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Courts, Environment, and Climate Change

The Indian Experience

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Introduction

India ranks seventh in the 2021 Global Climate Risk Index (Germanwatch 2021), and in 2017, it was the second most-affected country in terms of casualties related to extreme weather (Germanwatch 2017). Water pollution, food and water shortages (Niti Aayog 2019), waste management, and biodiversity loss (Kumari, Wate, and Anil 2014, 107) are just some of India's problems. Its large population coupled with a severe economic dependency on agriculture (FAO 2023) exposes it to severe vulnerabilities. Owing to its geography and high economic dependence on climate-sensitive sectors, India is one of countries most vulnerable to climate change (Harjeet Singh 2015). 'Food security of India may be at risk in the future due to the threat of climate change leading to an increase in the frequency and intensity of droughts and floods, thereby affecting production of small and marginal farms.' (Ministry of Environment and Forest 2009, 78). As a protector of people's rights, Indian courts are legally bound to protect the environment.

The chapter's research method involves an analysis of the literature and review of the judicial precedent. The chapter aims to compare the judicial precedents of the Supreme Court of India and the National Green Tribunal (NGT) to understand the evolution of their response to environmental litigation.

Article 48A in the Constitution of India obliges the government to protect the environment and conserve the natural resources of the country.

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Article 51 (1) (g) of the Constitution imposes a non-justiciable duty upon each citizen of the country to protect and improve the natural environment. Various laws such as the Wildlife Protection Act 1972, the Water (Prevention and Control of Pollution) Act 1974, the Air (Prevention and Control of Pollution) Act 1981, and the Environment (Protection) Act 1986, were passed from time to time to combat discrete environmental issues. India is also a signatory to the United Nations Framework Convention on Climate Change (UNFCCC) 1992 and confirmed its commitment to the protection of the environment. Thus, empowered by the law, government agencies wield vast power to enforce their commitment towards climate justice and discipline violators. Due to various reasons, such as the lack of a sound monitoring infrastructure, insufficient executive will, and, above all, the absence of an umbrella enforcement body, these laws have not been effective.

This is significant because the Constitution of India empowers the courts to issue directions to the executive should they fail to perform their duties, and for a country with an imperial past, this power of the courts is intended to constitutionally empower the citizens against the executive.

This chapter, which has been divided into three sections, seeks to critically compare the proactive role of the judiciary with how it has changed in the past two decades. It tests the hypothesis that now, when the response to climate change deserves to be more aggressive, the courts have begun to defer to the executive. In the first section, it sets out the role that Indian courts have played in the evolution of Indian environmental law utilizing the language of rights. In the second section, the chapter explores India's role, responsibilities, and obligations concerning the climate and the role of courts to apply international law to domestic environmental rules and compel necessary adaptations for climate change emergencies. In its third section, the chapter aims to compare the approach of Indian courts and tribunals concerning climate change after independence from the 1950s towards the end of the twentieth century and the evolution in the last decade. This chapter urges that current judicial trends reflect that the Indian courts are not acting proactively to combat climate change and defer to the executive's requirements. This has led to Indian executives taking insufficient measures to tackle the climate emergency. The chapter assumes that the institutional impetus of the judicial forum is imperative for an actionable climate change response and highlights the necessity of courts to play a more proactive role, given the executive lethargy

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Indian Courts Shaping the Environmental Law in India

The courts in India especially the constitutional courts, have provided content to the environmental legislation by tools of interpretation and have compelled the government to respond. The courts have played an important role in advancing the goal of environment conservation and even recognizing the right to a clean and healthy environment as a fundamental right. They can also compel the performance of statutory duties and review legislative and executive action.

The special place of the Supreme Court and the federal states' High Courts given by Article 32 and Article 226 respectively of the Constitution, and the freedom of Indians to approach such courts directly in the first instance for violation of constitutionally and statutorily guaranteed rights make such courts very powerful. It could be said that the 'right to a clean environment', as a facet of human and fundamental rights, was practically shaped by the courts—by progressively and cohesively reading other human rights. It has been held by the Supreme Court that the

> right to life is a fundamental right under Art. 21 of the Constitution and it includes the right to the enjoyment of pollution-free water and air for full enjoyment of life. If anything endangers or impairs that quality of life in derogation of laws a citizen has recourse to Art.32 of the Constitution for removing the pollution of water or air which may be detrimental to life. (*Subhash Kumar v State of Bihar* 1991, para 7)

Throughout the 1980s, the Supreme Court of India extensively broadened the concept of locus standi and expanded the scope of the fundamental right to life to encompass natural heritage and pollution-free environments (Sivaramakrishnan 2011, 917).

The evolution of environmental law in India following independence primarily revolves around the judiciary's responsiveness to citizen complaints concerning environmental degradation and bureaucratic inaction (Divan and Rosencranz 2021, 1). For decades, Indian courts have passed judgments and orders, exercising (even the creeping and epistolary) jurisdiction, to safeguard the right to a clean and healthy environment. Instances have been observed where courts have assumed administrative responsibilities, imposing strict directives to be adhered to and even mandating the cessation of non-compliant entities based on diverse legal doctrines.

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The initial approach of the interpretation of the Constitution adopted by the Supreme Court of India was to read individual articles recognizing fundamental human rights separately and independently from one another (*A.K. Gopalan v State of Madras* 1950). However, subsequently the interpretative approach evolved and the 'silos of rights' approach was abandoned, allowing fundamental human rights to be read along with each other (*E.P. Royappa v State of Tamil Nadu* 1974; *Maneka Gandhi v Union of India* 1978). Consequently, the courts were enabled to expansively read the Constitution and the rights guaranteed therein. Litigation and judicial pronouncement were positively impacted by the liberalization of the rules of locus standi, allowing citizens with standing to approach the court on behalf of disadvantaged groups or to enforce a collective right. During its early stages, public interest litigation (PIL) has largely focused on issues surrounding bonded labour, prisoners, child labour, the mentally ill, and women in custodial institutions. However, in the latter half of the 1980s, environmental concerns began to gain prominence within PIL (Rural Litigation Entitlement Kendra 1986). PIL as a tool, unshackled by ordinary rules of litigation, allowed common villagers to approach the courts, and allowed the courts to be informed about the environmental harm taking place in areas much outside the public gaze. By the 1990s, environmental matters had come to dominate judicial discourse as issues of public interest (Sivaramakrishnan 2011, 915), and the Supreme Court also took the assistance of amicus curiaes and committees in PILs (*Sheela Barse v Union of India* 1988). The cases enumerated below are some examples of judicial precedents that drew from a range of legal doctrines to arrive at their respective conclusions to protect the environment.

The Supreme Court of India has read the 'right to life' to include a 'right to a clean environment' (*N. D. Jayal v Union of India* 2004, paras 23–24). In its judgment in the *Span Motels* case, pertaining to hotel construction on the riverbed, the Supreme Court invoked the public trust doctrine and extended it to environmental law in India (*M.C. Mehta v Kamal Nath* 1997, para 25). It stated: 'The doctrine enjoins upon the Government to protect the resources for the enjoyment of the general public rather than to permit their use for private ownership or commercial purposes.'

The court declared that the 'public trust doctrine' as discussed in the judgment is a part of the law of the land (para 37). In addition to the public trust doctrine, the court also started adjudicating based on the precautionary principle (which holds that harm is presumed in the absence of proof

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to the contrary) to elucidate the interplay between fundamental rights, fundamental duties, directives of state policy, and environmental protection. The 'precautionary principle' has been described as follows: 'when an activity raises threats of harm to human health or the environment, precautionary measures should be taken even if some cause and effect relationships are not fully established scientifically' (Raffensperger and Tickner 1999). In 1998, the Supreme Court of India directed the closure of brick kilns in Delhi and directed the local administration to assist the kilns in adopting cleaner technology or to relocate them to industrial areas (*M.C. Mehta v Union of India*, 1998).

In 1999, the Supreme Court relied on the doctrine of 'the precautionary principle' and held that when a risk of great or irreversible damage to the environment is perceived, the burden of proof must lie on the one that is proposing to undertake the activity in question (*A.P. Pollution Control Board v Prof. M.V. Nayudu* 1999, para. 38). The judiciary's intervention in supplementing statutory provisions with a clear purpose and direction has become a consistent practice, largely on account of the fact that these principles were not stated within the legislation. Courts have found it necessary to declare such principles as law so as to provide a standard on which the rights could be implemented.

As the twentieth century drew to a close, the Supreme Court of India passed numerous judgments pertaining to the safeguarding of the environment, including those related to industrial mishaps such as the *Oleum Gas Leak* case. In this particular instance, the Supreme Court established the principle of absolute liability, asserting that this liability is not subject to any of the exceptions that pertain to the tortious principle of strict liability (*M.C. Mehta v Union of India* 1987, para 31), and disallowing even the narrow defences such as due care and lack of *mens rea* (mental element). In the river water pollution case, the Supreme Court ordered the pollutant unit (tanneries) to set up primary treatment plants and stated that the financial capacity of the unit is irrelevant while requiring them to establish primary treatment plants. The court expounded that, in matters pertaining to unemployment and loss of revenue versus life, public health, and ecology, the latter shall take precedence (*M.C. Mehta v Union of India* 1988, paras 14 and 22). In the deforestation case, the court directed that all ongoing activity throughout the country which commenced without the prior approval of the government must be stopped, among other directions, preventing the felling of trees which continue to operate even today (*T.N. Godavarman Thirumulpad v Union of*

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India 1997, para 5). The aforementioned cases represent a subset of numerous legal proceedings that evince the courts' solicitude towards environmental conservation and preservation.

While the contribution of the courts was noteworthy, the courts were getting involved in 'polycentric disputes' (see Fuller and Winston 1978), which fall outside judicial expertise and within the legislative and executive domain (Rajamani 2007). It was upon the Supreme Court's direction that Delhi switched to using compressed natural gas.(CNG) buses, even though the choice of fuel and manner of implementation was an executive decision (*M.C. Mehta v Union of India* 2002, para 47). The Supreme Court had also introduced a license regime for the running of saw mills, veneer, and plywood industries, which are all actions in the realm of policy (*T.N. Godavarman Thirumulpad v Union of India* 1997).

In the *Oleum Gas Leak* case (*M.C. Mehta v Union of India* 1987, paras 21 and 22) the Supreme Court observed and expressed its thought to the government that cases involving issues of environmental destruction are increasingly coming before the courts for adjudication and that such cases require a high level of scientific expertise and technical sophistication. It further said that it might be desirable to set up environmental courts on a regional basis. In *Vellore Citizens* case, the Supreme Court observed that the central government should constitute an authority under section 3(3) of the Environment Protection Act 1986, and that the authority be 'headed by a retired Judge of the High Court and it may have other members—preferably with expertise in the field of pollution control and environment protection—to be appointed by the Central Government' (*Vellore Citizens' Welfare Forum v Union of India* 1996, para 25).

These recommendations arguably formed the basis for parliament to enact the NGT Act 2010, with the intent of setting up a specialized tribunal dedicated solely to the adjudication of environmental disputes with expert guidance and required by the statute to apply the principles of sustainable development, the precautionary principle, and the 'polluter pays' principle. In its initial years, the NGT relentlessly enforced environmental law and even assumed *suo motu* jurisdiction and passed orders that formed the jurisprudential basis for its future adjudication. Being a 'green court' created only for the protection of the environment, it understood its role correctly and acted zealously, exercising continuing jurisdiction to oversee even the enforcement of its orders (Gill 2015).

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India and the Global Environmental Crisis

The courts, however creative, are obliged to follow the laws of the land. This section examines the role of the Indian courts in reading international law into the domestic law for the enforcement and protection of the environment. The interdependence between the courts, executive, and legislature is particularly important in the context of the environment, as climate change presents a unique challenge. The courts uphold and enforce laws related to climate change made by the legislature and common law. Non-enforcement of regulations and laws can have significant consequences on society as a whole, and not just on specific groups or individuals.

India has obligations under various international treaties and agreements pertaining to environmental issues. These agreements include the Convention for the Protection of the Ozone Layer (Vienna, 1985), the UNFCCC (Rio de Janeiro, 1992), and the Paris Climate Agreement or COP21, which was adopted in 2015 and signed by India in 2016. However, absent a specific legislation for their enforcement, the citizens are dependent upon courts to read them into the domestic law.

This concern can be noticed, for instance, when Kirpal argues for a robust role of courts in protecting the environment, and he emphasizes the role of courts due to the inability or unwillingness of governments to account for the externalities of environmental damage. A major concern of governments appears to be enhanced economic growth while ignoring the environmental cost of pollution (Kirpal 2022, 202), which continues to be urged before the courts notwithstanding the adoption of the 'precautionary principle' in domestic law.

In *Vellore Citizens* case, the court walked an extra mile while dealing with the release of untreated effluents in the rivers and laid down certain guidelines and norms that formed the law, in the 'absence of an enacted law', to provide for the effective enforcement of basic human rights (*Vellore Citizens' Welfare Forum v Union of India* 1996). The Supreme Court of India stepped in and came up with certain guidelines to prevent sexual harassment of women in the workplace (*Vishaka v State of Rajasthan* 1997, para 17), as at that time there was no specific enactment that dealt particularly with this issue. 'A robust system of prevention and prohibition of sexual harassment at the workplace was put in place via judicial diktat rather than through any legislation' (Kirpal 2022, 104). The Supreme Court of India has taken the view

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that the 'doctrine of incorporation' had been accepted by courts, according to which rules of international law are incorporated to be a part of national law unless they conflict with an Act of Parliament (*Gramophone Co. of India Ltd. v Birendra Bahadur Pandey* 1984, para 5). The recognition by the Supreme Court of India of international obligations and their enforcement mechanisms represents a significant advancement for a dualist polity such as India, particularly with respect to environmental law. Under Indian law, parliament alone is empowered to legislate to give effect to international conventions.

In the year 2008, the central government came up with a 'comprehensive' document called 'The National Action Plan on Climate Change' (NAPCC), which outlined India's strategy to address the challenges of climate change. Its objective was to address both adaptation and mitigation measures. The plan incorporates eight national missions that are centred around critical domains, including solar power, energy efficiency, sustainable agriculture, and water conservation. Thus, at the very minimum, the plan acknowledges the interrelationship of efforts. However, the NAPCC has come under severe criticism as experts regard it as vague, and its greater shortcoming is the failure 'to articulate a vision, nationally or globally' (*Economic and Political Weekly* 2008). One scholar has noted:

> One of the main criticisms of India's climate policy is that there is no specified goal or target for sustainable development projects. For instance, the solar mission fails to focus on off-grid solar power, which could be a boon for remote areas. Similarly, there's little emphasis on low-chemical practices in the sustainable agriculture mission—a practice that would not just boost sustainability of crops but also help reduce greenhouse gases. Some deeply-embedded challenges such as removing environmentally destructive subsidies for chemical fertilisers have not been taken seriously at all. (Priyadarshini 2012)

While India ranks high in terms of the risk it faces from climate change, parliament has shown little interest in responding proactively to what lies ahead. It will not be possible to combat climate change in the absence of comprehensive legislation passed by the parliament backing the NAPCC, especially without the governments invoking 'cooperative federalism'. The institutional structures designed to implement NAPCC either did not last

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or did not persist, resulting in the weakening of climate change responses (Dubash and Joseph 2016).

While parliament has passed several laws to combat environmental issues and ecological concerns, such as air pollution and the protection of wildlife, none of these previous laws have addressed the issue of climate change. The Indian parliament and policymakers urgently require a comprehensive legislative and strategic framework that includes a vision for tackling climate-related issues while considering the imminent danger the country faces and guidance for courts. On the contrary, in the name of development, approvals are being given to developmental projects overlooking the precautionary principle (*Economic and Political Weekly* 2016)

In the absence of any credible legislative or executive efforts, the onus is put once again on the courts to innovate. Examples of past innovations by NGT, a tribunal with limited jurisdiction, include taking *suo motu* cognizance of environmental concerns on the basis of newspaper reports or entertaining letter petitions (*Municipal Corporation of Bombay v Ankita Sinha* 2021). However, this time, there exists the NGT, tasked with adjudicating on matters related to environmental protection and conservation, and is now treated as the court of first instance for environmental issues.

Judicial Response to Climate Change

Sensing the need for judicially supervised enforcement of environmental law and to harness the judicial power to elicit a credible governmental response, public-spirited persons did approach the courts in certain cases seeking enforcement and content for the NAPCC. However, the judicial response has largely been unenthusiastic. For instance, in a case, India's NGT showed deference to the executive, stating 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 …' The applicant had asked for broad directions to be issued, mainly to do with climate change being considered under the EIA (Environmental Impact Assessment) and to direct the government to ensure India's climate policy aligned with its commitments under the Paris Agreement. Without engaging with the climate change issues by the applicant, the NGT dismissed it, so the argument of the court did not challenge any particular action or statute (*Ridhima Pandey v Union of India*

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2019). This may be contrasted with the judgment in *Vellore Citizens*, where the court walked an extra mile to lay down specific guidelines, as there was no enacted law on the subject. This may also be contrasted with *M.C. Mehta*, where the court itself directed for phasing out of non-CNG buses rather than waiting for the executive to respond.

In *Ridhima Pandey*, the applicant had approached the NGT against the government over its failure to prepare a carbon budget and a national climate recovery plan, specifically referencing the *Ashgar Leghari* from Pakistan (Nagpal and Pak 2019, 172), where the courts had declared the delay in enforcement of NAPCC as violation of basic human rights and noticed that climate justice is the successor of environmental justice. Thus, *Ridhima Pandey* also offers a contrast with the approach in relation to climate change in other countries.

In *Wilfred v MoEF* (2016), the applicant had claimed that the site of a proposed project, in southern India, in its immediate vicinity, was inhabited by small-scale fishermen who depend on the coastal and offshore water of the district and fishing for their livelihood. They challenged a regulatory approval granted to a deepwater container port project in that ecologically fragile area. It was prayed by the applicants before the tribunal that the Vizhinjam coast is likely to be inundated due to the rise in sea level as a result of global warming and that it should be included as an area of 'outstanding natural beauty' and categorized in the CRZ-I category (Coastal Regulation Zone, or CRZ, refers to the coastal stretches of India and the water area up to its territorial water limit where commercial activities are prohibited). The applicants contended that they sought to protect and safeguard coastal areas of outstanding natural beauty and areas likely to be inundated due to the rise in sea level because of global warming, the categories which were deleted from the classification of CRZ-I areas in Coastal Zone Regulation Notification, 2011. They further submitted to the tribunal that, as per the Coastal Zone Regulation Notification 1991, coastal areas of outstanding natural beauty and areas likely to be inundated due to the rise in sea level consequent upon global warming were categorized or classified as CRZ-1 areas (para 14).

Since the inception of the port's construction, concerns have been raised by the fishermen and the local community regarding the extensive coastal erosion caused by the said construction. Another significant threat that has been identified is the irreversible destruction of the ecology, posing lethal hazards to the natural environment. It is widely acknowledged that without adequate safeguards in place, ports have the potential to inflict considerable

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damage on marine life and the livelihoods of the local population, particularly in ecologically vulnerable areas (V. Thomas, 2022). According to a study by the National Centre for Sustainable Coastal Management (NCSCM), a major stretch of Kerala's coastline is eroding. It advised that proper precautions should be taken before erecting any further structures along the eroding and vulnerable coastal stretches of Kerala (Ramesh, Purvaja, and Senthil n.d.). 'Significant erosion' was also confirmed by National Institute of Ocean Technology, Chennai. (V. Thomas 2022).

The movement against the Vizhinjam port is seen as part of the global movement for protecting livelihood and preserving the oceans and critiques the neoliberal mega projects that governments advocate in the name of development (Moolakkattu and Chathukulam 2022).

In 2016, in its final decision, the NGT dismissed the case while stating that building of such a port is crucial for economic development for the state as well as the country and that lack of infrastructure is seriously hampering India's international trade, competitiveness and economic growth (*Wilfred J. v Ministry of Environment and Forests* 2016, para 59). Even though the court did set up a 'committee' to ensure that the project proponent complies with all the norms and directions passed by the court, it is evident that despite genuine environmental concerns and protests by the local community, the court appears to have prioritized developmental interests over environmental considerations. This apparent erring in favour of economic development raises significant questions regarding the court's commitment to upholding environmental protection and the precautionary principle, especially since it described the project in the following words: 'This will also boost the development of Indian Coastal shipping which is much cheaper than any other mode of transport.… National security is also served in emergency because of proximity to international shipping routes.' Abandoning the precautionary principle in favour of economic rationales for building a port reflects a shift in the court's understanding of ecology and gives way to short-term economic benefits.

In another case, *D Swamy v Karnataka State Pollution Board* (2022), the NGT had refused the plea for the closure of a common bio-medical waste treatment facility on the ground of alleged non-compliance with the provisions of the Environmental Impact Assessment Notification 2006. The court observed that when the bio-medical waste treatment facility was being operated with the requisite consent to operate, it could not be closed on the grounds of want of prior environmental clearance. The court had indeed

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noted that the need to comply with the requirement to obtain environmental clearance is non-negotiable and that pollution laws should strictly be enforced. However, it further went on to say that 'ex post facto environmental clearance' can be granted in exceptional circumstances. When the Tribunal Order was appealed against in the Supreme Court of India, the court admitted that ex post facto environmental clearance (EC) should not ordinarily be granted. However, the court dismissed the appeal while stating that ex post facto clearances and/or approvals cannot be declined with 'pedantic rigidity regardless of the consequences of stopping the operation' (para 49). The stand taken by the court is inconsistent with the view taken by it in 2017 in *Common Cause v Union of India* (2017) that '[t]he concept of an ex post facto or a retrospective EC is completely alien to environmental jurisprudence' because it can 'be detrimental to the environment and could lead to irreparable degradation of the environment' (para 125). It also sends across a message that it may be optional to comply with environmental regulations or that it can be condoned in appropriate cases, leaving no guidance on what qualifies as an appropriate case. In the *National Highway Authority of India*, the Supreme Court of India held: 'While economic development should not be allowed at the cost of ecology or by causing widespread environmental destruction, the necessity to preserve ecology and environment should not hamper economic and other development' (NHAI 2021, para. 18). In *Aarey Forest* case, the Supreme Court of India granted permission to fell trees for a metro rail project after initially granting an injunction (*Felling of Trees in Aarey Forest* 2022).

In *Hanuman Laxman Aroskar v Union of India* (2019), the Supreme Court had to overturn a heavily criticized judgment of the NGT while stating that 'the decision of NGT indicates that several significant submissions were urged before it. The entire analysis by NGT is contained in one paragraph of its judgment … the above paragraph, in our view, does not fulfil the requirement of a merits review by an expert adjudicatory body vested with appellate jurisdiction' (para 132).

In *Pahwa Plastics v Dastak NGO* (2022), the Supreme Court had ruled against closing down of a factory (irrespective of whether or not the factory actually causes pollution) employing a large number of people and contributing to the economy of the country on the ground that the factory not obtaining prior EC is a technical irregularity (para 54). It further said that ex post facto EC should not be granted routinely but in exceptional circumstances, taking into account all relevant environmental factors

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(para 63). However, the Court did not define or give parameters as to what constitutes as 'exceptional circumstances' and what are the 'relevant environmental factors' to be taken into consideration while granting an ex post facto EC. The conclusion given by the court in this case is bound to have serious consequences on the environmental rule of law as it enables parties to approach and seek condonation from the court after they have violated environmental norms, and thereby puts a premium on illegal conduct (Dutta 2022). 'A wrong and illegal decision is not just an issue of rule of law, but has the potential to destroy a natural entity which is a creation of millions of years of evolution. This can never be compensated, either punitively or monetarily' (Dutta 2019a).

While the NGT is quick to form committees and impose compensation, due to poor judicial process, such orders often do not withstand judicial scrutiny (A. Thomas 2022). It is apparent that while climate change claims, or claims using the language of global warming and climate change, have been brought before the Indian judiciary, particularly the NGT, in the recent past, the courts have tended to prioritize the economic interests of the governments. The longstanding tension between development and environmental protection in India underscores the critical role that courts play in mediating this issue and providing an impartial road ahead, having regard to the principles of environmental law that flow from the Constitution.

An independent court that holds the government accountable can pose a significant challenge to the executive branch. While this chapter does not aim to comment extensively on the extent to which the NGT has upheld its responsibility to hold the government accountable, it is essential to acknowledge the institutional independence of the tribunal. 'A "green" court that can take independent decisions in environmental concerns is an uncomfortable presence' (*Economic and Political Weekly* 2017). In 2017, an amendment was made to the selection process for adjudicating officers of tribunals, including the NGT. This amendment resulted in a relaxation of the selection criteria, potentially allowing for individuals of lesser qualifications to be appointed to the tribunal and providing the government with greater discretion in making appointments. In the context of the frequent conflicts between the Supreme Court and the government regarding the appointment of judges and the perception that tribunals may serve as a post-retirement haven for judges, the selection and appointment of judges to the NGT assume importance. Institutional independence may ultimately determine the success or failure of the efforts to respond to climate change through the medium

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of courts and tribunals. Many of the regional benches of the NGT remain dysfunctional due to a lack of coram, and the expert members' appointments remain largely at the pleasure of the government, thereby taking away a local forum from the citizens (Dutta 2019b). This shows that the independence of a tribunal (including the processes of appointment of its presiding officers) that reviews the government's commitment to environmental considerations is at the heart of effective and meaningful adjudication.

Conclusion

The jurisprudence surrounding environmental protection in India has been largely influenced by the discourse on sustainable development and the notion of irreparable harm to the common environment. However, the language of climate change has not been adequately integrated into the judicial mindset, and the distinction between 'environmental justice' and 'climate justice' as noticed by Pakistan's Lahore High Court in *Asghar Leghari,* has not been appreciated by the courts and tribunals in India. Despite the increasingly pressing and complex challenges posed by climate change, the judicial approach towards environmental protection remains relatively narrow and focused on the traditional paradigm of sustainable development. This dearth of attention to climate change in judicial discourse is concerning, given the urgent need for a more nuanced and proactive approach to address the rapidly evolving environmental challenges posed by climate change. The approach taken in the aforementioned climate change cases poses a threat to other socioeconomic rights as well as because the underlying source for the right is the same—Article 21 of the Constitution of India.

Indian courts empowered by the Constitution have played a major role in shaping the environmental law in the country. The judiciary played a key role in getting the government to pass legislation to protect and preserve the environment and maintain the ecological balance in nature. However, the current trendsindicate that the courts are not as proactive as they once were and are increasingly giving way to executive deference over environmental concerns. The lukewarm judicial response could be on account of the non-institutionalization of a climate change vocabulary as well as threats to judicial independence. Further research is required to explore ways to secure the independence of the NGT in the matters of appointment and

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service conditions of its presiding officers, as well as devising institutional mechanisms to train presiding officers in a better appreciation of obligations under domestic and international law, particularly under the NAPCC. This chapter argues that *now* is the time for the courts and tribunals to take climate change litigations seriously and to compel the executive to act.

Given the scale of impact, the Indian judiciary does need to step up. In some cases, even recently, the courts and the NGT have attempted to intervene (such as in glacial recession by regulating vehicles in the Leh–Ladakh region). In *MK Ranjitsinh v. Union of India, 2024*), described as the Supreme Court's Sophie's Choice moment (Mathur 2024), the Supreme Court recalled its injunction imposing a general prohibition on the laying of transmission lines in a designated area with a view to prevent bird collision. The prohibition was earlier imposed on the grounds that an already endangered species, the great Indian bustard, would be put at great risk given the high chances of collision with such transmission lines. In its latest order, the Supreme Court gave alternate directions (such as installing 'bird diverters') in an attempt to balance between the need to protect biodiversity and the need to cater to the laying of transmission lines connecting solar generators to the grid. However, one rarely witnesses such nuanced jurisprudence, often because there is no statutorily defined and coherently applied principle on how the balancing exercise is to be done. One must begin to view this from the global effects of climate change, and not to view it from what is now perceived as parochial the consideration of development typically expressed in the language of 'hyper-nationalism'. This would also involve the judiciary taking a more hands-on approach to enforcing environmental regulations and laws and holding those responsible for environmental damage accountable. The performance of the obligations by the government is to be ensured by the courts and the NGT, consistent with the judicial approach in the 1980s and 1990s.

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