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SYMPOSIUM ON JACQUELINE PEEL & JOLENE LIN, "TRANSNATIONAL CLIMATE LITIGATION: THE CONTRIBUTION OF THE GLOBAL SOUTH"

LITIGATING CLIMATE CLAIMS IN INDIA

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Jacqueline Peel and Jolene Lin's informative assessment of climate litigation in the Global South is a vital and timely contribution to the growing literature on the issue. It relies on a definition of climate litigation that allows the authors to draw on a much larger set of cases from the Global South by including cases in which climate concerns are "at the periphery." This essay examines climate litigation in India. Although the term "global warming" started appearing in Indian environmental judgments in the 1990s,[1] climate litigation in India is of relatively recent provenance, and with a few exceptions, climate concerns are peripheral to other, more mainstream environmental issues. Peel and Lin analyze five Indian cases as part of their Global South docket; I expand this set by including fourteen more cases that I believe fit their article's chosen definitional ambit. I classify these cases into four categories based on the use of climate language—reference to climate change, greenhouse gas (GHG) emissions, or the international negotiations—in the courts' judgment. Drawing from case law analysis and Indian environmental litigation, I make observations about what we can interpret from the current set of climate cases, and I predict that while conditions are favorable for climate litigation in India to grow, in the near future climate claims are likely to remain peripheral issues.

Contextualizing Climate Change Litigation in India

Although India's per capita carbon dioxide emissions are very low and its historical emissions were insignificant, its current annual GHG emissions are the third highest in the world. At the same time, given its topography, demography, and disparate levels of economic development across the population, India is extremely vulnerable to the impacts of climate change. In 2008, the Government of India released the National Action Plan on Climate Change (NAPCC), which endorsed a "co-benefits approach"—an approach that promotes India's development objectives while also addressing climate change effectively. The NAPCC led to the emergence of national climate policy-making and institution-building in India.[2] Several laws also address different aspects of climate change—in particular, causes and impacts—and thus provide potential hooks for climate litigation.[3] But there is no comprehensive legislation on climate change in India.

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[1] Environmental and Ecological Protection Samithy v. Exec. Eng'r & Others, MANU/KE/0436/1991; C.P. Antony v. Commr. Corp. of Cochin & Others, MANU/KE/0733/1993.

[2] Navroz K. Dubash & Shibani Ghosh, *National Climate Policies and Institutions*, *in* India in a Warming World 329 (Navroz K. Dubash ed., 2019).

[3] Shibani Ghosh, *Climate Litigation in India*, *in* Comparative Climate Change Litigation: Beyond the Usual Suspects (Francesco Sindico & Makane Moise Mbengue eds., forthcoming).

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The Indian judiciary—particularly the Supreme Court, the High Courts, and the National Green Tribunal (NGT)[4]—has played an active role in Indian environmental governance over the past three decades. It has nurtured public interest litigation as an instrument to increase access to the judicial system, and several cases of environmental and social salience have been brought to judicial attention without meeting onerous procedural requirements. The judiciary has also expansively interpreted constitutional and statutory rights (both substantive and procedural[5]), prodded an otherwise apathetic executive machinery into action, molded relief to appropriately respond to deteriorating environmental conditions, and readily relied on, or referred to, international legal instruments to support its decisions. Therefore, it is not surprising that climate concerns are finding their way to Indian courts even in the absence of a climate law.

Classifying Indian Climate Cases

Based on my analysis of judgments of the Supreme Court, High Courts, and the NGT in which the parties have raised climate change issues, and where reference to climate change or global warming and the international negotiation process is not just incidental, I have identified fourteen cases, apart from the five identified by Peel and Lin. I classify the use of climate language in these judgments into four categories, three of which map closely onto characteristics identified by Peel and Lin.

First, in five of the fourteen cases, either the litigant or the court refers to the climate impacts of a particular government decision or of the government's inability to regulate certain activities. In *Om Dutt Singh*, the applicants challenged the construction of a massive irrigation project. One of the grounds they raised was that submergence of large tracts of forest land would lead to methane emissions.[6] The NGT did not address this issue in its final order. It rejected the challenge, primarily—it seems from the judgment—because shutting down the project at such a late stage would have meant a massive waste of public money.

In *Sukhdev Vihar*, the NGT had to consider whether a waste-to-energy plant should be permitted to operate in a densely populated residential area.[7] One of the applicants' contentions was that incineration of unsegregated waste leads to GHG emissions. The Tribunal rejected the applicants' case, as it found that the plant met all of the prescribed emission standards. Significantly, the Tribunal noted that the project was a Clean Development Mechanism (CDM) project, and was therefore required to meet international standards, including stoppage of GHG emissions.

In *Society for Protection of Environment & Biodiversity*, the NGT found portions of a government notification exempting the construction industry (responsible for 22 percent of India's annual GHG emission) from an environmental regulatory approval process to be illegal.[8] The Tribunal held that the exemption was inter alia in derogation of India's commitment under the Paris Agreement and the Rio Declaration. Apart from a cursory reference to the need to reduce carbon emissions, the Tribunal's judgment did not explain how the government violated the Paris Agreement.

[4] The NGT is a specialized environmental tribunal set up under the National Green Tribunal Act 2010.

[5] Loveleen Bhullar, *The Judiciary and the Right to Environment in India: Past, Present and Future*, *in* INDIAN ENVIRONMENTAL LAW: KEY CONCEPTS AND PRINCIPLES 1 (Shibani Ghosh ed., 2019); Shibani Ghosh, *Procedural Environmental Rights in Indian Law*, *in id.* at 55; Lavanya Rajamani, *The Right to Environmental Protection in India: Many a Slip Between the Cup and the Lip?*, 16 RECIEL 274 (2008).

[6] Nat'l Green T [NGT], Om Dutt Singh v. State of Uttar Pradesh, Application No. 521/2014 (May 7, 2015).

[7] NGT, Sukhdev Vihar Residents' Welfare Ass'n v. Union of India [UoI], Application No. 22 (THC)/2013 (Feb. 2, 2017).

[8] NGT, Soc'y for Protection of Env't & Biodiversity v. UoI, Application No. 677/2016 (Dec. 8, 2017).

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The two remaining cases in the first category feature an extensive discussion on the climate impacts of deforestation in the context of the illegal felling of trees[9] and rampant unauthorized construction.[10] The Tribunal in both cases referred to the destruction of carbon sinks, carbon dioxide emissions from forest loss, and localized warming effects of small-scale deforestation. In my view, three of the cases discussed by Peel and Lin—the *Rohtang Pass* case,[11] the *KIADB* case,[12] and the *Manushi* case[13]—also fall into this first category.

The second category of cases consists of five cases in which the litigants approached the court seeking proper implementation of the law or government policy. In two of these five, climate change was the core issue, as the cases dealt with the formulation and implementation of climate action plans. In the first such case, the applicants sought orders from the NGT directing the central and state governments to show the steps taken by them to implement the NAPCC.[14] In its final order, the Tribunal did not directly rule on its jurisdiction over the implementation of the NAPCC but held that in future, specific cases regarding violation of the NAPCC, its impact, or consequences could be filed before it. Additionally, the Tribunal directed states that had yet to draft their state action plans in accordance with the NAPCC to prepare them and get them approved expeditiously by the Ministry of Environment, Forest and Climate Change (MoEFCC). In the second case in which climate change was the core issue, the applicant approached the Tribunal with regard to the formulation of the action plan by the State of Delhi. The matter was disposed of when the action plan was submitted by Delhi to the central government for final approval.[15] From a reading of the Tribunal's orders, it does not appear that the Tribunal played any role in formulating the plan, but judicial attention may have expedited the plan's submission, which was long overdue.

In the other three category-two cases, the courts used climate language to support decisions that they arrived at for other reasons. The Tribunal in the first of these directed the MoEFCC to come up with a monitoring and compliance protocol that would ensure that all thermal power plants and coal mines effectively implement a notification requiring coal-based thermal power plants to use coal with ash content not exceeding 34 percent.[16] In its final judgment, the Tribunal justified its orders on the ground that an "important co-benefit of such [a]n initiative would be lesser GHG emissions—i.e. lesser carbon footprint in thermal power generation."[17] In the second case, an approval granted for the construction of a new airport was suspended by the Supreme Court on the ground that the statutory process for approvals was not followed properly.[18] The Court discussed the tenets of the environmental rule of law that should underlie environmental governance in the country, and in particular the interpretation of the statutory process in question. The Court relied on several international legal instruments and documents including the Sustainable Development Goals (SDGs) (particularly SDGs 13 and 16), the Paris Agreement, and India's commitments in its Nationally Determined Contribution (NDC). In the third case,

[9] NGT, Court on its own Motion v. State of Himachal Pradesh & Others, Application No. 488/2014 (Aug. 1, 2017).

[10] NGT, Yogendra Mohan Sengupta & Others v. UoI & Others, Application No. 121/2014 (Nov. 16, 2017).

[11] NGT, Court on its own Motion v. State of Himachal Pradesh & Others, Application No. 237 (THC)/2013 (Feb. 6, 2014). The main issue before the NGT was environmental degradation, including melting of glacier, in the Rohtang Pass area in the Himalayas.

[12] In Karnataka Industrial Areas Development Board (KIADB) v. Sri C. Kenchappa (2006) 6 SCC 371, the Supreme Court considered the legality of conversion of agricultural land to industrial use.

[13] In Manushi Sangthan v. Govt. of Delhi & Others, MANU/DE/0321/2010, the government's decision to fix a limit on the number of licenses issued to cycle rickshaws was challenged before the High Court of Delhi.

[14] NGT, Gaurav Bansal v. UoI, Application No. 498/2014 (July 23, 2015).

[15] NGT, Mahendra Pandey v. UoI, Application No. 470/2016, (Jan. 2, 2019).

[16] NGT, Ratandeep Rangari v. State of Maharashtra & Others, Application No. 19/2014 (WZ) (Oct. 15, 2015).

[17] *Id* at para 34.

[18] Hanuman Laxman Aroskar v. UoI & Others, MANU/SC/0444/2019.

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while directing the government to formulate policy on the use of agricultural land for mining operations, the Kerala High Court stated that the Kyoto Protocol "reminds the nation to strive for the policies and measures to minimize adverse effects on climate change and to promote sustainable forms of agriculture in the light of climate change conditions."[19]

The third category consists of two cases in which litigants raised climate concerns while requesting directions to create new policies or realign existing processes and policies to accommodate those concerns. In a case challenging the setting up of a windmill farm, the applicants requested inter alia a direction requiring windmill farms to obtain environmental approvals in advance, on the ground that these projects have adverse environmental impacts and cause climate change. The NGT rejected this claim due to lack of evidence, but the central government referred to the inclusion of wind energy as a CDM project as one of the reasons to find that such projects do not create any environmental hazard.[20] In the second case, the applicants challenged a regulatory approval granted to a deep-water container port project in an ecologically fragile area, and also prayed for a direction that "areas likely to be inundated due to rise in sea level consequent upon global warming" are granted regulatory protection. The NGT dismissed the case and found the project to be of vital importance in terms of international trade.[21]

In my view, two of the cases discussed by Peel and Lin—the *HFC-23* case[22] and the *Pandey* case[23]—also fall within this third category. By way of an update on *Pandey*, the case raised many important climate issues, but the final order of the NGT did not engage with them, as the Tribunal held that there is "no reason to presume that Paris Agreement and other international protocols are not reflected in the policies of the Government of India or are not taken into consideration in granting environment clearances."[24]

The fourth and final category does not map neatly onto any of the characteristics identified by Peel and Lin but consists of two cases in which the government defended its policy decision by referring to climate change. In one, the government defended its decision to increase license fees on timber-based industries on the grounds that deforestation was responsible for a significant part of GHG emissions and that removal of forests leads to reduction in carbon sequestration and sudden release of large amounts of GHG.[25] The government also relied on the UN Environment Programme Gap Report in its submissions. The High Court of Allahabad found the license fee to be arbitrary and struck it down as illegal but did not discuss the climate concerns that the litigants raised.

In the second case, certain companies challenged a regulation issued by the State Electricity Regulatory Commission placing an obligation on them to purchase energy generated from renewable sources. The respondents defended their decision by relying on the NAPCC and the need to generate "green energy." The Supreme Court upheld the legality of the regulation and recognized the larger public interest in reducing pollution and mitigating GHGs by encouraging renewable energy sources.[26]

[19] Manu Anand v. State of Kerala, MANU/KE/0461/2016.

[20] NGT, Kallpavalli Vrishka Pempakamdarula Paraspara Sahayaka Sahakara Sangam Ltd. & Others v. UoI, Application No. 92/2013 (Aug. 25, 2015).

[21] NGT, Wilfred J v. Ministry of Env't & Forests, Application No. 74/2014 (Sept. 2, 2016).

[22] In NGT, Indian Council for Enviro-legal Action v. MoEFCC & Others, Application No. 170/2014 (Dec. 10, 2015), the applicants sought directions to stop industries manufacturing HCFC-22 (a refrigerant gas) from emitting HFC-23, which is categorized as a GHG under the Kyoto Protocol.

[23] NGT, Ridhima Pandey v. UoI, Application No. 187/2017 (Jan. 15, 2019). In this case, a minor sought directions from the NGT to the government and environmental regulatory agencies to consider climate-related issues in their decision-making.

[24] *Id* at para 3.

[25] M/S Singh Timber Traders & Others v. State of U.P. & Others, MANU/UP/2993/2014.

[26] Hindustan Zinc Ltd. v Rajasthan Electricity Regulatory Commission, (2015) 12 SCC 611.

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None of the cases discussed above have two of the characteristics that Peel and Lin identified in their article—the use of rights language and the use of the public trust doctrine. This is interesting because the Indian judiciary has developed an extensive jurisprudence on environmental rights as well as the public trust doctrine.[27] While litigants and judges in India may consider unconventional (climate) claims, relying on the tried and tested framework of legal rights and principles seems like a more obvious choice.[28] In view of India's vulnerability to climate impacts, it is also noteworthy that most cases did not raise concerns relating to adaptation. It is hard to theorize on these issues just yet, as the sample size of case law is quite small, but climate litigation is starting to grow. Future cases are likely to shed more light on the merits of particular doctrinal strategies.

What Do the Indian Climate Cases Tell Us?

The Indian cases to date suggest a few tentative lessons. First, it is important not to overstate the significance of climate claims being brought to Indian courts. While judgments provide an indication of how climate language is entering Indian environmental litigation, they do not provide a complete picture of how seriously the parties view climate concerns, as written pleadings are not easily accessible and oral pleadings are not necessarily recorded. Often issues may be argued at length in court but may not be supported by written pleadings, or the court may not adequately deal with them in its judgment. Conversely, the court in its judgment may express concerns and refer to climate issues that neither party raised.

Second, Indian environmental judgments often rely on international environmental law while interpreting statutory obligations, but judicial reasoning in such situations is not always robust, and the engagement seems superficial at times. A similar treatment can be seen in the context of climate claims where the courts refer to the UN Framework Convention on Climate Change, the Kyoto Protocol, the Paris Agreement, and India's NDCs. Like elsewhere, the courts' reliance on these instruments is not always accompanied by strong judicial reasoning that explains how India has violated, or is required to comply with, an international obligation.

Third, a cautionary note: one should not be overly optimistic about the outcomes of climate cases in India, as some of the systemic problems that plague the Indian legal system equally affect the environment, and therefore the climate, docket. Despite their "pro-environment" and "activist" reputation, Indian courts are often deferential to the executive on decisions on economic policy and infrastructure. In addition, Indian courts are notorious for their overflowing dockets. And judicial outcomes in India—in terms of content and enforcement—are largely unpredictable, as they are predicated on various legal and non-legal factors.

Conclusion

The Indian contribution to the Global South climate litigation docket is likely to grow in the coming years. The constitutional and statutory powers of Indian courts are broadly worded and allow them to exercise jurisdiction in innovative ways in situations that are not necessarily governed by black letter law. Indian courts have not shied away from using this discretionary space in adjudicating environmental disputes, and they are likely to extend this proactive approach to climate claims as well. The framework of environmental rights and legal principles that the Indian judiciary has developed over the past three decades is well placed to support climate litigation. At the same time, India is witnessing a massive decline in all environmental quality indicators, such as air, water, and forests, and

[27] Shibani Ghosh, *Public Trust Doctrine in Indian Environmental Law*, *in* INDIAN ENVIRONMENTAL LAW: KEY CONCEPTS AND PRINCIPLES, *supra* note 5, at 230.

[28] Lavanya Rajamani & Shibani Ghosh, *India*, *in* CLIMATE CHANGE LIABILITY: TRANSNATIONAL LAW AND PRACTICE 139 (Richard Lord et al eds., 2011).

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severe conflicts exist over a range of natural resources. It is also a growing economy with real developmental concerns. In this scenario, in the near future climate change is likely to remain a peripheral, *albeit* an important, issue in most cases that raise and address more "mainstream" environmental concerns.

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