

Title: Climate Change Litigation and Human Rights

Authors: Vidya Ann JACOB
Bhavna MISHRA
Rishav AMBASTHA

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CLIMATE CHANGE LITIGATION AND HUMAN RIGHTS¹

Introduction:

Climate change is one of the most contentious issues faced by the present generation. Scientists across the world are working towards mitigating climate change impacts and creating awareness among people on the causes and adverse effects of climate change.² The Intergovernmental Panel on Climate Change (IPCC) states that “*most of the observed increase in global average temperatures since the mid-20th century is very likely due to the observed increase in anthropogenic [greenhouse gas] concentrations.*”³

The adverse effect of climate change has had an impact on governments, citizens and ecology. Studies indicate that cities such as New York, Mumbai, and Shanghai will be at the risk of submerging by the end of the century on the account of rise in sea levels caused by global warming.⁴ Kiribati Island in the Pacific is already bearing the brunt of rising sea level. The inhabitants of the island are at risk of losing their land as rise in ocean levels have engulfed the beaches. This has threatened their livelihood and ecology.⁵

In the last few decades, there has been a growth of national and international responses to climate change in terms of international covenants, laws and policies. These laws have vested rights on the citizen and imposed correlative duties on the state. Many citizens have turned towards judiciary for redressal of climate change issues through law-suits/petitions which are referred as ‘climate change litigation’.⁶ The failure of the state in its duty so imposed under the law, *inter alia*, has been the subject-matter of ‘climate change litigation.’

¹ Authors: Vidya Ann Jacob, Assistant Professor, School of Law, Christ, Bengaluru; Bhavna Mishra and Rishav Ambastha, IV year, National Law School of India University, Bengaluru.

² Working Group I of the Intergovernmental Panel on Climate Change 2007: The Physical Science Basis pp.665-66 (2007), available at https://www.ipcc.ch/publications_and_data/publications_ipcc_fourth_assessment_report_wg1_report_the_physical_science_basis.htm (last visited on December 1, 2017).

³ Working Group I of the Intergovernmental Panel on Climate Change 2007: Mitigation of Climate Change p.39 (2007), available at https://www.ipcc.ch/pdf/assessment-report/ar4/wg3/ar4_wg3_full_report.pdf (last visited on December 1, 2017).

⁴ Major cities threatened by rapid sea level rise, new reports find, (February 22, 2016) available at <http://www.climatechangenews.com/2016/02/22/major-cities-increasingly-threatened-by-rapid-sea-level-rise-new-reports-find/> (last visited on December 2, 2017).

⁵ Coastal Erosion, available at <http://www.climate.gov/ki/category/effects/coastal-erosion/> (last visited on December 2, 2017).

⁶ Marilyn Averill, *Climate Litigation: Ethical Implication and Societal Impact*, 85 Denv. U. L. Rev. 899 2007-2008, available at http://heinonline.org/HOL/Page?handle=hein.journals/denlr85&div=42&start_page=899&collection=journals&set_as_cursor=0&men_tab=srchresults (Last visited on December 2, 2017).

The objective of ‘climate change litigation’ is attribution of liability on persons or entities responsible for greenhouse gas emissions that contribute to climate change in a significant manner. This exercise involves the following process, *first*, the plaintiff has to establish her standing in the case. *Second*, the defendant should be a party appropriate to seek redressal and *last*, there must be an appropriate forum before which an action can be brought.⁷ These issues are pertinent where redressal is sought through law-suits, which have a technical character depending upon the civil procedural laws of various states. Various countries such as India and Pakistan have a unique method of Public Interest Litigation, where the requirement of ‘standing’ has been relaxed. In many jurisdictions, climate change litigation is still at a nascent stage.

The international response of creation of treaties has a more recognizable appeal since it allows states to formulate a system that makes the most effective incentives for decreasing greenhouse gases, while factoring in the differences in local capacity and economic development, international equity, and other factors.⁸

At the international level, climate change has posed a difficult policy problem. There are three major problem that the community at large faces.⁹ *First*, it is difficult to track climate change over time. *Second*, the people who are in the best position to address and mitigate the problem of climate change are the primary contributors of greenhouse emissions. Unless the global community incentivises these actors to reduce their emission, it would become difficult to arrive at a solution. The final problem of the international community is regarding legal jurisdiction. There is no central authority or body which has the power to address climate change issues, given the global scope of the problem.

Litigations are important techniques which can be used to compel policymakers and other stake holders to comply with effective means to implement climate change mitigation and adaption methods.¹⁰ The states are mandated under Paris Agreement (2015) to lay down

⁷ Shi-Ling Hsu, *A realistic evaluation of climate change litigation through the lens of a hypothetical lawsuit*, 79 U. Colo. L. Rev. 701 (2008) available at, http://heinonline.org/HOL/Page?handle=hein.journals/ucollr79&div=22&g_sent=1&collection=journals (Last visited December 21, 2017).

⁸ Eric A. Posner, *Climate Change and International Human Rights Litigation: A Critical Appraisal*, University of Pennsylvania Law Review, Vol. 155, No. 6, Symposium: Responses to Global Warming: The Law, Economics, and Science of Climate Change (Jun., 2007), pp. 1925-1945.

⁹ Richard J. Lazarus, *Super wicked problems and climate change: Restraining the present to liberate the future*, 94 Cornell L. Rev. 1153, 1160 (2009) available at, <http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=3143&context=clr> (last visited January 2, 2018).

¹⁰ *The Status of Climate Change Litigation – A Global Review*, United Nation Environment Programme (May, 2017) available at,

certain norms for mitigation of climate change and reduction of greenhouse gases to arrest global warming within 2 degrees Celsius.¹¹ The Paris Agreement was the first ratified instrument which dealt with an international action plan to reduce greenhouse gas emissions. Post the Paris accord, courts in various jurisdictions have ordered governments to act on climate change regulations.

The Sabin Center for Climate Change in the United States has reported that climate change litigation is prevalent in at least twenty-four countries. There have been at least 654 cases filed in the U.S. alone and at least 230 cases in all the other countries combined.¹² The emergence of climate change litigation should be addressed not only from an economic and political perspective, but also from a human rights perspective.

Given the scale of the effect of climate change on human beings, the recent climate summit has not addressed issues concerning human right violations. This perspective is significant because climate change causes human right violations. There are many communities who are already experiencing the adverse effects of climate change, yet few remedies are available to them.¹³

Rachel Baird, in her article titled '*The Impact of Climate Change on Minorities and Indigenous Peoples*',¹⁴ outlines the impact of climate change on minorities and indigenous people. These people do not have the ability to influence governments' policies for combating and adapting to climate change. The laws governing climate change must cater to the society as a whole and should not merely look into the environmental aspects.

Climate change is a phenomenon that demands collective responsibility¹⁵ and climate change litigation should be inclined on the lines of society being a subset of nature rather than being solely technical in its dealings. It is generally argued that there are two styles in climate

¹¹ The Paris Agreement, available at, http://unfccc.int/paris_agreement/items/9485.php (last visited on January 8, 2017).

¹² Meredith Wilensky, *Climate Change in the Court: An Assessment of Non- U.S Climate Litigation*, (Sabin Center for Climate Change Law Columbia Law School, 2015) available at https://web.law.columbia.edu/sites/default/files/microsites/climate-change/white_paper_-_climate_change_in_the_courts_-_assessment_of_non_u.s._climate_litigation.pdf (last visited on December 21, 2017).

¹³ *Climate Change and Human Rights: A Rough Guide*, (International Council on Human Rights Policy, 2008) available at, http://www.ohchr.org/Documents/Issues/ClimateChange/Submissions/136_report.pdf (last visited on December 20, 2017).

¹⁴ Rachel Baird, *The Impact of Climate Change on Minorities and Indigenous Peoples*' (Minority rights group international, 2008) available at, http://www.ohchr.org/Documents/Issues/ClimateChange/Submissions/Minority_Rights_Group_International.pdf (last visited on December 10, 2017).

¹⁵ Stanford Encyclopaedia of Philosophy, Aug 8 2005 (last visited January 8, 2018).

change litigation- Mitigation and/or Adaptation.¹⁶ The reason why one cannot particularly choose between the two is simply because there are various issues under the broad umbrella of climate change. Mitigation mainly aims at reducing reverberations of any further human interference with the environment and “*stabilize greenhouse gas levels in a timeframe sufficient to allow ecosystems to adapt naturally to climate change, ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner.*”¹⁷ Adaptation is accepting the environment as it is, due to irreversible damage, and taking measures to avoid potential vulnerability in the future in cases of sea-level encroachment or extreme weather conditions.¹⁸

Climate Change Litigation in the United States of America and the Asia Pacific

Courts in the Asia-Pacific region are adjudicating a number of disputes related to climate change mitigation and adaptation efforts. These efforts can be seen in some of the countries like Australia, China, Philippines, Pakistan and India.

Climate Change litigation in the United States of America

The Supreme Court delivered a landmark decision in *Massachusetts v. Environmental Protection Agency*¹⁹ where the Environmental Protection Agency was taken to court for not regulating greenhouse gas emission (GHG) from motor vehicles under the Clean Air Act, 1963. A group of private citizens petitioned the Environmental Protection Agency that certain green-house gases which emanate out of motor vehicles should be subject to regulation. The petition was declined stating that its mandate did not include issuing mandatory regulation to address global warming changes and even if it did have that jurisdiction it would not do because there is established causal link between greenhouse gases and increase in global temperatures, impairment of President’s ability to negotiate with developing countries to reduce emission, and existence of programmes of executive branch of the government to address global warming.

¹⁶*Responding to Climate Change*, NASA Global Climate Change, available at <https://climate.nasa.gov/solutions/adaptation-mitigation/>, (last visited on January 9, 2018).

¹⁷2014 report on Mitigation of Climate Change from the United Nations Intergovernmental Panel on Climate Change, page 4

¹⁸*Responding to Climate Change*, NASA Global Climate Change, available at <https://climate.nasa.gov/solutions/adaptation-mitigation/>, (last visited on January 9, 2018).

¹⁹549 U.S. 497 (2007).

The court held that these regulations of greenhouse gases are clearly within the remit of the agency and further, any denial of petition on the grounds of such as those above are not relevant considerations for response of a petition, the relevant consideration under the statute is whether air pollutants or air pollution endangers public health and welfare and remanded the matter to EPA for re-consideration. If there is profound confusion in the scientific community about the evidence to assert a claim regarding the contribution of emission to global warming, it must say so, which the court noted it had not.

From the point of view of pre-empting climate change litigation on the basis of federal common law of public nuisance as a ground for relief against defendants engaged in emission of greenhouse gases, in a lawsuit against power companies, the Supreme Court stated that presence of a statutory authority under Environment Protection Act, and Clean Air Act displaced the federal common law right to seek abatement of greenhouse emission emanating from fossil fuel based power companies (in this case) or more generally greenhouse emitters.²⁰ That is, a plaintiff cannot file a lawsuit against an entity seeking it to prohibit emission of greenhouse gases on the ground of public nuisance. The recourse would be to petition the Environment Protection Agency.

The approach discernible in the case above is vastly different from the approach on this side of the Pacific in India and in Pakistan. The court plainly steers clear of ordering any directive for the mitigation of climate change itself. It acknowledges and recognises that it lacks the expertise to undertake that exercise, it is only undertaken by the appropriate statutory authority. The only extent of intervention permissible is when the statutory authority itself while exercising its scientific judgement failed to consider grounds otherwise relevant. In a significant case currently being argued in the District Court of the State of Oregon,²¹ the plaintiffs have filed a lawsuit seeking declaration that the defendant reduce the emission in the atmosphere of carbon dioxide. There are three bases for the relief as requested. *First*, violation of the due process clause on account of unchecked use of fossil fuels. *Second*, inter-generational equity, i.e., denial of the fundamental rights which were afforded by the past and the present generation; and *finally*, failure of the defendant to fulfil the obligations under the public trust doctrine. The public trust doctrine subsumes the duty of the government to safeguard natural resources for use by the public. The defendant sought to dismiss the lawsuit prior to the stage of the trial, however, the trial court refused the request of dismissal. At this

²⁰ American Electric Power Company v. Connecticut, 564 U.S. 410 (2011).

²¹ Juliana v. United States, Case No. 6:15-cv-01517-TC (In the United States District Court for the District of Oregon).

stage, the order of refusal to dismiss the law-suit has been appealed and pending before Ninth Circuit Court of Appeal.

Australian Climate Change Litigation

In Australia, climate change litigation has generally been in the domain of challenging public infrastructure projects which pose a threat to the environment. Climate Action Network Australia (CANA) was a programme which was launched by climate change enthusiasts who came forward to fight climate change through climate change litigations. In 2003, a program called Australian Climate Justice brought various activists, lawyers and scientists who aimed at imposing liability on perpetrators of climate change.²²

The *Hazelwood case*²³ in Victoria, which was the first climate change litigation case filed in Australia, was brought by CANA and three other environment agencies. The courts directed the coal mine company to submit a detailed report of the assessment of greenhouse gas emissions from burning of coal even though it was not directly related to the application of setting up the mining project.

In one such case,²⁴ a thermal power plant applied for development of coal mines necessary for its operational purpose. This development was opposed by the environment activists. The government stated that there would be an exclusion of consideration of the greenhouse gases in its Environment Impact Assessment. This exclusion was challenged in court. The statutory requirement was that relevant factors be taken into consideration while considering such an application. The court giving a broad interpretation to the relevant factors stated that the objects of the act were maintain ecological processes and balancing in the present and future interest of all citizens. The intergenerational effects of climate change on the account of burning of coal was an important and relevant consideration and therefore, the greenhouse effects must be factored in. Despite taking this into consideration pursuant to the court order, the government gave go ahead to the industrial activity.

In a similar case,²⁵ in an application for setting up of coal mines for supply to power plant and overseas supply, some factors were deemed relevant for Environment Impact Assessment on the basis of the industry standard developed by World Business Council for Sustainable Development and World Resources Institute (WBCSDWR). These factors were

²² Jacqueline Peel, *The Role of Climate Change Litigation in Australia's Response to Global Warming*, EPLJ Vol. 24, No. 90 (Law Book Co., 2007).

²³ Australian Conservation Foundation v. Minister for Planning (2004) VCAT 2029

²⁴ Re Australian Conservation Foundation v. Latrobe City Council, (2004) 140 LGERA 100.

²⁵ Gray v. The Minister for Planning, [2006] NSWLEC 720.

direct greenhouse emission from the sources controlled by the applicant, emission emanating from the generation of electricity and emissions from other indirect sources, which was an optional category in the WBCSDWR. The last factor was excluded and therefore, burning of coal by third parties outside the scope of control of the applicant would not be relevant consideration for EIA.

The court held that this excluded factor was an important consideration for the purpose of EIA. The EIA would be done keeping in mind the principles of precaution and inter-generational equity. There should be all relevant information available to the decision maker as to enable him to take measures to prevent degradation of the environment. A quantification of the effects of greenhouse gases and its contribution to climate change was required to be done in the EIA. The fact that it was not possible to make such a quantification with certainty did not preclude the attempt of such an exercise.

Lastly, in a similar case,²⁶ the challenge was taken the decision of the minister of the federal government to dispense with the requirement of the Environment Impact Assessment for a coal-based project. There was no mandatory requirement of EIA under the federal law unless it concerned with matters of national environment significance, unlike in the state law in the previous two cases. So, mere greenhouse emissions and its contribution to climate change is not a sufficient factor to trigger the requirement of EIA. The court upheld the decision of the minister, while noting such climate change factors were taken into consideration while granting permission for the project, but no extensive study was done to determine the impact of the project on climate change.

The courts have within the limited scope of judicial review, where the scrutiny is circumscribed to examining the manner of exercise of power, forced the executive to undertake certain considerations for the purpose of Environment Impact Assessment, which may have potential impact on the climate. This judicial review is possible when there is an enabling statutory provision mandating that certain factors be taken into consideration while either granting permits or environment impact assessment for projects with potential impact on climate change.

Climate Change Litigation in China

²⁶ Wildlife Preservation Society of Queensland Proserpine/Whitsunday Branch Inc v. Minister for the Environment & Heritage [2006] FCA 736.

China is presently one the world's leading Green House Gas (GHG) emitters. China's GHG emissions have grown rapidly over the years.²⁷ The National Climate Change Program, released in June 2007, documented for the first time a slew of adverse impacts of climate change.²⁸

China's outlook on climate policies are rather paradoxical. On one hand, at the international level, China seems reluctant to ratify many policies relating to carbon emissions. On the other hand, the judiciary in China has given impetus to addressing the issue of climate change through environmental public interest litigation. In the 1990's, there was a shift in the government's attitude towards climate change policies. These considerations were included in the broader purview of economic development, as is seen in the 13th Five Year Plan for Economic and Social Development of the People's Republic of China in part X "Ecosystems and the environment".²⁹

China also faces the challenge of severe environmental pollution which includes massive levels of soot, domestic air pollution, smog and more which are affecting the health of the people. The Environment Protection Law of 2015 opened the doors to Public Interest Litigation in China. Upon the enactment of this legislation, more than 100 cases of PILs were brought by NGOs in less than 2 years.³⁰ This legislation was China's way of taking a step forward in attempting to solve environmental problems and effectively handling the issue of Climate Change caused by these environmental problems. Overall, China does have a long way to go with regard to climate change litigation considering the magnitude of environmental pollution that occurs in the country. The government needs to recognize the causes of climate change and tackle them with the aim of sustainable development.

Climate Change Litigation in Philippines

Philippines is an island country ranked third in risk with respect to impacts caused by climate change. It is the need of the hour not only for the country and its government but also

²⁷ Jonathan B. Wiener, *Climate Change Policy and Policy Change in China*, UCLA, Vol. 55, No. 6 (August 2008); pg. 1805-1826.

²⁸ Patricia Ross McCubbin, *China and Climate Change: Domestic Environmental Needs, Differentiated International Responsibilities, and Rule of Law Weaknesses*, Environmental & Energy Law & Policy Journal, Vol. 3, No. 2 (Fall 2008); pg. 200-235

²⁹ *13th Five Year Plan for Economic and Social Development of the People's Republic of China*, available at <http://en.ndrc.gov.cn/newsrelease/201612/P020161207645765233498.pdf> (last visited on January 8, 2018).

³⁰ Giulio Corsi, *The New Wave of Climate Change Litigation: A Transferability Analysis*, ICCG Reflection No.59 (October 2017); pg. 1-12.

the international community to address the human right violations caused by climate change in Philippines and the small island nations in the Asia Pacific.

According to Article II, section 16 of the Philippines Constitution, right to life includes ‘*right to a balanced and healthful ecology in accord to the rhythm and harmony of nature.*’³¹ This right provides a right to a clean environment to its citizens. On April 29, 2010, Chief Justice Puno of Philippines Supreme Court initiated the Rules of Procedure for Environmental Cases which included the writ of Kalikasan which is a legal remedy to protect the rights laid down under Article II, Section 16 of the Constitution.

The first case in Philippines using the Writ of Kalikasan was the *Global Legal Action on Climate v. the Philippines Government* (2010), wherein the petitioner was advocating for an effective climate change adaptation measure within the existing legislations.³² The main contention in this case was that the biggest emitters had violated the human rights of Filipinos. Climate change litigation should not only aim at mitigating climate change but also ensure climate justice is achieved.

In Philippines, a human rights-based approach towards climate change has been adopted. The Commission of Human Rights is mandated “*to conduct investigations on human rights violations against marginalised and vulnerable sectors of the society, involving civil and political rights.*” In 2015, there was a petition requesting investigation of the responsibility of the “carbon majors” for human rights violation or threats of violation resulting from the impacts of climate change.³³ The petition alleged that the production of fossil fuels by carbon majors have been responsible for large amounts of greenhouse gases. These gases cause climate change and ocean acidification. This has violated the human rights of the Filipino people and an investigation is underway. This is a one of its kind investigation into activities of corporations which have resulted in the emissions of greenhouses gases contributing to the phenomenon of climate change. Usually, most climate change related litigation is directed against government for its inaction in addressing climate change.

Climate Change Litigation in Pakistan

³¹ *Minors Oposa v. Factoran, Secretary of the Department of Environment and Natural Resources* (1994) 224 SCRA 792.

³² RESEARCH HANDBOOK ON CLIMATE CHANGE MITIGATION LAW, Geert Van Calster, et al (Edt), (Edward Elgar Publication, 2015)

³³In Re: Greenpeace South East, Commission of Human Rights (2015). The carbon major are companies such as BP, Shell, Total, Cheron, Suncor, BHP Billiton, etc.

The Lahore High Court Green bench in 2015 in the case of *Leghari v. Republic of Pakistan*³⁴, outlines the attempt of the judiciary to deal with the issue of climate change. The petitioner filed a Public Interest Litigation stating that the government had failed to implement the National Climate Change Policy 2012 and the Framework for Implementation of Climate Change Policy (2014 – 2030) which “*Offends the fundamental rights of the citizens which need to be safeguarded.*” The court noted that no action had been taken on the part of the government pursuant to these policies. It directed formation of a commission under its direction to facilitate the implementation of the policy.

The basis of the order was “*Fundamental rights, the right to life which includes the right to healthy and clean environment and right to human dignity read with constitutional principle of democracy, equality, social, economic, and political justice include within its ambit and commitment the international environmental principles of sustainable development, precautionary principle, environmental impact assessment, inter and intra-generational equity and public trust doctrine.*” It mooted a transformation from Environment Justice, which is limited and localised, to Climate Change Justice. According to the court, the aforementioned rights provided sufficient basis for the court to address and monitor the response of the government.

It is discernible that the approach in this particular case is not very different from the approach of the Indian judiciary, where the judiciary directed the State to act on its own policy and form its own mechanism to monitor the implementation of that policy. The government has demonstrated a cavalier approach in its efforts towards addressing global warming concerns, and therefore, the courts have had to intervene for the purpose of mitigation, even though such steps may clearly at times, strictly speaking, violate the principle of separation of powers between the judiciary and the executive.

Climate Change litigation in India:

In India, there is a dedicated judicial forum, National Green Tribunal (hereafter called the ‘tribunal’), with jurisdiction to adjudicate cases with “*substantial question relating to environment (including enforcement of any legal right relating to environment)*” and for enforcement of legislations mentioned in Schedule I.³⁵ The adjudication must be on the basis

³⁴Leghari v. Republic of Pakistan (2015) W.P. No. 25501/2015.

³⁵ Sec. 14, National Green Tribunal Act, 2010; Schedule I mentions legislatures, *inter alia*, The Water (Prevention and Control of Pollution) Act, 1974, The Forest (Conservation) Act, 1980, The Environment (Protection) Act, 1986, etc.

of “*principles of sustainable development, the precautionary principle, and the polluter pay principle.*”³⁶ Additionally, there is a strong tradition of judicial activism, where judiciary (constitutional courts such as various High Courts and Supreme Court) has, under public interest litigation, ordered directive for protection of the environment. The courts have, mostly, demonstrated a level of responsiveness and alacrity while dealing with issues related to the environment.³⁷

The Supreme Court has addressed climate change concerns in at least two ways – examining international standards for policy purpose, and ordering studies of environmental impact of the public projects. In *Karnataka Industrial Areas Development Board v. Sri C. Kenchappa*,³⁸ a number farmers and agriculturist, whose land had been acquired by the government, filed a petition restraining the government from converting their land for industrial purpose. The Supreme Court, among other pressing environmental concerns have taken note of climate change concern. The court ordered authorities to appropriately study the adverse impact of the project on the environment and impact on ozone depletion and climate. In *Manushi Sangthan, Delhi v. Govt. Of Delhi*,³⁹ the issue pertained to the limit set on the issue of cycle rickshaw licence by the Delhi Municipal Corporation. Among other things the argument put forward by the petitioners was that the IPCC’S Fourth Assessment Report, 2007 had laid down that policies of countries should be in such a manner as to encourage use of fuel-efficient vehicles, which was inclusive of cycle rickshaws. The Court in the instant case held “*the limit imposed by the Delhi Municipal Corporation to be arbitrary, and ordered a more detailed study on urban transportation options.*” This demonstrates that even the judiciary is looking at international standards set for mitigation of climate change.

In one instance, the tribunal took cognisance of the degradation of the ecology of Rohtang Pass and the effect on the glaciers of serious emissions and traffic hazards.⁴⁰ The court invoked the doctrine of public trust, imposing obligation on both the State and the public to maintain the natural environment for the subsequent generation. It also took judicial notice of “*degradation of environment and ecology of the eco-sensitive area.*”⁴¹ The government had repeatedly given assurances, which the tribunal found lacking in practical

³⁶ Sec. 20, National Green Tribunal Act, 2010.

³⁷ For instance, the MC Mehta cases regarding ban of diesel vehicles, ban of entry of heavy and light goods vehicles into Delhi, *et cetera*.

³⁸ (2006) 6 SCC 371.

³⁹ (2010) DLT 168.

⁴⁰ Re: Court on its own Motion v. State of Himachal Pradesh, (National Green Tribunal, 9 May 2016)

⁴¹ Sec. 57, Indian Evidence Act, 1872.

enforcement. Subsequently, it passed a series of orders prohibiting activities which had an adverse impact on the environment such as operationalisation of CNG and electric buses, regulation of tourism activities, *et cetera*.

In coal-based electricity industries, an attempt has been made to force thermal power plants to use coal with only a certain level of ash content for the purpose of mitigating the emission levels.⁴² There were existing notifications which mandated the use of coal with ash content lower than thirty-four percent.⁴³ However, the tribunal was dismayed with non-enforcement of the notification, noted a lack of existence of proper enforcement mechanism and directed the State and Central Pollution Control Board to upgrade the scientific, technical and infrastructural man-power for effective implementation of the notification.

Lastly, in this case, the contribution of a gaseous substance (HFC 23) to climate change was disputed, which is in relative terms 14,800 times more potent in causing climate change than carbon dioxide.⁴⁴ However, there existed a dispute whether it was a pollutant. No study had been conducted to determine its impact on air toxicity. Though there was an international framework to phase out this gaseous substance, at domestic level no regulation had been formed. The tribunal ordered a comprehensive plan to study the effects of HFC 23 as a pollutant and its extent of contribution to global warming.

In another instance, even though no substantial result accrued out of the case, the NGT was petitioned requesting various states to put on record material to demonstrate compliance with National Action Plan on Climate Change.⁴⁵ It further sought to direct the states to not act in contravention with the plan and come up with a state plan akin to National Action Plan on Climate Change. The tribunal ordered the states to draft such plans expeditiously. However, since there was no specific allegation regarding the violation of the plan, it granted liberty to make such allegations for such violations in future applications with the tribunal.

In an ongoing case, the NGT has been petitioned to direct the Union of India to undertake “*effective, science-based action to reduce and minimize the adverse impacts of climate change in the country*” invoking principles of sustainable development, precautionary

⁴²Rantandeep Randari v. State of Maharashtra, (National Green Tribunal, 15th October, 2015).

⁴³Rule 3(8), Environment Protection Rules, 1986.

⁴⁴Indian Council for Enviro-legal Action v. Ministry of Environment, Forest and Climate Change, Org. Appl No. 170 of 2014.

⁴⁵Gaurav Kumar Bansal v. Union of India, Org. App. 498 of 2014 (National Green Tribunal, 2017).

principle, public trust doctrine and inter-generational equity principle.⁴⁶ No orders have been passed yet.

In the decided cases discussed above, two points emerge. *First*, judicial notice of fact of climate change. This development is significant since the factum of climate change would not require to be proved because “*no fact on which the Court will take judicial notice need be proved.*”⁴⁷ It would provide the needed impetus and remove the evidentiary bottleneck for climate change litigation. *Second*, the tool of ad-hoc directives to the state to implement measures for mitigation of climate change. These directives manifest the statutory mandate to apply precautionary principle, where the state formulates regulations for mitigation of climate change. However, a deterrent based approach, polluter pay principle, has been largely ignored, which would involve identification of the delinquents for the purpose of imposing punitive sanctions.

Lavanya Rajamani in her working paper titled ‘*Rights Based Climate Litigation in the Indian Courts: Potential, Prospects & Potential Problems*’⁴⁸ in an in-depth study of climate related claims in India through cases that have been addressed by the Judiciary classifies the cases into three categories namely,

*“cases in which petitioners raise climate concerns, among others, to challenge what they perceive as ill informed decision making on environmental matters; cases in which respondents raise climate concerns, among others, to justify, in the face of a challenge, what they perceive as environmentally sound decision making; and cases in which judges appear of their own volition to refer to climate concerns, albeit in passing and as obiter, as one among the reasons for their decision.”*⁴⁹

Litigants have started realising the lacunas in the existing governmental policies to protect individual rights *vis-a vis* climate change and its effects. Courts in India need to revisit the provisions of laws to incorporate climate change aspects.

Human rights approach to climate change litigation

⁴⁶Riddhima Pandey v. Union of India (National Green Tribunal, 2017).

⁴⁷ Sec. 56, Indian Evidence Act, 1872.

⁴⁸LavanyaRajamani, *Working Paper on Rights Based Climate Litigation in the Indian Courts: Potential, Prospects & Potential Problems*, Centre for Policy Research Climate Initiative (May 1, 2013) available at http://www.cprindia.org/sites/default/files/working_papers/Working%20paper%202013_LRajamani_Climate%20Litigation_5.pdf (last visited on December 11, 2017).

⁴⁹*Id.*

The World Health Organization reported that climate change will cost health centres across the world an estimated two to four billion dollars a year by 2030 with children being the most affected stakeholders.⁵⁰ Advocates who have adapted the mechanism of human rights in considering climate change have, in part, categorized the need to respond to climate change as a moral guide. Human rights promote human development without curtailing once liberty.⁵¹ Climate change litigation is not just limited to health concerns but to provide for other viable options to deal with climate related problems. Sweden and Finland have adopted laws which encourage climate refugees and sustainable development. This will address various issues pertaining to climate change litigation.⁵²

Integrating climate change and human rights have become more important in the recent years. The United Nations Human Rights Council issued a resolution on March 2008, which stated that “*climate change poses an immediate and far-reaching threat to people and communities around the world and has implications for the full enjoyment of human rights*”. The Office of the High Commissioner on Human Rights (OHCHR) was asked by the Council to study the correlation between climate change and human rights, further the report was to be submitted to the council within a year. The Council also stated “*that human rights obligations and commitments have the potential to inform and strengthen international and national policy making in the area of climate change, promoting policy coherence, legitimacy and sustainable outcomes*”, and asked the body to conduct continuous studies and debate upon the correlation between human rights and climate change.⁵³

Various international human rights instruments including the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights ensure that the States guarantee remedies that are effective in cases of human right violations. It has been reported by the high commission of human rights that climate change has adversely affected millions of people and their survival is at stake.⁵⁴ There should be some legal recourse to

⁵⁰ Elizabeth D. Gibbons, *Climate Change, Children's Rights, and the Pursuit of Intergenerational Climate Justice*, Health and Human Rights Journal Vol. 16, No. 1 (June 2014), pp. 19-31,

<https://cdn2.sph.harvard.edu/wp-content/uploads/sites/13/2014/06/Hall2.pdf> (last visited on January 3, 2018).

⁵¹ Margaux J. Hall, *Advancing Climate Justice and the Right to Health Through Procedural Rights*, Health and Human Rights Journal (June 2014), pp. 8-18, <https://cdn2.sph.harvard.edu/wp-content/uploads/sites/13/2014/06/Hall2.pdf> (last visited on January 3, 2018).

⁵² Eric A. Posner, *Climate Change and International Human Rights Litigation: A Critical Appraisal*, University of Pennsylvania Law Review, Vol. 155, No. 6, Symposium: Responses to Global Warming: The Law, Economics, and Science of Climate Change (Jun., 2007), pp. 1925-1945

⁵³ *Id.*

⁵⁴ Office of High commissioner for human rights, *Understanding human rights and climate change*, available at <http://www.ohchr.org/Documents/Issues/ClimateChange/COP21.pdf>(last visited on December 21, 2017)

these affected victims. States should bring about a legal mechanism to ensure the basic human rights of its citizens are protected and the State should also impose penalties on greenhouse emitters who have violated the rights of innocent people, community and other stake holders.⁵⁵

From the era of the Industrial Revolution, humans have been involved in emitting greenhouse gases that have had adverse impacts on climate change vis-à-vis sea levels, temperature, precipitation and storm intensity. Climate justice helps in framing global warming issues with respect to ethics and politics, rather than viewing it as a mere environmental concern.

Emerging trends in climate change litigation

There is a rise in the number of cases pertaining to people who seek a refuge in other countries or regions owing to the effects of climate change. The term “climate refugee” is occasionally used in news reports and advocacy documents, but there has been some difficulty in its applicability in a legal or practical sense.⁵⁶ The legal definition of refugee laid down under the U.N. Refugee Convention does not include migrants displaced solely by changes to their environment.⁵⁷

The international conventions on refugees include the 1951 Convention on the Status of Refugees and the 1967 Optional Protocol on status of the refugees. The 1951 Convention deals with the definition of the refugees and their rights. It defines a refugee as, “*an individual who is outside his or her country of nationality or habitual residence who is unable or unwilling to return due to a well-founded fear of persecution based on his or her race, religion, nationality, political opinion, or membership in a particular social group,*” in Article 1(A) (2). The Convention is followed even now because of its highly persuasive text.⁵⁸

The present governing international laws, particularly the 1951 Convention on the Status of refugees and the 1967 Optional Protocol on the status of the refugees were drafted

⁵⁵Marilyn Averill, *Linking Climate Litigation and Human Rights*, RECIEL Vol. 18 No. 2 (Blackwell Publishing Ltd., 2009) available at, http://sciencepolicy.colorado.edu/admin/publication_files/2009.68.pdf (last visited on January 3, 2018).

⁵⁶ Marta Picchi, *Climate Change and the Protection. Of Human Rights: The Issues of Climate Refugees*, 13 US-China L. Rev. 13 576(2016).

⁵⁷ Jane McAdam, *Refusing ‘Refuge’ in the Pacific: (De) Constructing Climate –Induced Displacement in International Law*, available at, www.austlii.edu.au/au/journals/UNSWLRS/2010/27.txt/cgi-bin/...cgi/.../27.pdf (last accessed on January 7, 2018).

⁵⁸Asylum & the Rights of Refugees.” International Justice Resource Center. N.p., 2012. Web. 25 July 2016

at a time when the consequences of environmental disasters were unknown. Thus the usage of the word “climate refugee” is a quasi-definitional description which cannot be enforced in law by any international treaty, convention or law. It is believed by many experts that the 1998 Guiding Principles on Internal Displacement gives protection to people who are forced to move within their borders. People who are displaced internally are called internally displaced persons (IDPs) and are given protection under the international humanitarian law of 1998 Guiding Principles, but it does not consider the people who cross the international borders for causes other than persecution.⁵⁹

There is neither any concrete definition or international recognition of climate refugees, nor any accurate numerical figures of the displaced population. Some countries consider these refugees as migrants and some consider them as undocumented immigrants while others don't recognise them at all.

Climate change refugee litigation is prevalent in New Zealand. There are numerous instances where the immigrants overstayed their permit and raised climate change as a ground for protection against deportation or have sought refugee status on the account of climate change in the home country. However, so far, neither of these grounds has been successfully pleaded.

In one case,⁶⁰ the apex court refused to accord refugee status to the appellant, who came to NZ from Kiribati, where he had been residing even post expiry of his permit. He had applied for a refugee status stating that there has been a constant rise of sea levels in his hometown – Kiribati, as a consequence of climate change. In the particular facts of the case, the court stated that the appellant, if returned to his hometown, will not face any serious harm. No evidence was adduced to demonstrate that the government of Kiribati was not taking any steps to mitigate climate change. However, the court stated that the ruling in this case did not mean persons affected by environmental degradation as a result of climate change could not be extended refugee status at all.

In another case, the petitioner sought protection from deportation to Tuvalu on the ground of, *inter alia*, “*risk of suffering adverse impacts of climate change.*”⁶¹ The standard for receiving protection was exceptional circumstance of humanitarian nature. The court

⁵⁹ Benjamin Glahn, *Climate refugees'? Addressing the international legal gaps*, International Bar Association, available at, [https://9 www.ibanet.org/Article/NewDetail.aspx?ArticleUid=B51C02C1-3C27-4AE3-B4C4-7E350EB0F442](https://9www.ibanet.org/Article/NewDetail.aspx?ArticleUid=B51C02C1-3C27-4AE3-B4C4-7E350EB0F442) (last accessed on January 3, 2018).

⁶⁰Ioane Teitiota v. Chief Executive, Ministry of Business, Innovation, and Employment (Supreme Court of NZ, 1st April 2015).

⁶¹ AD (Tuvalu) [Immigration and Protection Tribunal NZ, 4 June 2014]

noted that even though generally climate change is a broad humanitarian concern, however, to seek protection on that ground required to demonstrate that the concern must unduly and harshly affect the petitioner so seeking protection from deportation, which had not been established.

The Paris Agreement, 2015, is a historic agreement which has been approved by many countries all around the world. This agreement has recognised that climate change is an important occurrence that must be tackled world-wide.⁶² This agreement does not take into account the issues of “climate refugees” as such. In view of this agreement, the European Parliament calls for a humanitarian approach to these refugees. It also insists upon the need for developing and developed country to come together to tackle climate changes.

With climate change as a global issue on a large magnitude, a need arises to create a sense of collective responsibility. Laws and conventions are made for the society. In a rapidly evolving society, these laws and conventions ought to be altered and amended to cater to the need of the hour. While provisions have already been made on who a refugee is and what rights and protection are to be provided under the 1951 Convention on status of refugees and the 1967 Optional Protocol, amendments ought to be made widening the scope of refugees by incorporating environmental/climate refugees into the aforementioned statutes.

Climate change has an intense impact on a wide range of human rights, such as the right to life, self-determination, food, health, water and sanitation, and housing. The human rights framework also requires that global efforts to mitigate and adapt to climate change should be guided by relevant human rights norms and principles, including the rights to participation and information, transparency, accountability, equity, and non- discrimination. Inevitably, climate change is a human rights issue and any solution cannot be devoid of the human rights framework.⁶³ Climate change litigation provides a tool that can be used to shape climate policy and to seek redress from climate-related injuries.

Conclusion:

All around the world, there has been a rise in trend of entities taking their governments to court over policies in addressing climate change related concerns. These actions have taken different forms ranging from the traditionally judicial review of the

⁶² Marta Picchi, *Climate Change and the Protection. Of Human Rights: The Issues of Climate Refugees*, 13 US-China L. Rev. 13 576(2016).

⁶³ *Supra* note 39.

actions of the government where it is mandated to examine environment related factors when granting permit, where relevant factors were not factored in; to the court issuing directives for implementing measures for climate change mitigation and stepping out of the mould of mere adjudication of disputes. While, such directives may not fit well with the notion of separation of powers, these have usually been last resorts of the court manifesting its frustration over lack of initiatives undertaken by the executive and to some extent justifying such efforts. Interestingly, climate change has also permeated immigration law, where climate change in the home country has been taken up as a ground for protection against deportation and seeking refugee status.

There are two accepted methods proposed by climate advocates to deal with Climate Change. The first method is through treaties and conventions, and the second mechanism is a newer, more innovative and efficient method to deal with climate change, known as Climate Change Litigation. In order to gauge the importance of focussing on Climate Change Litigation as a tool to curb climate change, it is required to define the term Climate Change Litigation. Climate change litigation aims at ensuring that ‘communities, individuals and governments have procedural and legal rights in substantive amount to enjoy a clean, safe, sustainable, and healthy environment, and the means to take recourse legally when this right has been infringed, within their legal framework, legislations and statutes, and wherever necessary at a regional, national, and international level.’⁶⁴

Climate change litigation can be brought within the ambit of various legislative frameworks such as international law, constitutional provisions, statutes, or common law. In certain cases, a combination of these laws would be required for providing legal basis for the litigants. The citizens can sue the regulators for any instance of non-compliance on the climate change mitigation commitments where the statute has authorized them to do so. In the Asia Pacific countries, courts need to ensure that climate litigants are provided with remedies which are not only based on mitigating climate change, but which also must ensure that human rights are protected. Where the government and policy makers fail in addressing the issues arising from the impact of climate change, the courts should impose liability on emitters of greenhouse gases to protect the interests of the affected parties. Therefore, the

⁶⁴ *Achieving Justice and the Human Rights in the Era of Climate Disruption*, Climate Change Justice and Human Rights Task Force Report (International Bar Association, 2014) available at <https://www.ibanet.org/Document/Default.aspx?DocumentUid=0f8cee12-ee56-4452...> (Last accessed on January 7, 2018).

policy makers, the courts and the regulators need to work in tandem in order to ensure that climate justice is rendered.
