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INDIA'S PROGRESSIVE ENVIRONMENTAL CASE LAW: A WORTHY ROADMAP FOR GLOBAL CLIMATE CHANGE LITIGATION

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Abstract

This Article explores how the long-standing tradition of common law countries, such as India, which have long acknowledged the fundamental right to a healthy and pollution-free life, can assist judges in other jurisdictions and inform global climate governance. Many other common 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 on this fundamental right. This Article examines how Indian courts have adjudicated environmental 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 environmental and climate protection. The Article also examines observable trends and the way forward for environmental and climate litigation in India. We compare the 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 the environment, observed India as the only exception in the common law family to interpret the constitutional right to the environment without an express constitutional provision.[2]

The Indian Supreme Court in the early 1980s found a constitutional right to a healthy environment[3] within Article 21 of the Indian Constitution, 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] a pollution-free environment;[7] to enjoy 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]

In 2011 and 2013, Professor Lavanya Rajamani and Shibani Ghosh noted that no climate-related claim had been brought before the

1. Friends of the Irish Env't v. Ireland [2017] IR 793.
2. *Id.* ¶ 8.13.
3. Mun. Council of Ratlam v. Vardhichand, (1980) 4 SCC 162 (India).
4. India Const. art. 21.
5. Lavanya Rajamani & Shibani Ghosh, *India*, in CLIMATE CHANGE LIABILITY: TRANSNATIONAL LAW AND PRACTICE 139, 147, 154–156 (Richard Lord et al. eds., 2012).
6. Subhash Kumar v. State of Bihar, (1991) 1 SCC 598 (India).
7. Charan Lal Sahu v. Union of India, (1990) 1 SCC 613, 653 (India).
8. *Id.* at 622.
9. *See* Narmada Bachao Andolan v. Union of India, (2000) 10 SCC 664 (India).
10. *See id.*
11. Vellore Citizens Welfare F. v. Union of India, (1996) 5 SCC 647, 660 (India).
12. Shantistar Builders v. Narayan Khimale Totmane, (1990) 1 SCC 520, 527 (India).
13. Rural Litig. & Entitlement Kendra v. State of Uttar Pradesh, (1985) 2 SCC 431, 432 (India).
14. Virendra Gaur v. State of Haryana, (1995) 2 SCC 577, 580 (India).

Indian Supreme Court[15] and that climate litigation was in its infancy in India.[16] In 2011, Rajamani and Ghosh 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] These writings were an exception. The idea of linking the expansive environmental law jurisprudence to human rights evolved in the Global South, and especially India, but these considerations were missed in the global discourse. Only recently have scholars started articulating this linkage either through an already expanded understanding of environmental law or through a human rights angle.[18]

In 2019, Jacqueline Peel and Jolene Lin[19] conducted the first comparative study[20] analyzing the contribution of the "Global South"[21] in climate litigation.[22] In their comparative study, Peel and Lin write that an analysis of the Global South's experience of climate litigation serves two purposes. One, it helps contribute to global climate governance as

15. Rajamani & Ghosh, *supra* note 5, at 147; Lavanya Rajamani, *Rights Based Climate Litigation in the Indian Courts: Potential, Prospects & Potential Problems* (Ctr. for Pol'y Rsch. Climate Initiative, Working Paper No. 2013/1, 2013). Rajamani's work did not examine climate litigation as, at the time of writing in 2011 and 2013, India did not classify cases as climate litigation. Rajamani's work examined climate policy as well as environment litigation in India.

16. Rajamani & Ghosh, *supra* note 5, at 176.

17. *Id.*

18. *See* Eeshan Chaturvedi, *Climate Change Litigation: Indian Perspective*, 22 GER. L. J. 1459 (2021); Gitanjali N. Gill & Gopichandran Ramachandran, *Sustainability Transformations, Environmental Rule of Law and the Indian Judiciary: Connecting the Dots Through Climate Change Litigation*, 23 ENV'T L. REV. 228 (2021); Shibani Ghosh, *Climate Litigation in India*, *in* COMPARATIVE CLIMATE CHANGE LITIGATION: BEYOND THE USUAL SUSPECTS 347 (Francesco Sindico & Makane Moïse Mbengue eds., 2021) [hereinafter *Climate Litigation in India*]; 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 AM. J. INT'L L. 679 (2019).

20. *See* Setzer & Vanhala, *supra* note 18, at 4 ("[A] first comprehensive study focused on Global South climate litigation is yet to be published.").

21. *See* Peel & Lin, *supra* note 19, at 682. The usage and scope of the term Global South is contested. However, that is outside the scope of the Article and we accept the usage of Global South to include India, as has previously been accepted in climate litigation research.

22. *Id.* at 683.

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.

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 will fail to adequately capture developments occurring outside the Global North."[25] This Article aims to compare and understand perspectives from India to inform global climate governance and understand the diverse nature of global climate litigation.

The remainder of this Article 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 classified as climate litigation in India by two leading climate litigation databases.[26] The definition used by these databases is contested, as the fifteen cases have been termed "climate litigation" but apply a narrow definition of climate litigation, to which some authors have objected.[27] Part III of the Article 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

23. INT'L BAR ASS'N, ACHIEVING JUSTICE AND HUMAN RIGHTS IN AN ERA OF CLIMATE DISRUPTION: INT'L BAR ASS'N CLIMATE CHANGE JUSTICE AND HUMAN RIGHTS TASK FORCE REPORT 180 (July 2014).

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

25. *Id.* at 686.

26. The LSE Grantham Research Institute on Climate Change and the Environment runs the Climate Change Laws of the World database at https://climate-laws.org (last visited Aug. 18, 2022) and the Sabin Center for Climate Change Law at Columbia Law School maintains the database at http://climatecasechart.com (last visited Aug. 18, 2022) [hereinafter Climate Databases]. These two databases are primarily referred to by climate litigation authors; *See* Peel & Lin, *supra* note 19, at 691; Setzer & Vanhala, *supra* note 18; Hari M. Osofsky, *The Continuing Importance of Climate Change Litigation*, 1 CLIMATE L. 3 (2010); Jacqueline Peel & Hari M. Osofsky, *A Rights Turn in Climate Change Litigation?*, 7 TRANSNAT'L ENV'T. L. 37 (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." *See infra* Part III.

27. *See also* Kim Bouwer, *The Unsexy Future of Climate Change Litigation*, 30 J. ENV'T L. 483 (2018); *cf.* Peel & Lin, *supra* note 19, at 683.

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 analyzing how the Indian judiciary is creative in allowing easy access to justice[30] while often basing its judgments in a rights-based framework.[31] This part analyzes the challenges faced in the Global North, mainly in Europe, in trying to utilize a rights-based approach to climate litigation[32] while comparing how Indian courts deal with similar challenges. Part IV also compares the similarities between the flurry of cases[33] currently before the European Court of Human Rights (ECtHR) and Indian cases dealing with similar issues.

It is important to note that the Article does not analyze the position in the United States as it is merely trying to compare cases that currently raise questions related to the constitutional or human rights of 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 U.S. courts have "gotten 'out of the business' of recognizing new unenumerated fundamental rights."[36] Accordingly, the Article does not conduct a comparison with U.S. jurisprudence, which prefers a different approach from that employed in Indian courts.

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

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

29. *See infra* Part III; many cases predominantly decided on the environment protection including curbing the release of GHGs on grounds of pollution have not been classified as climate litigation by either the Climate Databases, *supra* note 26.

30. *See* Vellore Citizens Welfare F. v. Union of India, (1996) 5 SCC 647, 647 (India).

31. *See* Shantistar Builders v. Narayan Khimale Totmane, (1990) 1 SCC 520, 527 (India); Rural Litig. & Entitlement Kendra v. State of Uttar Pradesh, (1985) 2 SCC 431, 438 (India).

32. Peel & Osofsky, *supra* note 26.

33. *See* Duarte Agostinho v. Portugal, App. No. 39371/20 (Sept. 13, 2020); Verein Klimaseniorinnen Schweiz v. Switzerland, App. No. 53600/20 (Nov. 26, 2020); Mex Müllner v. Austria, App. No. 18859/21 (March 25, 2021); *see also* Greenpeace Nordic v. Norway, App. No. 34068/21 (Dec.16, 2021).

34. Juliana v. United States, 947 F.3d 1159 (9th Cir. 2020).

35. *Id.* at 1171.

36. Case Comment, *Juliana v. United States: Ninth Circuit Holds that Developing and Supervising Plan to Mitigate Anthropogenic Climate Change Would Exceed Remedial Powers of Article III Court*, 134 HARV. L. REV. 1929, 1933 (2021).

II. Environmental 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 the environment as a constitutional right[38] without an express constitutional provision.[39] The Irish Supreme Court referred to David Boyd's detailed study[40] on the right to the environment, observing that most of the states where the constitutional right to the environment was adopted had achieved this by including such wording in the constitution and not through expansive indirect interpretation. An expansive interpretation, often labeled "activist,"[41] divides opinions.[42] In the Indian context, since the 1980s, the Supreme Court has held numerous times that the right to the environment follows from the right to life.

Nonetheless, such cases that deal with environmental pollution and other environmental issues have been termed "environmental litigation"[43] and have not ordinarily been included in the discourse on climate litigation. In this regard, while the scope of climate litigation needs to be widened to understand the Indian perspective,[44] we must first understand the nature of environmental litigation and its effects, regardless of how they are categorized. In this Part, we analyze the origins of environmental and climate litigation in India along with key trends and evolving

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37. Friends of the Irish Env't v. Ireland [2017] IR 793 ("It is striking that, with one exception, no such right [referring to an inherent right to a healthy environment] has been recognized in countries within the broad common law family. The exception concerned is India.").

38. *See* Subhash Kumar v. State of Bihar, (1991) 1 SCC 598, 604 (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 *Shehla Zia v. WAPDA*, the Pakistan Supreme Court held the right to life to include the right to a healthy environment. *See* Shelhla Zia v. Water & Power Dev. Auth. (1994) PLD (SC) 693; *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*, 16 Tulane Env't L. J. 65 (2002). 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*, 20 Rev. Eur. Cmty & Int'l Env't L. 171, (2011).

40. David Boyd, The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment (2011).

41. *See* Upendra Baxi, The Indian Supreme Court and Politics, at xi-xii, 248, 248A (1989); *It is sheer propaganda to say that PIL amounts to judicial overreach: Prof Upendra Baxi*, Bar and Bench (Apr. 3, 2021, 2:53 AM), https://www.barandbench.com/news/sheer-propaganda-to-say-pil-amounts-judicial-overreach-prof-upendra-bax.

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, s*upra* note 18, at 1460.

44. *See infra* Part III.

principles. In doing so, we also attempt to describe and point out certain differences between environmental and climate litigation. As elaborated in Part III of the Article, one should not get trapped in defining or differentiating climate from environmental litigation, as a better understanding of the 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] The issue in the case was whether the municipal council breached any rights while failing to provide sanitary facilities, the absence of which led to contamination and pollution. The Court held that "[d]ecency 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, including construction and management of the drainage system, stopping polluted effluents from seeping onto 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 that the "[r]ight 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] 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. 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 Public Interest Litigations (PILs).[50]

In various other cases, the Court held that the right to live in a wholesome environment,[51] pollution-free environment,[52] fresh air,[53] clean

45. Mun. Council of Ratlam v. Vardhichand, (1980) 4 SCC 162 (India).
46. *Id.* at 171.
47. *Id.* at 173.
48. *See* Subhash Kumar v. State of Bihar, (1991) 1 SCC 598, 604 (India).
49. *Id.*
50. *Id.* at 605.
51. *Id.*
52. Charan Lal Sahu v. Union of India, (1990) 1 SCC 613, 653 (India).
53. *See* Narmada Bachao Andolan v. Union of India, (2000) 10 SCC 664 (India).

environment,[54] and decent environment[55] exists 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 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. The Polluter Pays Principle

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 into the environment at Birchi village in the State of Rajasthan. The Court held that chemical companies had polluted the environment and were liable to pay damages and costs incurred to clean the pollution.[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 recognized[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

54. Vellore Citizens Welfare F. v. Union of India, (1996) 5 SCC 647, 660 (India).

55. Shantistar Builders v. Narayan Khimale Totmane, (1990) 1 SCC 520, 527 (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*, 10 CLIMATE L. 50 (2020) (comparing how India has generalized and integrated environmental principles into Indian law to guide government action).

57. Indian Council For Enviro-Legal Action v. Union of India, 1996 3 SCC Online 212 (India).

58. *Id.* at 218.

59. *Id.* at 246.

60. National Green Tribunal Act, 2010, §20.

61. *See generally* Rsch. Found. for Sci. v. Union of India, (2005) 13 SCC 186 (India); Bittu Sehgal v. Union of India, (2001) 9 SCC 181 (India); Vellore Citizens Welfare F. v. Union of India, (1996) 5 SCC 647 (India); Karnataka Industrial Areas Development Board v. Sri C. Kenchappa, (2006) 6 SCC 371 (India).

62. *Indian Council For Enviro-Legal Action*, 3 SCC 212 at 247.

industry."[63] To ensure an easier application that would favor environmental protection, the Indian courts thus 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 the 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 found the doctrine of public trust to emerge from common law, holding further that the "[p]ublic 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 good and in public interest."[68]

In this case's context, the Court did not need to establish the public trust doctrine. Instead, the Court preferred establishing the doctrine which would help provide a ground to review government action where allocation of resources had an adverse impact on the environment.[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 that were polluting the

63. *Id.* at 248.

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 Online 161; *see also* Harshita Singhal & Sujith Koonan, *Polluter Pays Principle in India: Assessing Conceptual Boundaries and Implementation Issues*, 7 RGNUL STUDENT RSCH. REV. 33 (2021).

65. M.C. Mehta v. Kamal Nath, (1997) 1 SCC 388 (India).

66. *See M. C. Mehta*, M.C. MEHTA ENV'T FOUND., http://mcmef.org/web/m-c-mehta/.

67. *M.C. Mehta*, 1 SCC 388 at 413.

68. *Id.*

69. *Id.*

70. *See* Vellore Citizens Welfare F. v. Union of India, (1996) 5 SCC 647 (India).

Parlar River. The Parlar River was the primary source of water supply for the citizens of the state. 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. The Court mandated the application of the polluter pays principle, wherein the polluting tanneries had to bear the cost of compensation and the clean-up.[71] The Court also expanded the precautionary principle to regulate future government action to prevent such pollution.

The Court held that the precautionary principle included three elements. First, "the statutory Authorities must anticipate, prevent, and attack the causes of environmental degradation."[72] Second, faced with the threat of serious and irreversible damage, lack of "scientific certainty should not be used as the reason for postponing[] measures to prevent environmental depredation."[73] Third, "the onus of proof was on the developer to show how their actions were environmentally benign."[74]

The precautionary principle thus placed the burden on the projects to prove how they would not adversely impact the environment. The precautionary principle also governed all government actions—including approval of new projects—which eventually culminated in the adoption of a regulated Environment Impact Assessment process.[75]

4. Existence of Intergenerational 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*),[76] addressed the question of conflict between development and the environment. While finding that protection of the environment was needed to fulfill the rights guaranteed under the

71. *Id.* at 668.

72. *Id.*

73. *Id.*

74. *Id.*

75. 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 Env't. & Forests, S.O. 1533(E) (Notified on September 14, 2006).

76. Intellectuals Forum v. State of Andhra Pradesh, (2006) 3 SCC 549 (India).

Constitution, one of the principles the Court applied was the principle of intergenerational equity.

The Court, while referring to Principles 1 and 2 of the Stockholm Declaration,[77] 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).
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> 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.[78]

Adding to the application of the principle of intergenerational equity in the given case, the Court opined that the representatives of future generations have *locus standi*[79] in filing cases for the protection of the rights of future generations. The Court 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[80] and observed,

> [The question] 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 garb

77. U.N. Conference on the Human Environment, Stockholm Declaration on the Human Environment, UN Doc. A/CONF.48/14 (1972).

78. *Intellectuals Forum*, 3 SCC Online at 576 (India).

79. *Locus standi* means the cause of action needed to file a case, generally originating from an action which causes one some legal harm. *See* Armin Rosencranz & Michael Jackson, *The Delhi Pollution Case: The Supreme Court of India and the Limits of Judicial Power*, 28 COLUM. J. ENV'T. L. 223 (2003).

80. *See* Vellore Citizens Welfare F. v. Union of India, (1996) 5 SCC 647 (India).

> 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.[81]

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*.[82] 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 intergenerational equity."[83] The Court observed, "[a]fter all, the present generation has no right to deplete all the existing forests and leave nothing for the next and future generations."[84]

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.[85] Therefore, in deciding 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 refers to the cause of action needed to file a case, generally originating from an action that causes one some legal harm.[86] In India, the generous interpretation of *locus* stems from instances of

81. *Intellectuals Forum*, 3 SCC Online 549 at 577.

82. State of Himachal Pradesh v. Ganesh Wood Prod., (1995) 6 SCC 363, 365 (India).

83. *Id.*

84. *Id.* at 389.

85. *Id.* at 394–95.

86. *See* S.P. Sathe, *Public Participation in Judicial Process: New Trends in Law of Locus Standi with Special Reference to Administrative Law*, 26 J. INDIAN L. INST. 1 (1984); Konakuppaktail Gopinathan Balakrishnan, *Growth of Public Interest Litigation in India*, 21 SING. ACAD. L. J. 1 (2009); Gitanjali Nain Gill, *Human rights and the environment in India: Access through public interest litigation*, 14 ENV'T L. REV. 200 (2012).

judicial creativity.[87] A few instances are allowing PILs,[88] treating a letter received by the Court as a writ petition,[89] and allowing a person to file a writ of *habeas corpus* for oneself.[90] In doing so, Courts have expanded *locus standi* to impart justice to a large and diverse society.

As seen in *Intellectuals Forum,* the Court opined that representatives of future generations may have *locus standi* to file cases for the protection of the rights of future generations. *Locus standi* is interpreted very liberally in India,[91] and often, public interest is sufficient cause for the courts to admit a case.[92] The courts have taken some environmental causes *suo moto* or of their own accord.[93] A *suo moto* case is where the courts, observing a wrong that they are often informed of by information in the public domain, such as newspaper articles, take up a case.[94]

The Supreme Court has constitutional and inherent powers to take up cases *suo moto*,[95] as it has in the past.[96] In the case of *Municipal Corporation of Bombay v. Ankita Sinha*,[97] the Court held the National Green Tribunal (NGT) to additionally have inherent powers to take up cases *suo moto*. Interpreting the NGT to have *suo moto* powers to take

87. Upendra Baxi, *Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India*, 1985 THIRD WORLD LEGAL STUD. 118–119; *see also* Rosencranz & Jackson, *supra* note 79, at 230.

88. Bandhua Mukti Morcha v. Union of India, (1984) 3 SCC 161, 167 (India).

89. S.P. Gupta v. Union of India, 1981 Supp. SCC 87, 115 (India); *see also* Dhananjay Mahapatra, *SC Faces a Deluge of Letter Petitions*, TIMES 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.

90. Sunil Batra v. Delhi Admn., (1978) 4 SCC 494, 505 (India).

91. Baxi, *supra* note 87, at 107, 110.

92. *Id.* at 108.

93. *See* "Hindustan Times" A.Q.F.M. Yamuna v. Cent. Pollution Control Bd., (2004) 9 SCC 576 (India); *see also In re* Delhi Transp. Dept., (1998) 9 SCC 250 (India); *see also* Krishnadas Rajagopal, *Supreme Court Takes Suo Motu Cognisance of Contamination of Rivers*, HINDU (Jan. 13, 2021, 8:11PM) https://www.thehindu.com/news/national/supreme-court-takes-suo-motu-cognisance-of-contamination-of-rivers/article33569924.ece.

94. *See* Sunil Batra v. Delhi Admn., (1978) 4 SCC 494 (India); *see also* Mihir R, *46 Suo Moto Cases in the Supreme Court from 1990-2021*, SUP. CT. OBSERVER (June 4, 2021), https://www.scobserver.in/journal/46-suo-moto-cases-in-the-supreme-court-from-1990-2021 (observing how the first instance of taking suo moto cognisance is often considered to be in the Sunil Batra case and how taking suo moto cognisance was derived from the relaxation of procedures when considering PILs). *But see* Baxi, *supra* note 87, at 118 (considering habeas corpus cases where the detenu writes a letter to be cases under the Court's epistolary jurisdiction).

95. *See* Mihir R, *supra* note 94. The procedure to now take up *suo moto* petitions is formalised under Order 38, Rule 12(1)(a) in the Supreme Court Rules, 2013.

96. *See* Marc Galanter & Vasujith Ram, *Suo Motu Intervention and the Indian Judiciary*, *in* A QUALIFIED HOPE: THE INDIAN SUPREME COURT AND PROGRESSIVE SOCIAL CHANGE 92 (Gerald N. Rosenberg et al. eds., 2019).

97. Mun. Corp. of Greater Mumbai v. Ankita Sinha, 2021 SCC Online SC 897 (India).

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."[98] Here, the Court differentiated general *suo moto* powers that the Supreme Court and High Courts had, observing that the *suo moto* power conferred on the NGT was only applicable to environmental issues.

An instance of the NGT exercising its s*uo moto* powers is *In re Court on its own motion v. State of Himachal Pradesh*,[99] which is discussed in Part II. B.2.c., later in the Article (Part IV), the authors also comparatively analyze how *locus standi* is treated in other jurisdictions, specifically Europe, to better understand 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*,[100] 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. Another principle the Indian Supreme Court has established is that lack of state resources is not a defense when the state fails to fulfill its environmental obligations.[101]

The NGT in *Society for Protection of Environment & Biodiversity v. Union of India*[102] applied the doctrine of *non-regression*.[103] In international environmental law, the doctrine of non-regression mandates the state or its entities not to pursue action that has a "net effect of diminishing the legal protection of the environment or access to environmental justice."[104]

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98. *Id.* ¶ 96.

99. Court on its own motion v. State of Himachal Pradesh, 2014 SCC Online NGT 8 (India).

100. Bangalore Medical Trust v. B.S. Muddappa, (1991) 4 SCC 54, 71 (India).

101. Wadehra v. Union of India, (1996) 2 SCC 594, 595 (India); *see also* Mun. Council of Ratlam v. Vardhichand, (1980) 4 SCC 162, 164-65 (India).

102. Soc'y for Prot. of Env't & Biodiversity v. Union of India, (2018) SCC Online NGT 190 (India).

103. *See generally* Michel Prieur, *Non-regression in Environmental Law*, 5 SURV. & PERSP. INTEGRATING ENV'T & SOC'Y 53 (2012).

104. Int'l Union for Conservation of Nature [IUCN], *IUCN World Declaration on the Environmental Rule of Law*, Principle 10 (Apr. 2016), https://www.iucn.org/sites/default/files/2022-10/world_declaration_on_the_environmental_rule_of_law_final_2017-3-17.pdf.

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, the courts [referring to the NGT] to apply the doctrine of non-regression in its decisions."[105] 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 law to protect the environment. In another paper, Shibani Ghosh points out how Indian courts have used various international principles and treaties to decide environment-related matters.[106]

Interestingly, in many cases where these principles were laid down or adopted, there was no necessity to apply or expound those principles. To guide state action and develop environmental jurisprudence in India, the courts established these principles and read them into either common law or the Constitution.[107] The emergence of these principles points to the trend of laying the groundwork for environmental claims in a rights-based framework.

As seen above, the cases show a 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,[108] fundamental duties are not enforceable in India.[109] They merely aid and guide the judiciary in interpreting the Constitution.[110] Hence, the Irish Supreme Court's observation is technically true that there is no express, enforceable constitutional

105. Chaturvedi, s*upra* note 18, at 1465.

106. Ghosh, *supra* note 18, at 354.

107. *See* SHYAM DIVAN & ARMIN ROSENCRANZ, ENVIRONMENTAL LAW AND POLICY IN INDIA (2nd ed. 2001).

108. India Const. art. 51A, cl. (g) (stating "to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures").

109. Sneha Rao, *Why Linking Fundamental Rights To Duties Is An Extra-Constitutional Argument*, LIVELAW (Nov. 30, 2021, 9:10 AM), https://www.livelaw.in/columns/why-linking-fundamental-rights-to-duties-is-an-extra-constitutional-argument-186639.

110. *See* Rural Litig. and Entitlement Kendra v. State of Udhar Pradesh, AIR 1988 SC 2187 (India).

provision recognizing the right to the environment in the Indian Constitution.

In the absence of an express right to the environment, the Indian Supreme Court has based its judgments on interpreting Article 21, which guarantees the right to life, including the right to a healthy, pollution-free, and clean environment.[111] In establishing these principles within a constitutional framework, the Court based the "Environmental Rule of Law"[112] concept on Article 14 of the Indian Constitution, which guarantees "equality before the law or the equal protection of the laws"[113] and is discussed in detail in Part II.C.

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 Constitution.[114] 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, until 2011, no climate-related claim was brought before the Indian Supreme Court. Two leading climate litigation databases note, cumulatively, fifteen instances of climate litigation to have occurred in India to date, all post-2011.[115] In this Article, we convey that the methodology and the definitions of climate litigation adopted by these databases merit more scrutiny, as Part III of the Article examines.

For instance, neither *Wilfred J.*[116] nor *Jan Chetna*[117] (cases classified as climate change cases and discussed in detail below) have a direct

111. Subhash Kumar v. State of Bihar, (1991) 1 SCC 598, 604 (India).

112. *See* Hanuman Laxman Aroskar v. Union of India, (2019) 15 SCC 401, 462 (India).

113. India Const. art. 14 ("The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.").

114. *See generally* M.C. Mehta v. Kamal Nath, (1997) 1 SCC 388 (India); Vellore Citizens Welfare F. v. Union of India, (1996) 5 SCC 647 (India).

115. The Climate Change Laws of the World and Climate Chase Chart databases, s*upra* note 26.

116. Wilfred J. v. Ministry of Env't & Forests, Unreported Judgments, O.A. No. 74 Of 2014, decided on Sept. 2, 2016 (NGT), 21 (India).

117. Jan Chetna v. Ministry of Env't & Forests, 2012 SCC Online NGT 81 (India).

argument or issue regarding climate change but rather have an indirect effect on climate change. They have been classified as climate litigation by the London School of Economics' Grantham Research Institute's (GRI LSE) database.[118] The discrepancy is also reflective of the problem of trying to apply a strict definition of what constitutes climate litigation in India, which we elaborate on in Part III of the Article.

Of the fifteen cases of climate litigation in India, twelve are decisions by the NGT, and three are by the Supreme Court of India (SC). The table below briefly summarizes all fifteen cases and points out the heading under which the database 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	HOLDING	CLASSIFIED AS (DATABASE)
2011	NGT	*Vimal Bhai v. Ministry of Environment & Forests*[119]	Clearance given to a dam was under challenge. The NGT found that the project complied with the precautionary principle and the principle of sustainable development and allowed the project.	Mitigation (LSE GRI)
2012	NGT	*Jan Chetna v. Ministry of Environment & Forests*[120]	The NGT held that a public consultation as mandated by Environmental Impact Assessment (EIA) regulations is required to be conducted, ordering the same, and suspended the environmental clearance in the meantime.	Adaptation (LSE GRI)

118. Climate Databases, *supra* note 26.

119. Vimal Bhai v. Ministry of Env't & Forests, 2011 SCC Online NGT 16 (India).

120. *Jan Chetna*, 2012 SCC Online NGT 81 (India).

TABLE 1: CONTINUED

YEAR	FORUM	PARTIES TO THE SUIT	HOLDING	CLASSIFIED AS (DATABASE)
2013	NGT	*Sukhdev Vihar Welfare Residents Association v. Union of India*[121]	The NGT rejected the challenge of operating a waste-to-energy (Clean Development Mechanism) plant in a densely populated area because it emitted Greenhouse Gases (GHGs). 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*[122]	The clearance given to a port was challenged. It was contended that the port was being constructed in an ecologically sensitive area. The NGT rejected the same in the public's interest due to its economic importance.	Adaptation (LSE GRI)
2014	NGT	*Punamchand v. Union of India*[123]	The applicant challenged a hydroelectric project requiring around 133,000 trees to be felled. The applicant was not present during the hearing. The NGT accepted the government plan to plant upward of two million seedlings, which exceeded the NGT's mandated ratio of one to eight.	Mitigation (LSE GRI)

121. Sukhdev Vihar Residents Welfare Ass'n v. State of NCT of Delhi, Unreported Judgments, O.A. 22 Of 2013 decided on Feb. 2, 2017 (NGT) (India).

122. Wilfred J. v. Ministry of Env't & Forests, Unreported Judgments, O.A. No. 74 Of 2014, decided on Sept. 2, 2016 (NGT), 21 (India).

123. Punamchand v. Union of India, 2014 SCC Online NGT 2101 (India).

TABLE 1: CONTINUED

YEAR	FORUM	PARTIES TO THE SUIT	HOLDING	CLASSIFIED AS (DATABASE)
2014	NGT	*Indian Council for Enviro-Legal Action v. Ministry of Environment and Forests*[124]	The applicant brought to the NGT's attention the unregulated emissions of HFC-23, a greenhouse gas thousands of times more potent than carbon dioxide. The NGT directed the Ministry of Environment and Forests and the appropriate bodies to provide directions for regulating HFC-23 emissions.	GHG emissions reduction and trading (Sabin); Mitigation (LSE GRI)
2014	NGT	*Gaurav Bansal v. Union of India*[125]	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*[126]	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)

124. Indian Council for Enviro-Legal Action v. Ministry of Env't & Forests, 2014 SCC Online NGT 2723 (India).

125. Gaurav Kumar Bansal v. Union of India, Unreported Judgments, O.A. 498 Of 2014 decided on July 23, 2015 (NGT), 1 (India).

126. Hindustan Zinc Ltd. v. Rajasthan Elec. Regul. Comm'n, (2015) 12 SCC 611 (India).

TABLE 1: CONTINUED

YEAR	FORUM	PARTIES TO THE SUIT	HOLDING	CLASSIFIED AS (DATABASE)
2016	NGT	*In re Court on its own motion v. State of Himachal Pradesh & Others*[127]	The NGT, on its 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*[128]	The NGT quashed a draft EIA notification that exempted particular building and construction projects from EIA. The NGT found the exemption to breach 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*[129]	The NGT ordered better formulation and enforcement of forest fire management plans, observing that 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)

127. Court on its own motion v. State of Himachal Pradesh, 2014 SCC Online NGT 8, ¶ 38 (India).

128. Soc'y for Prot. of Env't & Biodiversity v. Union of India, 2016 SCC Online NGT 1052 (India).

129. Rajiv Dutta v. Union of India, 2017 SCC Online NGT 30 (India).

TABLE 1: CONTINUED

YEAR	FORUM	PARTIES TO THE SUIT	HOLDING	CLASSIFIED AS (DATABASE)
2016	NGT	*Mahendra Pandey v. Union of India*[130]	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	*Ridhima Pandey v. Union of India*[131]	The applicant asked for broad directions to be issued, mainly to do with climate change being considered under an EIA, and that the NGT directs the government to ensure India's climate policy is aligned with its commitments under the Paris Agreement.	Human Rights, Environmental assessment and permitting, Protecting biodiversity and ecosystems, and Public Trust. (Sabin); Mitigation (LSE GRI)
2020	SC	*Hanuman Laxman Aroskar v. Union of India*[132]	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.[133] 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)

130. Mahendra Pandey v. Govt't of Nat'l. Cap. Territory of Delhi, 2018 SCC Online NGT 2225 (India).

131. Ridhima Pandey v. Union of India, 2019 SCC Online NGT 843.

132. *See* Hanuman Laxman Aroskar v. Union of India, (2019) 15 SCC 401, 457 (India).

133. An Environmental Impact Assessment (EIA) is generally carried out to understand the impact of the proposed activity on the environment. In India, it is mandated by a 2006 notification issued by the Ministry of Environment and Forests. *See* Ministry of Env't and Forests, S.O. 1533(E) (Notified on September 14, 2006).

TABLE 1: CONTINUED

YEAR	FORUM	PARTIES TO THE SUIT	HOLDING	CLASSIFIED AS (DATABASE)
2021	SC	*Association for Protection of Democratic Rights v. The State of West Bengal and Others*[134]	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 NGT was formed under the National Green Tribunal Act.[135] The NGT has jurisdiction over "all civil cases where a substantial question relating to the environment (including enforcement of any legal right relating to the environment) is involved."[136] It has jurisdiction over disputes arising from the enforcement of certain acts that regulate and control various kinds of pollution.[137] Accordingly, the NGT receives environmental and climate-related claims.

The NGT is headed by a retired Supreme Court judge or a retired Chief Justice of a High Court[138] and is very effective—sometimes attracting unwanted attention from the government for its effectiveness in the past.[139] The NGT plays a crucial role in fulfilling India's environmental policy, with the Rio Declaration[140] reflected in the

134. Assn. for Protection of Democratic Rights v. State of West Bengal, 2021 SCC Online SC 259 (India).

135. National Green Tribunal Act § 3.

136. *Id.* § 14.

137. *Id.* sched.I.

138. *Id.* § 5.

139. Armin Rosencranz & Geetanjoy Sahu, *Assessing the National Green Tribunal after Four Years,* J. INDIAN L. & SOC'Y, 191, 191 (2014) (noting "[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.").

140. U.N. Conference on Environment and Development, Rio Declaration on Environment and Development, ¶ 10, U.N. Doc.A/CONF.151/26/Rev.1 (Vol.I), annex I (Aug. 12, 1992).

preamble,[141] which was one of the primary reasons for the establishment of the NGT.[142] Due to its very nature, the NGT receives many cases related to pollution, environmental clearances, and breaches in the impact assessment process, among others.[143] This is evident in the fact that twelve of the fifteen cases classified as climate litigation in India were before the NGT. Also, as the NGT was established in late 2010,[144] cases classified as climate litigation were all brought post-2010, of which the earliest classified case was decided in 2011.

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 decided by the NGT in 2019.[145] Similar to *Duarte Agostinho*,[146] where a group of children sued many European states to better the climate policy (*Duarte Agostinho* is elaborated upon in Part IV.A), in this case, Ridhima Pandey, a nine-year-old girl, petitioned the NGT to direct the government to take more significant action, as current government actions to mitigate GHGs and combat climate change were insufficient. One of the reliefs asked was that the NGT order the government to "assess the climate related issues while appraising projects for grant of environmental clearance."[147] The petition also proposed the term "environment"[148] to include climate.[149]

The petition relied on many principles, such as the public trust doctrine and the existence of intergenerational rights, as were expounded

141. National Green Tribunal Act, pmbl.

> [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.

142. *Id.*; see also Domenico Amirante, *Environmental Courts in Comparative Perspective: Preliminary Reflections on the National Green Tribunal of India*, 29 PACE ENV'T L. REV. 441, 465 (2012).

143. Sridhar Rengarajan et al., *National Green Tribunal of India—an Observation from Environmental Judgements*, 25 ENV'T SCI. POLLUTION RSCH. 11313 (2018).

144. About Us, NATIONAL GREEN TRIBUNAL, https://greentribunal.gov.in/about-us (last visited Aug. 18, 2022).

145. Ridhima Pandey v. Union of India, 2019 SCC Online NGT 843 (India).

146. *See* Application, Duarte Agostinho v. Portugal, App. No. 39371/20 (Sept. 2, 2020).

147. *See Ridhima Pandey*, 2019 SCC Online NGT 843.

148. National Green Tribunal Act § 2(a).

149. Brief for the Petitioner, Ridhima Pandey v. Union of India, 2019 SCC Online NGT 843 (India).

in environmental litigation cases. However, the NGT dismissed the case and held, "[t]he issue of climate change is certainly a matter covered in the process of impact assessment"[150] under the Environment (Protection) Act of 1986. Hence, it was determined that no additional orders were needed in that regard. The NGT also observed 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."[151] While the case is currently under appeal before the Indian Supreme Court,[152] the NGT's order implies that the term "environment" includes climate.[153]

The corollary to the above interpretation is that climate change concerns must be examined in a statutory context, such as the EIA Notification adopted under the Environment (Protection) Act, 1986.[154] This ruling may open a floodgate of possibilities and challenges to government approvals because 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.[155] This is examined in further detail in Part II.C.1.a.

b. On Impact Assessment

Four of the twelve Indian climate litigation cases have dealt with challenges to EIAs. In *Vimal Bhai v. Ministry of Environment and Forests*, the forest clearance given to a dam post-impact assessment was challenged.[156] 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 on 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

150. *Ridhima Pandey*, 2019 SCC Online NGT 843.

151. *Id.*

152. Civil Appeal No. 388/2021, Ridhima Pandey v. Union of India, 2019 SCC Online NGT 843.

153. *See infra* Part II.C.2.

154. Ministry of Env't and Forests, S.O. 1533(E) (Notified on September 14, 2006).

155. *See* Ecology Action Ctr. v. Nova Scotia, [2022] N.S.S.C. 104 (Can.); Highlands Dist. Cmty. Ass'n v. British Columbia (Att'y Gen.), 2021 BCCA 232 (Can.). While these cases were dismissed by the Court, some success has been found in other jurisdictions such Australia. *See Gloucester Resources Ltd. v Minister for Planning* [2019] NSWLEC 7 (Austl.).

156. Vimal Bhai v. Ministry of Env't & Forests, 2011 SCC Online NGT 16 (India).

prepare clear guidelines and instructions to carry out a cost-benefit analysis for future projects.[157]

Similarly, the clearance for constructing a deep-water container port was challenged in *Wilfred J. v. Ministry of Environment and Forests.*[158] A bench of the NGT dismissed the petition on technical grounds,[159] which was successfully challenged on appeal, where the appellate bench remanded the petition to the original bench.[160] 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*[161] held that the Ministry had to carry out a public consultation as mandated by EIA regulations. The NGT suspended the environmental clearance accorded for the expansion of the steel factory and reiterated that the government and developers must follow the precautionary principle while granting and applying for environmental clearances.[162]

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.*[163] The NGT noted that such an exemption violated the principle of sustainable development and the precautionary principle and accepted the petitioner's arguments that the notification shall have a "serious repercussion on climate change."[164] Consequently, the NGT struck down the specific provisions that exempted small construction projects from the EIA process.

c. On Emissions

Four of the twelve cases marked as "climate litigation" before the NGT have dealt with the issue of GHG and carbon emissions. In

157. *Id.*

158. Wilfred J. v. Ministry of Env't Forests, Unreported Judgments, O.A. No. 74 Of 2014 decided on Sept. 2, 2016 (NGT) (India).

159. *Id.*

160. *Id.* at 21.

161. Jan Chetna v. Ministry of Env't & Forests, 2012 SCC Online NGT 81, ¶ 39 (India).

162. LSE Grantham Research Institute on Climate Change and the Environment, Case Summary of Jan Chetna v. Ministry of Environment & Forests (Dec. 2010), https://web.archive.org/web/20211021212618/https://climate-laws.org/geographies/india/litigation_cases/jan-chetna-v-ministry-of-environment-forests.

163. Soc'y for Prot. of Env't & Biodiversity v. Union of India, 2018 SCC Online NGT 190, 1052 (India).

164. *Id.*

Sukhdev Vihar Welfare Residents Association v. Union of India,[165] the operation of a waste-to-energy plant in a densely populated area was challenged. The petitioner alleged that the operation of the waste-to-energy plant emitted GHGs, which violated their right to a pollution-free environment. The NGT fined the plant for a past violation of its "stack emissions being in excess of prescribed parameters," and held the plant to be a "Clean Development Mechanism project" and compliant with all pollution laws.[166] As the NGT found a past violation of excessive emissions, as a precaution, it directed the creation of a Joint Inspection Team, which would monitor the emissions and carry out monthly inspections and checks.

Similar issues about unregulated emissions were litigated in *Indian Council for Enviro-Legal Action (ICELA-II) v. Ministry of Environment and Forest*.[167] In ICELA-II, the petitioner challenged the production and emission of HFC-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 that the petitioner had *locus*.

On the questions of emissions of HFC-23, the NGT found that there was no regulatory framework for the "mechanism of storage, handling incinerators and emission standards of HFC-23"[168] and directed the Ministry and appropriate bodies to issue appropriate guidelines for the same. The NGT observed: "[t]he impacts of climate change of which one of the major contributors is the release/emissions of greenhouse gases visible around the globe or environment is not exceptional."[169] 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."[170] As a result, the NGT ordered the Ministry to form guidelines on the emissions of HFC-23 expeditiously.

165. Sukhdev Vihar Residents Welfare Ass'n v. State of NCT of Delhi, Unreported Judgment, M.A. 19 Of 2014 decided on Feb. 2, 2017 (NGT) (India).

166. *Id.* at 138.

167. Indian Council for Enviro-Legal Action v. Ministry of Env't & Forests, 2014 SCC Online NGT 2723, ¶ 7.

168. *Id.* ¶ 28.

169. *Id.* ¶ 26.

170. *Id.* ¶ 27.

Similarly, in *In re Court on its own motion v. State of Himachal Pradesh*,[171] 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.[172] 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."[173]

In *Rajiv Dutta v. Union of India*, the petitioner challenged the lack of guidelines for dealing with and preventing forest fires in Uttarakhand and Himachal Pradesh.[174] The NGT acknowledged that fire emissions caused by forest fires directly contributed to climate change and noted that forest fires emit GHGs, specifically black carbon, which detrimentally affects the environment.[175] The NGT directed the governments to form appropriate measures to better tackle forest fires and also to formulate a "National policy/Guidelines for forest fire prevention and control, which should be updated periodically."[176]

d. On Climate Action Plans and Mitigation

Two out of the twelve cases classified as climate litigation before the NGT have dealt with ensuring the government prepares and enforces a climate action plan, while one case has dealt with ensuring the government mitigates the adverse climate impact of a project.

The status of the implementation of the National Action Plan on Climate Change (NAPCC)[177] was questioned in *Gaurav Bansal v. Union*

171. Court on its own motion v. State of Himachal Pradesh, 2014 SCC Online NGT 8, ¶ 4 (India).

172. *See generally* Ria Saini, Plastic Waste Threatens Picturesque And Ecologically Fragile Rohtang Pass, NDTV (June 4, 2018), https://www.ndtv.com/india-news/world-environment-day-plastic-waste-threatens-picturesque-and-ecologically-fragile-rohtang-pass-1862309.

173. Court on its own motion v. State of Himachal Pradesh, Interim Order, 2014 SCC Online NGT 1, ¶ 8 (India).

174. Rajiv Dutta v. Union of India, 2017 SCC Online NGT 30.

175. *Id.* ¶ 72.

176. *Id.* ¶ 94(i).

177. Prime Minister's Council on Climate Change, National Action Plan on Climate Change (NAPCC) (Issued June 30, 2008) (India). The NAPCC, launched in 2008, comprised of eight generic "missions" to aid protect the climate. A core element of NAPCC was the creation of

of India.[178] One of the key 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 the NAPCC, which the Ministry of Environment and Forest would then approve. The petition before the NGT did not allege a specific violation of the NAPCC, nor did it challenge the NAPCC, so the NGT merely ordered the state governments and union territories to "prepare their respective draft plan and get the same approved expeditiously."[179]

Be that as it may, even after the NGT nudged all states to file a SAPCC, the government of the National Capital Territory (NCT) of Delhi did not file a SAPCC with the Ministry of Environment and Forest. The non-filing of a SAPCC by the government of the NCT of Delhi was challenged in the case of *Mahendra Pandey v. Union of India,*[180] where the NGT directed the government of the 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*,[181] the petitioner challenged a hydroelectric project requiring the felling of 130,179 trees. The NGT acknowledged the importance of the project, which had obtained all the requisite approvals, considered the public welfare, and performed a cost-benefit analysis, allowing the project to proceed subject to its afforestation efforts. The government promised to plant 2,562,966 seedlings, which exceeded the NGT-mandated ratio of planting eight seedlings for every tree felled.[182] Hence, the NGT allowed the project to proceed while directing the appropriate authorities to oversee the process of plantation and afforestation. It is also to be noted that no one appeared on the petitioner's behalf during the hearings before the NGT.[183]

2. Indian Supreme Court

Three of the fifteen climate litigation cases in India have been brought before the Indian Supreme Court. All three of them dealt with

localised State Action Plans on Climate Change (SAPCC). However, as seen in various cases, the NAPCC and the SAPCC lag in being implemented and may be outdated.

178. Gaurav Kumar Bansal v. Union of India, Unreported Judgments, O.A. 498 Of 2014 decided on July 23, 2015 (NGT) (India).

179. *Id.* at 1.

180. Mahendra Pandey v. Govt't of Nat'l. Cap. Territory of Delhi, 2018 SCC Online NGT 2225 (India).

181. Punamchand v. Union of India, 2014 SCC Online NGT 2101 (India).

182. *Id.* ¶ 4.

183. *Id.* ¶ 5.

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 a third case concerned the 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*.[184] The Rajasthan government had passed a law that mandated companies owning captive generation power plants to purchase a minimum percentage of energy from renewable resources. 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 favor of the Rajasthan government.[185] 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. . . ."[186] The Court also observed that the NAPCC and the preamble of the Electricity Act ". . . [emphasize] promotion of efficient and environmentally benign policies to encourage generation and consumption of green energy. . . ."[187]

More recently, the Supreme Court had to decide whether to allow the felling of around 300 historically significant trees to widen roads in *Association for Protection of Democratic Rights v. State of West Bengal*.[188] 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[189] to Nationally

184. Hindustan Zinc Ltd. v. Rajasthan Elec. Regul. Comm'n, (2015) 12 SCC 611 (India).

185. Ambuja Cements Ltd. v. Raj. Elec. Regul. Comm'n, 2012 SCC Online Raj 2525 (India).

186. *Hindustan Zinc Ltd.*, (2015) 12 SCC 611, 640 (India).

187. *Id.* at 615.

188. Assn. for Protection of Democratic Rights v. State of West Bengal, 2021 SCC Online SC 259 (India).

189. Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104.

Determined Contributions (NDCs)[190]—"one of the stated objectives [being] to create an additional carbon sink of 2.5 to 3 billion tonnes of CO2 equivalent through additional forest and tree cover by 2030."[191]

Rather than deciding the matter, the Court directed the formulation of an expert committee, which would form rules and guidelines to "govern decision making concerning the cutting of trees for developmental projects."[192] 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 since the order directing the constitution of the committee.[193]

The clearance to construct a new airport based on its faulty EIA was challenged in *Hanuman Laxman Aroskar v. Union of India*.[194] In its 2018 order,[195] the Court suspended the clearance 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 flaws in the EIA process should be disregarded.[196] The Court further rejected the argument that the petitioners had no *locus standi*, holding that environmental governance concerns were a matter of public interest.[197]

The Court, applying the concept of "Environmental Rule of Law," as was elaborated upon 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."[198] The Court rooted such an iteration of environmental governance within the confines of the Constitution, observing,

190. *See generally* Nationally Determined Contributions (NDCs), UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE SECRETARIAT, https://unfccc.int/process-and-meetings/the-paris-agreement/nationally-determined-contributions-ndcs.

191. U.N. Food & Agric. Org., India's Intended Nationally Determined Contributions: Working Towards Climate Justice, 29, U.N. Doc. LEX-FAOC188478 (Oct. 1, 2015).

192. *Assn. for Prot. of Democratic Rights*, 5 SCC Online 466, at 468.

193. 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.

194. *See* Hanuman Laxman Aroskar v. Union of India, (2019) 15 SCC 401, 468 (India).

195. *See id.* at 468.

196. *See id.* at 467.

197. *See id.* at 469.

198. *Id.* at 462.

> 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.[199]

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 [Sustainable Development Goals]," 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."[200] The Court rejected the argument that flaws in the EIA process, as mandated under the 2006 notification, should be disregarded because a new airport was needed. In doing so, the Court reiterated that the application of principles of sustainable development[201] and intergenerational equity, among others, were to be considered when embarking on new projects.[202]

On the viability of the project, the Court allowed the Expert Appraisal Committee (EAC) to re-evaluate and revisit the recommendations made for the grant of environmental clearance, keeping in mind the specific objections raised in the judgment. The EAC followed the Court's instructions, and in its 2019 order, the Court permitted the construction of the new airport. 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.[203]

In these sets of orders in *Hanuman Laxman Aroskar*, the Court pointed out that the EIA was a critical step in analyzing a project's environmental impact.[204] The Court conveyed that an adverse environmental impact would lead to the violation of the right to a healthy environment. Hence, the EIA was constitutionally significant and played a role in fulfilling the right to a healthy environment.

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199. *Id.* at 466.

200. *Id.* at 467.

201. *See id.* at 458.

202. *See id.* at 464.

203. Hanuman Laxman Aroskar v. Union of India, (2020) 12 SCC 1, 38 (India).

204. *See* Hanuman Laxman Aroskar v. Union of India, (2019) 15 SCC 401, 457 (India); Hanuman Laxman Aroskar v. Union of India, (2020) 12 SCC 1, 35 (India).

3. Unclassified or Overlooked Climate Litigation in India

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,[205] a few of which will be touched upon below.[206]

The methodology used to uncover cases missed by the databases was to search for cases that included the term "climate change" before Indian courts using SCC Online's[207] search engine.[208] The authors of this Article analyzed cases that merely made a passing reference to climate change and cases that referred to climate change substantively. In doing so, additional cases arose that could have been classified as climate litigation, which are briefly discussed in this section.

As seen in cases classified as "climate litigation," one case deals with renewable power and energy quotas,[209] with climate change factoring in on how to interpret the provision and understand its intended purpose. A few other cases deal with a challenge to energy provisions that mandate renewable energy quotas. [210] 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 deemed part of climate litigation.

As in various environmental litigations, the government is the trustee or caretaker of public resources.[211] This is the public trust doctrine. Recently, there have been cases on similar grounds—where either forest land is illegally encroached on or land given for environmental

205. While these databases contribute immensely to climate change research and keeping track of climate litigation across the globe, it is also quite understandable that some of the finer and nuanced cases in a particular jurisdiction may have been missed. This was also conceded by the creators. The present Article attempts to add to and expand the work carried out by the databases.

206. Climate Databases, *supra* note 26.

207. SCCOnline is a database of reportable Indian cases available at https://www.scconline.com/.

208. 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.

209. *See* Hindustan Zinc Ltd. v. Rajasthan Elec. Regul. Comm'n, (2015) 12 SCC 611 (India).

210. *See* Timarpur-Okhla Waste Mgmt. Co. Ltd. v. Delhi Elec. Regul. Comm'n, 2015 SCC Online APTEL 82, ¶ 2 (India); Paschim Gujarat Vij Co. Ltd. v. Gujarat Elec. Regul. Comm'n, 2015 SCC Online APTEL 19, ¶ 8–9 (India).

211. M.C. Mehta v. Kamal Nath, (1997) 1 SCC 388, 389 (India).

purposes is misused. In some of these cases, the Courts have examined and factored in climate change.

For instance, in *Manu Anand v. State of Kerala*, government land was allotted for agricultural purposes, and the allottee sought approval to mine on the land.[212] The petitioner 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 "[t]he Kyoto Protocol to the United Nations Frame Work [sic] Conventions on climate change reminds the nation to strive for the policies and measures to minimise [sic] adverse effects on climate change and to promote sustainable forms of agriculture in the light of climate change conditions."[213] The Court set aside the executive order, which had allowed for mining on the land.

Similarly, in *Gulab Dass v. State of H.P.*[214] and *Pancham Chand v. State of H.P.*,[215] 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 [one of the] 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.[216]

Gulab Dass and *Pancham Chand* clearly show the role climate change played in the High Court's decisions and the Court's conscious effort at afforestation to maintain carbon sinks. As these cases deal with

212. Manu Anand v. State of Kerala, 2016 SCC Online Ker 41184 (India).

213. *Id.* ¶ 17.

214. Gulab Dass v. State of Himachal Pradesh, 2016 SCC Online HP 1384, ¶ 14 (India).

215. Pancham Chand v. State of Himachal Pradesh, 2016 SCC Online HP 3114 (India).

216. *Id.* ¶ 17.

emissions and mitigation, they make a case to be classified as climate litigation.

Another case dealing with impact assessment, environmental clearance, and mitigation makes a strong argument to be considered climate litigation. In the case, *Federation of Rainbow Warriors v. Deputy Conservator of Forests*,[217] the felling of trees for a public project was challenged before the Bombay High Court. The High Court prefixed its observation by noting the ecologically sensitive issue. The High Court observed, "[c]ourts have to be mindful of the environmental jurisprudence evolved under the Constitution of India, the statutory frame work [sic] and the various treaties and conventions to fight the climate change and the depleting tree cover."[218]

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 given after a comprehensive study that ascertains precisely how many trees are required to be cut and if some can be saved or transplanted. The High Court quashed the conservator's previous order and remanded the issue back to the conservator for reconsideration.

Factors such as cleaner energy, emissions, and climate change are also observed in a 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 noted that nuclear power was much greener compared to coal and fossil-fuel-based power generation.[219] When appealed to the Indian Supreme Court,[220] the Court, among other things, observed that the 1992 Framework Convention on Climate Change "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 the public's 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.

217. Fed'n of Rainbow Warriors v. Deputy Conservator of Forests, 2018 SCC Online Bom 329 (India).

218. *Id.* ¶ 426.

219. G. Sundarrajan v. Union of India, 2012 SCC Online Mad 3331, ¶ 94 (India).

220. G. Sundarrajan v. Union of India, (2013) 6 SCC 620, ¶ 168 (India).

These cases show and continue the trend of climate litigation in India following a similar pattern of grounding themselves 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 the environment. Grounding climate litigation in such a framework also resulted in certain aspects of human rights applications.

Basic human rights are reflected in fundamental rights under the Indian Constitution and are synonymous.[221] In *Maneka Gandhi v. Union of India* (*Maneka Gandhi*),[222] 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 asserted that the right to life is inalienable and cannot be suspended.[223]

In *ADM Jabalpur*, Justice H. R. Khanna, dissenting, quoted *R. C. Cooper,*[224] 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 clearly and without doubt that Article 21 confers the fundamental right of personal liberty."[225]

Justice Khanna's dissent was partially upheld by *Maneka Gandhi.*[226] The Indian Supreme Court in *Maneka* referred to Article 13 of the Universal Declaration of Human Rights, which enumerated the right to freedom of movement, acknowledging that it "is a highly valuable right which is a part of personal liberty. . . ."[227] The Court further observed that if the passport authority unilaterally canceled a passport, this would violate a "basic human right" protected under Article 21.[228]

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221. Harsh Pathak, *Concept of Right to Life and Its Protection under Constitution of India*, 2019 REV. DR. CONST. 55; *see also* Gitanjali Gill, *Human Rights and the Environment in India: Access through Public Interest Litigation*, 14 ENV'T L. REV. 200 (2012).

222. Maneka Gandhi v. Union of India, (1978) 1 SCC 248 (India).

223. ADM Jabalpur v. Shivkant Shukla, (1976) 2 SCC 521 (India).

224. R.C. Cooper v. Union of India, (1970) 1 SCC 248, ¶ 52 (India).

225. A.D.M. Jabalpur, (1976) 2 SCC 521, ¶ 446 (Khanna, J., dissenting) (India).

226. *Maneka Gandhi*, (1978) 1 SCC 248 (India).

227. *Id.* at 322.

228. *Id.* at 388–90, 400.

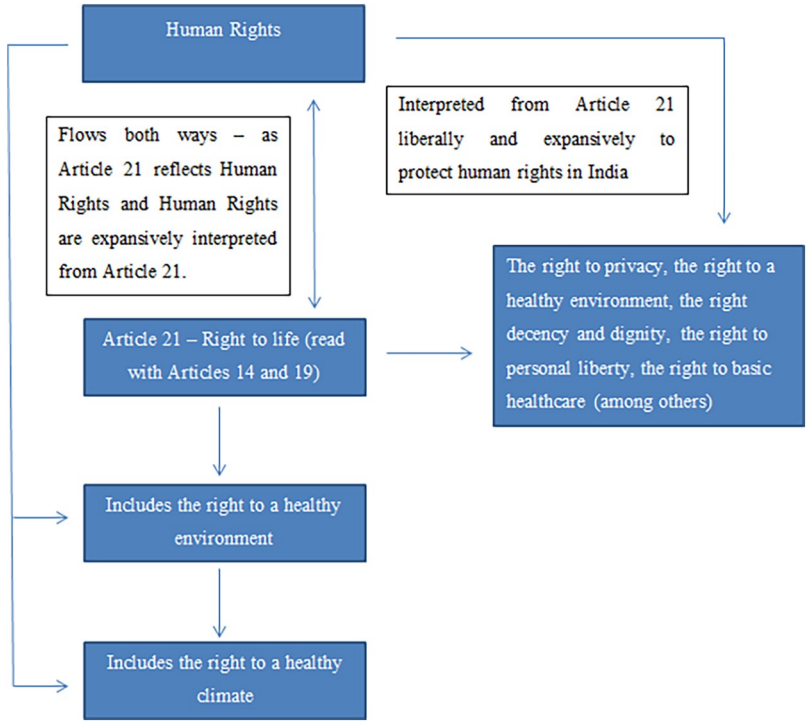
It took close to forty years for the Supreme Court of India to completely overrule *ADM Jabalpur*. In holding that there existed a fundamental right to privacy under Article 21, the Court in *K.S. Puttaswamy v. Union of India (2017)*[229] observed,

> 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 requiring an* ***expansive reading of liberties and freedoms to preserve human rights under the Rule of Law*** [emphasis added].[230]

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,[231] decency,[232] dignity,[233] and a healthy environment,[234] among others.

229. *See* Puttaswamy v. Union of India, (2017) 10 SCC 344 (India).
230. *Id.* at 477.
231. *Id.* at 504.
232. Sunil Batra v. Delhi Admn., (1978) 4 SCC 494, 509 (India).
233. *Maneka Gandhi*, 1 SCC 248 (India).
234. *See* Subhash Kumar v. State of Bihar, (1991) 1 SCC 598 (India).

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



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, judgments and orders regarding environmental and climate litigation are anchored in a rights-based approach.

Ridhima Pandey and *Hanuman Laxman Aroskar* present the emergence of the trend of including climate change within the pre-existing right to the environment.[235]

1. Ridhima Pandey: Climate Change and Impact Assessment

In *Ridhima Pandey,* the applicant petitioned the NGT for eight specific directions to:

235. Rajamani & Ghosh, s*upra* note 5, at 147 (predicting the inclusion of climate litigation within the pre-existing right to the environment).

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 include not only 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; and
viii. constitute a committee to oversee the implementation of these prayers.[236]

These prayers can be classified into three 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 aimed at combating government inaction, and the third is to tie any government action to India's climate commitments under the Paris Agreement, which are protecting and increasing India's carbon sink.

In dismissing *Ridhima Pandey,* the NGT held, "[t]he issue of climate change is certainly a matter covered in the process of impact assessment."[237] While the case is under appeal before the Indian Supreme Court, the ruling of the NGT is still in effect and has not been

236. Complaint, Ridhima Pandey v. Union of India, 2019 SCC Online NGT 843 (India).
237. Ridhima Pandey v. Union of India, 2019 SCC Online NGT 843 (India).

suspended.[238] A direct inference of the NGT order is that climate change factors must be considered while conducting an impact assessment.

When the NGT held climate change was to be covered under the impact assessment process, it also indirectly interpreted the term "environment" to include climate. The impact assessment process is carried out under the Environment Protection Act of 1986. Under the Environment Protection Act, the 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."[239] The EIA notification is promulgated under the Environment Protection Act, whose mandate is to protect the environment. If the EIA process is certain to include climate change factors, it is only reasonable to infer that the term "environment" includes the climate. The inference that the right to a healthy environment includes the right to a healthy climate follows naturally.

In cases termed "climate litigation," courts and tribunals have invoked the right to a pollution-free or healthy environment[240] as the basis to direct appropriate action to combat climate change. The assumption that the term "environment" includes climate is a logical inference. This inference would also help link the rich existing jurisprudence protecting the right to a healthy and pollution-free environment to combat climate change.

a. EIAs as a Potential Gateway for Specific Climate Litigation in India

Drawing from the Global North,[241] if climate change factors are to be considered while conducting an impact assessment, they may serve as a gateway for climate litigation. Here, the assessment process would provide a ground to challenge the approval or clearance if climate change factors are not adequately considered in the process.

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,

238. *Id.*

239. Environment Protection Act, 1986, § 2(a).

240. *See generally* Soc'y for Prot. of Env't & Biodiversity v. Union of India, 2018 SCC Online NGT 190 (India); M.C. Mehta v. Kamal Nath, (1997) 1 SCC 388 (India); Vellore Citizens Welfare F. v. Union of India, (1996) 5 SCC 647 (India).

241. *See* Ecology Action Ctr. v. Nova Scotia, [2022] N.S.S.C. 104 (Can.); Highlands Dist. Cmty. Ass'n v. British Columbia (Att'y Gen.), 2021 BCCA 232 (Can.).

hence, has to factor in climate change.[242] 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 susceptible to being struck down.

It may be some time before such a trend emerges, as *Ridhima Pandey* was recently decided and is also currently under appeal.[243] It is reasonable to expect approvals and clearances to be challenged because the impact assessment did not consider climate change as a factor.

The trend to challenge EIAs in the Global North has faced some setbacks. In both the Canadian cases of *Ecology Action Centre v. Nova Scotia*[244] and *Highlands District Community Association v. British Columbia*,[245] 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*,[246] 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 the generally agreed goal of limiting the increase in global average temperature to well below 2°C above pre-industrial levels.[247]

The Land and Environment Court indirectly imposed upon the government the requirement to not approve projects that contribute to GHG emissions and climate change. This decision did not translate into substantive safeguards. In 2022, the Australian Environment Minister successfully appealed against an interim decision in a separate case that held that the "Minister has a duty to take reasonable care to

242. *Ridhima Pandey*, 2019 SCC Online NGT 843 (India); *see also* Hanuman Laxman Aroskar v. Union of India, (2019) 15 SCC 401, 459 (India).

243. Civil Appeal No. 388/2021, Ridhima Pandey v. Union of India, 2019 SCC Online NGT 843. The appeal was last listed before the Supreme Court on March, 27, 2023 and is currently pending. The case will next be heard tentatively on February 20, 2024. *Case Status*, SUP. CT. OF INDIA, https://main.sci.gov.in/case-status (last visited Dec. 31, 2023).

244. *See Ecology Action Ctr.*, [2022] N.S.S.C. 104.

245. *Highlands Dist. Cmty. Ass'n*, BCCA 232 (Can.).

246. *Gloucester Resources Ltd*, [2019] NSWLEC 7.

247. *Id.* ¶ 697.

avoid causing personal injury to the Children" when approving coal projects to protect children from carbon emissions.[248]

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,[249] 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*.[250] However, the Australian Federal Court did not specifically rule on such arguments but rather held that it would not be appropriate for the court to intervene in government policy. Peel and Markey-Towler note that "[t]he 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 is not its place to set policies on climate change."[251]

That said, such a ruling has not deterred efforts to use 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 to new coal exploration and mining.[252] Forest and Bird, the conservation charity, alleges 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."[253] The case is ongoing, and a decision is pending. The decision has the potential to be a landmark decision in nature, as noted by Professor Ian Lowe.[254]

As discussed in Section IV.A, Norway is being sued before the ECtHR for not taking emissions and climate change impacts into consideration

248. *Sister Marie Brigid Arthur v Minister for the Env't* [2021] FCA 560 (Austl.).

249. *Minister for the Env't v Sharma* [2022] FCAFC 35 (Austl.).

250. *See* Justine Bell-James, *Landmark Rocky Hill Ruling Could Pave the Way for More Courts to Choose Climate over Coal*, CONVERSATION (Feb. 11, 2019, 1:06 AM), https://theconversation.com/landmark-rocky-hill-ruling-could-pave-the-way-for-more-courts-to-choose-climate-over-coal-111533.

251. Jacqueline Peel & Rebekkah Markey-Towler, *Today's Disappointing Federal Court Decision Undoes 20 Years of Climate Litigation Progress in Australia*, CONVERSATION (Mar. 15, 2022, 2:33 AM), https://theconversation.com/todays-disappointing-federal-court-decision-undoes-20-years-of-climate-litigation-progress-in-australia-179291.

252. Media Release, *Coal case in Invercargill High Court*, FOREST & BIRD (July 12, 2022), https://www.forestandbird.org.nz/resources/coal-case-invercargill-high-court.

253. *Id.*

254. Blair Jackson, *Expanding or Developing New Coal Mines 'Totally Irresponsible', Professor Says*, STUFF (July 22, 2022, 07:03 PM), https://www.stuff.co.nz/environment/climate-news/129326502/expanding-or-developing-new-coal-mines-totally-irresponsible-professor-says.

while approving licenses for the exploration of oil and gas. Therefore, it is reasonable to conclude that the EIA processes and approvals granted can be challenged on the grounds that they do not consider climate change as a factor.

The outcome of *Ridhima Pandey* was the NGT dismissing the petition as the statutory scheme was not under challenge. Even in dismissing the petition, though, the NGT had a profound impact merely by observing that "[t]he issue of climate change is certainly a matter covered in the impact assessment process."[255] However, as seen in the NGT's other observation that "[t]here 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," [256] it is still challenging to prove that the government is not fulfilling its commitments under the Paris Agreement.

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—the petition merely asked for the NGT to direct the government to do more without challenging any government action. 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.[257] In doing so, the Court observed how environmental issues are rights-based matters and how NDCs may impact India's obligations—all while emphasizing 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 Court observed a lack of

255. Ridhima Pandey v. Union of India, 2019 SCC Online NGT 843 (India).

256. *Id.*

257. Hanuman Laxman Aroskar v. Union of India, (2019) 15 SCC 401, 462 (India).

environmental governance within India's rule of law and due process framework to lead to flaws in the EIA process. The Court cited several international environmental law instruments to substantiate the need for a healthy environmental rule of law framework. The Court cited the "First Environmental Rule of Law Report"[258] in observing that the four pillars of sustainable development (economic, social, environmental, and peace) were supported by the environmental rule of law;[259] the IUCN World Declaration on the Environmental Rule of Law,[260] 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.[261] In referring to these goals and targets, the Court emphasized 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."[262]

The Court also 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.[263]

The Court held that the EIA process is an integral part of the environmental rule of law—observing that "[t]he 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."[264]

b. Climate Change Is a Rights-Based Matter and Not a Policy Decision or a Political Question

One of the arguments raised by the Indian government in *Hanuman Laxman Aroskar*[265] was that constructing a new airport was a policy

258. UNITED NATIONS ENV'T PROGRAMME, ENVIRONMENTAL RULE OF LAW: FIRST GLOBAL REPORT (2019).

259. *Hanuman Laxman Aroskar,* 15 SCC at 462.

260. INT'L UNION FOR CONSERVATION OF NATURE, WORLD DECLARATION ON THE ENVIRONMENTAL RULE OF LAW (2016).

261. G.A. Res. 70/1 (Sept. 25, 2015).

262. *Hanuman Laxman Aroskar,* 15 SCC at 465.

263. *Id.* at 464 (The Court also referred to Dhvani Mehta's dissertation as it is the only comprehensive study on environmental rule of law in India); *see also* Dhvani Mehta, The Environmental Rule of Law of India (2017) (Ph.D. dissertation, University of Oxford), https://ora.ox.ac.uk/objects/uuid:730202ce-f2c4-4d2f-9575-938a728fe82a.

264. *Hanuman Laxman Aroskar,* 15 SCC at 466.

265. *See id.* at 467.

decision, and hence, flaws in the EIA, which was also a statutory requirement, should be overlooked. The Court rejected this argument, observing that 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."[266] The Court further pointed out how flaws in the EIA process would violate due process.[267] 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 the environment.

Basing the right to the environment within the Constitution provides the advantage of climate change as a matter of rights and enables judicial review of how governments may take action to either fulfill or not violate the right.[268] Such an approach skirts the debate of climate change being a policy issue to be decided by the Parliament over the courts.[269] It is to be noted that the standard of proof of harm and the causality of government inaction violating the constitutional right to the environment has its challenges,[270] as is deliberated upon in Part IV of the Article.

c. Nationally Determined Contributions May Guide Courts in Holding the Government Accountable

The Court referred to India's NDCs[271] under the Paris Agreement in two of the three climate litigations before the Court, including *Hanuman Laxman Aroskar*.[272] 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

266. *Id.*

267. *See Hanuman Laxman Aroskar,* 15 SCC at 467.

268. *See generally supra* Part II.

269. *See generally* James R. May, *Climate Change, Constitutional Consignment, and the Political Question Doctrine*, 85(4) DENV. U. L. REV. 919 (2008); Amelia Thorpe, *Tort-Based Climate Change Litigation And The Political Question Doctrine*, 24 J. LAND USE & ENV'T L. 79–105 (2008).

270. Peel & Osofsky, *supra* note 26, at 46.

271. 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 framework. *See* Nationally Determined Contributions (NDCs), *supra* note 190. However, it is also to be noted that India's NDCs are non-binding. *See* U.N. Food & Agric. Org., India's Intended Nationally Determined Contributions: Working Towards Climate Justice, 30, U.N. Doc. LEX-FAOC188478.

272. See Ass'n for Protection of Democratic Rights v. State of West Bengal, 2021 5 SCC Online 466, 467 (India); *Hanuman Laxman Aroskar*, 15 SCC at 466.

to keep government actions, which adversely impact the climate, in check.

Shibani Ghosh, an environmental lawyer, also observes in her research how India's NDCs can be a hook for climate litigation.[273] Citing that the government's clearing of forests may hamper India from achieving the third NDC of creating an additional carbon sink,[274] Ghosh notes that such forest clearing actions may provide the *locus standi* for climate litigation. While Ghosh concedes that there has been no decision regarding the justiciability of India's NDCs,[275] the Court's actions in *Hanuman Laxman Aroskar*[276] may 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 Joana Setzer and Professor Lisa Vanhala noted in their review of climate litigation.[277] In their annual report on Global Trends in Climate Litigation,[278] Setzer and Catherine 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."[279] The Sabin Center climate database[280] and the LSE Grantham Research Institute's database[281] adopt the same definition while classifying climate litigation. Setzer and Higham also concede that a degree of subjectivity is involved in classifying cases.

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. In their paper analyzing climate litigation in the Global South, Peel and Lin claim that the definitions developed in the literature that focuses on the Global North emphasize "the centrality of climate-focused arguments and strategies in litigation. . . ."[282] Such emphasis may mean that the definition may fail to adequately capture

273. Ghosh, *supra* note 18, at 358–59.

274. *Id.* at 358.

275. *Id.* at 358–59.

276. *See Hanuman Laxman Aroskar*, 15 SCC at 466.

277. Setzer & Vanhala, s*upra* note 18, at 3.

278. Joana Setzer & Catherine Higham, Global Trends in Climate Litigation: 2022 Snapshot (2022).

279. *Id.* at 46.

280. *About-Global Climate Change Litigation Database*, Sabin Ctr. for Climate Change – Colum. L. Sch., https://climatecasechart.com/about/ (last visited Aug. 18, 2022).

281. *Id.*

282. Peel & Lin, s*upra* note 19, at 686.

developments in the Global South, where climate change issues and arguments are more peripheral. Peel and Lin's work is added upon by Shibani Ghosh, covering fourteen Indian cases in addition to the five analyzed by Peel and Lin. 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."[283]

In this part, we build upon Peel, Lin, 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 emphasize climate change as a central issue for climate litigation.[284] While there is a debate among some commentators as to whether cases opposing the regulation of GHGs qualify as climate litigation,[285] the common understanding is that climate litigation has something to do with an issue or argument related to climate change.[286]

The level of the relation of a case to climate change often raises 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 [that] is a material issue of law or fact."[287] Such a definition overlooks cases where climate change may be a secondary argument. Cases that regulate GHG and carbon emissions but do not directly raise the argument of climate change may also be overlooked.[288] As 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.[289]

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"[290] are climate litigations,

283. Shibani Ghosh, *Litigating Climate Claims in India*, 114 AM. J. INT'L L. UNBOUND 45 (2020).

284. *See* Elizabeth Fisher, *Climate Change Litigation, Obsession and Expertise: Reflecting on the Scholarly Response to Massachusetts v. EPA*, 35 L. & POL'Y 236 (2013).

285. Setzer & Vanhala, s*upra* note 18, at 3 ("Some scholars include cases both supporting and opposing regulation of GHG emissions as climate change litigation whereas others include only the supportive cases.").

286. *See generally* Peel & Lin, s*upra* note 19; *see e.g.* Fisher, *supra* note 284.

287. SETZER & HIGAM, *supra* note 278, at 46.

288. *See* Bouwer, *supra* note 27.

289. Peel & Lin, s*upra* note 19, at 686.

290. Setzer & Vanhala, s*upra* note 18, at 3.

even when those cases do not use the term climate change, and yet have adaptation,[291] loss, and damage arguments.[292] They do not see the need for an overarching definition of climate change and advise authors and "scholars to be clear about how they are conceptualizing and operationalizing their ideas about what climate litigation is and is not."[293]

Nonetheless, Setzer, writing with Higham, classifies climate litigation as centering climate change as a material issue.[294] Such a definition gives rise to many difficulties—as seen in the Indian context. 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 that takes into account climate change concerns.

In the Indian context, Arindam Basu, writing in 2011,[295] reiterated a climate litigation definition that classified climate litigation into three categories.[296] Those three were broadly: first, climate change as a causal factor in a civil case; second, an administrative law claim for inaction to control GHG emissions, which breaches a constitutional or statutory duty; third, 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.[297] In making such a claim, Basu differentiated environmental litigation from climate litigation in India. Such a differentiation is not entirely straightforward. This is examined in the next section (Section III.B).

Another scholar who has categorized climate litigation in India is Shibani Ghosh.[298] Ghosh classifies fourteen cases of climate litigation in India into four categories. The first is a reference to climate change

291. To understand adaptation in the context of climate litigation, see Jacqueline Peel and Godden Lee, *Planning for Adaptation to Climate Change: Landmark Cases from Australia*, 9 SUSTAINABLE DEV. L. & POL'Y 37 (2009).

292. To understand loss and damage cases in the context of climate litigation, see Patrick Toussaint, *Loss and Damage and Climate Litigation: The Case for Greater Interlinkage*, 30 REV. EUR., COMPAR. & INT'L ENV'T L. 16 (2020).

293. Setzer & Vanhala, s*upra* note 18, at 3.

294. SETZER & HIGAM, *supra* note 278, at 46

295. Arindam Basu, *Climate Change Litigation in India: Seeking a New Approach Through the Application of Common Law Principles*, 1 NALSAR ENV. L. & PRAC. REV. 34, 35 (2011).

296. Jose A. Cofre et. al., *Climate Change Litigation*, *in* CLIMATE CHANGE: A GUIDE TO CARBON LAW AND PRACTICE 229, 230–31 (Paul Q. Watchman ed., 2008).

297. Basu, s*upra* note 295, at 38. Basu was possibly referring to them being used to pursue environmental litigation.

298. Ghosh, *supra* note 283.

language (such as GHG emissions and international negotiations, among others).[299] The second category is "seeking proper implementation of [a climate] law or [government] policy."[300] The third is raising climate concerns, seeking directions to create new policies or realign existing ones.[301] The fourth is where climate change is raised as a defense by the government.[302]

The fourteen cases analyzed by Ghosh join the five cases discussed by Peel and Lin. Of the five cases discussed by Peel and Lin, *Ridhima Pandey*[303] (referred to as *Pandey* by Peel and Lin), *In re Court on its own motion v. State of Himachal Pradesh & Others*[304] (referred to as *Rohtang Pass* by Peel and Lin), and *Indian Council for Enviro-Legal Action v. Ministry of Environment and Forests*[305] (referred to as *HFC23* 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,[306] are *Karnataka Industrial Areas Development Board (KIADB) v. Sri C. Kenchappa (KIADB)*[307] and *Manushi Sangthan v. Govt. of Delhi (Manushi)*.[308] In *KIADB,* the legality of converting agricultural land for industrial use was challenged when the Supreme Court noted that deforestation caused an increase in emissions and directed that in the future, approval from the pollution control board needs to be sought before any such conversions.[309] While climate change was not an argument, Ghosh classifies *KIADB* as referring to climate impacts. Ghosh classifies *Manushi* under the same category of climate impact, wherein the Delhi High Court highlighted emissions as a concern when the Delhi government's decision to limit the number of cycle rickshaw licenses was challenged.

To understand Ghosh's classification of climate litigation in the Indian context, we need to analyze the fourteen cases Ghosh classifies as climate litigation,[310] as simplified in the table below.

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299. *Id.* at 46.

300. *Id.* at 47.

301. *Id.*

302. *Id.* at 48.

303. Ridhima Pandey v. Union of India, 2019 SCC Online NGT 843 (India).

304. Court on its own motion v. State of Himachal Pradesh, 2014 SCC Online NGT 8 (India).

305. Indian Council for Enviro-Legal Action, 2014 SCC Online NGT 2723 (India).

306. Ghosh, *supra* note 283, at 47.

307. Karnataka Industrial Areas Development Board v. Sri C. Kenchappa, (2006) 6 SCC 371 (India); Peel & Lin, s*upra* note 19.

308. Manushi Sangthan v. Gov't. of Delhi, 2010 SCC Online Del 580 (India).

309. Karnataka Industrial Areas Development Board, 6 SCC 391 (India).

310. Ghosh, *supra* note 283.

TABLE 2: GHOSH'S (2020) CLASSIFICATION AND CATEGORIZATION OF CLIMATE LITIGATION IN INDIA

PRESENT IN THE DATABASE (TABLE 1)	YEAR	FORUM	PARTIES TO THE SUIT	HOLDING	CLASSIFICATION 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*[311]	The applicants challenged an irrigation project as it would lead to methane emissions, which would trigger adverse climate action. The NGT allowed the project and created a committee to oversee its sustainable implementation.	Reference to methane emissions, adverse climate impacts.
Yes	2013	NGT	*Sukhdev Vihar Welfare Residents Association v. Union of India*[312]	NGT rejected the challenge to the operation of a waste-to-energy (clean development mechanism) plant in a densely populated area because it emitted GHGs. The NGT fined the plant for past breaches and issued guidelines and directions for future operations.	Reference to GHG emissions reduction and clean development mechanism project.

311. Om Dutt Singh v. State of Uttar Pradesh, 2018 SCC Online NGT 2864 (India).

312. Sukhdev Vihar Residents Welfare Ass'n v. State of NCT of Delhi, Unreported Judgments, M.A. 19 Of 2014 decided on Feb. 2, 2017 (NGT) (India).

TABLE 2: CONTINUED

PRESENT IN THE DATABASE (TABLE 1)	YEAR	FORUM	PARTIES TO THE SUIT	HOLDING	CLASSIFICATION BY GHOSH
Yes	2016	NGT	*Society for Protection of Environment & Biodiversity v. Union of India*[313]	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 Motion v. State of Himachal Pradesh*[314]	NGT took *suo moto* cognizance of the illegal felling of trees and issued many directions to remedy the same. In doing so, it noted the adverse consequence of deforestation, resulting in the loss of carbon sinks and adverse climate reactions.	Reference to the destruction of carbon sinks, carbon dioxide emissions from forest loss, and localized warming effects of small-scale deforestation.
No	2017	NGT	*Yogendra Mohan Sengupta & Others v. Union of India*[315]	The NGT issued directions on rampant unauthorized and illegal constructions in the green belt present in Shimla.	

313. Soc'y for Prot. of Env't & Biodiversity v. Union of India, 2018 SCC Online NGT 190, 1052 (India).

314. Court on its own motion v. State of Himachal Pradesh, 2017 SCC Online NGT 1434 (India).

315. Yogendra Mohan Sengupta & Others v. Union of India, 2017 SCC Online NGT 1719 (India).

TABLE 2: CONTINUED

PRESENT IN THE DATABASE (TABLE 1)	YEAR	FORUM	PARTIES TO THE SUIT	HOLDING	CLASSIFICATION BY GHOSH
CATEGORY II - SEEKING PROPER IMPLEMENTATION OF A CLIMATE LAW OR POLICY					
Yes	2014	NGT	*Gaurav Bansal v. Union of India*[316]	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.	Implementation of climate policy.
Yes	2016	NGT	*Mahendra Pandey v. Union of India*[317]	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.	

316. Gaurav Kumar Bansal v. Union of India, O.A. 498 of 2014 decided on July 23, 2015 (NGT) (India).

317. Mahendra Pandey v. Govt't of Nat'l. Cap. Territory of Delhi, 2018 SCC Online NGT 2225 (India).

TABLE 2: CONTINUED

PRESENT IN THE DATABASE (TABLE 1)	YEAR	FORUM	PARTIES TO THE SUIT	HOLDING	CLASSIFICATION BY GHOSH
No	2015	NGT	*Ratandeep Rangari v. State of Maharashtra*[318]	The NGT directed the creation of a committee to effectively implement a notification directing coal plants not to use more than thirty-four percent ash content with coal.	Effective implementation of climate policy.
No	2016	Kerala High Court	*Manu Anand v. State of Kerala*[319]	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*[320]	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.

318. Ratandeep Rangari v. State of Maharashtra, 2014 SCC Online NGT 2960 (India).
319. Manu Anand v. State of Kerala, 2016 SCC Online Ker 41184 (India).
320. *See* Hanuman Laxman Aroskar v. Union of India, (2019) 15 SCC 401, 468 (India).

TABLE 2: CONTINUED

PRESENT IN THE DATABASE (TABLE 1)	YEAR	FORUM	PARTIES TO THE SUIT	HOLDING	CLASSIFICATION BY GHOSH
CATEGORY III - RAISING CLIMATE CONCERNS SEEKING DIRECTIONS TO CREATE NEW POLICIES, OR REALIGNING EXISTING ONES					
Yes	2014	NGT	*Wilfred J v. Ministry of Environment & Forests*[321]	The clearance given to a port was challenged as the port was being constructed in an ecologically sensitive area. 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*[322]	The applicant challenged the establishment of wind farms, claiming that they caused climate change and adverse economic impacts. The NGT found no evidence of the same and dismissed the application.	A prayer for a direction requiring wind farms to obtain environmental approvals in advance.

321. Wilfred J. v. Ministry of Env't Forests, Unreported Judgments, O.A. No. 74 Of 2014 decided on Sept. 2, 2016 (NGT) (India).

322. Kallpavalli Vrishka Pempakamdarula Paraspara Sahayaka Sahakara Sangam Ltd. v. Union of India, 2015 SCC Online NGT 193, ¶ 16 (India).

TABLE 2: CONTINUED

PRESENT IN THE DATABASE (TABLE 1)	YEAR	FORUM	PARTIES TO THE SUIT	HOLDING	CLASSIFICATION BY GHOSH
CATEGORY IV - CASES WHERE CLIMATE CHANGE IS RAISED AS A DEFENSE BY THE GOVERNMENT					
Yes	2015	SC	*Hindustan Zinc Ltd. v. Rajasthan Electricity Regulatory Commission*[323]	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.	Climate change as a defense against government action under challenge.
No	2014	Allahabad High Court	*M/S Singh Timber Traders v. State of Uttar Pradesh*[324]	The High Court found the increase in the license fee for timber-based industries to be arbitrary and rejected the government's argument that climate change was one of the reasons for the increase.	

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. Ghosh also observes that the "term 'global warming' started appearing in Indian environmental judgments in the 1990s. . . ."[325] This leads to the question: would those cases that refer to climate change language such as emissions, global

323. Hindustan Zinc Ltd. v. Rajasthan Elec. Regul. Comm'n, (2015) 12 SCC 611 (India).
324. Singh Timber Trader v. State of Uttar Pradesh, 2014 SCC Online All 16207 (India).
325. Ghosh, *supra* note 283, at 45.

warming, rising sea levels, 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.[326] With Indian courts now implying that the right to a healthy environment encompasses the right to a healthy climate, the question of whether environmental litigation is different from climate litigation needs to be examined.

B. *Climate Litigation v. Environmental Litigation in India: Is There a Difference?*

As discussed earlier, Indian courts have long upheld the right to a healthy and pollution-free environment within the confines of Article 21 of the Constitution.[327] It did so in cases which alleged specific instances of pollution[328] and mismanagement of the environment leading to pollution.[329] 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.[330] These cases used some climate change language, such as global warming and deforestation, among others. The absence of specific climate change arguments or issues in these cases led them to be predominantly classified as environmental litigation and not climate litigation. 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 climate change factors into consideration.[331] While specific

326. *Id.* at 46.

327. *See* Subhash Kumar v. State of Bihar, (1991) 1 SCC 598 (India).

328. *See* M.C. Mehta v. Kamal Nath, (1997) 1 SCC 388 (India).

329. *See* Court on its own motion v. State of Himachal Pradesh, 2014 SCC Online NGT 8, ¶ 17 (India).

330. *See generally* M.C. Mehta v. Kamal Nath, (1997) 1 SCC 388 (India); Hanuman Laxman Aroskar v. Union of India, (2019) 15 SCC 401, 462 (India).

331. 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.

cases against environmental pollution, which have been termed environmental litigation, may be the basis of climate litigation in India, in some instances, they may also be labeled climate litigation due to their use of climate change language. The authors acknowledge that certain issues could arise from labeling those cases "climate litigation," mainly due to their specific nature reflected in the specificity of the relief sought, which is almost always highly localized.[332]

Environmental litigation contributes immensely to Indian jurisprudence on climate change. For instance, in 1995,[333] 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. 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.[334]

Such cases represent the dilemma posed in the Indian context. They do not use the term climate change, yet they propagate jurisprudence and actions to curb environmental pollution or protect forest covers and trees that act as carbon sinks, which in turn prevent 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 in the media narrative about the case. . . ."[335] They conclude that rather than focusing on an overarching definition, scholars should try to be clear about "what climate litigation is and is not."[336]

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332. *See generally* Mun. Council of Ratlam v. Vardhichand, (1980) 4 SCC 162 (India); Charan Lal Sahu v. Union of India, (1990) 1 SCC 613 (India); Shantistar Builders v. Narayan Khimale Totmane, (1990) 1 SCC 520 (India); Vellore Citizens Welfare F. v. Union of India, (1996) 5 SCC 647 (India).

333. State of Himachal Pradesh v. Ganesh Wood Prod., (1995) 6 SCC 363 (India).

334. *See* M. C. Mehta v. Union of India, 1994 Supp. 3 SCC 717 (India); M.C. Mehta v. Union of India, 1992 Supp. 2 SCC 633 (India) (Kampur Tanneries Case); Vellore Citizens Welfare F., 5 SCC 647; Shantistar Builders, 1 SCC 520.

335. Setzer & Vanhala, *supra* note 18, at 3.

336. *Id.*

The Sabin Center and the LSE GRI databases both use the "material connection with climate change standard to classify cases."[337] Such classification is not straightforward—as seen through Ghosh's classification of some cases, which are different from the cases classified by the databases as climate litigation.[338] The authors have also pointed out other cases that may be classified as climate litigation.

The definition of climate change in the Indian context needs to be revisited in a comparative study to truly reap the benefits of India's rich jurisprudence. 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 require adjusting our 'lens' for understanding this phenomenon to bring into focus developments in the Global South."[339]

In India, approaching climate litigation to include the cases that 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. . . ."[340] Such an approach to understanding and unearthing Indian jurisprudence is discussed in the next section.

C. *The Concentric Circles of Climate Litigation in India*

In their review of climate change litigation in 2020,[341] Peel and Hari M. Osofsky build on the research carried out by Setzer and Vanhala in 2019. Even Peel and Osofsky concede that the definition of climate litigation is often a point of contention. They note, "[t]he 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."[342] 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.

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337. *See* SABIN CTR. FOR CLIMATE CHANGE, *supra* note 280; *Climate Change Laws of the World*, GRATHAM RSCH. INST. ON CLIMATE CHANGE & ENV'T-LONDON SCH. ECON., https://climate-laws.org/.

338. Ghosh, *supra* note 283, at 46.

339. Peel & Lin, *supra* note 19, at 686.

340. Bouwer, *supra* note 27, at 484.

341. *See* Jacqueline Peel & Hari M. Osofsky, *Climate Change Litigation*, 16 ANN. REV. L. & SOC. SCI. 21 (2020).

342. *Id.* at 23.

Circle one, or the core circle, comprises only cases "with climate change as the central issue."[343] Circle two includes cases "with climate change as a peripheral issue."[344] Circle three further 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 extend their ambits to any case with a direct implication for climate change aspects, such as adaptation and mitigation.[345]

Such an understanding of climate litigation may be best suited to understand climate litigation in India—where cases fought with a climate change motivation or motivation to protect the environment often do not raise climate change as an issue. 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. A concentric circle approach still unearths much of India's environmental and climate jurisprudence, as is illustrated utilizing the cases that have been discussed in this Article.

Applying the concentric circles' definition in the Indian context, at the core level (litigation with climate change as a central issue) would be cases such as *Ridhima Pandey*,[346] *Hanuman Laxman Aroskar*,[347] *Association for Protection of Democratic Rights*.[348] These cases had climate change issues at their core, as seen in the relief they sought. However, cases that deal with flawed EIAs,[349] challenged on grounds other than the fact that climate change was not considered, may fall under the category of cases where climate change was a secondary issue. Similarly,

343. *Id.*

344. *Id.*

345. JACQUELINE PEEL & HARI M. OSOFSKY, CLIMATE CHANGE LITIGATION: REGULATORY PATHWAYS TO CLEANER ENERGY 8–9 (2015).

346. Ridhima Pandey v. Union of India, 2019 SCC Online NGT 843 (India).

347. *See* Hanuman Laxman Aroskar v. Union of India, (2019) 15 SCC 401 (India).

348. Assn. for Protection of Democratic Rights v. State of West Bengal, (2021) 5 SCC Online 466 (India).

349. *See* Vimal Bhai v. Ministry of Env't & Forests, 2011 SCC Online NGT 16 (India); Wilfred J. v. Ministry of Env't & Forests, Unreported Judgments, O.A. No. 74 Of 2014, decided on Sept. 2, 2016 (NGT) (India); Jan Chetna v. Ministry of Env't & Forests, 2012 SCC Online NGT 81 (India).

cases dealing with renewable energy quotas, where the Electricity Act was the primary statute, would fall under this circle.[350]

Further, cases that deal with petitions to protect the environment, not on the grounds of climate change but on other grounds (e.g., pollution of rivers, discharge of untreated water, illegal emissions of pollutants)[351] and invoking the statutory remedies, would fall under the third concentric circle (cases that protect the environment but do not significantly raise climate change as an argument).

Lastly, the outermost circle would deal with cases with climate change implications that are not explicitly framed to have such implications. In India, a common iteration of such cases would be litigation on illegal mining and illegal encroachment of forest land, which are localized yet impact climate change.[352] There can be some disagreement and confusion about cases that lie between the two outermost circles. After all, 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 organization), 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 are predominantly framed in a Global North context.

The authors also 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 to understand how cases impact climate litigation from a broader perspective.[353]

IV. Climate Litigation and Human Rights Claims Before European Courts of Human Rights

Climate change is a global issue. Peel and Lin, in their comparative study, observe that an analysis of climate litigation in the Global South would not only help contribute to global climate governance, as climate

350. *See* Hindustan Zinc Ltd. v. Rajasthan Ele. Regul. Comm'n, (2015) 12 SCC 611 (India); Timarpur-Okhla Waste Mgmt. Co. Ltd. v. Delhi Elec. Regul. Comm'n, 2015 SCC Online APTEL 82, ¶ 2–3 (India); Paschim Gujarat Vij Co. Ltd. v. Gujarat Elec. Regul. Comm'n, 2015 SCC Online APTEL 19, ¶ 8–9 (India).

351. *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, 1992 Supp. 2 SCC at 635; 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).

352. *See, e.g.*, Gulab Dass v. State of H.P., 2016 SCC Online HP 1384, ¶ 15 (India); Pancham Chand v. State of Himachal Pradesh, 2016 SCC Online HP 3114 (India).

353. *See generally* Bouwer, *supra* note 27; Peel & Osofsky, *supra* note 26.

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.[354] A global understanding better equips policymakers and activists to combat climate change. However, as noted earlier, attempts to understand climate litigation in the Global South have only recently gained traction.[355]

In this part, we analyze Indian jurisprudence with a broad lens, including environmental and climate litigation, and explore how they may inform global climate jurisprudence and jurisprudence in the Global North. In that regard, this part specifically reviews how European Courts are faced for the first time with having to interpret and assess whether there exists an implied fundamental right to a healthy and pollution-free environment. The cases further force courts to review whether state inaction on climate change infringes on this fundamental right.

A. *The Five Human Rights Climate Litigations Before the European Court of Human Rights*

At the end of 2022, five climate litigations before the ECtHR were grounded in a human rights framework, relying on the European Convention on Human Rights (ECHR).[356]

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354. Peel & Lin, s*upra* note 19, at 683.

355. *See* Peel & Lin, s*upra* note 19. This was the first comprehensive transnational analysis of climate litigation in the Global South.

356. Helen Keller & Corina Heri, *The Future is Now: Climate Cases Before the ECtHR*, 40 NORDIC J. HUM. RTS. 153, 155 (2022) (explaining four of the five cases filed in 2022 before the ECtHR). During the later stages of the review of the paper, additional cases were filed. Presently there are a total of ten cases before the ECtHR, for three of which hearings have been conducted. The ECtHR has decided to adjourn the examination of the remaining seven cases until they decide on the three cases which are currently being heard. *See* Press Release, European Court of Human Rights, Status of climate applications before the European Court (Feb. 9, 2023) https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-7566368-10398533&filename=Status%20of%20climate%20applications%20before%20the%20European%20Court.pdf (The Court decided to adjourn its examination of seven cases until such time as the Grand Chamber has ruled in the climate change cases before it. . .) In addition to the two cases which have been adjourned and are included in the table, the five cases which have been adjourned are Uricchio v. Italy and 31 other States, App. No. 14615/21; De Conto v. Italy and 32 other States, App. No. 14620/21; The Norwegian Grandparents' Climate Campaign and Others v. Norway, App. No. 19026/21; Soubeste and 4 other applications v. Austria and 11 other States, App Nos. 31925/22, 31932/22, 31938/22, 31943/22, and 31947/22; Engels v. Germany, App. No. 46906/22. For more information and analysis of the hearings, see Ole Pedersen, Climate Change Hearings and the ECtHR Round II, EJIL TALK (Oct. 9 2023) https://www.ejiltalk.org/climate-change-hearings-and-the-ecthr-round-ii/. It is also important to note that two cases were declared inadmissible in unpublished judgments. *See* Status of climate applications before the European Court, *supra*

TABLE 3: CLIMATE LITIGATION CURRENTLY BEFORE THE ECTHR

CASE	CLAIM	STATUS
Verein Klimaseniorinnen and Others v. Switzerland[357]	An association of elderly women who "are particularly susceptible to intense and frequent heat waves" claims 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).	The case was heard on March 29, 2023.
Carême v. France[358]	The mayor of the municipality of Grande-Synthe (in his individual capacity) argued that the French government's insufficient actions to mitigate climate change breached his right to life (Article 2, ECHR) and right to health (Article 8, ECHR). The French government's insufficient action would also result in the risk of flooding his house, according to the petitioner.	The case was heard on March 29, 2023.
Mex M v. Austria[359]	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 targets in consonance with the Paris Agreement to control temperatures.	Adjourned.

note 356. (In addition, the Court declared the two applications below inadmissible on the grounds that the applicants were not sufficiently affected by the alleged breach of the Convention or its Protocols to claim to be victims of a violation within the meaning of Article 34 (right of individual petition) of the Convention. These decisions were taken, respectively, in a Single Judge and Committee judicial formations in a non-public written procedure).

357. Application, Verein Klimaseniorinnen Schweiz v. Switzerland, App. No. 53600/20 (Nov. 26, 2020).

358. Carême v. France, App. No. 7189/21 (June 7, 2022), https://hudoc.echr.coe.int/fre.

359. Mex Müllner v. Austria, App. No. 18859/21 (March 25, 2021).

TABLE 3: CONTINUED

CASE	CLAIM	STATUS
Duarte Agostinho v. Portugal[360]	The applicants allege that thirty-three States parties to the ECHR have violated their human rights guaranteed under the ECHR by failing to form a comprehensive climate policy.	The case was heard on September 27, 2023.
Greenpeace Nordic and Others v. Norway[361]	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.	Adjourned.

In *Verein Klimaseniorinnen and Others v. Switzerland*,[362] the applicants argued that the current 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*,[363] the applicant, who has temperature-sensitive multiple sclerosis and Uhthoff's syndrome, argued that the Austrian government's failure to set effective GHG emissions reduction measures is violative of the applicant's human rights. In *Carême v. France*,[364] a similar argument is put forth, where it is contended that the French government's inaction to mitigate climate change would risk causing floods where the applicant resides.[365]

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, resulting in a violation of the applicants' human rights. While these cases allege a specific

360. *See* Application, Duarte Agostinho v. Portugal, App. No. 39371/20 (Sept. 2, 2020).

361. Greenpeace Nordic v. Norway, App. No. 34068/21 (Dec. 16, 2021), https://hudoc.echr.coe.int/?i=001-214943.

362. Application, Verein Klimaseniorinnen Schweiz v. Switzerland, App. No. 53600/20 (Nov. 26, 2020).

363. Mex Mullnerr, App. No. 18859/21.

364. Carême, ECHR App. No. 7189/21.

365. *See* Marta Torre-Schaub, *The Future of European Climate Change Litigation*, VERFASSUNGSBLOG (Aug. 10, 2022), https://verfassungsblog.de/the-future-of-european-climate-change-litigation/ (providing a detailed analysis on the merits of the case).

violation, the harm or violation has not occurred yet and may never occur. This factor may impede both cases, as Keller and Heri observe. They also note that the ECtHR in *Cordella v. Italy*[366] was willing "to hear claims that transcend restrictive interpretations of victim status."[367] Here, the Indian judiciary's approach to include the precautionary principle within the framework of the right to a healthy environment may inform a way to deal with climate litigation cases that allege a violation due to the risk of future harm.

The other two cases before the ECtHR are *Duarte Agostinho v. Portugal*[368] and *Greenpeace Nordic and Others v. Norway*,[369] primarily built on the issue of intergenerational rights and the future rights of children, respectively.

In *Duarte Agostinho*, the applicants allege that thirty-three states parties to the ECHR have failed to sufficiently tackle climate change, which, in turn, violates their human rights guaranteed under the ECHR, including Article 2, which guarantees the right to life and Article 8, which guarantees the right to health and family life.[370] The harms alleged are "harm/risk to their lives, to their health, to their family lives, and to their privacy," which would drastically increase in the absence of mitigation measures.[371] In raising such future harms, the applicants also rely on the precautionary principle and the principle of intergenerational equity.[372]

In *Greenpeace Nordic*, the applicants challenge Norway's decision to allow new oil and gas exploration licenses.[373] Among other claims, including that Norway did not count exported emissions in its total count, the applicants allege that allowing new oil and gas explorations

366. Cordella v. Italy, App. Nos. 54414/13 & 54264/15, ¶ 5 (June 24, 2019), https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-189421%22]}.

367. Keller & Heri, *supra* note 356, at 157.

368. *See* Application, Duarte Agostinho v. Portugal, App. No. 39371/20 (Sept. 2, 2020).

369. Greenpeace Nordic v. Norway, App. No. 34068/21 (Dec. 16, 2021), https://hudoc.echr.coe.int/?i=001-214943.

370. For more information on how they may be used in the case, *see* 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/.

371. Application, Duarte Agostinho v. Portugal, App. No. 39371/20, ¶ 8 (Annex) (Sept. 2, 2020).

372. *Id.*

373. Greenpeace Nordic, App. No. 39371/20.

violates their right to life under the ECHR.[374] The applicants' argument hinges on the future harm caused by Norway's action—of allowing new oil and gas exploration—which would lead to more emissions and then cause a rise in temperature. In support of the argument, the applicants quote 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.[375]

While all five 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 the harm caused and how it results in a violation. *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. They also focus 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.[376]

Duarte Agostinho and *Nordic Greenpeace* face the same challenges as were described by Peel and Osofsky while analyzing climate litigation that raises human rights arguments.[377] As also observed by Keller and Heri,[378] there remain questions about granting the applicant's victim status, which provides the *locus standi*, for which some harm has to be proven. Keeler and Heri also question—can an extraterritorial application of human rights to climate harm occurs within the text of the ECHR?[379] While Keeler and Heri review the relevant literature arguing against[380] and advocating for an extraterritorial application,[381] they

374. *Id.*

375. *Id.*

376. BverfG, 1 BvR 2656/18, Mar. 24, 2021, ¶ 147, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2021/03/rs20210324_1bvr265618en.html.

377. Peel & Osofsky, *supra* note 26, at 46.

378. *See generally* Keller & Heri, *supra* note 356.

379. *Id.* at 161.

380. Samantha Besson, *The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts To*, 25 LEIDEN J. INT'L L. 857, 857 (2021).

381. FIONA DE LONDRAS & KANSTANTSIN DZEHTSIAROU, GREAT DEBATES ON THE EUROPEAN CONVENTION ON HUMAN RIGHTS (Palgrave ed., 2018).

conclude, "[W]hile the Court's living instrument approach may not be entirely appropriate in this context, the Court does have a degree of flexibility."[382] Nonetheless, climate litigation based on a human rights framework before the ECtHR faces various impediments.

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:

i. Establishing *locus standi* or establishing victim status[383] before the ECtHR (more specifically, in the context of the ECtHR, non-exhaustion of domestic remedies is an important issue).[384]
ii. Establishing a causal link between government action (or inaction) with a (future) human rights harm.[385]
iii. Applying human rights extraterritorially[386] (as is done in *Duarte Agostinho,*[387] where citizens of one state allege a human rights breach caused due to the actions of another state).

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.[388] Peel and Osofsky observe that "[a]s 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 U.N. Human Rights bodies to examine the relationship between human rights and climate change.[389]

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382. Keller & Heri, *supra* note 356, at 163 .

383. *Id.* at 157.

384. *Id.* at 159; *see also* Peel & Osofsky, *supra* note 26, at 46

385. *See* Peel & Osofsky, *supra* note 26, at 46.

386. *See* Siobhán McInerney-Lankford, *Climate Change and Human Rights: An Introduction to Legal Issues,* 33 HARV. ENV'T L. REV. 431, 433 (2009).

387. *See* Application, Duarte Agostinho v. Portugal, App. No. 39371/20 (September 2, 2020).

388. Hari 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* CLIMATE CHANGE AND INDIGENOUS PEOPLES: THE SEARCH FOR LEGAL REMEDIES 313-38 (R.S. Abate & E.A. Kronk eds., 2013).

389. Peel & Osofsky, *supra* note 26, at 47.

Decades later, the U.N. General Assembly recently passed a resolution recognizing the human right to a clean, healthy, and sustainable environment.[390] 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. U.N. General Assembly Resolutions may also 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.

C. *The Scope of Judicial Creativity: Lowering the Locus Standi in India*

Ordinarily, to bring a matter before the courts, the petitioner or the applicant needs cause or *locus standi*—commonly a direct legal violation or infringement, which the court can then redress.[391] According to traditional jurisprudence, such *locus* should be direct, and the person aggrieved should directly petition the court. 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 a position to do so.[392] Indian courts created the concept of PILs,[393] where "any member of the public [may] petition the court" on behalf of "a determinate class of persons" in "case [of] any breach of fundamental rights."

Such a conception allowed the public interest to serve as a *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.[394] This is because the right to a pollution-free environment arises out of Article 21, which is a fundamental right; the public interest thus serves as a *locus standi*.

Courts have also 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.[395] The Court noted, "[v]ague aspersions on the

390. G.A. Res. 76/300 (Aug. 22, 2022).

391. Baxi, *supra* note 87, at 107, 110; BAR AND BENCH, *supra* note 41.

392. Bandhua Mukti Morcha v. Union of India, (1984) 3 SCC 161, 185 (India).

393. S.P. Gupta v. Union of India, (1981) Supp. SCC 87, 116 (India).

394. Gill, *supra* note 86.

395. *See* Hanuman Laxman Aroskar v. Union of India, (2019) 15 SCC 401, 469 (India).

intention of public-spirited individuals do not constitute an adequate response to those interested in the protection of the environment."[396]

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 once treated a letter received from a laborer as a writ petition[397] and allowed an individual to file a *habeas corpus* plea for himself,[398] among other acts of resourceful and liberal interpretation.

Admittedly, while Indian judges are often forced to be innovative due to the absence of legislation or government inaction,[399] 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."[400]

Similar to *locus standi* in India, the ECtHR has victim status.[401] 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."[402] Hence, victim status is a statutory requirement.

While Keeler and Heri note the possible difficulties in proving victim status based on 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.[403] Schmid elaborates that when there is an allegation of a violation by omission, "[t]o know if an omission exists and if the applicant(s) are affected by it, [the Court] must first ask what measures

396. *Id.*

397. Bandhua Mukti Morcha v. Union of India, (1984) 3 SCC 161, 162–63 (India).

398. Sunil Batra v. Delhi Admn., (1978) 4 SCC 494, 505 (India).

399. Chaturvedi, s*upra* note 18, at 1463, 1467.

400. Peel & Lin, s*upra* note 19, at 700.

401. Evelyne Schmid, *Victim Status before the ECtHR in Cases of Alleged Omissions: The Swiss Climate Case*, EJIL TALK (Apr. 30, 2022), https://www.ejiltalk.org/victim-status-before-the-ecthr-in-cases-of-alleged-omissions-the-swiss-climate-case/.

402. Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, Nov. 4, 1950, 213 U.N.T.S. 221.

403. Schmid, s*upra* note 401.

would have, approximately, been required."[404] This means that there would be an examination of what measures the Swiss government could adopt to try and mitigate the applicants' complaints, which would involve 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 they have done in some environmental cases.[405]

The Indian judiciary has even ruled on *locus* for the protection of intergenerational rights. As early as 1995, the Supreme Court recognized the principle of intergenerational equity—while not allowing new wood factories to open without proper scrutiny.[406] There have been many cases where the judiciary has recognized and referred to the principle of intergenerational equity. Regarding the *locus standi* of such cases where one represents future generations, the Court has ruled that such cases are admissible.[407] 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.

Indian jurisprudence on liberally interpreting admissibility and intergenerational rights contrasts with the approach advocated by Keeler and Heri. The Indian judiciary has its detractors who call it activist due to its expansive interpretation of rights.[408] It is also to be noted that an activist approach has gained widespread support for purporting an expansive interpretation of rights—as often government inaction leads to violations of those rights.[409] 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 Rights-Based Framework*

As referred to in the earlier section, basing climate litigation in a rights-based framework in India is the result of judicial creativity. Indian judges have often expanded the right to life to include a plethora of rights.[410] This includes the right to a healthy environment, which

404. *Id.*

405. *See* Subhash Kumar v. State of Bihar, (1991) 1 SCC 598 (India).

406. See State of Himachal Pradesh v. Ganesh Wood Prod., (1995) 6 SCC 363 (India).

407. *See, e.g.*, Intellectuals Forum v. State of Andhra Pradesh, 2006 3 SCC Online 549 (India).

408. *See generally* Khosla, *supra* note 42.

409. BAXI, *supra* note 41.

410. *See* Maneka Gandhi v. Union of India, (1978) 1 SCC 248, 252 (India); K. S. Puttaswamy v. Union of India (2017) 10 SCC 1, 37 (India); Olga Tellis v. Bombay Municipal Corp. (1985) 3 SCC 545, 548–49 (India); Sunil Batra v. Delhi Admin. (1978) 4 SCC 494, 573–74 (India).

covers climate change. The courts' expansive interpretation of rights results from government inaction or insufficient government action[411]—as is also alleged in various climate litigations.

This is reflected in how the Indian judiciary has interpreted the right to life. The judiciary has held the right to life not merely to amount to the basic right to life[412]—but to include the right to dignity,[413] the right to privacy,[414] the right to due process,[415] and the right to basic healthcare,[416] among others. In the face of flagrant environmental mismanagement, the judiciary further extended the right to life to include the right to a healthy and pollution-free environment, thus directing the government to take action.[417]

A rights-based argument was also accepted by the Dutch Supreme Court in *The State of the Netherlands v. Urgenda*.[418] In *Urgenda*, the Dutch Supreme Court found that the Dutch government's inaction over climate change was breaching its citizens' human rights, as guaranteed under Article 2 (right to life) of the ECHR. However, such rights-based arguments have not found favor in the United States, as in *Juliana v United States*,[419] and in some other jurisdictions, such as those in Canada[420] and Australia.[421]

A similar challenge to climate policy on a human rights framework did not find much success in India before the NGT, as seen in *Ridhima Pandey*.[422] It is to be noted that *Ridhima Pandey* did not challenge any specific action. Hence, the NGT's power of judicial review was limited, as is discussed in detail in Part II.C.1. As of December 2023, *Ridhima Pandey* is currently under appeal to the Supreme Court. The Supreme Court of India may be better suited to address or grant the reliefs prayed for in *Ridhima Pandey*—as the Supreme Court can use its power

411. Chaturvedi, s*upra* note 18, at 1463, 1467.

412. Sunil Batra v. Delhi Admn., (1978) 4 SCC 494, 573–74 (India).

413. *See* Francis Coralie Mullin vs The Adm'r (1981) 1 SCC 608, 609 (India).

414. Puttaswamy, 10 SCC 504.

415. See Maneka Gandhi, 1 SCC 327.

416. *See* Paschim Banga Khet Mazoor Samity v. State of West Bengal, (1996) 4 SCC 37, 38 (India).

417. *See, e.g.* M.C. Mehta v. Kamal Nath, (1997) 1 SCC 388 (India); Research Foundation for Science Technology National Resource Policy v. Union of India, (2005) 10 SCC 510 (India).

418. HR 20 december 2019, ECLI:NL:HR:2019:200, m.nt. (The State of Netherlands/Stichting Urgenda) (Neth.).

419. Juliana v. United States, 947 F.3d 1159 (9th Cir. 2020).

420. *See* La Rose v. Canada, [2020] F.C. 1008 (Can.).

421. *See Minister for the Env't v Sharma* [2022] FCAFC 35 (Austl.).

422. Ridhima Pandey v. Union of India, 2019 SCC Online NGT 843 (India).

to do complete justice[423] to frame guidelines and issue sweeping directions, as it has in some previous cases.

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.[424] Almost all environmental and climate litigation has sought specific relief against a specific transgression. Proving a causal relationship was not challenging and never in question. Even when adjudicating on such specific cases, the Indian judiciary has set out general and sweeping 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.[425] Accordingly, such a principle enabled the judiciary to govern future human rights infringements based on projections of future climate impacts of current actions.[426] This enabled the courts to act even when the harm to human rights is predicted but not visible or apparent—in line with the precautionary principle.

Peel and Osofsky point out the various difficulties that arise in pursuing climate litigation under a human rights-based framework, specifically in a Global North context.[427] 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.[428] 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.[429]

423. *See* India Const. art. 142.

424. *Ridhima Pandey* was the first case to do so. 2019 SCC Online NGT 843. 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.

425. Vellore Citizens Welfare F. v. Union of India, (1996) 5 SCC 647, 659 (India).

426. *See* Intellectuals Forum v. State of A.P., 2006 3 SCC Online 549, 577 (India).

427. *See* Peel & Osofsky, *supra* note 26, at 46.

428. Peel & Osofsky, *supra* note 26, at 46–47.

429. *Id.* at 47.

E. *Specific Environmental Litigations 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 this regard, India interestingly has a plethora of specific litigation based on statutory frameworks challenging particular instances of environmental pollution.[430]

Such litigation, while not termed climate litigation,[431] still contributes immensely to combating climate change. For instance, a targeted challenge to the discharge of untreated water into a river[432] or challenging the opening of a new factory in an ecologically sensitive area[433] is not termed climate litigation due to the statute-specific arguments it raises. While they contribute to combating climate change, such cases still are not classified as strategic climate litigation[434] but are "invisible."[435]

Kim Bouwer notes,"[T]he complexity of the climate problem entails that many climate issues might be 'invisible,' even as we work 'in the context of climate change.'"[436] 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."[437]

In India, such cases that deal with specific instances of pollution not only allow for a particular action, which also helps combat climate change, but also provide the Indian judiciary with an opportunity to expound, expand, and adopt principles that help in future environmental 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,"[438] notes how "weak environmental

430. *See supra* Part II.A.

431. *See* Bouwer, s*upra* note 27.

432. *See* M.C. Mehta v. Union of India, 1992 Supp. 2 SCC at 635.

433. *See* State of Himachal Pradesh v. Ganesh Wood Prod., (1995) 6 SCC 363 (India).

434. *See* Joana Setzer & Lisa Benjamin, *Climate Litigation in the Global South: Constraints and Innovations*, 9 TRANSNAT'L ENV'T L. 77, 77–101 (2020).

435. *See* Bouwer, s*upra* note 27, at 502.

436. *Id.* at 484.

437. *Id.*

438. ASIAN DEVELOPMENT BANK, REPORT 2: CLIMATE CHANGE, COMING SOON TO A COURT NEAR YOU (2020).

governance is common in Asia and the Pacific, creating cascading effects in this era of climate change."[439]

The report calls on judges to act,[440] but it concedes that they need to be innovative to protect the environment. In the Indian jurisdiction, judges have done so creatively—not only regarding *locus standi* but also by anchoring climate litigation in a rights-based framework. Therefore, such legal creativity, as seen in India, may inform judges across the globe when deciding on climate litigations.

V. Conclusion

Recently, in the Global North, courts are, for the first time, faced with the question of the existence of a human right to a healthy environment and climate. These cases are termed climate litigation as they explicitly raise climate change issues. In this regard, Indian jurisprudence can offer valuable insights and enrich comparative legal discussions.

India's environmental jurisprudence is based on the implied constitutional right to a healthy environment. This Article examined how the right to a healthy environment can serve as the basis for future climate litigation globally. Situated within the right to a healthy environment is the environmental rule of law, which also encompasses EIAs as a tool. As examined in this Article, in dismissing *Ridhima Pandey*, the NGT observed that "the issue of climate change is certainly a matter covered in the process of impact assessment."[441] It will be interesting to closely follow if and how courts further build on this statement—especially in cases where climate change impacts are ignored in the regulatory approval process of large-scale projects.

Cases that challenge government inaction on climate change have seen mixed success. For instance, the Ninth Circuit Court in the United States refused to find an implied right to a healthy environment.[442] On the other hand, courts in the Netherlands found human rights-based obligations on the government to reduce emissions.[443] Similar human rights-based arguments are seen in the climate litigation cases currently before the Grand Chamber of the ECtHR. These cases face some

439. *Id.* at xxvi.

440. *Id.*

441. Ridhima Pandey v. Union of India, 2019 SCC Online NGT 843 (India).

442. Juliana v. United States, 947 F.3d 1159 (9th Cir. 2020).

443. Hof's-Gravenhage 9 oktober 2018, AB 2018, 417 m.nt. GA van der Veen, Ch.W. Backes (Staat der Nederlanden/Stichting Urgenda) (Neth.).

challenges to success, as finding an implied right to a healthy environment within a treaty may prove challenging.[444]

In this regard, using domestic environmental law remedies and environmental jurisprudence to conserve the environment and climate takes on significance. Indian jurisprudence—where Indian courts have developed and adopted various principles to protect and conserve the environment—allows for such an application. Cases such as *Ganesh Wood Factories*[445] and *Hanuman Laxman Aroskar*[446] show how seeking highly localized and specific remedies can also be used to protect the environment and climate. Linking India's environmental jurisprudence and basing future climate litigation within that jurisprudence is a promising avenue to aid climate conservation efforts, as reflected in the growing number of strategic climate litigations that challenge and seek localized and specific remedies.

As reflected in this Article and by many authors, while it is instructive to try and define climate litigation, researchers should not get caught up in the definition of climate litigation but rather try to understand how cases impact climate litigation from a broader perspective. In light of climate litigation being a global phenomenon, a single narrow definition may not uncover the true extent of jurisprudence to support climate litigation.

444. *See* Keller & Heri, *supra* note 356.

445. *See* State of Himachal Pradesh v. Ganesh Wood Prod., (1995) 6 SCC 363 (India).

446. *See* Hanuman Laxman Aroskar v. Union of India, (2019) 15 SCC 401 (India).