interpret and assess whether there is a fundamental right to a healthy and pollution free environment. This question forces them to review whether state inaction on climate change infringes this fundamental right. This paper examines how Indian courts have adjudicated environment and climate litigation. We further scrutinize the classification of cases as climate litigation in the Indian context to try and truly unearth Indian jurisprudence on environment and climate protection. The paper also examines the trends observable and the way forward for environment and climate litigation in India. We compare the four human rights based climate litigations before the European Court of Human Rights with Indian jurisprudence to understand transnational climate litigation better.

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I. Introduction

In July 2020, the Irish Supreme Court,[1] while refusing to acknowledge a constitutional right to environment, observed India as the only exception in the common law family to interpret the constitutional right to environment without an express constitutional provision.[2]

The Indian Supreme Court in the early 1980s held a constitutional right to a healthy environment[3] within Article 21, which guarantees the right to life.[4] Post-1980s,[5] many cases have interpreted the right to life to include the right to live in a wholesome environment,[6] pollution free environment,[7] the right to enjoyment of pollution free air,[8] fresh air,[9] pollution free water,[10] a clean environment,[11] and a decent environment,[12] etc. The judicial formulation of the right to live in a pollution free and healthy environment also includes the right to live in a healthy environment with minimal disturbance of ecological balance,[13] living in an atmosphere congenial to human existence.[14]

Writing in 2011 and 2013, Rajamani noted no climate related claim to have been brought before the Indian Supreme Court[15] and climate litigation to be in its infancy in India,[16] and opined, "given the Court's jurisprudence and expansionist proclivities – that it would either interpret the environmental right to include a right to climate protection or apply a human rights optic to climate impacts."[17] While these writings were an exception, the idea of linking the expansive environmental law jurisprudence evolved in Global South – especially, in India, where

[1] Friends of the Irish Environment v Ireland [2017] JR 793 (Ir.).
[2] *Id*. at 8.13.
[3] Municipal Council Ratlam v. Vardhichand, AIR 1980 SC 1622 (India)
[4] India Const. art. 21.
[5] RICHARD LORD, SILKE GOLDBERG, LAVANYA RAJAMANI & JUTTA BRUNNÉE, CLIMATE CHANGE LIABILITY: TRANSNATIONAL LAW AND PRACTICE (ed. 2012).
[6] Subhash Kumar v State of Bihar AIR 1991 SC 420 (1991) (India).
[7] Charan Lal Sahu v Union of India (1990) 1 SCC 613 (India).
[8] *Id.*
[9] Narmada Bachao Andolan v Union of India (2010) 10 SCC 664 (India).
[10] *Id.*
[11]Vellore Citizens Welfare Forum v Union of India (1996) 5 SCC 647 (India).
[12] Shantistar Builders v Narayan Khimale Totmane and Ors. (1990) 1 SCC 520 (India).
[13] Rural Litigation and Entitlement Kendra v State of UP (1985) 2 SCC 431 (India).
[14]. Virender Gaur and Ors. v State of Haryana and Ors. (1995) 2 SCC 577 (India).
[15] Rajamani, *supra* note 5, at 7.19; Lavanya Rajamani, *Rights Based Climate Litigation in the Indian Courts: Potential, Prospects & Potential Problems*, CENTRE FOR POLICY RESEARCH CLIMATE INITIATIVE WORKING PAPER 2013/1 (2013). It is to be noted, at the time of writing in 2011 and 2013, as there were no classified climate litigation in India, Rajamani's work did not examine climate litigation but rather the climate policy as well as environment litigation in India.
[16] Rajamani, *supra* note 5, at 7.19.
[17] Rajamani, *supra* note 5, at 7.22.

expansive interpretation was a way to include climate law considerations was missed in the global discourse. Only recently, scholars have started articulating this linkage either through an already expanded understanding of environmental law or through a human rights angle.[18]

In 2019, while Peel and Lin[19] conducted the first comparative study[20] in analysing the contribution of the "Global South"[21] in climate litigation,[22] they did not focus on any particular jurisdiction in the Global South. In their comparative study, Peel and Lin write that an analysis of the Global South experience of climate litigation serves two purposes. One, it helps contribute to global climate governance as climate change is a global phenomenon.[23] Two, it helps "inform advocacy, partnering initiatives, and capacity-building efforts",[24] which would help reduce emissions and combat climate change. However, Peel and Lin also note that "seemingly universal definitions of climate change litigation fail to capture developments occurring outside the Global North adequately."[25] This paper aims to compare and understand perspectives from India to inform global climate governance and understand the diverse nature of climate litigation.

The remainder of this paper is divided into four parts. Part II focuses on climate litigation in India. It traces the historical origins of the constitutional right to a healthy and pollution free environment. This part also examines the path the Indian Supreme Court has chosen or is choosing to traverse regarding climate litigation. In doing so, the authors refer to fifteen cases

[18] *See* Eeshan Chaturvedi, *Climate Change Litigation: Indian Perspective*, GERMAN LAW JOURNAL, 22, 1459–1470 (2021) (hereinafter Chaturvedi); Gitanjali Gill, Gopichandran Ramachandran, *Sustainability transformations, environmental rule of law and the Indian judiciary: Connecting the dots through climate change litigation*, ENVIRONMENTAL LAW REVIEW 23(3) 228–247 (2021); Shibani Ghosh, *Climate Litigation in India*, in COMPARATIVE CLIMATE CHANGE LITIGATION: BEYOND THE USUAL SUSPECTS (Francesco Sindico, Makane Moïse Mbengue, Kathryn McKenzie ed.,2021); Joana Setzer & Lisa C. Vanhala, *Climate Change Litigation: A Review of Research on Courts and Litigants in Climate Governance*, 10 WIRES CLIMATE CHANGE 4 (2019) ("a first comprehensive study focused on Global South climate litigation is yet to be published.").

[19] Jacqueline Peel & Jolene Lin, *Transnational Climate Litigation: The Contribution of the Global South*, 113 AMERICAN JOURNAL OF INTERNATIONAL LAW 679–726 (2019).

[20] *See* Joana Setzer & Lisa C. Vanhala, *Climate Change Litigation: A Review of Research on Courts and Litigants in Climate Governance*, 10 WIRES CLIMATE CHANGE 4 (2019) ("a first comprehensive study focused on Global South climate litigation is yet to be published.").

[21] The usage and scope of the term global south is contested. However, that is outside the scope of the paper and we accept the usage of Global South to include India, as has previously been accepted in climate litigation research. *See* Peel & Lin, *id.* at footnote 20.

[22] Peel & Lin, *supra* note 19, note, "Attention to the types of climate cases emerging in the Global South promotes a reframing of our understanding of climate litigation. Adjusting the "lens" through which we view transnational climate litigation allows a clearer picture of the most promising jurisdictions for further growing the climate justice movement, as well as the potential barriers that can inhibit such development."

[23] International Bar Association, *Climate Change Justice and Human Rights Task Force Report: Achieving Justice and Human Rights in an Era of Climate Disruption,* INTERNATIONAL BAR ASSOCIATION (July 11, 2014), at https://www.ibanet.org/ PresidentialTaskForceClimateChangeJustice2014Report.aspx

[24] Peel & Lin, *supra* note 19, at 683.

[25] Peel & Lin, *supra* note 19, at 682.

classified as climate litigation by two leading climate litigation databases.[26] The definition used by these databases is contested as the fifteen cases have been termed climate litigation applying a narrow definition of climate litigation, as has been objected to by some authors.[27] Part III of the paper focuses on how climate litigation, as defined by authors in the Global North, may exclude many cases that positively contribute to combating climate change in India. This part also examines Peel and Lin's claim that authors from the Global North need to adjust the "lens" of viewing transnational climate change litigation to get a "clearer picture of the most promising jurisdictions for further growing the climate justice movement".[28] This claim is tested using Indian cases not ordinarily classified as climate litigation and hence absent from the global conversation.[29]

Part IV focuses on a comparative analysis of how Indian jurisprudence can better inform the global climate governance narrative. It does so by analysing how the Indian judiciary is creative in allowing easy access to justice[30] while often basing their judgments in a right based framework.[31] This part analyses the challenges faced in the Global North, mainly Europe, in trying to utilize a rights based approach to climate litigation[32] while comparing how Indian courts deal with similar challenges. Therefore, this part also compares the similarities between

[26] The LSE Grantham Research Institute on Climate Change and the Environment runs the Climate Change Laws of the World database accessible here; https://climate-laws.org and the Sabin Center for Climate Change Law at Columbia Law School maintains the http://climatecasechart.com database. These two databases are primarily referred to by climate litigation authors (Accessed the database on 18th August, 2022; *See* Peel & Lin, *supra* note 19; Setzer & Vanhala, *supra* note 20; Hari M. Osofsky, *The Continuing Importance of Climate Change Litigation*,1 CLIMATE LAW 3 (2010); Jacqueline Peel & Hari M. Osofsky, *A Rights Turn in Climate Change Litigation?*,7 TRANSNAT'L ENVTL. L. 37 (Mar. 1, 2018). These two databases have a combined total of fifteen cases concerning India, which are termed climate litigation. However, both the databases acknowledge that "climate change law, policy or science must be a material issue of law or fact in the case. Cases that make only a passing reference to climate change, but do not address climate-relevant laws, policies, or actions in a meaningful way are not included. In general, cases that may have a direct impact on climate change, but do not explicitly raise climate issues, are also not included in the database." This is discussed further in Part III *infra*.

[27] Peel & Lin, *supra* note 19, at 683.

[28] Peel & Lin, *supra* note 19, at 683.

[29] Part III *infra*; *See generally*, Rajamani, *supra* note 5, at 7.19, where even after quoting cases upholding the implied constitutional right to environment, Rajamani does not consider them climate litigation due to absence of climate change arguments. Similarly, many other cases predominantly decided on the environment protection including curbing the release of GHGs on grounds of pollution have not been classified as climate litigation.

[30] Vellore Citizens Welfare Forum v Union of India (1996) 5 SCC 647 (India).

[31] Shantistar Builders v Narayan Khimale Totmane and Ors. (1990) 1 SCC 520 (India); Rural Litigation and Entitlement Kendra v State of UP (1985) 2 SCC 431 (India).

[32] Jacqueline Peel & Hari M. Osofsky, *A Rights Turn in Climate Change Litigation?*,7TRANSNAT'L ENVTL. L. 37 (Mar. 1, 2018).

the flurry of cases[33] currently before the European Court of Human Rights (ECHR) and Indian cases dealing with similar issues.

It is also important to note that the paper does not analyse the position in the United States – as it is merely trying to compare cases that currently raise questions related to the constitutional or human right to a healthy environment. While *Juliana v. United States*[34] did raise such a question, it was dismissed because "a comprehensive scheme to decrease fossil fuel emissions and combat climate change" would have exceeded the court's powers.[35] Further, *Juliana* was always considered a longshot as US Courts have "gotten out of the business" of recognizing new un-enumerated fundamental rights."[36] Accordingly, a comparison with the US jurisprudence, which prefers a different approach in contrast to Indian courts, is not carried out in the paper.

Part V concludes with how Indian climate litigation may help inform and guide the global climate narrative and trends in the Global North.

II. Environment and Climate litigation in India: Origins and Trends

As observed by the Irish Supreme Court,[37] the Indian Supreme Court was the only common law jurisdiction to interpret the right to environment as a constitutional right[38] without an express constitutional provision.[39] The Irish Supreme Court referred to David Boyd's detailed

[33] *See* Duarte Agostinho and Others v Portugal and Others App no 39371/20 (ECHR, Communicated Case, 13 November 2020); Verein Klimaseniorinnen Schweiz and Others v Switzerland App no 53600/20 (ECHR, Communicated Case, 17 March 2021); Mex M v Austria (ECHR Not Communicated); and Greenpeace Nordic and Others v Norway App no 34068/21 (ECHR, Communicated Case, 16 December 2021).
[34] Juliana v United States 947 F.3d 1159 (9th Cir. 2020).
[35] *Id*. at 1171.
[36] Juliana v United States, *Federal Courts*, HARVARD LAW REVIEW (Mar 10, 2021) https://harvardlawreview.org/2021/03/juliana-v-united-states/
[37] Friends of the Irish Environment v Ireland [2017] JR 793 (Ir.). The Court observes, "It is striking that, with one exception, no such right (referring to an inherent right to a healthy environment) has been recognised in countries with a board common law family. The exception is India."
[38] Subhash Kumar v State of Bihar AIR 1991 SC 420 (1991) (India).
[39] However, Pakistan also lays claim to be a common law jurisdiction which has expansively interpreted the right to life to include the right to a healthy environment. In Ms. Shehla Zia v. WAPDA, PLD 1994 SC 693 (Pak), the Pakistan Supreme Court held the right to life to include the right to a healthy environment. *See also* Sumudu Atapattu, *The Right to a Healthy Life or the Right to Die Polluted?: The Emergence of a Human Right to a Healthy Environment Under International Law*, TULANE ENVIRONMENTAL LAW JOURNAL, 16.1 (Winter, 2002), pp. 65-126. Further, a few other jurisdictions also merit more scrutiny with regards to the interpretation of an implicit constitutional right to a healthy environment, *see* David Boyd, *The Implicit Constitutional Right to live in a Healthy Environment*, RECIEL 20 (2) 2011, pp 171-179.

study[40] on the right to environment and observed that most of the states where the constitutional right to environment was adopted had been achieved by including such wording in the constitution and not through expansive indirect interpretation. An expansive interpretation, often labelled activist,[41] divides opinions.[42] Regardless, in the environmental context, the Indian Supreme Court, since the 1980s, has held numerous times that the right to an environment follows from the right to life.

Nonetheless, such cases which deal with environmental pollution and other environmental issues have been termed environmental litigation[43] and have been excluded from the ambit of climate litigation. While the scope of climate litigation needs to be widened to understand the Indian perspective,[44] we must first understand the nature environmental litigation and their effect, regardless of how they are categorized. In this Part, we analyse the origins of environment and climate litigation in India along with key trends and principles evolved. In doing so, we also attempt to describe and point out certain difference between environment and climate litigation. However, as is elaborated in Part III of the paper, one should not get trapped in defining or differentiating climate and environment litigation as a better understanding of environment and climate better informs the global discourse.

A. Origins and Trends

In 1980, the Indian Supreme Court faced one of the first cases concerning pollution and government inaction.[45] In the case, the issue was – did the municipal council breach any rights while failing to provide sanitary facilities – the absence of which led to contamination and pollution. The Court held that "Decency and dignity are non-negotiable facets of human rights",[46] and the contamination breached such human rights, which were reflected as fundamental rights under the Indian constitution. Accordingly, the Court directed the municipal council to remedy the lack of sanitary facilities and passed five directions in this regard – such

[40] DAVID BOYD, THE ENVIRONMENTAL RIGHTS REVOLUTION: A GLOBAL STUDY OF CONSTITUTIONS, HUMAN RIGHTS, AND THE ENVIRONMENT (UBC Press 2011)
[41] *See generally*, UPENDRA BAXI, THE INDIAN SUPREME COURT AND POLITICS (1989); Bar and Bench, *It is sheer propaganda to say that PIL amounts to judicial overreach: Prof Upendra Baxi*, BAR AND BENCH (April 3, 2021) https://www.barandbench.com/news/sheer-propaganda-to-say-pil-amounts-judicial-overreach-prof-upendra-baxi.
[42] Madhav Khosla, *Addressing Judicial Activism in the Indian Supreme Court: Towards an Evolved Debate*, 32 HASTINGS INT'L & COMP. L. REV. 55 (2009).
[43] *See generally*, Chaturvedi, *Supra* note 18, at 1460.
[44] *Infra*, Part III.
[45] Municipal Council Ratlam v. Vardhichand, AIR 1980 SC 1622 (India) (Hereinafter Ratlam).
[46] *Id.* at 15.

as construction and management of the drainage system, stopping polluted effluents seeping on the street and directions to maintain a hygienic and clean environment.[47]

Ratlam set the precedent of basing the right to a healthy or pollution-free environment in a rights based framework. In *Subhash Kumar v State of Bihar*,[48] the Court held – "Right to life is a fundamental right under Article 21 of the Constitution, and it includes the right of enjoyment of pollution free water and air".[49] However, the result of the case was the dismissal of the petition – as the Court found government action to curb water pollution to be reasonable and that the public interest litigation (PIL) petition was instead filed in the petitioner's interest. Regardless, in dismissing the case, the Court clarified that a right to a healthy environment existed within the right to life – and a breach of the right to a healthy environment could be litigated through PILs.[50]

Similarly, in many other cases, the Court held the right to live in a wholesome environment,[51] pollution free environment,[52] fresh air,[53] clean environment,[54] and decent environment[55] to exist within the confines of Article 21, which guarantees the right to life.

These cases focused on a specific issue of environmental pollution, not a general environmental issue or a climate change concern. Nonetheless, these cases also established certain general and overarching principles to help protect the environment and, in turn, the climate.[56] Many principles established over the years also provide a basis for future climate litigation. Some of these principles are highlighted below.

1. <u>The Polluter Pays Principle</u>

[47] *Id.* at 24.
[48] Subhash Kumar v State of Bihar AIR 1991 SC 420 (1991) (India).
[49] *Id.* at 7.
[50] *Id.* at 8.
[51] *Id.*
[52] Charan Lal Sahu v Union of India (1990) 1 SCC 613 (India).
[53] Narmada Bachao Andolan v Union of India (2010) 10 SCC 664 (India).
[54]Vellore Citizens Welfare Forum v Union of India (1996) 5 SCC 647 (India).
[55] Shantistar Builders v Narayan Khimale Totmane and Ors. (1990) 1 SCC 520 (India).
[56] *See generally* Paul Barresi, *The Polluter Pays Principle as an Instrument of Municipal and Global Environmental Governance in Climate Change Mitigation Law: Lessons from China, India, and the United States,* CLIMATE LAW 10, 1, 50-93, (2020). Barresi compares how Indian have generalised and integrated environmental principles into Indian law to guide government action.

In 1996, the Indian Supreme Court established the polluter pays principle in the case of *Indian Council for Enviro-Legal Action v Union of India* (ICELA).[57] In *ICELA*, the Court faced the issue of remedying pollution and environmental damage[58] – caused by dumping untreated wastewater and sludge in the environment at Birchi village in the State of Rajasthan. The Court held the chemical companies had polluted the environment and were liable to pay damages and costs incurred to clean the pollution caused.[59] *ICELA* was the first instance of the polluter pays principle being adopted by any Indian court. Post-*ICELA*, polluter pays as a principle has been statutorily recognised[60] and used in many subsequent cases before various Indian courts and tribunals.[61]

In *ICELA*, the Court applied the "universally accepted" principle of polluter pays to answer the "question of liability of the respondents to defray the costs of remedial measures."[62] In doing so, rather than engage with the tortious jurisprudence on liability and compensation, the Court merely adopted the polluter pays principle to assign the "responsibility for repairing the damage (to) that of the offending industry."[63] Hence, for an easier application which would favour environment protection, the Indian courts adopted the polluter pays principle.[64]

2. The Public Trust Doctrine

The Public Trust doctrine was established in the case of *M. C. Mehta v Kamal Nath*.[65] In this case, issues regarding activities of a private company on government leased land were brought to the Court's notice by an environmental activist – M. C. Mehta.[66] Regardless of the private nature of the activity in question, the Court established the public trust doctrine. The Court

[57] Indian Council For Enviro-Legal Action v. Union of India, (1996) 3 SCC 212 (India).
[58] *Id.* at 67
[59] *Id.* at 70
[60] The National Green Tribunal Act, 2010, §20.
[61] *See generally* Research Foundation for Science v. Union of India, (2005) 13 SCC 186 (India); Bittu Sehgal v. Union of India, (2001) 9 SCC 181 (India); Vellore Citizens Welfare Forum v Union of India (1996) 5 SCC 647 (India); Karnataka Industrial Areas Development Board v. C. Kenchappa, (2006) 6 SCC 371 (India).
[62] Indian Council For Enviro-Legal Action v. Union of India, (1996) 3 SCC 212 at pp 247.
[63] *Id.*
[64] Indian courts have often faced criticism for its difficult use of tortious law in assigning compensation. The most visible problems have arisen under the Motor Vehicles Claims Act wherein the courts often use different ways to provide for compensation. This also leads to large delays and innumerable appeals. However, adopting the polluter pays principle in this regard is much more efficient. Regardless, there are issues with the application of the polluter pays principle as well. For instance, in ICELA itself, the petitioners used dilatory tactics to delay the implementation of the judgment. *See* Indian Council for Enviro-Legal Action v. Union of India, (2011) 8 SCC 161. *See also* Harshita Singhal and Sujith Koonan, *Polluter Pays Principle in India: Assessing Conceptual Boundaries and Implementation Issues*, 7(2) RGNUL STUDENT RESEARCH REVIEW (2021), p 33-50.
[65] M.C. Mehta v. Kamal Nath, (1997) 1 SCC 388 (India).
[66] *See* About, *M C Mehta*, M C MEHTA ENVIRONMENT FOUNDATION, http://mcmef.org/web/m-c-mehta/.

found the doctrine of public trust to emerge from common law holding further – "(the) public at large is the beneficiary of the sea shore, running waters, airs, forests and ecologically fragile lands. The State as a trustee is under a legal duty to protect the natural resources."[67] The Court concluded that any use of natural resources or the environment would not be permitted unless "the courts find it necessary, in good faith, for the public goods and in public interest."[68]

While in the case context, the Court did not need to establish the public trust doctrine, it felt establishing the public trust doctrine would help provide a ground to review government action regarding actions that are adverse to the environment. Therefore, the Public Trust doctrine is often used by judiciaries worldwide to regulate against misuse of environmental resources.[69]

3. The Precautionary Principle

A group of citizens approached the Indian Supreme Court in the case of *Vellore Citizens' Welfare Forum v Union of India*[70] to take action against tanneries in the State of Tamil Nadu, which were polluting the Parlar River. The Parlar River was the primary source of water supply for the citizens. The Court, in response to the petition directed the Central Government to constitute an authority to oversee the computation of damage and compensation given to affected citizens. In doing so – it mandated the application of the polluter pays principle – wherein the polluting tanneries had to bear the cost of compensation and the clean-up.[71] Further, the Court expanded the precautionary principle to regulate future government action to prevent such pollution.

The Court held the precautionary principle to include three things. One, "the statutory Authorities must anticipate, prevent' and attack the causes of environmental degradation". Two, faced with the threat of serious and irreversible damage, "scientific certainty should not be used as the reason for postponing, measures to prevent environmental depredation", and third, "the onus of proof was on the developer to show how their actions were environmentally benign."[72]

The precautionary principle thus established the onus on the projects to prove – how they would not adversely impact the environment. Therefore, the precautionary principle also governed all

[67] M. C. Metha (1997) at 34.
[68] M. C. Metha (1997) at 35.
[69] *See generally*, Michael Blumm and Rachel D. Guthrie, "*Internationalizing the Public Trust Doctrine: Natural Law and Constitutional and Statutory Approaches to Fulfilling the Saxion Vision*", UC DAVIS .L REV 45(3) 741 (2012)
[70] Vellore Citizens Welfare Forum v Union of India (1996) 5 SCC 647 (India).
[71] *Id.* at 12.
[72] *Id.* at 11.

government actions – including approval of new projects – which eventually culminated in the adoption of a regulated Environment Impact Assessment process.[73]

4. Existence of Inter-Generational Rights and Sustainable Development

The judgment in *Vellore Citizens' Welfare Forum* logically led to the question – would urban development take priority over preserving the environment. The Court in *Intellectuals Forum, Tirupathi v State of A.P.* (*Intellectuals Forum*)[74] addressed this question on conflict between the development and environment. While finding protection of the environment was needed to fulfil the rights guaranteed under the Constitution, one of the principles the Court applied was the principle of "Inter-Generational Equity".

The Court, while referring to Principles 1 and 2 of the Stockholm Declaration,[75] observed

> "80. Several international conventions and treaties have recognised the above principles and, in fact, several imaginative proposals have been submitted including the *locus standi* of individuals or groups to take out actions as representatives of future generations, or appointing an ombudsman to take care of the rights of the future against the present (proposals of Sands and Brown Weiss referred to by Dr. Sreenivas Rao Permmaraju, Special Rapporteur, paras 97 and 98 of his report).
>
> 81. The principles mentioned above wholly apply for adjudicating matters concerning environment and ecology. These principles must, therefore, be applied in full force for protecting the natural resources of this country."[76]

Adding to the application of the principle of "Inter-Generational Equity" in the given case, the Court opined that the representatives of future generations have *locus standi* in filing cases for the protection of rights of the future generations. The Court also referred to and reiterated the principle of sustainable development. It noted that the principle of sustainable development was referred to by the Court in previous cases[77] and observed

> "the courts are asked to adjudicate upon is whether economic growth can supersede the concern for environmental protection and whether sustainable development which can be achieved only by way of protecting the environment and conserving the natural resources for the benefit of humanity and future generations could be ignored in the

[73] An Environment Impact Assessment (EIA) is a process used to understand the impact any project has on the environment. Consequently, conducting an EIA is a prerequisite to get environmental clearance. The EIA is supposed to be conducted under the legal framework provided by the Environment (Protection) Act, 1986. More specifically, the detailed guidelines to conduct an EIA are given in a notification issued under the Environment (Protection) Act, 1986. *See*, Ministry of Environment and Forests, S.O. 1533(E) (Notified on 14 September, 2006).
[74] Intellectuals Forum v. State of A.P., (2006) 3 SCC 549 (India).
[75] Stockholm Declaration on the Human Environment, in Report of the United Nations Conference on the Human Environment, UN Doc. A/CONF. 48/14, at 2 and Corr. 1 (1972).
[76] *Id.* at 80, 81.
[77] *See* Vellore Citizens Welfare Forum v Union of India (1996) 5 SCC 647 (India).

> garb of economic growth or compelling human necessity. The growth and development process are terms without any content, without an inkling as to the substance of their end results. This inevitably leads us to the conception of growth and development, which sustains from one generation to the next in order to secure "our common future." In pursuit of development, focus has to be on sustainability of development, and policies towards that end have to be earnestly formulated and sincerely observed."[78]

The Court interlinked the principle of sustainable development with the protection of the rights of future generations – advocating for their application.

Intergenerational equity was also briefly discussed in *State of Himachal Pradesh v. Ganesh Wood Products*.[79] Herein, the Court noted how the action of approving wood factories was violative and "contrary to public interest involved in preserving forest wealth, maintenance of environment and ecology and considerations of sustainable growth and inter-generational equity." The Court observed, "After all, the present generation has no right to deplete all the existing forests and leave nothing for the next and future generations."[80] Subsequently, the Court remanded the matter back to the High Court, instructing it to decide the case in light of these principles and to conduct a survey to assess the impact of the factories on the environment.[81]

Therefore, in deciding on the impact of the action adverse to the environment, the Court also considered the future harm – and how it might impact future generations.

5. Lowering the Locus standi

Locus standi means the cause of action needed to file a case, generally originating from an action which causes one some legal harm. In India, the generous interpretation of *locus* stems from instances of judicial creativity.[82] A few instances are allowing Public Interest Litigations (PILs),[83] treating a letter received by the Court as a writ petition[84] and allowing a person to file

[78] Intellectuals Forum (2006) at 84.
[79] State of Himachal Pradesh v. Ganesh Wood Products, (1995) 6 SCC 363 (India).
[80] *Id*. at 51.
[81] *Id*. at 63.
[82] Upendra Baxi, "*Writing about impunity and environment: the 'silver jubilee' of the Bhopal catastrophe.*" JOURNAL OF HUMAN RIGHTS AND THE Environment 1 23-44 (2010); *see also* Armin Rosencranz & Michael Jackson, *The Delhi Pollution Case: The Supreme Court of India and the Limits of Judicial Power*, 28 COLUM. J. ENVTL. L. 223 (2003).
[83] Bandhua Mukti Morcha v. Union of India, (1984) 3 SCC 161 (India).
[84] S.P. Gupta v. Union of India, 1981 Supp SCC 87 (India); *see also* Dhananjay Mahapatra, *SC faces a deluge of letter petitions*, TIMES OF INDIA (Jan 16, 2020) https://timesofindia.indiatimes.com/india/sc-faces-deluge-of-letter-petitions-device-invented-by-it-40-years-ago/articleshow/73283380.cms.

a writ of *habeas corpus* for oneself.[85] In doing so, Courts have expanded *locus standi* to impart justice to a large and diverse society.

As seen in *Intellectuals Forum,* the Court also opined that representatives of future generations to have *locus standi* in filing cases for the protection of rights of the future generations. *Locus standi* is interpreted very liberally in India,[86] and often, public interest is sufficient cause for the courts to admit a case.[87] Furthermore, the courts have taken environmental causes *suo moto* or of their own accord.[88] A *suo moto* case is where the courts, observing a wrong which they are often informed of by information in the public domain, such as newspaper articles, take up a case.[89]

While the Supreme Court has constitutional and inherent powers to take up cases *suo moto,*[90] as it has in the past,[91] in the case of *Municipal Corporation of Bombay v Ankita Sinha* [92] it held the NGT to also have inherent powers to take up cases *suo moto*. Interpreting the NGT to have *suo moto* powers to take cognizance of cases, the Supreme Court observed, "the NGT, with the distinct role envisaged for it, can hardly afford to remain a mute spectator when no-one knocks on its door. The forum itself has correctly identified the need for collective stratagem for addressing environmental concerns".[93] However, the Court differentiated general *suo moto* powers which the Supreme Court and High Courts had; observing the *suo moto* power conferred on the NGT was only applicable to environmental issues.

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[85] Sunil Batra v. Delhi Admn., (1978) 4 SCC 494 (India).
[86] Upendra Baxi,"*Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India*," THIRD WORLD LEGAL STUD. 107, 114 (1985).
[87] Baxi, *Supra* note 82, at 32.
[88] *See* "Hindustan Times" A.Q.F.M. Yamuna v. Central Pollution Control Board, (2004) 9 SCC 576 (India); Delhi Transport Dept., Re, (1998) 9 SCC 250 (India); *see also* KRISHNADAS RJGOPAL, *Supreme Court takes suo motu cognisance of contamination of rivers*, THE HINDU (13th Jan, 2021) https://www.thehindu.com/news/national/supreme-court-takes-suo-motu-cognisance-of-contamination-of-rivers/article33569924.ece
[89] *See* Sunil Batra v. Delhi Admn., (1978) 4 SCC 494 (India), which was one of the first cases of suo moto cognizance taken by the Indian Supreme Court.
[90] *See* MIHIR R, *46 Suo Moto Cases in the Supreme Court from 1990-2021*, SUPREME COURT OBSERVER (4th Jun 2021) https://www.scobserver.in/journal/46-suo-moto-cases-in-the-supreme-court-from-1990-2021/; Mihir commenting on how *suo moto* petitions developed observes "the use of the procedure in writ or judicial review jurisdiction has been novel. It developed from the relaxation of procedure when considering PILs. The first instance is often considered to be in the Sunil Batra case. The procedure for *suo moto* petitions was formalised only in 2014 by the adoption of Order 38, Rule 12(1)(a) in the Supreme Court Rules, 2013."
[91] *See* Marc Galanter and Vasujith Ram, *Suo Motu Intervention and the Indian Judiciary*, in A QUALIFIED HOPE: THE INDIAN SUPREME COURT AND PROGRESSIVE SOCIAL CHANGE 92–122 (Gerald N. Rosenberg, Sudhir Krishnaswamy, & Shishir Bail eds., 2019).
[92] Municipal Corporation of Greater Mumbai v. Ankita Sinha, 2021 SCC OnLine SC 897 (India).
[93] *Id*. at para 35.

Further in this section, in Part II.B.2.c, the case, *In re Court on its own motion v. State of Himachal Pradesh* [94] is discussed, where the NGT took *suo moto* cognizance Later in the paper (Part IV), the authors have comparatively analysed how *locus standi* is treated in other jurisdictions, specifically Europe, to understand better the scope of liberally interpreting *locus* in climate change.

6. Other general principles

Indian courts and tribunals have enumerated and expounded various other principles, often borrowing from international law and reading them into the constitution. For instance, the Indian Supreme Court, in the case of *Bangalore Medical Trust v B.S. Muddappa*[95] held that the power under environmental legislation could only be used to protect the environment and not act in a manner as to undermine it. Similarly, another principle the Indian Supreme Court has established is – lack of state resources is not a defence – when the state fails to fulfil its environmental obligation.[96]

Further, the National Green Tribunal (NGT) in *Society for Protection of Environment & Biodiversity v. Union of India*[97] applied the doctrine of *non-regression*.[98] In International environmental law, the doctrine of non-regression mandates the state or its entities not to pursue action which has a "net effect of diminishing the legal protection of the environment or access to environmental justice."[99]

Eeshan Chaturvedi notes, " the doctrine of non-regression does not form part of Indian law. None of the enactments, especially within the environmental law domain, authorize or mandate that the courts (referring to the NGT) apply the doctrine of non-regression in its decisions."[100] Regardless, the NGT applied the doctrine of non-regression to protect the environment which was lauded by Chaturvedi. Such application according to Chaturvedi offers insights concerning the application of international principles within Indian environmental jurisprudence, wherein principles of international environmental law are adopted and often interpreted from common

[94] In re Court on its own Motion v. State of Himachal Pradesh, 2014 SCC OnLine the NGT 3064 (India).
[95] Bangalore Medical Trust v. B.S. Muddappa, (1991) 4 SCC 54 (India).
[96] Dr. B. L. Wadehra v. Union of India, AIR 1996 SC 2969 (India); *See also*, Municipal Council Ratlam v. Vardhichand, AIR 1980 SC 1622 (India).
[97] Society for Protection of Environment & Biodiversity v. Union of India 2018 SCC OnLine NGT 190 (India).
[98] *See generally* Michel Prieur, *Non-regression in environmental law*, S.A.P.I.EN.S 5.2 (2012)
[99] *Id*. at 54
[100] Chaturvedi, *Supra* note 18 at 1465

law to protect the environment. Similarly, Shibani Ghosh points out that Indian courts have used various international principles and treaties to decide environment related matters.[101]

Interestingly, in many cases where these principles were laid down or adopted, there was no necessity to apply or expound those principles. However, to guide state action and develop environmental jurisprudence in India, the courts established those principles and read them into either common law or the constitution.[102] The emergence of these principles points to the trend of laying the groundwork for environmental claims in a right based framework.

As seen above, the cases point out the trend of the Indian judiciary liberally interpreting constitutional rights – validating the Irish Supreme Court's observation of India being a common law jurisdiction expansively interpreting an implied right to the environment without any express or corresponding constitutional provision. While the fundamental duties concerning the environment are articulated in the Indian constitution,[103] however, fundamental duties are not enforceable in India.[104] Regardless, they aid and guide the judiciary in interpreting the Constitution.[105] Hence, it is true that there is no express constitutional provision recognising the right to environment.

Accordingly, the Indian Supreme Court has based its judgments on interpreting Article 21, which guarantees the right to life to include the right to a healthy, pollution free and clean environment.[106] In establishing these principles within a constitutional framework, the Court based the "Environmental Rule of Law"[107] concept on Article 14, which guarantees "equality before the law or the equal protection of the laws"[108] and is discussed in detail in Part II.C.

Further, the courts and tribunals in deciding cases refer to practices followed in common law and international environmental law principles, such as the precautionary principle, the public trust doctrine and the doctrine of non-regression. Consequently, the courts and tribunals base the principles or procedures they adopt within the framework of either common law or the

[101] Shibani Ghosh, *Climate Litigation in India*, see Supra note 18
[102] *See* SHYAM DIVAN AND ARMIN ROSENCRANZ, ENVIRONMENTAL LAW AND POLICY IN INDIA. (OUP, 2001)
[103] India Const. art 51A(g) states "to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures.".
[104] Sneha Rao, *Why Linking Fundamental Rights To Duties Is An Extra-Constitutional Argument*, LIVELAW (Nov 30, 2021) https://www.livelaw.in/columns/why-linking-fundamental-rights-to-duties-is-an-extra-constitutional-argument-186639.
[105] Rural Litigation and Entitlement Kendra v. State of U.P., 1989 Supp (1) SCC 504 (India).
[106] Subhash Kumar v State of Bihar AIR 1991 SC 420 (1991) (India).
[107] Hanuman Laxman Aroskar v. Union of India, (2019) 15 SCC 401 (India).
[108] India Const. art 14 states "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.".

constitution.[109] In such a manner, Indian courts continue to interpret the right to a healthy and pollution free environment, which includes the right to a pollution free climate, within a constitutional framework.

B. Climate Litigation in India

Purportedly, till 2011, no climate related claim was brought before the Indian Supreme Court. Similarly, two leading climate litigation databases note cumulatively – fifteen instances of climate litigation to have occurred in India to date, all post 2011.[110] In this paper we convey the methodology and the definitions of climate litigation adopted by these databases merits more scrutiny, as has been accorded in Part III of the paper.

For instance, neither *Wilfred J* nor *Jan Chetna* (cases classified as climate change and discussed in detail below) have a direct argument or issue regarding climate change but rather have an indirect effect on climate change. They have been classified as climate litigation by the GRI LSE database. Hence, we examine them under this section. Regardless, such a discrepancy is also reflective of the problem of trying to apply a strict definition of what constitutes climate litigation in India, which we have elaborated upon in Part III of the paper.

Of the fifteen cases, twelve are decisions by the NGT and three are by the Supreme Court of India. The table below briefly summarizes all the fifteen cases and points out the heading under which the database had classified them as climate litigation. These cases are discussed in detail in the following sections.

Table 1: Brief description of cases classified as climate litigation

Year	Forum	Parties to the suit	Held	Classified as (database)
2011	NGT	Vimal Bhai v. Ministry of Environment & Forests	Clearance given to a dam was under challenge. However, the NGT found it to comply with the precautionary principle and the principle of sustainable development and allowed the project.	Mitigation (LSE GRI)

[109] *See generally* M.C. Mehta v. Kamal Nath, (1997) 1 SCC 388 (India); Vellore Citizens Welfare Forum v Union of India (1996) 5 SCC 647 (India).
[110] Climate databases, *Supra* note 26.

2012	NGT	Jan Chetna v. Ministry of Environment & Forests	The NGT held, a public consultation as mandated by EIA regulations is required to be conducted ordering the same and suspended the environmental clearance in the meantime.	Adaptation (LSE GRI)
2013	NGT	Sukhdev Vihar Welfare Residents Association v. Union of India	the NGT rejected the challenge of operating a waste-to-energy (Clean Development Mechanism) plant in a densely populated area because it emitted GHGs. However, the NGT fined the plant for past breaches and issued guidelines and directions for future operations.	GHG emissions reduction and trading (Sabin); Mitigation (LSE GRI)
2014	NGT	Wilfred J v. Ministry of Environment & Forests	The clearance given to a port was challenged. It was contended that the port was being constructed in an ecologically sensitive area. However, the NGT rejected the same in public interest due to its economic importance.	Adaptation (LSE GRI)
2014	NGT	Punamchand v. Union of India	The applicant challenged a hydroelectric project requiring around one hundred thirty-three thousand trees to be felled. However, the applicant was not present during the hearing, and the NGT accepted the government plan to plant upward of two million seedlings which exceeded the NGT's mandated ratio of 1:8.	Mitigation (LSE GRI)
2014	NGT	Indian Council for Enviro-Legal Action v. Ministry of Environment and Forests	The applicant brought to the NGT's attention the unregulated emissions of HCF-23, a greenhouse gas thousands of times more potent than carbon dioxide. Subsequently, the NGT directed the Ministry of Environment and Forests and the appropriate bodies to provide	GHG emissions reduction and trading (Sabin); Mitigation (LSE GRI)

			directions for regulating HCF-23 emissions.	
2014	NGT	Gaurav Bansal v. Union of India	The applicant brought to the NGT's attention that many states had not prepared State Action Plans on Climate Change as they were supposed to under the National Action Plan on Climate Change. While not deciding on the jurisdiction or the NGT's power, the NGT directed all the states to make a State Action Plan on Climate Change as soon as possible.	GHG emissions reduction and trading (Sabin); Adaptation, Mitigation (LSE GRI)
2015	SC	Hindustan Zinc Ltd. v. Rajasthan Electricity Regulatory Commission	The Supreme Court upheld the High Court's decision stating that the companies having captive generation power plants would have to purchase a minimum percentage of energy from renewable resources as they fell within the purview of the Rajasthan law.	Energy and Power, GHG emissions reduction and trading (Sabin); Adaptation, Mitigation (LSE GRI)
2016	NGT	In re Court on its own motion v. State of Himachal Pradesh & Others	The NGT, on its own motion, issued directions to curb black carbon emissions around the ecologically sensitive Rohtang pass and directed the Himachal Pradesh government to undertake measures to ensure curbs on black carbon emissions.	Human Rights, Right to a healthy environment, GHG emissions reduction and trading (Sabin); Mitigation (LSE GRI)
2016	NGT	Society for Protection of Environment & Biodiversity v. Union of India	The NGT quashed a draft EIA notification that exempted particular building and construction projects from EIA. the NGT found the exemption to be in breach of the principle of sustainable development and the precautionary principle.	Environmental assessment and permitting (Sabin); Mitigation (LSE GRI)

2016	NGT	Rajiv Dutta v. Union of India	The NGT ordered better formulation and enforcement of forest fire management plans observing, unchecked forest fires cause ecological damage and release carbon and other emissions into the environment.	Protecting biodiversity and ecosystems (Sabin); Disaster Risk Management (LSE GRI)
2016	NGT	Mahendra Pandey v. Union of India	The NGT directed the Delhi government to formulate a State Climate Action Plan as it was supposed to do under the National Climate Action Plan.	GHG emissions reduction and trading (Sabin); Adaptation, Mitigation (LSE GRI)
2019	NGT	Riddhima Pandey v. Union of India	The applicant asked for broad directions to be issued, mainly to do with climate change being considered under EIA and direct the government to ensure India's climate policy aligned with its commitments under the Paris Agreement. The NGT dismissed it as it did not challenge any particular action or statute. It is currently under appeal to Supreme Court.	Human Rights, Environmental assessment and permitting, Protecting biodiversity and ecosystems, Public Trust. (Sabin); Mitigation (LSE GRI)
2020	SC	Hanuman Laxman Aroskar v. Union of India	In its 2019 order, the Court directed the expert committee to re-examine the approval given to a new airport due to a flawed EIA process. After the expert committee re-examined the approval and changed specific terms, the Court allowed the construction of the airport.	Environment assessment and permitting (Sabin); Mitigation (LSE GRI)
2021	SC	Association for Protection of Democratic Rights v. The State of West Bengal and Others	The Court ordered the establishment of a committee to draw up guidelines on cutting trees for development.	Environment assessment and permitting (Sabin); Mitigation (LSE GRI)

1. National Green Tribunal

The National Green Tribunal (NGT) was formed under the National Green Tribunal Act.[111] The NGT has jurisdiction over "all civil cases where a substantial question relating to environment (including enforcement of any legal right relating to environment) is involved."[112] It has jurisdiction over disputes arising from the enforcement of certain acts that regulate and control various kinds of pollution.[113] Accordingly, the NGT receives environment and climate related claims.

The NGT is headed by a retired Supreme Court judge or a retired Chief Justice of a High Court[114] and is very effective – sometimes attracting unwanted attention from the government for its effectiveness in the past.[115] The NGT plays a crucial role in fulfilling India's environmental policy – with the Rio Declaration[116] being reflected in the preamble,[117] which was one of the primary reasons for the establishment of the NGT.[118] Due to its very nature, the NGT receives many cases related to pollution, environment clearances, and breaches in the impact assessment process, among others.[119] Therefore, it is no wonder that twelve of the fifteen cases classified as climate litigation are before the NGT. Also, as the NGT was established in late 2010,[120] cases classified as climate litigation are all post-2010, with the earliest classified case being decided in 2011.

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[111] The National Green Tribunal Act, 2010, §3.
[112] The National Green Tribunal Act, 2010, §14.
[113] The National Green Tribunal Act, 2010, Schedule I.
[114] The National Green Tribunal Act, 2010, §5.
[115] Armin Rosencranz and Geetanjoy Sahu, *Assessing the National Green Tribunal after four years,* J. INDIAN L. & SOC'Y 5, 191 (2014). They note, "(NGT) seems to have caught the attention of the Modi government because of its unusual effectiveness. The current Environment Ministry seems to want the NGT to make recommendations to the government instead of issuing directions like a judicial body."
[116] Principle 10, *The Rio Declaration on Environment and Development* (1992) UN Doc.A/CONF.151/26/Rev.1 (93.I.8).
[117] The National Green Tribunal Act, 2010, Preamble. It states "(the Act is based upon) decisions (that) were taken at the United Nations Conference on Environment and Development held at Rio de Janeiro in June, 1992, in which India participated, calling upon the States to provide effective access to judicial and administrative proceedings, including redress and remedy and to develop national laws regarding liability and compensation for the victims of pollution and other environmental damage."
[118] Sudha Shrotria, *Environmental justice: is the National Green Tribunal of India effective?,* ENV L R 17(3), 169-188 (2015).
[119] Sridhar Rengarajan, Dhivya Palaniyappan, Purvaja Ramachandran & Ramesh Ramachandran, *National Green Tribunal of India—an observation from environmental judgements*, ENVIRON SCI POLLUT RES 25, 11313–11318 (2018).
[120] About Us, NATIONAL GREEN TRIBUNAL, (2019), https://greentribunal.gov.in/about-us

a) On Intergenerational Rights

Of the twelve cases included as climate litigation before the NGT, perhaps the most significant case and the only case dealing with the issue of intergenerational rights and climate change – was filed before the NGT in 2019.[121] Similar to *Duarte Agostinho*[122] where a group of children are suing many European states to better the climate policy (*Duarte Agostinho* is elaborated upon in Part IV.A), Ridhima Pandey, a nine year old girl, petitioned the NGT to direct the government to take more significant action as current actions to mitigate Greenhouse Gases (GHG) and climate change was insufficient. One of the reliefs asked was that NGT order the government to "assess the climate related issues while appraising projects for grant of environmental clearance".[123] The petition also proposed the term environment[124] to include climate.[125]

The petition also relied on many principles, such as the public trust doctrine and the existence of intergenerational rights, as were expounded in environmental litigation cases.

While the NGT dismissed the case, it held that "The issue of climate change is certainly a matter covered in the process of impact assessment"[126] under the Environment (Protection) Act, 1986. Hence, it determined that no additional orders were needed in that regard. The NGT further remarked that there was "no reason to presume that the Paris Agreement and other international protocols are not reflected in the policies of the Government of India or are not taken into consideration in granting environment clearances."[127] While the case is currently under appeal before the Indian Supreme Court,[128] the NGT's order implies the term environment to include climate.[129]

Corollary to the above interpretation is that climate change concerns must be examined in a statutory context such as the Environmental Impact Assessment (EIA) Notification adopted under the Environment (Protection) Act, 1986.[130] This ruling may open a floodgate of

[121] Ridhima Pandey v. Union of India, 2019 SCC OnLine NGT 843 (India) (hereinafter Ridhima Pandey).
[122] Duarte Agostinho and Others v Portugal and Others App no 39371/20 (ECHR).
[123] *See* Ridhima Pandey
[124] The National Green Tribunal Act, 2010, §2(a).
[125] Petition, Ridhima Pandey v. Union of India, 2019 SCC OnLine NGT 843 (India). Petition available at http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2017/20170325_Original-Application-No.-___-of-2017_petition-1.pdf
[126] Ridhima Pandey at 3.
[127] Ridhima Pandey at 4.
[128] Ridhima Pandey v. Union of India Civil Appeal No(s). 388/2021 (India).
[129] *See* Part II.C.2 *infra*
[130] Ministry of Environment and Forests, S.O. 1533(E) (Notified on 14 September, 2006)

possibilities and challenges to government approvals on the grounds that the EIA process did not consider climate change before granting approvals. Similar cases challenging EIAs which approve projects but have failed to consider climate change as a factor are seen in the Global North.[131] This is examined in further detail in Part II.C.1.a.

b) On Impact Assessment

Four of the twelve cases dealt with challenges to environment impact assessments (EIAs). In *Vimal Bhai v. Ministry of Environment and Forests*,[132] the forest clearance given to a dam post impact assessment was challenged. However, the NGT found the clearance to be in line with the precautionary principle and the principle of sustainable development as the EIA was carried out properly and the Forest Advisory Committee had carried out studies pertaining to the impact of the dam. Regardless, the NGT directed the Ministry to carry out a cumulative impact assessment to avoid unforeseen threats. The NGT further directed the Ministry to prepare clear guidelines and instructions to carry out a cost benefit analysis for future projects.[133]

Similarly, the clearance for constructing a deep-water container port was challenged in *Wilfred J v. Ministry of Environment and Forests*.[134] However, a bench of the NGT dismissed the petition on technical grounds,[135] which was successfully challenged in appeal where the appellate bench remanded the petition to the original bench.[136] Deciding the case, the NGT dismissed the challenge due to the project's public interest and economic importance.

Maintaining consistency, the NGT in *Jan Chetna v. Ministry of Environment and Forests*[137] held that the Ministry had to carry out a public consultation as mandated by the EIA regulations. Hence, the NGT suspended environmental clearance accorded for the expansion of the steel

[131] *See* Ecology Action Centre v. Nova Scotia (Environment), (2022) NSSC 104 (Can.); Highlands District Community Association v. British Columbia (Attorney General), (2021) BCCA 232 (Can.). While these cases were dismissed by the Court, some sporadic success has been found in other jurisdictions such Australia. *See* Gloucester Resources Limited v Minister for Planning [2019] NSWLEC 7 (Aus).
[132] Vimal Bhai v. Ministry of Environment & Forests, 2011 SCC OnLine NGT 16 (India).
[133] *Id*. at Conclusions.
[134] Wilfred J. v. Ministry of Environment & Forests', 2014 SCC OnLine NGT 6860 (India). Available on GRI LSE database as of 18th September, 2022 at https://climate-laws.org/geographies/india/litigation_cases/wilfred-j-v-ministry-of-environment-forests. An archived version is also available at https://web.archive.org/web/20210919083627/https://climate-laws.org/geographies/india/litigation_cases/wilfred-j-v-ministry-of-environment-forests
[135] Wilfred J. v. MoEF, 2014 SCC OnLine NGT 1038 (India).
[136] Wilfred J. v. MoEF, 2016 SCC OnLine NGT 929 (India).
[137] Jan Chetna v. Ministry of Environment & Forests, 2012 SCC OnLine NGT 81 (India).

factory. In doing so, the NGT reiterated that the government and developers must follow the precautionary principle both, while granting and applying for environmental clearances.[138]

A draft notification exempting small construction projects from the EIA process was challenged in *Society for Protection of Environment and Biodiversity v. Union of India*.[139] The NGT noted that such an exemption violated the principle of sustainable development, the precautionary principle and accepted the petitioner's arguments that the notification shall have a "serious repercussion on climate change."[140] Consequently, the NGT struck down the specific provisions which exempted small construction projects from the EIA process.

c) On Emissions

Four of the twelve cases marked as climate litigation before the NGT dealt with the issue of GHG and carbon emissions. In *Sukhdev Vihar Welfare Residents Association v. Union of India*,[141] the operation of a waste to energy plant in a densely populated area was challenged. The petitioner alleged the operation of the waste to energy plant emitted GHGs which was violative of their right to a pollution free environment. While the NGT fined the plant for a past violation of its "stack emissions being in excess of prescribed parameters",[142] the NGT held the plant to be a "Clean Development Mechanism project" and compliant with all the pollution laws. Nevertheless, as the NGT found a past violation of excessive emissions, it directed a Joint Inspection Team to be constituted, which would monitor the emissions and carry out monthly inspections and checks.

Similar issues about unregulated emissions were litigated upon in the *Indian Council for Enviro-Legal Action (ICELA-II) v. Ministry of Environment and Forest*.[143] ICELA, the petitioner challenged the production and emission of HCF-23, a GHG more potent than carbon dioxide. On the question of *locus standi* raised by the companies which claimed that the petitioner did not have any cause of action to bring the claim, the NGT, through a public interest route, ruled the petitioner to have *locus*.

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[138] Available on GRI LSE database as of 18th September, 2022 at https://climate-laws.org/geographies/india/litigation_cases/jan-chetna-v-ministry-of-environment-forests. An archived version is also available at https://web.archive.org/web/20211021212618/https://climate-laws.org/geographies/india/litigation_cases/jan-chetna-v-ministry-of-environment-forests

[139] Society for Protection of Environment and Biodiversity (SPENBIO) v. Union of India, 2016 SCC OnLine NGT 1052 (India).

[140] *Id*

[141] Sukhdev Vihar Residents Welfare Association v. State of NCT of Delhi, 2013 SCC OnLine NGT 1894 (India).

[142] *Id.*

[143] Indian Council for Enviro-Legal Action (ICELA) v. MoEF, 2014 SCC OnLine NGT 2723 (India).

On the questions of emissions of HCF-23, the NGT found that there was no regulatory framework for the "mechanism of storage, handling incinerators and emission standards of HFC-23"[144] and consequently directed the Ministry and appropriate bodies to issue appropriate guidelines for the same. In doing so, the NGT observed: "The impacts of climate change of which one of the major contributory is the release/emissions of greenhouse gases visible around the globe or environment is not exceptional."[145] The NGT further remarked, "we have no hesitation to say that contents of the application are a matter of global policy" for which "international convention and treaties have to provide a path for domestic legislation and in any case it has failed and it has to be regulated without further delay".[146] As a result, the NGT ordered the Ministry to form guidelines on the emissions of HFC-23 expeditiously.

Similarly, in *In re Court on its own motion v. State of Himachal Pradesh*,[147] the NGT took notice of black carbon emissions near Rohtang Pass, an ecologically sensitive area in the Himalayas. The NGT instructed the government of Himachal Pradesh to limit vehicular traffic and other activities that caused black carbon emissions near the Rohtang Pass – setting specific limits on the daily number of vehicles that could traverse the Rohtang Pass.[148] In doing so, the NGT observed the economic value of the ecosystem to be unquantifiable and emphasized the need to protect the environment – in light of growing "deforestation, uncontrolled and unsustainable grazing, soil erosion, siltation of dams and reservoirs, industrial and human wastes, forest fires and other effects of climate change."[149]

While in *Rajiv Dutta v. Union of India*,[150] the petitioner challenged the lack of guidelines on dealing with and preventing forest fires in Uttarakhand and Himachal Pradesh. The NGT acknowledged that fire emissions caused by forest fires directly contributed to climate change.[151] The NGT further noted that forest fires emit GHGs, specifically black carbon, which detrimentally affects the environment. Accordingly, the NGT required the governments to form appropriate measures to better tackle forest fires and also to formulate of a "National

[144] *Id*. at 23.
[145] *Id*. at 26.
[146] *Id*. at 27.
[147] In re Court on its own Motion v. State of Himachal Pradesh, 2014 SCC OnLine NGT 3064 (India).
[148] See generally Ria Saini, Plastic Waste Threatens Picturesque And Ecologically Fragile Rohtang Pass, NDTV (Jun 4, 2018) https://www.ndtv.com/india-news/world-environment-day-plastic-waste-threatens-picturesque-and-ecologically-fragile-rohtang-pass-1862309.
[149] In re Court on its own Motion v. State of Himachal Pradesh, Interim Order, 2014 SCC OnLine NGT 1 . 30 (India) at 8.
[150] Rajiv Dutta v. Union of India, 2016 SCC OnLine NGT 1002 (India).
[151] *Id*. at 72.

policy/Guidelines for forest fire prevention and control, which should be updated periodically."[152]

d) On Climate Action Plans and Mitigation

Two out of the twelve cases classified as climate litigation before the NGT dealt with ensuring the government had prepared and is enforcing a climate action plan, while one dealt with ensuring the government mitigated the adverse climate impact of a project.

The status of the implementation of the National Action Plan on Climate Change (NAPCC)[153] was questioned in *Gaurav Bansal v. Union of India*.[154] One of the critical characteristics of the NAPCC was that it directed state governments and union territories to prepare State Action Plans on Climate Change (SAPCC) within the framework of NAPCC, which the Ministry would then approve of Environment and Forest. However, as the petition did not allege a specific violation of the NAPCC nor did it challenge the NAPCC, the NGT merely ordered the state governments and union territories to "prepare their respective draft plan and get the same approved expeditiously."[155]

Be that as may, even after nudging by the NGT, the Government of NCT of Delhi did not file a SAPCC with the Ministry of Environment and Forest. Subsequently, in the case of *Mahendra Pandey v. Union of India,* [156] the NGT directed the Government of NCT of Delhi to file the SAPCC with the Ministry of Environment and Forest, which it eventually did.

In another case, *Punamchand v. Union of India*,[157] the petitioner challenged a hydroelectric project requiring the felling of one hundred thirty-three thousand, one hundred and seventy-nine trees. However, the NGT acknowledged the importance of the project, which had obtained all the requisite approvals and considered public welfare and the cost-benefit analysis, allowing the project to proceed subject to its afforestation efforts. The government promised to plant two million, five hundred sixty-two thousand nine hundred sixty-six seedlings which exceeded the NGT mandated ratio of planting eight seedlings for every tree felled.[158] Hence, the NGT allowed the project to proceed while directing the appropriate authorities to oversee the process

[152] *Id.* at 81 (a)
[153] Government of India, National Action Plan on Climate Change (Issued June 30, 2008). Say in 2/3 lines on what is NAPCC all about.
[154] Gaurav Kumar Bansal v. Union of India, 2018 SCC OnLine NGT 1110 (India).
[155] Gaurav Kumar Bansal v. Union of India, 2018 SCC OnLine NGT 1110 (India).
[156] Mahendra Pandey v. Govt. of NCT of Delhi, 2016 SCC OnLine NGT 3882 (India).
[157] Punamchand v. Union of India, 2013 SCC OnLine NGT 167 (India).
[158] *Id.*

of plantation and afforestation. However, it is also to be noted that no one appeared on the petitioner's behalf during the hearings before the NGT.[159]

2. *Indian Supreme Court*

Three of the fifteen climate litigation cases in India were before the Indian Supreme Court. All three of them were with regards to different issues. In one case, the Court was tasked with interpreting renewable energy quotas under the Electricity Act. In another, the approval given for the construction of a new airport was challenged and the third case was regarding felling of ecologically significant trees for the widening of a highway.

The Supreme Court was tasked with interpreting renewable energy quotas under the Electricity Act in the case of *Hindustan Zinc Ltd. v. Rajasthan Electricity Regulatory Commission*.[160] The Rajasthan government had passed a law which mandated companies having captive generation power plants to purchase a minimum percentage of energy from renewable resources. However, if the companies did not meet the limit, they would have to pay a surcharge. This matter was initially challenged before the Rajasthan High Court, which found in favour of the Rajasthan government.[161] Aggrieved by the decision, the companies appealed the case to the Indian Supreme Court.

The Court upheld the High Court's decision stating that the companies with captive generation power plants would have to purchase a minimum percentage of renewable energy from renewable resources as they fell within the purview of the Rajasthan law. In doing so, the Court acknowledged that "the provisions requiring purchase of minimum percentage of energy from renewable sources of energy have been framed with an object of fulfilling the constitutional mandate with a view to protect environment and prevent pollution."[162] The Court further emphasised that the NAPCC and the preamble of the Electricity Act observing that they "emphasize upon promotion of efficient and environmentally benign policies and encourage generation and consumption of green energy."[163]

More recently, the Court had to decide whether to allow the felling of around three hundred historically significant trees to widen roads in *Association for Protection of Democratic Rights*

[159] *Id.*
[160] Hindustan Zinc Ltd. v. Rajasthan Electricity Regulatory Commission, (2015) 12 SCC 611 (India).
[161] Ambuja Cements Ltd. v. Raj. Electricity Regulatory Commission, 2012 SCC OnLine Raj 2525 (India).
[162] Hindustan Zinc Ltd. v. Rajasthan Electricity Regulatory Commission, (2015) 12 SCC 611 (India) at 44.
[163] *Id*. at 29

v State of West Bengal.[164] While deliberating on the issue, the Court noted that the felling of trees assumed significance from a climate change perspective. It further noted India's commitment under the Paris Agreement[165] to Nationally Determined Contributions,[166] – "one of the stated objectives is to create an additional carbon sink of 2.5 to 3 billion tonnes of CO2 equivalent through additional forest and tree cover by 2030."[167]

Therefore, rather than deciding the matter, the Court directed the formulation of an expert committee – which would form rules and guidelines which would "govern decision making concerning the cutting of trees for developmental projects."[168] While the committee was supposed to file the report four weeks after the first meeting, there have been no further hearings or updates in the case post the order directing the constitution of the committee.[169]

Similarly, the clearance to construct a new airport based on its faulty EIA was challenged in *Hanuman Laxman Aroskar v. Union of India*. In its 2018 order,[170] the Court suspended the clearance given on the grounds that the EIA had not been conducted properly. In doing so, the Court rejected various arguments put forth by the Government. The Court rejected the assertion that constructing an airport was a policy matter; therefore, the EIA process's flaws should be disregarded.[171] The Court further rejected the argument that the petitioners had no *locus standi*, holding that environmental governance concerns were a matter of public interest.[172]

The Court applying the concept of "Environmental Rule of Law", as is elaborated upon in for the first time in India, noted that the Environmental Rule of Law would help narrow the "considerable implementation gap between the requirements of environmental laws and their implementation and enforcement."[173] The Court rooted such an iteration of environmental governance within the confines of the constitution, observing

[164] Assn. for Protection of Democratic Rights v. State of W.B., (2021) 5 SCC 466 (India).
[165] Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104
[166] *See generally Nationally Determined Contributions (NDCs*), UN NATIONS CLIMATE CHANGE, https://unfccc.int/process-and-meetings/the-paris-agreement/nationally-determined-contributions-ndcs/nationally-determined-contributions-ndcs
[167] *India's Intended Nationally Determined Contribution: Working Towards Climate Justice*, NDC REGISTRY, https://unfccc.int/NDCREG
[168] Assn. for Protection of Democratic Rights v. State of W.B., (2021) 5 SCC 466 (India).
[169] The Supreme Court website shows that while the case was listed for 25 March 2021, no further hearings have taken place post the interim order as of 23 July, 2022.
[170] Hanuman Laxman Aroskar v. Union of India, (2019) 15 SCC 401 (India).
[171] *Id*. at 158.
[172] *Id*. at 164.
[173] *Id*. at 143.

> "In a domestic context, environmental governance that is founded on the rule of law emerges from the values of our Constitution. The health of the environment is key to preserving the right to life as a constitutionally recognized value under Article 21 of the Constitution. Proper structures for environmental decision making find expression in the guarantee against arbitrary action and the affirmative duty of fair treatment under Article 14 of the Constitution."[174]

In doing so, the Court held the 2006 notification, which serves as the basis for an EIA to constitute "a significant link in India's quest to pursue the SDGs" and further held that "in the area of environmental governance, the means are as significant as the ends. The processes of decision are as crucial as the ultimate decision."[175] Therefore, the Court rejected the argument that flaws in the EIA process should be disregarded as a new airport was needed, reiterating the application of principles of sustainable development,[176] inter-generational equity, among others.[177]

On the viability of the project, the Court allowed the Expert Appraisal Committee (EAC) to revaluate and revisit the recommendations made for the grant of environmental clearance, keeping in mind the specific objections raised in the judgment. Subsequently, the EAC followed the Court's instructions, and in its 2019 order,[178] the Court permitted the construction of the new airport. However, while noting that the airport would be a zero carbon airport in the building and operational phases, the Court appointed a body to oversee the implementation of conditions under which environmental clearance was provided.[179]

In these sets of orders in *Hanuman Laxman Aroskar*, the Court pointed out that EIA was a critical step in analysing a project's environmental impact. The Court further noted that an adverse environmental impact would lead to the violation of the right to a healthy environment. Hence, EIA was constitutionally significant and played a role in fulfilling the right to a healthy environment.

3. Unclassified or Overlooked Climate Litigation in India

[174] *Id.* at 146.
[175] Hanuman Laxman Aroskar v. Union of India, (2019) 15 SCC 401 (India) at 157.
[176] *Id.* at 156.
[177] *Id.* at 145.
[178] Hanuman Laxman Aroskar v. Union of India, (2020) 12 SCC 1 (India).
[179] *Id*. at 8 and 58

While the climate litigation databases have classified fifteen cases as climate litigation, they have done so using a strict definition of climate litigation, as is examined in Part III. Regardless, going by their classification, many other cases may also be classified as climate litigation which the database has otherwise overlooked,[180] few of which we will touch upon below.[181]

The methodology we used to uncover cases missed by the databases was – to search for cases which included the term "climate change" before Indian courts using SCC Online's[182] search engine.[183] Of the remaining cases, we analysed which cases merely made a passing reference to climate change and which cases referred to climate change substantively. In doing so, we found cases that could have been classified as climate litigation. Some instances of such cases which may have been classified as climate litigation are briefly discussed in this section.

As seen in cases classified as climate litigation, one of the cases deals with renewable power and energy quotas[184] – with climate change factoring in on how to interpret the provision and understand its intended purpose. Similarly, a few other cases[185] also deal with a challenge to energy provisions that mandate renewable energy quotas. In these two scenarios, climate change was referred to and was a factor in upholding the provisions requiring renewable energy quotas. These can very well be termed as part of climate litigation.

As in various environmental litigations, the government is the trustee or caretaker of public resources.[186] This is the public trust doctrine. Recently, there have been cases on similar grounds – where either forest land is illegally encroached or land given for environmental purposes is misused. In some of these cases, where relevant, the Courts have examined and factored in climate change.

[180] While these databases contribute immensely to climate change research and keeping track of climate litigations across the globe, it is also quite understandable that some of the finer cases in a particular jurisdiction may have been missed. This was also conceded by the creators. The present paper attempts to add to and expand the work carried out by the databases.
[181] As of 18th September, 2022, none of these cases are included as climate litigation in either of the databases.
[182] SCCOnline is a database or reportable Indian cases and available at https://www.scconline.com/.
[183] To exclude cases which merely had the words "Ministry of Environment, Forest and Climate Change" and other such functionaries of the Ministry of Environment, Forest and Climate Change, we excluded the term-specific phrase "Environment, Forest and" from our search results
[184] *See* Hindustan Zinc Ltd. v. Rajasthan Electricity Regulatory Commission, (2015) 12 SCC 611 (India).
[185]Timarpur-Okhla Waste Management Company Ltd. (TOWMCL) v. Delhi Electricity Regulatory Commission, (2015) SCC OnLine APTEL 82 (India); Paschim Gujarat Vij Company Limited v. Gujarat Electricity Regulatory Commission, (2015) SCC OnLine APTEL 19 (India).
[186] M.C. Mehta v. Kamal Nath, (1997) 1 SCC 388 (India).

For example, *Manu Anand v. State of Kerala*,[187] government land was allotted for agricultural purposes. However, there were attempts to seek approval for mining on the land by the allottee. The petition approached the Kerala High Court to block such a conversion. The High Court, agreeing with the petitioner, held that the state would be guided by public interest in determining any land use. The High Court held, "the State shall not be merely guided by the market conditions to determine 'public interest'" and further went on to state that "the Kyoto Protocol to the United Nations Framework Conventions on Climate Change reminds the nation to strive for the policies and measures to minimise adverse effects on climate change and to promote sustainable forms of agriculture in the light of climate change conditions."[188] Accordingly, the Court set aside the executive order allowing for the land to be used to mine.

Similarly, in *Gulab Dass v. State of H.P.*[189] and *Pancham Chand v. State of H.P.*,[190] the Himachal Pradesh High Court addressed cases where the petitioners had encroached upon forest land. The High Court upheld the order to evict the petitioners, for which the cost of vacating the land was borne by the petitioners. The High Court also ordered afforestation at the cost of the petitioners, observing

> "People have long referred to the trees as '*Earth's lungs*' as they play a crucial role in our existence, consuming large quantities of carbon dioxide and producing oxygen which enables us to breathe. Apart from providing oxygen, they also cleanse the air and improve its quality, control climate, protect soil and support vast varieties of wildlife. It is universally accepted that deforestation is major contributing factors of climate change and that is why it is so important to protect trees and secure our natural landscapes for future generations."[191]

Gulab Dass and *Pancham Chand* clearly show the role climate change played and the High Court's conscious effort at afforestation to maintain carbon sinks. Therefore, as these cases deal with emissions and mitigation – they make a case to be classified as climate litigation.

Similarly, another case dealing with impact assessment, environmental clearance, and mitigation, makes a strong argument to be considered climate litigation. In this case,[192] the felling of trees for a public project was challenged before the Bombay High Court. The High Court prefixed their observation by noting the ecologically sensitive issue. The High Court observed, "The Courts have to be mindful of the environmental jurisprudence evolved under

[187] Manu Anand v. State of Kerala, (2016) SCC OnLine Ker 41184 (India).
[188] *Id* at 17
[189] Gulab Dass v. State of H.P., (2016) SCC OnLine HP 1384 (India).
[190] Pancham Chand v. State of H.P., (2016) SCC OnLine HP 3114 (India).
[191] *Id*, at para 17.
[192] Federation of Rainbow Warriors v. Deputy Conservator of Forests, (2018) SCC OnLine Bom 329 (India).

the Constitution of India, the statutory frame work and the various treaties and conventions to fight the climate change and the depleting tree cover."[193] Hence, it took climate change and the international conventions solidifying it into consideration.

Accordingly, the High Court decided that the conservator of the forest cannot blindly allow and pass an order for the felling of trees – but instead has to provide a reasoned order. The High Court further held that a reasoned order could only be reached after a comprehensive study – which ascertains precisely how many trees are required to be cut and if some can be saved or transplanted. Accordingly, it quashed the conservator's previous order and remanded the issue back to the conservator.

Factors such as cleaner energy, emissions and climate change are also observed in the case concerning the building of a nuclear plant at Kundankulam. In this case, the Madras High Court allowed the construction as it followed the principles of sustainable development and that nuclear power was much greener compared to coal and fossil fuel based power generation.[194] When appealed to the Indian Supreme Court,[195] the Court, among other things, observed that "(the Convention on the Climate Change 1992) highlighted the necessity to reduce emissions of greenhouse gases believed to be contributing to global warming" and that nuclear energy helped reduce such harmful emissions. Consequently, cleaner energy, in public interest, was one of the determining factors of the case in which the Indian Supreme Court allowed the building of a nuclear plant at Kundankulam.

These cases show and continue the trend of climate litigation in India following a similar pattern of being grounded in constitutional rights.

4. The Human Rights and Climate Change Link in India

As seen in the cases discussed, Indian courts and tribunals have often grounded climate litigation within the ambit of the constitutional right to environment. Grounding climate litigation in such a framework also resulted in certain aspects of human rights applications.

[193] *Id*, at para 8.
[194] G. Sundarrajan v. Union of India, 2012 SCC OnLine Mad 3331 (India).
[195] G. Sundarrajan v. Union of India, (2013) 6 SCC 620 (India) at 191.

Basic human rights are reflected in fundamental rights under the Indian Constitution and are synonymous.[196] In *Maneka Gandhi v Union of India* (hereinafter *Maneka Gandhi*),[197] the Indian Supreme Court upheld Justice H. R. Khanna's often quoted dissent in one of the most important constitutional law cases – the *ADM Jabalpur* case, wherein Justice Khanna viewed that the right to life is inalienable and cannot be suspended.[198]

In *ADM Jabalpur*, Justice H. R. Khanna in dissenting, quoted *R. C. Cooper,*[199] observing, "Part III (which guarantees fundamental rights including the right to life) of the Constitution weaves a pattern of guarantees on the texture of basic human rights." This statement of the law establishes and without a doubt that Article 21confers the fundamental right of personal liberty."[200]

Justice Khanna's dissent was partially upheld in *Maneka Gandhi*. The Indian Supreme Court in *Maneka* referred to Article 13 of the Universal Declaration of Human Rights which enumerated the freedom of movement, acknowledging that it "is a highly valuable right which is a part of personal liberty." The Court further observed that the passport authority unilaterally cancelling a passport would violate a "basic human right" protected under Article 21.

It took close to 40 years for the Supreme Court of India to completely overrule the *ADM Jabalpur.* In holding that there existed a fundamental right to privacy under Article 21, the Court in in *K.S. Puttaswamy v. Union of India (2017),*[201],observed:

> "The Constitution has evolved over time, as judicial interpretation, led to the recognition of specific interests and entitlements. These have been subsumed within the freedoms and liberties guaranteed by the Constitution. Article 21 has been interpreted by this Court to mean that life does not mean merely a physical existence. It includes all those faculties by which life is enjoyed. The ambit of "the procedure established by law" has been interpreted to mean that the procedure must be fair, just and reasonable. The coalescence of Articles 14, 19 and 21 has brought into being a jurisprudence which recognises the interrelationship between rights. That is how the requirements of fairness and non-discrimination animate both the substantive and procedural aspects of Article 21. *These constitutional developments have taken place as the words of the Constitution have been interpreted to deal with new exigencies*

[196] Harsh Pathak, *Concept of Right to Life and Its Protection under Constitution of India*, 2019 REV. DR. CONST. 55 (2019); *See also* Gitanjali Gill, *Human Rights and the Environment in India: Access through Public Interest Litigation*, ENVIRONMENTAL LAW REVIEW, 14(3):200-218 (2012).
[197] Maneka Gandhi v Union of India (1978) 1 SCC 248 (India).
[198] ADM Jabalpur v Shivkant Shukla (1976) AIR 1207 (India).
[199] R.C. Cooper v. Union of India (1970) 1 SCC 248 (India) at 52.
[200] Justice H. R. Khanna (dissenting), ADM Jabalpur at 446.
[201] K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1 (India).

requiring an ***expansive reading of liberties and freedoms to preserve human rights under the Rule of Law***."[202]

Hence, the Court found the expansive interpretation of Article 21 (in conjunction with Articles 14 and 19) to have a human rights application. Such expansive interpretation can be best observed in cases where the right to life has been the basis of interpreting many inherent human rights such as privacy,[203] decency,[204] dignity,[205] and a healthy environment,[206] among others.

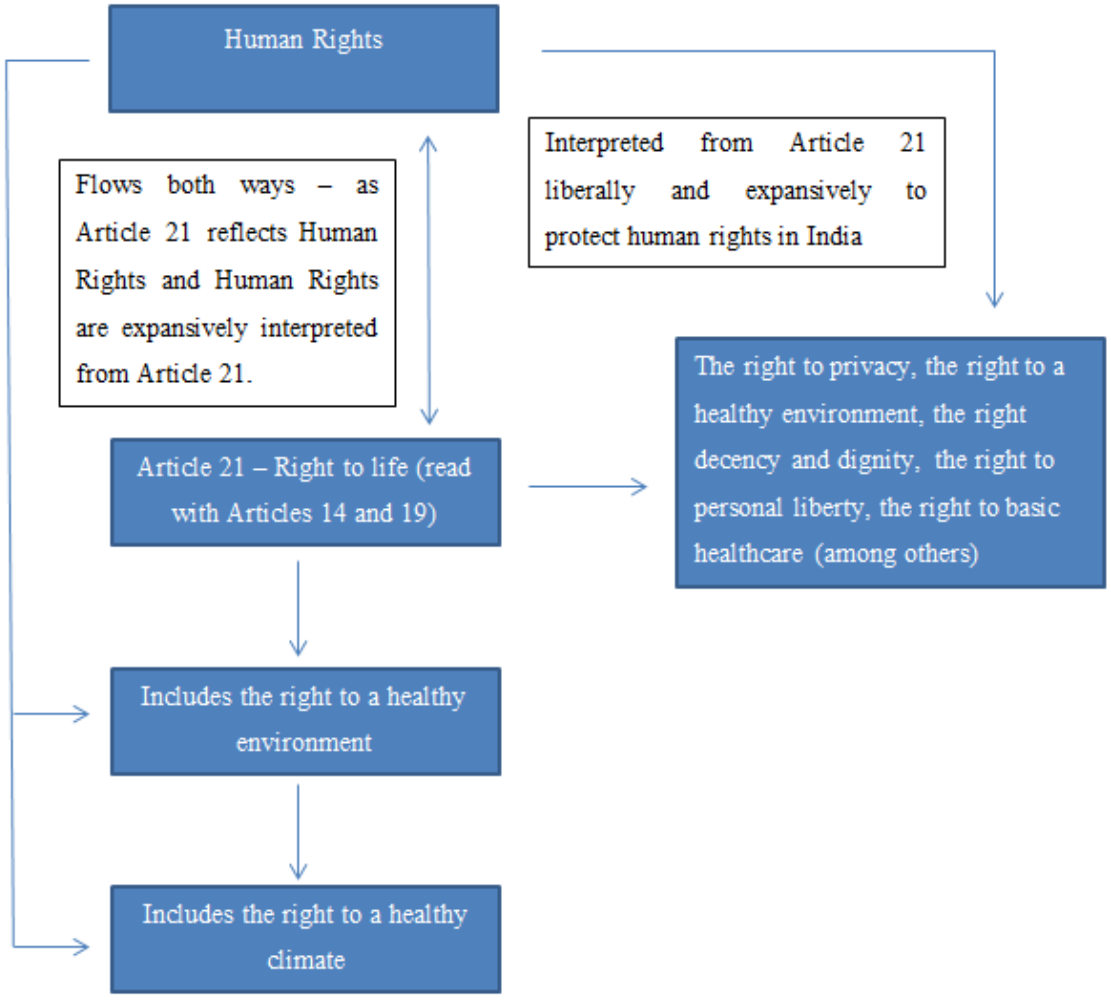

Figure 1: Explaining how the right to a healthy climate flows from a human rights application of Article 21 of the Constitution

[202] *Id* at para 259
[203] Puttaswamy v Union of India (2017) 10 SCC 1 (India).
[204] Sunil Batra v. Delhi Admn., (1978) 4 SCC 494 (India).
[205] Maneka Gandhi v Union of India (1978) 1 SCC 248 (India).
[206] Subhash Kumar v State of Bihar AIR 1991 SC 420 (1991) (India).

C. Ridhima Pandey and Hanuman Laxman Aroskar: Paving a Path Forward

As seen in the earlier section, the Indian Supreme Court, in various cases, has accorded fundamental rights an expansive interpretation – as are accorded to human rights. Correspondingly, the trends in examining environmental and climate litigation are anchored toward a more rights-based approach.

Hence, *Ridhima Pandey* and *Hanuman Laxman Aroskar* present the emergence of a trend of including climate change within the pre-existing right to environment.

1. Ridhima Pandey: Climate Change and Impact Assessment

In *Ridhima Pandey,* the applicant petitioned the NGT for eight specific directions, to know:[207]

i. assess climate related issues while appraising projects for grant of environmental clearance within the ambit of impact assessment;
ii. direct assessment of cases of forest diversion to not only include local factors but also climate change as a factor;
iii. ensure that in diverting forest land, compulsory afforestation is carried out in light of India's targets under the Paris agreement;
iv. direct the government to account for and inventory all sources of GHG emissions in India;
v. require the government to prepare quantifiable targets or a "Carbon budget" to control emissions to ensure targets under the Paris Agreement;
vi. direct the government to ensure approving projects are tiered to achieving the emission standards in India's carbon budget
vii. require the government to create a time-bound national climate recovery plan aimed at reducing GHG emissions by transitioning away from the development and use of fossil fuels, protecting forests, peatlands, grasslands, soil, mangroves, and other natural resources that store carbon; and engaging in massive reforestation and other methods of natural carbon sequestration such as improved agricultural and forestry practices

[207] Prayer, Ridhima Pandey v. Union of India, 2019 SCC OnLine NGT 843 (India). Petition available at http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2017/20170325_Original-Application-No.-___-of-2017_petition-1.pdf

viii. constitute a committee to oversee the implementation of these prayers

These prayers can be classified into three following main themes. These are discussed in detail in the subsequent paragraphs.

- The first is the inclusion of climate change as a factor in conducting impact assessments or granting clearances.
- The second is to direct the government to act in preparing a better climate change policy and is aimed at combating government inaction, and,
- The third is to tie any government action to India's climate commitments under the Paris Agreement, protecting and increasing its carbon sink.

In dismissing *Ridhima Pandey,* the NGT held – "The issue of climate change is certainly a matter covered in the process of impact assessment."[208] While the case is under appeal to the Indian Supreme Court, the ruling of the NGT is still in effect and has not been suspended.[209] Therefore, it is a direct inference that climate change factors must be considered while conducting an impact assessment.

Furthermore, when the NGT held climate change was assumed to be covered under the impact assessment process, it also indirectly interpreted the term environment to include the climate. The impact assessment process is carried out under the Environment Protection Act. Under the Environment Protection Act, environment is defined to include "water, air and land and the inter-relationship which exists among and between water, air and land, and human beings, other living creatures, plants, micro-organism and property."[210] The EIA notification is promulgated under the Environment Protection Act – whose mandate is to protect the environment. Consequently, if the EIA process is certain to include climate change factors – it is only reasonable to infer that the term environment includes the climate. Subsequently, the inference that the right to a healthy environment includes the right to a healthy climate follows naturally.

Also, in cases termed climate litigation, courts and tribunals have invoked the right to a pollution free or healthy environment[211] as the basis to direct appropriate action to combat climate change. Therefore, the assumption that the term environment includes climate is a

[208] Ridhima Pandey v. Union of India, 2019 SCC OnLine NGT 843 (India).
[209] Ridhima Pandey v. Union of India Civil Appeal No(s). 388/2021 (India).
[210] The Environment (Protection) Act, 1986, §2(a).
[211] *See generally* Society for Protection of Environment & Biodiversity v. Union of India 2018 SCC OnLine NGT 190 (India); M.C. Mehta v. Kamal Nath, (1997) 1 SCC 388 (India); M. C. Mehta v. Union of India, 1994 Supp (3) SCC 717 (India); Vellore Citizens Welfare Forum v Union of India (1996) 5 SCC 647 (India).

logical inference. This inference would also help accord the rich jurisprudence protecting the right to a healthy and pollution free environment to combat climate change.

a) EIA as a potential gateway for specific climate litigation in India

Drawing from the Global North,[212] if climate change factors are to be considered while conducting an impact assessment – it provides grounds to challenge the approval or clearance provided – based on the impact assessment if the EIA omits to consider climate change factors.

A conjoint reading of *Ridhima Pandey* and the jurisprudence on impact assessment leads to the conclusion that impact assessment is critical to fulfilling the principle of sustainable development and, hence, has to factor in climate change.[213] If it does not consider climate change or any other relevant factor, the impact assessment and the subsequent approval would be subject to judicial review and be liable to be struck down.

However, it may be some time before such a trend emerges as *Ridhima Pandey* was recently decided and is also currently sub-judice. However, it is reasonable to expect approvals and clearances to be challenged because the impact assessment did not consider climate change as a factor.

Regardless, it is to be noted that such a trend in the Global North has faced setbacks. In both the Canadian cases of *Ecology Action Centre v. Nova Scotia* and *Highlands District Community Association v. British Columbia*, the courts dismissed the challenge to the approval's non-consideration of climate change impacts on technicalities.

However, in Australia, in *Gloucester Resources Limited v. Minister for Planning,*[214] the New South Wales Land and Environment Court while denying approval for a new mine held that

> "The Project will be a material source of GHG emissions and contribute to climate change. Approval of the Project will not assist in achieving the rapid and deep reductions in GHG emissions that are needed now in order to balance emissions by sources with removals by sinks of GHGs in the second half of this century and achieve

[212] *See* Ecology Action Centre v. Nova Scotia (Environment), (2022) NSSC 104 (Can.); Highlands District Community Association v. British Columbia (Attorney General), (2021) BCCA 232 (Can.).
[213] Ridhima Pandey v. Union of India, 2019 SCC OnLine NGT 843 (India); *see also* Hanuman Laxman Aroskar v. Union of India, (2019) 15 SCC 401 (India).
[214] Gloucester Resources Limited v Minister for Planning [2019] NSWLEC 7 (Aus).

> the generally agreed goal of limiting the increase in global average temperature to well below 2ºC above pre-industrial levels."[215]

In doing so, the Land and Environment Court indirectly imposed upon the government the requirement to not approve projects that contribute to GHG emissions and climate change. Nonetheless, this did not translate into substantive safeguards. In 2022, the Australian Environment Minister successfully appealed against an interim decision in a separate case that held the "Minister has a duty to take reasonable care to avoid causing personal injury to the Children when" approving coal projects to protect the children from carbon emissions.[216] However, the interim order dismissed the challenge to stop the approval of the coal mine. The Minister subsequently approved the mine. An appeal against the imposition of the duty of care was preferred by the Minister, [217] in which it was argued that the Minister did not have a common law duty of care and that if the mine was not approved, the demand for coal would be fulfilled by someone else. This is a "market substitution" argument which was specifically rejected in *Gloucester Resources Limited.*[218] However, the Australian Federal Court did not specifically rule on such arguments but rather held that that it would not be appropriate for the court to intervene in government policy. In this regard, Peel and Markey-Towler note that "The federal court's 282-page judgment offers myriad reasons for why no duty should be imposed on the minister. But what emerges most clearly is the court's view that it's not their place to set policies on climate change."[219]

That said, such a ruling has not deterred efforts of using impact assessment as a gateway to challenge decisions granting approval to new fossil fuel explorations. In New Zealand, a conservation charity is challenging the Southland District Council's decision to grant access for a new coal exploration and mining.[220] Forest and Bird, the conservation charity allege that the "Council failed to properly consider the implications of climate change, the impact climate change will have on the district, including on future generations." However, the case is on-

[215] *Id*, at para 697.
[216] Sharma by her litigation representative Sister Marie Brigid Arthur v Minister for the Environment [2021] FCA 560 (Aus).
[217] Minister for the Environment v Sharma [2022] FCAFC 35 (Aus).
[218] See Justine Bell-James, *Landmark Rocky Hill ruling could pave the way for more courts to choose climate over coal*, THE CONVERSATION (February 11, 2019) https://theconversation.com/landmark-rocky-hill-ruling-could-pave-the-way-for-more-courts-to-choose-climate-over-coal-111533
[219] Jacqueline Peel and Rebekkah Markey-Towler, *Today's disappointing federal court decision undoes 20 years of climate litigation progress in Australia*, THE CONVERSATION (March 15, 2022) https://theconversation.com/todays-disappointing-federal-court-decision-undoes-20-years-of-climate-litigation-progress-in-australia-179291
[220] Media Release, *Coal case in Invercargill High Court*, FOREST AND BIRD (July 12, 2022) https://www.forestandbird.org.nz/resources/coal-case-invercargill-high-court

going and a decision is awaited. Regardless, Professor Ian Lowe notes that the ruling has scope to be landmark in nature.[221]

Similarly, as is discussed in Section IV.A, Norway is being sued before the ECtHR for not taking emissions and climate change impacts into consideration while approving licences for exploration of oil and gas. Therefore, it is reasonable to conclude that the environment impact assessment processes and approvals granted can be challenged on grounds that they do not consider climate change as a factor.

Therefore, while the outcome of the case was the NGT dismissing the petition as the statutory scheme was not under challenge, the NGT nonetheless had a profound impact in merely by observing that "The issue of climate change is certainly a matter covered in the impact assessment process."[222] However, as seen in the NGT's other observation that "There is no reason to presume that Paris Agreement and other international protocols are not reflected in the policies of the Government of India or are not taken into consideration in granting environment clearances", [223] it is still challenging to prove that the government is not fulfilling its commitments under Paris Agreement.

Regardless, it is important to note that no specific government action (or inaction) or statute was challenged under *Ridhima Pandey*. This fact curtailed the case before the NGT to a large extent – as the petition merely asked for the NGT to direct the government to do more without challenging any government action. However, as discussed earlier, even while dismissing the petition, the NGT added to the climate change jurisprudence by holding that the impact assessment process is assumed to consider climate change factors, and India's commitments under the Paris Agreement are presumed to be reflected in the policies of the Indian government.

2. Hanuman Laxman Aroskar: Establishing the Environmental Rule of Law and the importance of impact assessment

In *Hanuman Laxman Aroskar*, as described earlier in Part II.B.2, the Indian Supreme Court established the "Environmental Rule of Law" to counter the lack of due process in conducting an EIA. In doing so, the Court observed how environmental issues are rights based matters and

[221] Blair Jackson, *Expanding or developing new coal mines 'totally irresponsible', professor says*, STUFF NZ (Jull 22, 2022) https://www.stuff.co.nz/environment/climate-news/129326502/expanding-or-developing-new-coal-mines-totally-irresponsible-professor-says
[222] Para 2, Ridhima Pandey v. Union of India, 2019 SCC OnLine NGT 843 (India).
[223] *Id*, at Para 3.

how Nationally Determined Contributions may impact India's obligations – all while emphasising the importance of an EIA in combating climate change and fulfilling the right to a healthy environment which are discussed in detail below.

a) The Environmental Rule of Law

The Court noted that the process followed by the EIA was fundamentally flawed in *Hanuman Laxman Aroskar*. The flawed EIA led the Court to observe the lack of environmental governance within India's rule of law framework and due process. The Court cited several international environmental law instruments and programs to drive this point. They are, for example, the "First Environmental Rule of Law Report"[224] in observing that the four pillars of sustainable development (economic, social, environmental, and peace) were supported by the environmental rule of law;[225] the IUCN World Declaration on the Environmental Rule of Law[226] , which outlined thirteen principles – and was adopted by the World Environmental Law Congress in 2016; and the 2030 Agenda for Sustainable Development and its 17 SDGs[227]. In referring to all these goals and targets, the Court emphasised that they were fundamentally interrelated and "together, they provide an agenda for human development: development in a manner which accords adequate protection to the environment."[228]

Subsequently, the Court noted the dire climate situation, observing how rising sea levels and carbon dioxide emissions were ever proliferating. In doing so, the Court referred to the Paris Agreement and India's commitments to observe a need for the environmental rule of law to ensure environmental governance.[229]

Accordingly, it was held that the EIA process is an integral part of the environmental rule of law – observing that "The rule of law requires a regime which has effective, accountable and transparent institutions. Responsive, inclusive, participatory and representative decision making are key ingredients to the rule of law."[230]

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[224] Environmental Rule of Law: First Global Report, UNEP (2019).
[225] Hanuman Laxman Aroskar v. Union of India, (2019) 15 SCC 401 (India) at 128.
[226] World Declaration on the Environmental Rule of Law, *World Commission on Environmental Law*, IUCN, (2016).
[227] UN General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, A/RES/70/1 (2015).
[228] Hanuman Laxman Aroskar v. Union of India, (2019) 15 SCC 401 (India) at 134.
[229] The Court also referred to Dhwani Mehta, *The Environmental Rule of Law in India*, UNIVERSITY OF OXFORD (2017) as it is the only comprehensive study on environmental rule of law in India.
[230] *Id* at 120.

b) Climate change is a right based matter and not a policy decision or a political question

Subsequently, one of the arguments raised by the government was that constructing a new airport was a policy decision and hence flaws in the EIA, which was also a statutory requirement, should be overlooked. However, the Court rejected this argument observing the EIA is "integral to the project design because it is on that basis that a considered decision can be arrived at as to whether necessary steps to mitigate adverse consequences to the environment can be strengthened."[231] The Court further pointed out how flaws in the EIA process would violate due process.[232] Therefore, it is reasonable to infer that the Court rejected the argument for the construction of a new airport as a policy decision prioritizing the constitutional right to environment.

Therefore, basing the right to environment within the constitution provides the advantage of climate change being a matter of rights – and enables judicial review of how governments may take action to either fulfil or not violate the right.[233] Such an approach skirts the debate of climate change being a policy issue to be decided by the parliament over the courts.[234] However, it is to be noted that the standard of proof of harm and the causality of government inaction violating the constitutional right to environment has its challenges,[235] as is deliberated upon in Part IV of the paper.

c) Nationally Determined Contributions may guide courts in holding the government accountable

The Court referred to India's Nationally Determined Contributions[236] (NDCs) under the Paris Agreement in two of the three climate litigations before the Court, including *Hanuman Laxman*

[231] *See* Hanuman Laxman Aroskar v. Union of India, (2019) 15 SCC 401 (India) at 142; Assn. for Protection of Democratic Rights v. State of W.B., (2021) 5 SCC 466 (India).
[232] *Id*. at 157
[233] *See generally* Part II *supra*
[234] *See generally* James May, *Climate Change, Constitutional Consignment, and the Political Question Doctrine*, 85 DENV. U. L. REV. 919 (2008); Amelia Thorpe, Tort-Based Climate Change Litigation And The Political Question Doctrine, JOURNAL OF LAND USE & ENVIRONMENTAL LAW, 24(1), 79–105 (2008).
[235] Peel and Osofsky, *Supra* note 32, at 46.
[236] Nationally Determined Contributions (NDCs) are action plans or commitments each party to the Paris Agreement is requested to prepare and communicate. Article 4 of the Paris Agreement lays out the request to each party to prepare a NDC. The Paris Agreement envisages fulfilling its long term goals collectively through NDCs of all parties as the Paris Agreement itself does not have any binding agreements or goals and merely is a

Aroskar.[237] In referring to India's NDCs, the Court pointed out the importance of balancing development with the environment. This indicates a trend where Indian courts use India's NDCs to keep government actions – which adversely impact the climate, in check.

Furthermore, Shibani Ghosh observes how India's Nationally Determined Contributions can be a hook for climate litigation.[238] Citing the government's clearing of forests may hamper India from achieving the third NDC of creating an additional carbon sink,[239] Ghosh notes that such forest clearing actions may provide the *locus standi* for climate litigation. However, Ghosh concedes that there has been no decision regarding the justiciability of India's NDCs.[240] Therefore, the Court's actions indicate that the Court may use India's NDCs to keep climate adverse government action in check.

III. Classification of Climate Litigation: The Indian Perspective

Classifying and defining climate litigation is challenging and subject to criticism, as Setzer and Vanhala noted in their review of climate litigation.[241] In their annual report on Global Trends in Climate Litigation,[242] Setzer and Higham classify cases as climate litigation where "an issue of climate change science or climate change policy is a material issue of law or fact." This is the same definition Setzer and Vanhala adopt.[243] The Sabin Center climate database[244] and the LSE Grantham Research Institute's database[245] adopt the same definition while classifying climate litigation. However, Setzer and Higham also concede that a degree of subjectivity is involved in classifying cases.

framework. For more information, *see Nationally Determined Contributions (NDCs*), UN NATIONS CLIMATE CHANGE, https://unfccc.int/process-and-meetings/the-paris-agreement/nationally-determined-contributions-ndcs/nationally-determined-contributions-ndcs; However, it is also to be noted that India's NDCs are non-binding, *see India's Intended Nationally Determined Contribution: Working Towards Climate Justice*, NDC REGISTRY, https://unfccc.int/NDCREG.

[237] Assn. for Protection of Democratic Rights v. State of W.B., (2021) 5 SCC 466 (India); Hanuman Laxman Aroskar v. Union of India, (2019) 15 SCC 401 (India).

[238] Shibani Ghosh, *Climate Litigation in India*, in COMPARATIVE CLIMATE CHANGE LITIGATION: BEYOND THE USUAL SUSPECTS (Francesco Sindico, Makane Moïse Mbengue, Kathryn McKenzie ed.,2021).

[239] *Id.* at 358.

[240] *Id.* at 358.

[241] Setzer and Vanhala, *Supra* note 20, at 3.

[242] Setzer and Higham, *Global Trends in Climate Litigation; 2022 Snapshot* (2022)

[243] *Id.* at 46

[244] *About*, CLIMATE CASE CHARTS, http://climatecasechart.com/about/

[245] *Methodology – Litigation*, CLIMATE CHANGE LAWS OF THE WORLD (May 2, 2021) https://climate-laws.org/methodology-litigation

Regardless, the definition of climate litigation and the classification of cases merit deeper scrutiny in the Indian context, which has never been undertaken in the past. However, in their paper analysing climate litigation in the Global South, Peel and Lin claim that the definitions developed in the literature focus on the Global North emphasise "the centrality of climate-focused arguments and strategies in litigation."[246] Such emphasis may mean that the definition may fail to adequately capture developments in the Global South where climate change issues and arguments are more peripheral. Peel and Lin's work is added upon by Ghosh (2020),[247] where Ghosh analyses fourteen Indian cases in addition to the five analysed by Peel and Lin in their paper. Ghosh does so by using the broad definition Peel and Lin advocate for, which includes some cases in which climate concerns are "at the periphery."[248]

Therefore, in this part, we build upon Peel and Lin's and Ghosh's work by scrutinizing the definition of climate litigation from the Indian context to test whether it fairly captures and uncovers climate litigation and related developments in India.

A. Classification of Climate Litigation

A common theme across commentators and jurists in the Global North is to emphasise climate change as a central issue for climate litigation.[249] Further, there is a debate amongst some commentators as to whether cases opposing the regulation of GHG qualify as climate litigation.[250] Regardless, the common understanding is that climate litigation has something to do with an issue or argument related to climate change.[251]

However, the level of the relation of a case to climate change often raises further issues in classification. For instance, Setzer and Higham classify cases as climate litigation only if they discuss "an issue of climate change science or climate change policy (which) is a material issue of law or fact."[252] Such a definition overlooks cases where climate change may be a secondary argument. Further, cases which regulate GHG and carbon emissions but do not directly raise

[246] Peel and Lin, *Supra* note 19 at 686.
[247] Shibani Ghosh, *Litigating Climate Claims in India*, 114 AJIL Unbound 45–50 (2020).
[248] *Id* at 45
[249] *See generally* Elizabeth Fisher, *Climate Change Litigation, Obsession and Expertise: Reflecting on the Scholarly Response to Massachusetts v. EPA*, 35 L. & P OL'Y 236, 239 (2013).
[250] *Supra* note 20 at 3. They observe "Some scholars include cases both supporting and opposing regulation of GHG emissions as climate change litigation whereas others include only the supportive cases."
[251] *See generally* Peel and Lin, *Supra* note 19; *Fisher*, Supra note 249, amongst others.
[252] Setzer and Higam, *Supra* note 242 at 46.

the argument of climate change may also be overlooked.[253] Similarly, as also noted by Peel and Lin, such a climate change centric classification often overlooks cases in the Global South that have climate change as a secondary argument.[254]

Further, in their review of climate litigation literature, Setzer and Vanhala question "how is one to assess whether cases dealing with the consequences of more frequent and extreme weather events"[255] which do not use the term climate change – yet have adaptation[256] and loss and damage arguments.[257] Setzer and Vanhala conclude that they do not see the need for an overarching definition of climate change and advice authors and scholars to be clear about "how they are conceptualizing and operationalizing their ideas about what climate litigation is and is not."[258]

Nonetheless, Setzer, when writing with Higham, classifies climate litigation as having climate change as a material issue.[259] Such a definition gives rise to many difficulties – as seen in the Indian context. Further, the difficulty in classifying cases using this definition in the Indian context misses out on the jurisprudence formed in India around the right to a healthy environment – a right which takes into account climate change concerns.

In the Indian context, Arindam Basu writing in 2011,[260] reiterated a climate litigation definition which classified climate litigation into three categories.[261] Those three broadly were, one, climate change being a causal factor in a civil case. Two, an administrative law claim for inaction to control GHG emissions, which breaches a constitutional or statutory duty and three, other legal claims against corporate entities or companies for climate change related issues. Basu observed that of the three, the first two were already being explored in India in a very different context.[262] In making such a claim, Basu differentiated environment litigation from

[253] See Kim Bouwer, *The unsexy future of climate change litigation*, JOURNAL OF ENVIRONMENTAL LAW, 30(3), 483–506 (2018).
[254] Peel and Lin, *Supra* note 19 at 686.
[255] Setzer and Vanhala, *Supra* note 20 at 3.
[256] To understand adaptation in the context of climate litigation, s*ee generally* Jacqueline Peel and Godden Lee, "*Planning for Adaptation to Climate Change: Landmark Cases from Australia*", SUSTAINABLE DEVELOPMENT LAW & POLICY, Winter 37-41, 71-72 (2009).
[257] To understand loss and damage cases in the context of climate litigation, s*ee generally* Patrick Toussaint, *Loss and damage and climate litigation: The case for greater interlinkage*. RECIEL.30: 16– 33 (2021).
[258] Setzer and Vanhala, *Supra* note 20 at 3.
[259] Setzer and Higam, *Supra* note 242 at 46
[260] Arindam Basu, "*Climate Change Litigation in India: Seeking a New Approach Through the Application of Common Law Principles*" 1 NALSAR ENV LAW PR W 35 (2011)
[261] Jose A Cofre, Nicholas Rock, Paul watchman, Dewey & LeBoeuf, *Climate Change Litigation*, in CLIMATE CHANGE: A GUIDE TO CARBON LAW AND PRACTICE (Paul Q Watchman ed. 2008) at 280.
[262] Basu, *Supra* note 260 at 38. Basu was possibly referring to them being used to pursue environmental litigation.

climate litigation in India. However, such a differentiation is not entirely straightforward. This is examined in the next section (Section III.B).

Another scholar that has categorised climate litigation in India is Ghosh (2020).[263] Ghosh classifies fourteen cases as climate litigation in India into four categories – first, reference to climate change language (such as greenhouse gas (GHG) emissions, and international negotiations, among others). The second category is, seeking proper implementation of a climate law or policy, the third, raising climate concerns seeking directions to create new policies or realign existing ones and the fourth is where climate change is raised as a defence by the government.

The fourteen cases analysed by Ghosh (2020) are in addition to the five cases discussed by Peel and Lin. Of the five cases discussed by Peel and Lin, *Ridhima Pandey*[264] (referred to as *Pandey* by Peel and Lin), *In re Court on its own motion v. State of Himachal Pradesh & Others*[265] (referred to as *Rohtang Pass* by Peel and Lin) and *Indian Council for Enviro-Legal Action v. Ministry of Environment and Forests*[266] (referred to as *HCF23* by Peel and Lin) are covered under the database (refer to Table 1).

The two other cases Peel and Lin refer to, according to Ghosh,[267] are *Karnataka Industrial Areas Development Board (KIADB) v. Sri C. Kenchappa (KIADB)*[268] and *Manushi Sangthan v. Govt. of Delhi (Manushi).*[269]

In *KIADB*, the legality of converting agricultural land for industrial use was challenged where the Supreme Court referred to deforestation causing an increase in emissions and directed that in the future, approval from the pollution control board needs to be sought before any such conversions. While climate change was not an argument, Ghosh classifies *KIADB* as referring to climate impacts. Similarly, Ghosh classifies *Manushi* under the same category of climate impact – wherein the Delhi High Court referred to emissions as a concern when the Delhi government's decision to limit the number of cycle rickshaw licences was challenged.

[263] Ghosh (2020), *supra* note 247.
[264] Ridhima Pandey v. Union of India, 2019 SCC OnLine NGT 843 (India).
[265] In re Court on its own Motion v. State of Himachal Pradesh, 2014 SCC OnLine NGT 3064 (India).
[266] Indian Council for Enviro-Legal Action (ICELA) v. MoEF, 2014 SCC OnLine NGT 2723 (India).
[267] Ghosh (2020), *supra* note 247 at 47.
[268] Karnataka Industrial Areas Development Board (KIADB) v. Sri C. Kenchappa (2006) 6 SCC 371 (India).
[269] Manushi Sangthan v. Govt. of Delhi & Others, MANU/DE/0321/2010 (India).

To understand Ghosh's (2020) classification of climate litigation in the Indian context, we need to analyse the fourteen cases Ghosh classifies as climate litigation, as simplified in the table below.

Present in the database	**Year**	**Forum**	**Parties to the suit**	**Held**	**Classified due to by Ghosh**
Category 1 - a reference to climate change language (such as greenhouse gas (GHG) emissions, and international negotiations, among others)					
No	2015	NGT	Om Dutt Singh v. State of Uttar Pradesh[270]	The applicants challenged an irrigation project as it would lead to methane emissions which would trigger adverse climate action. However, the NGT allowed the project and constituted a committee to oversee the sustainable implementation of the project.	reference to methane emissions, adverse climate impacts.
Yes	2013	NGT	Sukhdev Vihar Welfare Residents Association v. Union of India[271]	NGT rejected the challenge to the operation of a waste to energy (clean development mechanism) plant	Reference to GHG emissions reduction and clean development

[270] Om Dutt Singh v. State of U.P., 2018 SCC OnLine NGT 2864 (India).
[271] Sukhdev Vihar Residents Welfare Association v. State of NCT of Delhi, 2013 SCC OnLine NGT 1894 (India).

				in a densely populated area because it emitted GHGs. However, the NGT fined the plant for past breaches and issued guidelines and directions for future operations.	mechanism project.
Yes	2016	NGT	Society for Protection of Environment & Biodiversity v. Union of India[272]	The NGT quashed a draft EIA notification that exempted certain building and construction projects from EIA. The NGT found the exemption to be in breach of the principle of sustainable development and the precautionary principle.	Reference to the need to reduce carbon emissions, violation of India's commitments under the Paris Agreement
Yes	2017	NGT	Court on its own Motion v. State of Himachal Pradesh[273]	NGT took *suo moto* cognizance of the illegal felling of trees and issued many directions to	Reference to the destruction of carbon sinks, carbon dioxide emissions from

[272] Society for Protection of Environment and Biodiversity (SPENBIO) v. Union of India, 2016 SCC OnLine NGT 1052 (India).
[273] Court on its own Motion v. State of Himachal Pradesh & Others, NGT App. No. 488/2014 (Aug. 1, 2017) (India).

				remedy the same. In doing so, it noted the adverse consequence of deforestation, resulting in loss of carbon sinks and adverse climate reactions.	forest loss, and localized warming effects of small-scale deforestation.
No	2017	NGT	Yogendra Mohan Sengupta & Others v. Union of India[274]	The NGT issued directions on rampant unauthorized and illegal constructions in the green belt present in Shimla.	
Category II - seeking proper implementation of a climate law or policy					
Yes	2014	NGT	Gaurav Bansal v. Union of India[275]	The applicant brought to the NGT's attention that many states had not prepared State Action Plans on Climate Change as they were supposed to under the National Action Plan on Climate Change. While not deciding on the	Implementation of Climate Policy.

[274] Yogendra Mohan Sengupta & Others v. UoI & Others, NGT, App. No. 121/2014 (Nov. 16, 2017) (India).
[275] Gaurav Kumar Bansal v. Union of India, 2018 SCC OnLine NGT 1110 (India).

				jurisdiction or the NGT's power, the'NGT directed all the states to make a State Action Plan on Climate Change as soon as possible.	
Yes	2016	NGT	Mahendra Pandey v. Union of India[276]	The NGT directed the Delhi government to formulate a State Climate Action Plan as it was supposed to do under the National Climate Action Plan.	
No	2015	NGT	Ratandeep Rangari v. State of Maharashtra[277]	The NGT directed the constitution of a committee to effectively implement a notification directing coal plants not to use more than 34 per cent ash content with coal.	Effective implementation of climate policy.

[276] Mahendra Pandey v. Govt. of NCT of Delhi, 2016 SCC OnLine NGT 3882 (India).
[277] Ratandeep Rangari v. State of Maharashtra & Others, NGT, App No. 19/2014 (WZ) (Oct. 15, 2015) (India).

No	2016	Kerala High Court	Manu Anand v. State of Kerala[278]	The High Court took notice of an attempt to use agricultural land for mining purposes and directed the formulation of guidelines for the same. In doing so, it referred to the Kyoto Protocol.	Direction for the formulation of policy.
Yes	2020	SC	Hanuman Laxman Aroskar v. Union of India[279]	In its 2019 order, the Court directed the expert committee to re-examine the approval given to a new airport due to a flawed EIA process. After the expert committee re-examined the approval and changed certain terms, the Court allowed the construction of the airport.	Implementation of the statutory process for environmental clearance.
Category III - raising climate concerns seeking directions to create new policies or realign existing ones					

[278] Manu Anand v. State of Kerala, (2016) SCC OnLine Ker 41184 (India).
[279] Hanuman Laxman Aroskar v. Union of India, (2019) 15 SCC 401 (India).

Yes	2014	NGT	Wilfred J v. Ministry of Environment & Forests[280]	The clearance given to a port was challenged as the port was being constructed in an ecologically sensitive area. However, the NGT rejected the same in the public interest due to its economic importance.	Due to a prayer for a direction that "areas likely to be inundated due to rise in sea level consequent upon global warming" are granted regulatory protection.
No	2015	NGT	Kallpavalli Vrishka Pempakamdarula Paraspara Sahayaka Sahakara Sangam Ltd. v. Union of India[281]	The applicant challenged the setting up of wind farms, claiming that they caused climate change and adverse economic impact. However, the NGT found no evidence of the same and dismissed the application.	A prayer for a direction requiring windmill farms to obtain environmental approvals in advance.
Category IV - cases where climate change is raised as a defence by the government					
Yes	2015	SC	Hindustan Zinc Ltd. v. Rajasthan Electricity	The Supreme Court upheld the High Court's decision stating that the	Climate Change as a defence against government

[280] Wilfred J. v. MoEF, 2016 SCC OnLine NGT 929 (India).
[281] Kallpavalli Vrishka Pempakamdarula Paraspara Sahayaka Sahakara Sangam Ltd. v. Union of India, 2015 SCC OnLine NGT 193 (India).

			Regulatory Commission[282]	companies having captive generation power plants would have to purchase a minimum percentage of energy from renewable resources as they fell within the purview of the Rajasthan law.	action under challenge.
No	2014	Allahabad High Court	M/S Singh Timber Traders v. State of Uttar Pradesh[283]	The High Court found the increase in the license fee on timber-based industries to be arbitrary and rejected the government's argument that climate change was one of the reasons for the increase.	

Table 2: Ghosh's (2020) classification and categorization of climate litigation in India. Source; Shibani Ghosh, Litigating Climate Claims in India, 114 AJIL Unbound 45–50 (2020).

While Ghosh shares eight of the fourteen cases with the climate databases, Ghosh classifies some cases as climate litigation even if they refer to climate change language such as emissions. Further, Ghosh also observes that the "term "global warming" started appearing in Indian

[282] Hindustan Zinc Ltd. v. Rajasthan Electricity Regulatory Commission, (2015) 12 SCC 611 (India).
[283] Singh Timber Trader v. State of U.P., 2014 SCC OnLine All 16207

environmental judgments in the 1990s."[284] Consequently, this leads to the question, would those cases that refer to climate change language such as emissions, global warming, rising sea level, and deforestation – without actually referring to climate change – be classified as climate litigation.

Specifically, in the Indian context, even in cases dealing with environmental pollution, Indian courts have referred to climate change language. Furthermore, with Indian courts now implying the right to a healthy environment encompasses the right to a healthy climate, the question, is environmental litigation different from climate litigation needs to be examined.

B. Climate Litigation v Environment Litigation in India: Is there a difference?

As discussed earlier, Indian courts have long held the right to a healthy and pollution free environment exists within the confines of Article 21 of the Constitution.[285] It did so in cases which alleged specific instances of pollution[286] and mismanagement of the environment leading to pollution.[287] Further, as explained earlier, in many cases where it did not need to expound and adopt environmental principles – the Indian Supreme Court did so under the guise of strengthening environmental jurisprudence in India to guide government action.[288] However, they used some climate change language such as global warming, deforestation among others. Nevertheless, the absence of specific climate change arguments or issues in those cases predominantly leads them not to be classified as climate litigation but as environmental litigation.[289] However, herein lies the problem. Recently, as has been argued in Part II.C.2, the NGT implied that the right to a healthy environment has always included the right to a healthy climate – by observing that climate change factors would certainly be covered in the impact assessment process under the Environment Protection Act.

In doing so, the NGT indirectly appropriated all environmental safeguards to protect the climate as well, most notably holding that the EIA would take into consideration climate change factors.[290] Hence, while specific cases against environmental pollution, which have

[284] Ghosh (2020), *supra* note 247 at 45.
[285] Subhash Kumar v State of Bihar AIR 1991 SC 420 (1991) (India).
[286] *See* M.C. Mehta v. Kamal Nath, (1997) 1 SCC 388 (India).
[287] *See* Court on its own Motion v. State of Himachal Pradesh, 2014 SCC OnLine NGT 3064 (India).
[288] *See generally* M.C. Mehta v. Kamal Nath, (1997) 1 SCC 388 (India); Hanuman Laxman Aroskar v. Union of India, (2019) 15 SCC 401 (India).
[289] Chaturvedi, *Supra* note 18, at 1460.
[290] As per informal communications the authors have had with a few Indian EIA consultants, the NGT's assumption or observation in *Ridhima Pandey* has not yet resulted into any standardised practice of including climate change as a parameter in the EIA Reports prepared as part of the EIA process.

been termed environment litigation may be the basis of climate litigation in India, in some instances, they may also make a case to be labelled as climate litigation due to their use of climate change language. However, the authors acknowledge certain issues could be created by labelling those cases as climate litigation, mainly due to their specific nature reflected in the specificity of the relief sought – which almost always is highly localised.[291]

Nonetheless, environmental litigation contributes immensely to Indian jurisprudence on climate change. For instance, in 1995,[292] the Indian Supreme Court, denying permission to open new factories, referred to the need to protect the environment for future generations. While such a case did not use the term climate change, it denied opening a new factory to protect the environment, referring to the principle of intergenerational equity and the right to a healthy environment. Similarly, much environmental litigation has stopped the release of harmful pollutants into the environment, protected forests and ecologically sensitive zones and prohibited other climate adverse actions – often using climate change language in the process.[293]

Such cases represent the dilemma posed in the Indian context. While they do not use the term climate litigation – they propagate jurisprudence and action to curb environmental pollution or protect forest covers and trees which act as carbon sinks – which in turn prevents adverse climate actions from taking place.

Setzer and Vanhala also raise a similar question – though in a different and more modern context. They question "whether cases dealing with the consequences of more frequent and extreme weather events" should be classified as loss and damage cases under climate litigation, even though they "do not happen to have the words "climate change" in the legal arguments, law reports or the media narrative about the case."[294] Hence, they conclude that rather than focusing on an overarching definition, scholars should try and be clear about what climate litigation is and is not.[295]

[291] *See generally* Municipal Council Ratlam v. Vardhichand, AIR 1980 SC 1622 (India); Charan Lal Sahu v Union of India (1990) 1 SCC 613 (India); Shantistar Builders v Narayan Khimale Totmane and Ors. (1990) 1 SCC 520 (India); Vellore Citizens Welfare Forum v Union of India (1996) 5 SCC 647 (India).
[292] State of Himachal Pradesh v. Ganesh Wood Products, (1995) 6 SCC 363 (India).
[293] *See* M. C. Mehta v. Union of India, 1994 Supp (3) SCC 717 (India); M.C. Mehta v. Union of India (Kanpur Tanneries case), 1992 Supp (2) SCC 633 (India); Vellore Citizens Welfare Forum v Union of India (1996) 5 SCC 647 (India); Shantistar Builders v Narayan Khimale Totmane and Ors. (1990) 1 SCC 520 (India).
[294] Setzer and Vanhala, *supra* note 20 at 3.
[295] Ibidem.

However, both the Sabin Center and the LSE Grantham Research Institute databases use the material connection with climate change standard to classify cases.[296] Such classification is not straightforward – as seen in Ghosh classifying some cases which are different to the cases classified by the databases as climate litigation.[297] Further, the authors have also pointed out other cases which may be classified as climate litigation.

Consequently, the definition of climate change in the Indian context needs to be revisited to truly reap the benefits of India's rich jurisprudence in a comparative study. At the very least, climate litigation in India needs to be examined from a broader perspective. Peel and Lin advocate for a similar approach noting that "the nature and significance of transnational climate litigation requires adjusting our "lens" for understanding this phenomenon to bring into focus developments in the Global South."[298]

Therefore, in India, approaching climate litigation to include the cases which deal with and curb environmental pollution would be well advised. A similar approach has been mooted by Kim Bouwer, who calls for thinking about "(climate) litigation 'in the context of' climate change, as well as litigation 'about' climate change."[299] Such an approach to understand and unearth Indian jurisprudence has been mooted upon in the next section.

C. The Concentric Circles of Climate Litigation in India

In their review of climate change litigation in 2020,[300] Peel and Osofsky build on the research carried out by Setzer and Vanhala in 2019. However, even Peel and Osofsky concede that the definition of climate litigation is often a point of contention. They note, "The diversity within the climate litigation literature about the definition of the phenomenon under study is, in many ways, a reflection of the breadth of climate change itself."[301] Further, Peel and Osofsky point out their definition to better understand what climate litigation is – where they represent climate change litigation through a series of concentric circles.

Circle one or the core circle comprises only of cases "with climate change as the central issue". Circle two includes cases "with climate change as a peripheral issue". Circle three further

[296] About, *supra* note 244 and Methodology, *supra* note 245.
[297] Ghosh (2020), *supra* note 247
[298] Peel and Lin, *supra* note 19 at 686.
[299] Bouwer, *supra* note 253.
[300] Jacqueline Peel and Hari M. Osofsky, *Climate Change Litigation*, ANNU. REV. LAW SOC. SCI, 16:21–38 (2020).
[301] *Id*, at 23.

extends its scope by including cases brought with climate change motivations, but on technical or statutory grounds that do not raise climate change issues. Circle four and the outermost circle extends its ambit to any case with a direct implication for climate change aspects – such as adaptation and mitigation.[302]

Such an understanding of climate litigation may be best suited to understand climate litigation in India – where often cases fought with a climate change motivation or motivation to protect the environment do not raise climate change as an issue. However, such concentric circles still leave room for subjectivity as it often becomes problematic in the Indian context to classify when climate change is a central issue and when climate change is a peripheral issue. The problem arises due to the inclusion and reference to a wide array of environmental and climate language and jurisprudence in Indian cases. Often, a case may skip over climate change as an argument but may utilize climate language such as holding the need to reduce air pollution and carbon emissions. However, a concentric circle approach still unearths much of India's environment and climate jurisprudence, as is illustrated utilizing the cases that have been discussed in the paper.

Applying the concentric circles' definition in the Indian context, at the core (litigation with climate change as a central issue) would be cases such as *Ridhima Pandey, Hanuman Laxman Aroskar, Association for Protection of Democratic Rights.* These cases had climate change issues at the core, as seen in the relief they sought. However, cases that deal with flawed EIAs[303] challenged on grounds other than that of climate change not being considered, may fall under the category of cases where climate change was a secondary issue. Similarly, cases dealing with renewable energy quotas,[304] where the Electricity Act was the primary statute, would fall under this circle.

Further, cases which deal with petitions to protect the environment, not on the grounds of climate change but other grounds such as – pollution of the river, discharge of untreated water,

[302] JACQUELINE PEEL AND HARI M. OSOFSKY, CLIMATE CHANGE LITIGATION : REGULATORY PATHWAYS TO CLEANER ENERGY (Cambridge University Press, 2015).
[303] *See* Vimal Bhai v. Ministry of Environment & Forests, 2011 SCC OnLine NGT 16 (India); Wilfred J. v. Ministry of Environment & Forests', 2014 SCC OnLine NGT 6860 (India); Jan Chetna v. Ministry of Environment & Forests, 2012 SCC OnLine NGT 81 (India).
[304] *See* Hindustan Zinc Ltd. v. Rajasthan Electricity Regulatory Commission, (2015) 12 SCC 611 (India); Timarpur-Okhla Waste Management Company Ltd. (TOWMCL) v. Delhi Electricity Regulatory Commission, (2015) SCC OnLine APTEL 82 (India); Paschim Gujarat Vij Company Limited v. Gujarat Electricity Regulatory Commission, (2015) SCC OnLine APTEL 19 (India).

illegal emissions of pollutants[305] – and invoke the statutory remedies – would fall under the third concentric circle (cases to protect the environment but not significantly raising climate change as an argument).

Lastly, the outermost circle would deal with cases with a climate change implication – but are not explicitly framed to have climate change implications. In India, a common iteration of such cases would be litigation on illegal mining and illegal encroachment of forest land, which are localised but impact climate change.[306] However, there may be some disagreement and confusion about cases that lie between the two outermost circles. How is the intention of a petitioner to be determined? While some instances might betray the petitioner's intentions (if the petitioner is a well-known environmental activist or a non-governmental organisation), often, it would be challenging to unearth the petitioner's intent – thus giving rise to possible confusion. Regardless, a concentric circles approach includes and unearths much more than strict climate litigation definitions, which predominantly are framed in a global north context.

Also, the authors would agree with the broad sentiment that while it is instructive to attempt to define climate litigation, one should not get caught up in the definition of climate litigation – but rather try and understand what climate litigation entails from a broader perspective.[307]

IV. Climate Litigation and Human Rights Claims before European Courts and How Indian Jurisprudence May Help

Climate change is a global issue. Peel and Lin, in their comparative study, observe – an analysis of climate litigation in the Global South would not only help contribute to global climate governance as climate change is a global phenomenon but also help "inform advocacy, partnering initiatives, and capacity-building efforts" which in turn would help reduce emissions and combat climate change.[308]Therefore, a global understanding better equips policymakers

[305] *See* M.C. Mehta v. Kamal Nath, (1997) 1 SCC 388 (India); M. C. Mehta v. Union of India, 1994 Supp (3) SCC 717 (India); M.C. Mehta v. Union of India (Kanpur Tanneries case), 1992 Supp (2) SCC 633 (India); M.C. Mehta v. Union of India, (1986) 2 SCC 325 (India); M.C. Mehta v. Union of India, (1988) 1 SCC 471 (India); M.C. Mehta v. Union of India, (1991) 2 SCC 137 (India).
[306] *See* Gulab Dass v. State of H.P., (2016) SCC OnLine HP 1384 (India); Pancham Chand v. State of H.P., (2016) SCC OnLine HP 3114 (India).
[307] *See generally* Bouwer *supra* note 253; Peel and Osofsky *supra* note 302.
[308] Peel and Lin, *Supra* note 19 at 686.

and activists to combat climate change. However, as noted earlier, attempts to understand climate litigation in the Global South have only recently gained traction.[309]

In this part, we analyse Indian jurisprudence from a broad lens, including environment and climate litigation, and explore how they may inform global climate jurisprudence and jurisprudence in the Global North. In that regard, this part would specifically review how European Courts which are faced for the first time with having to interpret and assess whether there is a fundamental right to a healthy and pollution free environment, thus forcing them to review whether state inaction on climate change infringes this fundamental right.

A. The Four Human Rights Climate Litigation before the European Courts of Human Rights

Currently, before the European Court on Human Rights (ECtHR) presently lie four climate litigations grounded in a human rights framework.[310]

Case	Claim	Status as on 18th August, 2022
Verein Klimaseniorinnen and Others v. Switzerland	An association of elderly women who are "are particularly susceptible to intense and frequent heat waves" claim the Swiss government is not doing enough to mitigate the rise in temperatures due to climate change - thus breaching the petitioners' right to life (Article 2, ECHR and right to health (Article 8, ECHR)	Jurisdiction relinquished by the Chamber in favour of the Grand Chamber
Mex M v. Austria	The applicant suffers from temperature-sensitive multiple sclerosis and Uhthoff's syndromes and alleges that the Austrian government has not performed its duty to mitigate rising temperatures by setting GHG	Not yet communicated

[309] Peel and Lin, *Supra* note 19 was the first comprehensive transnational analysis of climate litigation in the Global South.
[310] Helen Keller & Corina Heri *The Future is Now: Climate Cases Before the ECtHR*, NORDIC JOURNAL OF HUMAN RIGHTS, (2022).

	targets in consonance with the Paris Agreement to control temperatures.	
Duarte Agostinho v. Portugal	The applicants allege that 33 States to the European Convention on Human Rights have violated their human rights guaranteed under ECHR by failing to form a comprehensive climate policy.	Communicated
Greenpeace Nordic and Others v. Norway	The applicants challenged Norway's decision to allow new licenses for oil and gas exploration, claiming that it would contribute adversely to the climate, therefore, breaching Norway's obligations towards the applicants under the ECHR.	Communicated

Table 3: Climate Litigation currently before the ECtHR

In *Verein Klimaseniorinnen and Others v Switzerland*,[311] it is argued that the Swiss climate policy does not do enough to combat climate change and is putting a group of elderly citizens at risk of adverse health impacts, including death – due to future heat waves caused and worsened by climate change. Similarly, in *Mex M v Austria*,[312] the applicant, who has temperature-sensitive multiple sclerosis and Uhthoff's syndrome, has argued that the Austrian government's failure to set effective GHG emissions reduction measures is violative of the applicant's human rights.

Both these cases share the common trend of alleging that government climate policy does not do enough to control emissions – which, in turn, would lead to an increase in temperatures – which results in a violation of the applicants' human rights. While both of these cases allege a specific violation – the harm or violation has not occurred yet and may never occur. This factor may be an impediment in both cases, as Keller and Heri observe. However, they also note that the ECtHR in *Cordella v Italy*[313] were willing "to hear claims that transcend restrictive interpretations of victim status."[314] Here, the Indian judiciary's approach to include the

[311] Verein Klimaseniorinnen Schweiz and Others v Switzerland App no 53600/20 (ECHR, Communicated Case, 17 March 2021).
[312] Mex M v Austria (ECHR Not Communicated). However, the petition to the ECtHR is available at https://climaterightsdatabase.com/2021/05/23/unnamed-v-austria/
[313]Cordella v. Italy App nos. 54414/13 and 54264/15 (ECHR).
[314] Keller and Heri, *Supra* note 310, at 5.

precautionary principle within the framework of the right to a healthy environment may inform a way to deal with climate litigation cases which allege a violation due to risk of future harm.

The other two cases before the ECtHR are *Duarte Agostinho v Portugal*[315] and *Greenpeace Nordic and Others v Norway*[316] – primarily built on the issue of intergenerational rights and the future rights of children, respectively.

In *Duarte Agostinho*, the applicants allege that 33 States to the European Convention on Human Rights (ECHR) have failed to sufficiently tackle climate change – which, in turn, violates their human rights guaranteed under ECHR – including Article 2 which guarantees the right to life and Article 8 which guarantees the right to health and family life.[317] The harms alleged are "harm/risk to their lives, to their health, to their family lives, and to their privacy", which would increase drastically in the absence of mitigation measures. In raising such future harms, the applicants also rely on the precautionary principle and the principle of intergenerational equity.[318]

Similarly, in *Greenpeace Nordic*, the applicants challenged Norway's decision to allow new oil and gas exploration licences. Among other claims, such as Norway did not count exported emissions in its total count – the applicants alleged that allowing new oil and gas explorations violated their right to life under the ECHR.[319] The applicant's argument hinged on the future harm caused by Norway's action – of allowing new oil and gas exploration – which would lead to more emissions – which would then lead to a rise in temperature. In support of the argument, the applicants quoted the precautionary principle, which instructs preventive measures to be taken to protect the environment in the absence of scientific certainty about whether an action may harm the environment.

While all four cases before the ECtHR deal with the issue of future harm resulting in a human rights violation – *Verein Klimaseniorinnen* and *Mex M* were more specific about the nature of

[315] Duarte Agostinho and Others v Portugal and Others App no 39371/20 (ECHR, Communicated Case, 13 November 2020).
[316] Greenpeace Nordic and Others v Norway App no 34068/21 (ECHR, Communicated Case, 16 December 2021).
[317] For more information on how they may be used in the four case, *see generally* Corina Heri, *The ECtHR's Pending Climate Change Case: What's Ill-Treatment Got To Do With It?* EJIL TALK (Dec 22, 2022) https://www.ejiltalk.org/the-ecthrs-pending-climate-change-case-whats-ill-treatment-got-to-do-with-it/; Paul Clark, *Climate change and the European Court of Human Rights: The Portuguese Youth Case,* EJIL TALK (Oct 6, 2020) https://www.ejiltalk.org/climate-change-and-the-european-court-of-human-rights-the-portuguese-youth-case/.
[318] Duarte Agostinho and Others v Portugal and Others App no 39371/20 (ECHR, Communicated Case, 13 November 2020).
[319] Greenpeace Nordic and Others v Norway App no 34068/21 (ECHR, Communicated Case, 16 December 2021).

the harm caused – and how it results in a violation. However, *Duarte Agostinho* and *Nordic Greenpeace* build more upon the general harms of global warming and how it breaches the human rights of children and the upcoming generation. Hence, *Duarte Agostinho* and *Nordic Greenpeace* focus more on the precautionary principle and principle of intergenerational equity within a human rights framework. While the principles of intergenerational equity and intergenerational rights have not yet been litigated in the context of climate change before the ECtHR – the German Constitutional Court recently ruled the German Federal Climate Law (Klimaschutzgesetz) to violate the rights of the future generations for not doing enough based on the principle of intergenerational equity – which is codified in the Basic Law of Germany.[320]

However, *Duarte Agostinho* and *Nordic Greenpeace* face the same challenges – as were described by Peel and Osofsky while analysing climate litigation raising the human rights arguments.[321] As also observed by Keller and Heri,[322] there remain questions about the applicants being granted victim status, which provides the *locus standi* – for which some harm has to be proven. Further, Keeler and Heri question – can an extraterritorial application of human rights to climate harms occur within the text of ECHR?[323] While Keeler and Heri review the relevant literature arguing against[324] and advocating for an extraterritorial application,[325] they conclude, "while the Court's living instrument approach may not be entirely appropriate in this context, the Court does have a degree of flexibility."[326] However, climate litigation in a human rights framework faces various impediments before the ECtHR.

B. Challenges faced by Climate Litigation based in Human Rights

As discussed in the previous section, climate litigation based in human rights faces three significant challenges. They are:

[320] BVerfG, Order of the First Senate of 24 March, (2021) 1 BvR 2656/18, paras. 1-270 (Ger.)
[321] Peel and Osofsky, *Supra* note 32, at 46.
[322] *See generally* Keller and Heri, *Supra* note 310.
[323] Keller and Heri, *Supra* note *Supra* note 310, at 9.
[324] Samantha Besson, '*The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts To*', 25(4) LEIDEN JOURNAL OF INTERNATIONAL LAW 857 (2021).
[325] FIONA DE LONDRAS AND KANSTANTSIN DZEHTSIAROU, GREAT DEBATES ON THE EUROPEAN CONVENTION ON HUMAN RIGHTS (Palgrave ed., 2018)
[326] Keller and Heri, *Supra* note *Supra* note 310 at 5-7.

i. Establishing *locus standi* or establishing victim status[327] before the ECtHR (more specifically, in the context of the ECtHR, non-exhaustion of domestic remedies is an important issue).[328]

ii. Establishing a causal link between government action (or inaction) with a (future) human rights harm.[329]

iii. Applying human rights extraterritorially[330] (as is done in *Duarte Agostinho,* where citizens of one state allege a human rights breach caused due to the actions of another state).

While climate litigation based in human rights face these challenges, Peel and Osofsky argue that such cases have a positive impact, regardless of their outcome. They cite the failed Inuit petition on climate change and human rights before the Inter-American Court of Human Rights.[331] Peel and Osofsky observe, "As a legal intervention designed to protect the Inuit's human rights and to generate action on climate change, the Inter American Court of Human Rights petition failed. Nevertheless, it still had a considerable impact" as it spurred the UN Human Rights bodies into examining the relationship between human rights and climate change.[332]

Decades later, recently, the UN General Assembly recently passed a resolution recognising the human right to a clean, healthy and sustainable environment.[333] This signifies a definite shift in climate litigation based in a human rights framework and the existence of the human right to a clean and healthy environment. It may provide persuasive value to answer the questions posed before the ECtHR regarding the human right to a healthy environment. In the same vein, examining how the Indian judiciary has dealt with challenges of *locus standi* and causality may also prove useful in informing the global narrative.

[327] Keller and Heri, *Supra* note 310 at 3.
[328] Keller and Heri, *Supra* note 310 at 6; *See also* Peel and Osofsky, *Supra* note 32, at 46
[329] *See* Peel and Osofsky, *Supra* note 32, at 46.
[330] *See* McInerney-Lankford, '*Climate Change and Human Rights: An Introduction to Legal Issues'* (2009) 33(2) HARVARD ENVIRONMENTAL LAW REVIEW, pp. 431–7
[331] H.M. Osofsky, '*Complexities of Addressing the Impacts of Climate Change on Indigenous Peoples through International Law Petitions: A Case Study of the Inuit Petition to the Inter-American Commission on Human Rights*', in R.S. Abate & E.A. Kronk, CLIMATE CHANGE AND INDIGENOUS PEOPLES: THE SEARCH FOR LEGAL REMEDIES (Edward Elgar, 2013), pp. 313–38
[332] Peel and Osofsky, *Supra* note 32, at 47.
[333] UN General Assembly, The human right to a clean, healthy and sustainable environment, A/RES/76/300 (2022).

C. Scope for Judicial creativity: Lowering the locus standi in India

Ordinarily, to bring a matter before the courts, the petitioners or the applicant needs cause or *locus standi* – commonly a direct legal violation or infringement, which the court can then redress.[334] According to traditional jurisprudence, such *locus* should be direct, and the person aggrieved should directly petition the court. However, Indian courts have allowed an unrelated third party to file a case in the interest of the affected individuals – often because they are not in the position to do so.[335] Consequently, Indian courts created the concept of Public Interest Litigations (PILs),[336] wherein "any member of the public to petition the court" on behalf of "a determinate class of persons" in "case (of) any breach of fundamental rights."

Such a conception allowed public interest to serve as *locus*. With regards to the right to a pollution free environment which includes the right to a pollution free climate – the court, in various instances, has allowed public interest to serve as a ground. This is because the right to a pollution free environment arises out of Article 21, which is a fundamental right; public interest serves as a *locus standi*.

Furthermore, courts have taken a considerate view of those approaching the court on public interest grounds in environmental matters. In *Hanuman Laxman Aroskar*, the Court rebuked the government for briefly indicating that the appellants were approaching the Court with a personal agenda. The Court noted, "Vague aspersions on the intention of public-spirited individuals do not constitute an adequate response to those interested in the protection of the environment."[337]

Public interest litigation was a result of the creativity of the Indian judiciary. Indian judges have a history of being inventive in dispensing justice. For instance, Indian judges have treated a letter received from a labourer as a writ petition[338] and allowed an individual to file a *habeas corpus* plea for oneself,[339] among other acts of resourceful and liberal interpretation.

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[334] *See*, UPENDRA BAXI, THE INDIAN SUPREME COURT AND POLITICS (1989); Bar and Bench, *It is sheer propaganda to say that PIL amounts to judicial overreach: Prof Upendra Baxi*, BAR AND BENCH (April 3, 2021) https://www.barandbench.com/news/sheer-propaganda-to-say-pil-amounts-judicial-overreach-prof-upendra-baxi.
[335] Bandhua Mukti Morcha v. Union of India, (1984) 3 SCC 161 (India).
[336] S.P. Gupta v. Union of India, 1981 Supp SCC 87 (India).
[337] Hanuman Laxman Aroskar v. Union of India, (2019) 15 SCC 401 (India) at 164.
[338] Bandhua Mukti Morcha v. Union of India, (1984) 3 SCC 161 (India).
[339] Sunil Batra v. Delhi Admn., (1978) 4 SCC 494 (India).

Admittedly, while Indian judges are often forced to be innovative due to the absence of legislation or government inaction[340] – these grounds are often raised during climate litigations. Peel and Lin observe that the creative template followed by some judges in the Global South may "provide a model for judiciaries both in the South and the North as domestic constituencies seek to play a role in holding governments and other actors to account for the implementation of international climate commitments."[341]

Similar to *locus standi* in India, the ECtHR has victim status.[342] Article 34 of the ECHR states that the ECtHR may receive an application from an individual "claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto."[343] Hence, the victim status is a statutory requirement.

While Keeler and Heri note the possible difficulties in proving victim status on the basis of future harm, as discussed earlier, Evelyne Schmid makes a different and interesting point, similar to the approach some Indian courts have adopted. One of Schmid's arguments is that in the case of *Verein Klimaseniorinnen*, admissibility and merits are inevitably intertwined.[344] Schmid elaborates that when there is an allegation of a violation by omission, the Court "To know if an omission exists and if the applicant(s) are affected by it, (the Court) must first ask what measures would have, approximately, been required."[345] Consequently, there would be an examination of what measures the Swiss government could adopt to try and mitigate the applicants' complaints – which would be an analysis of the case's merits to a certain extent.

In India, we often see this in PILs – where, to determine if public interest exists, the courts often need to examine the issue at hand, as it has done in many cases in the past in the environmental context.[346]

Further, the Indian judiciary has even ruled on *locus* for the protection of intergenerational rights. As early as 1995, the Supreme Court recognised the principle of intergenerational equity – while not allowing new wood factories to open without proper scrutiny.[347] Similarly, there

[340] Chaturvedi, *Supra* note 18, at 1463.
[341] Peel and Lin, *Supra* note 19 at 700.
[342] Evelyne Schmid, Victim Status before the ECtHR in Cases of Alleged Omissions: The Swiss Climate Case, EJIL Talk (April 30, 2022) https://www.ejiltalk.org/victim-status-before-the-ecthr-in-cases-of-alleged-omissions-the-swiss-climate-case/
[343] Article 34, Council of Europe. "Convention for the Protection of Human Rights and Fundamental Freedoms." Council of Europe Treaty Series 005, Council of Europe, 1950.
[344] Schmid, Supra note 342.
[345] Schmid, Supra note 342.
[346] *See* Subhash Kumar v State of Bihar AIR 1991 SC 420 (1991) (India).
[347] State of Himachal Pradesh v. Ganesh Wood Products, (1995) 6 SCC 363 (India).

have been many cases where the judiciary has recognised and referred to the principle of intergenerational equity. Regarding the *locus standi* of such cases where one represents the future generations – the Court has ruled that such cases are admissible.[348] The judiciary has based these principles on a purposive reading of the right to a healthy and pollution free environment – based on the constitutional right to life.

However, Indian jurisprudence on liberally interpreting admissibility and intergenerational rights contrasts the approach advocated by Keeler and Heri. Nonetheless, the Indian judiciary does have its detractors calling it activist due to an expansive interpretation of rights.[349] It is also to be noted that an activist approach has gained widespread support for purporting an expansive interpretation of rights – as often government apathy leads to violation of those rights.[350] Hence, such a narrative may also inform courts across the globe in deciding climate litigations within a rights-based framework in the context of government inaction.

D. Anchoring climate litigation in a right based framework

As referred to in the earlier section – basing climate litigation in a rights-based framework in India is a result of judicial creativity. Indian judges have often expanded the right to life to include a plethora of rights.[351] This includes the right to a healthy environment – which covers climate change. While such an approach might result from government inaction or insufficient government action,[352] the Indian judiciary still deserves credit for basing environmental and climate litigation in a rights-based framework.

The judiciary has done so by including the right to life to not amount to the mere basic right to life[353] – but to include the right to dignity.[354] In the face of flagrant environmental mismanagement,[355] the judiciary further extended this right to include the right to a healthy and pollution free environment – thus directing the government to take action.

[348] Intellectuals Forum v. State of A.P., (2006) 3 SCC 549 (India).
[349] *See generally* Khosla, *supra* note 42.
[350] Baxi, *Supra* note 41.
[351] *See* Maneka Gandhi v Union of India AIR 1978 SC 597 (India); K. S. Puttaswamy v Union of India (2017) 10 SCC 1 (India); Olga Tellis v Bombay Municipal Corporation 1985 SCC (3) 545 (India); Sunil Batra v. Delhi Admn., (1978) 4 SCC 494 (India).
[352] Chaturvedi, *Supra* note 18, at 1463.
[353] Sunil Batra v. Delhi Admn., (1978) 4 SCC 494 (India).
[354] Francis Coralie Mullin vs The Administrator 1981 AIR 746 (India).
[355] M.C. Mehta v. Kamal Nath, (1997) 1 SCC 388 (India).

Similar rights-based arguments were rejected in *Urgenda v. The State of the Netherlands*.[356] In *Urgenda*, the Hague District Court did not find merit in the argument that the Dutch government's inaction over climate change was breaching the citizens' human rights. However, in *Urgenda*, the Dutch government's actions on climate change, in general, were under challenge.

Such general challenges to climate policy under a human rights framework have not found much success in India before the NGT – as seen in *Ridhima Pandey*.[357] However, it is to be noted that *Ridhima Pandey* did not challenge any specific action. Hence, the NGT's power of judicial review was limited. Nonetheless, *Ridhima Pandey* is currently under appeal to the Supreme Court, which may better suit the reliefs *Ridhima Pandey* seeks – as the Supreme Court can use its power to do complete justice[358] to frame guidelines and issue sweeping directions.

Regarding establishing a causal link between the action or inaction and harm that occurred – the Indian judiciary has not faced any case asking for a sweeping declaration until now.[359] Almost all environment and climate litigation before the judiciary has prayed for specific reliefs against a specific transgression. Therefore, proving a causal relationship was not challenging and never in question. Regardless of such specific cases before the Indian judiciary – the judiciary has set out general and overarching principles to govern environmental and climate action and policy.

In doing so, one of the cases expounded the right to a healthy and pollution free environment to include the precautionary principle – and instructed the application of the precautionary principle to all government action to ensure the protection of the right to a healthy and pollution free environment.[360] Accordingly, such a principle enabled the judiciary to govern future human rights infringements based on projections of future climate impacts of current actions.[361] This enabled the courts to even act when the human rights harm is predicted and not visible or apparent – in line with the precautionary principle.

[356] Urgenda v. Netherlands, Case No. 200.178.245/01, The Hague Court of Appeal, Oct. 9, 2018.
[357] Ridhima Pandey v. Union of India, 2019 SCC OnLine NGT 843
[358] India Const. art. 142.
[359] Ridhima Pandey v. Union of India, 2019 SCC OnLine NGT 843 was the first case to do so. However, the NGT found no specific challenge and dismissed it observing climate change to be certainly covered under impact assessment. However, the case now lies under appeal to the Supreme Court.
[360] Vellore Citizens Welfare Forum v Union of India (1996) 5 SCC 647 (India).
[361] *See* Intellectuals Forum v. State of A.P., (2006) 3 SCC 549 (India).

Peel and Osofsky point out the various difficulties that arise in pursuing climate litigation under a human right based framework, specifically in a global north context.[362] They note, "claimants in rights-based climate change litigation face several hurdles", such as "establishing causal links" with government climate policy and how its climate change impact breaches human rights. Peel and Osofsky further emphasize "specifically attributing human rights effects to climate change", where often the harm that occurred due to climate change takes time to manifest – as it uses "predictions of future climate change impacts" as the basis for human rights claims in climate litigation.[363]

E. Specific Environment Litigations are used to assist in protecting the climate

While basing climate litigation in a human rights framework has advantages such as turning climate change into a matter of law rather than a matter of policy – there are certain drawbacks as well – as noted by Peel and Osofsky. In that regard, India interestingly has a plethora of specific litigation based in statutory frameworks challenging particular instances of environmental pollution.[364]

Such litigation, while not termed climate litigation[365] – still immensely contributes to combating climate change. For instance, a targeted challenge to the discharge of untreated water into the river[366] or challenging the opening of a new factory in an ecologically sensitive area – is not termed climate litigation due to the statutory specific arguments it raises. While, they nonetheless contribute to combating climate change, such cases still do not classify as strategic climate litigation[367] but are "invisible".[368]

Accordingly, Kim Bouwer notes – "the complexity of the climate problem entails that many climate issues might be 'invisible', even as we work 'in the context of climate change'". Bouwer further notes that it "also means that 'climate change litigation' can happen inadvertently, particularly where this involves small and mundane issues that nevertheless interface with any aspect of domestic climate policy."[369]

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[362] Peel and Osofsky, *Supra* note 32, at 46.
[363] Peel and Osofsky, *Supra* note 32, at 47.
[364] *See* Part II.A *Supra*.
[365] *See* Bouwer, *Supra* note 253.
[366] M.C. Mehta v. Union of India (Kanpur Tanneries case), 1992 Supp (2) SCC 633 (India).
[367] Joana Setzer & Lisa Benjamin, *Climate Litigation in the Global South: Constraints and Innovations*, 9 TRANSNATIONAL ENVIRONMENTAL LAW 77–101 (2020).
[368] *See* Bouwer, *Supra* note 253.
[369] *See* Bouwer, *Supra* note 253.

However, in India, such cases which deal with specific instances of pollution not only allow for particular action which also helps combat climate change – but also provide the Indian judiciary with an opportunity to expound, expand and adopt principles which help in future environment and climate litigation. Such a strategy may also guide activists and judges across the globe.

Such judicial creativity is to be noted – as it often guides the way. The Asian Development Bank's report titled "Climate Change, Coming Soon to a Court Near You",[370] notes how "weak environmental governance is common in Asia and the Pacific, creating cascading effects in this era of climate change."[371]

The report called on the judges to act.[372] In the Indian jurisdiction, judges have done so creatively – not only regarding *locus standi* but also by anchoring climate litigation into a rights-based framework. The report concedes how judges need to be innovative to protect the environment – as it is one of the only ways to protect the environment. In contrast, politicians pay heed to short term gains at the cost of the environment. Therefore, such legal creativity may inform judges across the globe in deciding on climate litigations.

V. Conclusion

As described by many jurists, the fulfilment of rights is both an intra-generational and an inter-generational project.[373] Further, the judiciary, the executive and the legislative are all institutions which aim to fulfil this project. Often, as is the case in effectively regulating climate change – the executive and the legislative are late to react and have to be spurred into action by the judiciary – with the common motive of protecting and fulfilling the human rights guaranteed by the Constitution. Such has been the case concerning climate litigation in India.

However, India has a rich jurisprudence and strong safeguards present to protect the environment. Further, Indian courts have indicated that the right to a healthy and pollution free environment includes the right to a healthy climate. Also, in conducting an impact assessment

[370] Report 2, *Climate Change, Coming Soon to a Court Near You*, ASIAN DEVELOPMENT BANK (2020)
[371] *Id*. at xxvi.
[372] *Id*. at xxv.
[373] *See* Britta Clark, *Neutrality, nature, and intergenerational justice*, ENVIRONMENTAL POLITICS (2020)

under the Environment Protection Act – climate change factors must be considered. Accordingly, India is basing its climate litigation in a rights-based framework.

Unfortunately, India's rich environmental jurisprudence has not figured in the discourse on climate litigation. This is predominantly due to two reasons – one, the Global South has only recently been given attention to by scholars studying climate litigation,[374] and two, the definition and the process of classifying climate litigation are questionable.[375] Due to these reasons, India's rich and insightful environmental jurisprudence, which may significantly inform global climate governance, is by and large absent from the narrative.

Hence, this paper has analysed India's rich environmental and climate jurisprudence while trying to better inform the global and transnational climate governance in light of substantial questions posed by various human rights-based climate litigations in the Global North. The Indian judiciary's creative, liberal and purposive interpretation of the right to life may inform judges across the globe – who often, faced with a tepid government response, have to lead the way regarding climate change.

However, the implementation of these creative judgments often remains a challenge in the face of executive apathy, which is also observed in India. Nonetheless, government tepidity forced the courts to expound various principles to guide government action, which adversely affected the environment – but they were either not or poorly followed– leading to litigation. It is also to be noted that litigating every government action is not quite feasible – especially on climate change – where even a minor government actions can have irreversible consequences which may not immediately be apparent. Hence, while judicial creativity may pave the environmental and climate protection path, it is one the executive ultimately has to fulfill.

[374] Setzer and Vanhala, *Supra* note 20, at 4.
[375] Peel and Lin, *Supra* note 19 at 686.