

## **The Emerging Constitutional Challenge of Climate Change: India in Perspective**

*Persuading polluters to pay for the damage they cause elsewhere, in the interest of helping those worst affected, will be a major challenge in coming decades. “Burden sharing is a very complex issue, and frankly I don’t see much sign of it happening yet.”*  
--Rajendra Pachauri, Chairman IPCC<sup>1</sup>

### **Introduction:**

Climate change discussions currently lay emphasis on mitigation strategies with minimum adverse impact. India, as a rapidly transitioning economy, is critical to the outcome because of the potential and actual increase in its energy consumption and greenhouse gas emissions. However, concentrating on India’s role, although crucial, undermines another concern—the potential erosion of constitutionally guaranteed rights of millions of Indians. In particular, the rights of Indians, whose head count support the Indian government’s equitable claim to emit green house gases (GHG) based on a per capita calculation, are at stake, but there is no remedy in sight.

This article argues India’s focus on mitigation overlooks the threat that climate change presents to constitutional rights of Indians, which can only be taken away by the State and by proper legal procedure. Further, safeguarding these rights presents substantial challenges within the current legal structure, even within the Indian judiciary’s epistolary jurisdiction, when foreign states are involved and international and other remedies against these states are limited. Through this analysis, this article aims to demonstrate a less examined issue in international law, that its absence, rather than presence, may affect a country’s exercise of sovereign interests.

The first part of the article discusses India’s mitigation focus. The second part explains the constitutional challenges that climate change presents to Indians and the limits of remedies.

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<sup>1</sup> Laurie Goering, “Warming to the Challenge of Climate Change,” Chicago Tribune, April 29, 2007. Also cited at <http://inel.wordpress.com/2007/04/29/rajendra-pachauris-3-points-on-climate-change/>

The third and fourth parts discuss the scope for judicial action and their limits, followed by concluding remarks.

### **India's Mitigation Focus:**

On August 26, 2002, India acceded to the Protocol (Kyoto Protocol)<sup>2</sup> to the United Nations Convention on Climate Change (UNFCCC).<sup>3</sup> Neither instrument obligates the Government of India to reduce its greenhouse gas (GHG) emissions.<sup>4</sup> However, given its economic growth<sup>5</sup> and resultant increase in GHG emissions,<sup>6</sup> the Government of India is under international pressure to accept binding obligations post Kyoto,<sup>7</sup> much like Annex I nations.<sup>8</sup>

The Indian Government resists such proposals on grounds of economics and equity.<sup>9</sup> However, the administration is undertaking several voluntary measures that will slow down GHG emission increases. These measures include promotion of renewable energy<sup>10</sup> and

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<sup>2</sup> Kyoto Protocol Status of Ratification as of 11<sup>th</sup> May 2007, at <http://unfccc.de>; Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, 37 I.L.M. 22 (1998), entered into force Feb. 15, 2005.

<sup>3</sup> UN Framework Convention on Climate Change (UNFCCC), May 29, 1992, 31 I.L.M. 849, entered into force May 21, 1994.

<sup>4</sup> Under Article 2 (a) & (b) of UNFCCC only developed countries and other Annex I countries, are required to stabilize emissions by adopting appropriate national policies and regularly submit progress reports. Further, under Article 3 of the Kyoto Protocol, Annex I countries are required to reduce their GHG emissions to at least 5% below 1990 levels between 2008-2012, and have been assigned specific emission quotas under Annexes A and B.

<sup>5</sup> India's GDP has grown steadily by about 8% in the last few years. *See* Reserve Bank of India Press Release, RBI Increases Cash Reserve Ratio, February 13, 2007, [http://www.rbi.org.in/scripts/BS\\_ViewBulletin.aspx?Id=8333](http://www.rbi.org.in/scripts/BS_ViewBulletin.aspx?Id=8333).

<sup>6</sup> India is now the fifth largest emitter of greenhouse gases in the world. *See* THE LITTLE GREEN DATA BOOK, World Bank, 2007, <http://siteresources.worldbank.org/INTDATASTA/64199955-1178226923002/21322619/LGDB2007.pdf>

<sup>7</sup> The Byrd-Hagel Resolution passed by the U.S. Senate unanimously, 95-0, expressly advised the Clinton Administration not to accept binding obligations under Kyoto Protocol unless developing countries did so as well. Byrd-Hagel Resolution, Report No. 105-54, 105<sup>th</sup> Congress, 1<sup>st</sup> Session, S. Res. 98. *See also*, Letter to Members of the Senate on the Kyoto Protocol on Climate Change, 37 Weekly Comp. Pres. Doc. 444 (Mar. 13, 2001) for a statement by President Bush rejecting the Kyoto Protocol.

<sup>8</sup> In legal terms, India would have to accept emissions reduction obligations within a fixed period of time, like other Annex I Parties. Article 2, Kyoto, *supra* note 4.

<sup>9</sup> *See* Anita M. Havlorsen, *Common, But Differentiated Commitments in the Future Climate Change Regime—Amending the Kyoto Protocol to Include Annex C and The Annex C Mitigation Fund*, 18 COLO. J. INT'L ENVTL. L. & POL'Y 247 (2007). The reasons for differentiating between developed and developing countries on grounds of economic differences and historic contributions to the build up of greenhouse gases in the atmosphere is specifically recognized and acknowledged in the Preamble to UNFCCC, [www.unfccc.ch](http://www.unfccc.ch)

<sup>10</sup> The Ministry of New and Renewable Energy, which began as a Department of Non-Conventional Energy Sources within the Ministry of Energy in the 1970s was recast as a new ministry in 2006. It is exploring alternatives such as

investments in clean development technologies.<sup>11</sup> The Government has also adopted energy regulations<sup>12</sup> and established new ministries or administrative agencies.<sup>13</sup> It has also set up special committees, including one headed by IPCC Chairperson, Rajendra Pachauri and other prominent government and non-government representatives, to consider additional venues for action.<sup>14</sup>

Competing policies and interests, however, present significant challenges to these efforts. Demand for energy and carbon intensive materials to sustain development activities has risen exponentially. Notably, there is growing demand for electricity for hi-tech industries and for modern amenities such as air conditioners; for materials to build infrastructure for the spiraling land and air traffic; and for cement for commercial and residential constructions.<sup>15</sup>

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solar, wind, hydropower and biogas substitutes. *See* Ministry of Renewable Energy, Annual Report 2005-2006. *See* also Administrative Circular Notification, No. 24/1/1993-Admn.II, Government of India, October 20, 2006.

<sup>11</sup> According to Article 12 of the Kyoto Protocol, “[t]he purpose of the clean development mechanism shall be to assist Parties not included in Annex I in achieving sustainable development and in contributing to the ultimate objective of the Convention, and to assist Parties included in Annex I in achieving compliance with their quantified emission limitation and reduction commitments under Article 3.” This means Annex I and non-Annex I countries facilitate projects that would support low-emission development, which would reduce potential increase in emissions in the non-Annex I country and which would count towards the Annex I country’s emissions reduction. In effect, contributing to the prevention of increased emissions in one country would be treated as an effort towards stabilization of GHGs to 1990 levels. A list of CDM projects underway in India is available at *See* <http://cdmindia.nic.in>.

<sup>12</sup> For example, the Energy Conservation Act (ECA) was passed in 2001 to promote efficient use of energy; The Energy Conservation Act, 2001, No. 52 of 2001, Ministry of Law, Justice and Company Affairs, Sec. 1 The Gazette of India Extraordinary 3.

<sup>13</sup> The Bureau of Energy Efficiency (BEE) was created under ECA. It comprises ministers of Central and State energy-related agencies. BEE is working with key industries including cement, paper and pulp, and aluminum, to establish voluntary energy efficiency practices. It is also drafting standards for energy labeling, building codes, certification programs, among other initiatives. *See* <http://www.bee-india.nic.in/>

<sup>14</sup> Divya Gandhi, *Committee on Climate Change Set Up*, THE HINDU, Friday, May 11, 2007, <http://www.thehindu.com/2007/05/11/stories/2007051102381300.htm>

<sup>15</sup> *See* P.R. Shukla, Rajesh Nair, Manmohan Kapshe, Amit Garg, S. Balasubramaniam, Deepa Menon, and K.K. Sharma, *Development and Climate: An Assessment of India*, Indian Institute of Management, Ahmedabad, May 2003 (on file with author). *See* also Steven Ferrey, *Why Electricity Matters, Developing Nations Matter, and Asia Matters Most of All*, 15 N.Y.U. Env’tl. L. J. 113 (2007), explaining the growing demand for electricity in Asia, notably India and China, and their reliance on coal; INDIA’S INITIAL NATIONAL COMMUNICATIONS TO THE UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE, Ministry of Environment and Forests, New Delhi, 2004, <http://unfccc.de>. *See* generally, Daniel Yergin, Dennis Eklof & Jefferson Edmond, *Fueling Asia’s Recovery*, 77 FOREIGN AFF. 34 (1998), discussing Asia’s future fuel needs, for transport and market growth, in the context of energy security.

These energy requirements have driven the Government to exploit its coal reserves and increase its dependence of petroleum resources,<sup>16</sup> despite growing emphasis on weaning away from traditional fuel.<sup>17</sup> Further, the administration's focus on encouraging internal and foreign direct investments to jumpstart some of the above mentioned projects, particularly infrastructure building—power plants construction, marine ports, telecommunications and real estate<sup>18</sup>—threaten to undermine environmental impact assessment legislation,<sup>19</sup> which are being used in other jurisdictions to measure climate change impacts of a project.<sup>20</sup>

In short, increase in trade and commerce is driving up India's GDP and its emissions. Thus, the Government faces the uphill challenge of designing policies that balance economic growth and climate change mitigation. It has responded by focusing on alternative energy

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<sup>16</sup> See also Steven Ferrey, *Why Electricity Matters, Developing Nations Matter, and Asia Matters Most of All*, 15 N.Y.U. Env'tl. L. J. 113 (2007), explaining the growing demand for electricity in Asia, notably India and China, and their reliance on coal; INDIA'S INITIAL NATIONAL COMMUNICATIONS TO THE UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE, Ministry of Environment and Forests, New Delhi, 2004, <http://unfccc.de>. See generally, Daniel Yergin, Dennis Eklof & Jefferson Edmond, *Fueling Asia's Recovery*, 77 FOREIGN AFF. 34 (1998), discussing Asia's future fuel needs, for transport and market growth, in the context of energy security.

<sup>17</sup> The Ministry of N estimates that only 5-6% of energy will be produced through renewable resources. See Ministry of Renewable Energy, Annual Report 2005-2006. See also, Administrative Circular Notification, No. 24/1/1993-Admn.II, Government of India, October 20, 2006. See also David Sandalow, *Freedom from Oil*, 2008, for a discussion on the problems of reliance on traditional oil.

<sup>18</sup> The Indian Electricity Act of 2003 gives incentives such as a fixed return on investment of 16%, removal of licensing requirements to operate and maintain power-generation stations, participation in distribution and transmission with license from a newly created Central Electricity Regulatory Commission (CERC), provision for selling power directly without government intervention, and the creation of a separate Appellate Tribunal for Electricity. The Government is also drafting an Open Skies Policy and an Airport Economic Regulatory Authority to expand modern construction of airports. See Mark J. Riedy and Andrews Kurth, *Project Finance India 2007—Overcoming Hurdles to Growth: Current Trends and Innovative Transactional Structures in India*, 1587 PRACTISING LAW INSTITUTE 143. See also Nandan Nelivigi, Doug Peel, and Christopher Krishnamoorthy, *Infrastructure Project Finance in India: Recent Developments*, 1587 PRACTISING LAW INSTITUTE 133, 2007.

<sup>19</sup> For instance, the Govindrajan Committee specifically recommended the removal of hurdles to infrastructure development, especially EIA. See Report on Reforming Investment Approval & Implementation Procedures, Part-I (Investment approval procedures-Government and Public Sector Projects), Government of India, May 2002, <http://dipp.nic.in/implrepo/implrepo1.pdf>. See also, Ritu Paliwal, EIA Practice in India and its Evaluation using SWOT Analysis, *Environmental Impact Assessment Review*, Vol. 26, Issue 5, July 2006, pp 492-510.

<sup>20</sup> See e.g., *Border Power Plant Working Group v. Department of Energy*, 02-CV-513-IEG (POR), in which the US District Court of Southern California held that the government was required to conduct impact assessment to measure increase in carbon dioxide emissions, before constructing utility plants. A copy of the decision is available at

options, even though they can neither fuel its current developmental demands, nor adequately minimize the country's impact on climate change.

### **Threats to Constitutional Rights**

In early 2007 an Indian farmer was reportedly forced to abandon his ancestral agricultural land, which was part of one of two islands submerged in the Sunderbans region.<sup>21</sup> Another farmer faced a similar threat temporarily.<sup>22</sup> Absent compensation and support from the Government, the former moved to urban areas in search of alternative livelihood, whereas the latter stayed on despite the risk of future flooding and limited access to food.<sup>23</sup> Both incidents, which have been attributed to climate change related sea level rise, portend the fate of nearly sixty five percent of India's population that is dependent on agriculture, forestry and fisheries for a living.<sup>24</sup>

The Intergovernmental Panel on Climate Change (IPCC)<sup>25</sup> predicts that glacial melts in the Himalayan region alone will increase flooding, trigger avalanches and landslides, and cause extinction of species and ecosystems.<sup>26</sup> As such, Himalayan glaciers, including the Gangotri,

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<sup>21</sup> Roger Harrabin, *How Climate Change Hits India's Poor*, BBC NEWS, Thursday, 1 February 2007.

<sup>22</sup> See also Sujoy Dhar, *Environment-India: Rising Seas Threaten Bengal's Deltaic People*, Inter Press Service News Agency, October 21, 2007, available at, <http://ipsnews.net/news.asp?idnews=38035>.

<sup>23</sup> *Supra* notes 20 and 21.

<sup>24</sup> See India's Initial National Communications to the United Nations Framework Convention on Climate Change, Ministry of Environment and Forests, New Delhi, 2004, <http://unfccc.int/resource/docs/natc/indnc1.pdf>.

<sup>25</sup> The Intergovernmental Panel on Climate Change, comprising scientific experts from a select number of countries, was established in 1988 by the Executive Council of the World Meteorological Organization (WMO), with support from UNEP, to identify "uncertainties and gaps in "present knowledge" about climate change and its potential impacts; gather information "to evaluate policy implications" and "response strategies;" "review...national/international policies" regarding GHGs; and carry out "scientific and environmental assessments regarding GHG emissions and transfer them for relevant governmental and intergovernmental agencies. These functions are divided among three Working Groups—available scientific information on climate change, environmental and socio-economic impacts of climate change, and formulation of response strategies, which have published regular reports since 1990. See Intergovernmental Panel of Climate Change, 16 Years of Scientific Assessment in Support of the Climate Convention, December 2004, at <http://ipcc.ch>.

<sup>26</sup> Climate Change 2007 Impacts, Adaptability and Vulnerability, Working Group II Contribution to the Intergovernmental Panel on Climate Change Fourth Assessment Report, Summary for Policy Makers, April 2007,

which is a source of the perennial and holy river Ganga, have receded by thirty meters, endangering water supply in the dry season.<sup>27</sup> Other changes in hydrological cycles are also expected to cause extreme drought or flood conditions;<sup>28</sup> shorten crop duration periods to the detriment of agricultural yields,<sup>29</sup> threaten biological diversity,<sup>30</sup> increase risk of malarial outbreaks by creating conditions favorable to disease carrying vectors,<sup>31</sup> and increase cyclones in coastal regions.<sup>32</sup>

These catastrophic events will not only have severe economic repercussions, but also implicate constitutional rights of citizens. The rights that will be affected are either fundamental rights under the Indian Constitution, notably the Article 21 right to life, or rights that the

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Intergovernmental Panel on Climate Change, available at <http://www.ipcc.ch>. See also Andrew C. Revkin, *Poor Nations to Bear the Brunt as World Warms*, New York Times, April 1, 2007.

As described in the section on the Asia scenario, "Glacier melt in the Himalayas is projected to increase flooding, and rock avalanches from destabilized slopes, and to affect water resources within the next two decades to three decades. This will be followed by decreased river flows as the glaciers recede. Freshwater availability in Central, South, East and Southeast Asia, particularly in large river basins, is projected to decrease due to climate change which, along with population growth and increasing demand arising from higher standards of living could adversely affect more than a billion people by the 2050s. Coastal area, especially heavily-populated mega-delta regions in South, East and Southeast Asia, will be at greater risk due to increased flooding from the sea and, in some mega-deltas, flooding from the rivers. Climate change is projected to impinge on sustainable development of most developing countries of Asia, as it compounds the pressures on natural resources and the environment associated with urbanization, industrialization, and economic development. It is projected that crop yields could increase up to 20% in East and Southeast Asia while they could decrease up to 30% in Central and South Asia by the mid-21<sup>st</sup> century. Taken together and considering the influence of rapid population growth and urbanization, the risk of hunger is projected to remain very high in several developing countries. Endemic morbidity and mortality due to diarrhoeal disease primarily associated with floods and droughts are expected to rise in East, South and Southeast Asia due to projected changes in the hydrological cycle associated with global warming. Increases in coastal water temperature would exacerbate the abundance and/or toxicity of cholera in South Asia." *Ibid*.

<sup>27</sup> Emily Wax, A Sacred River Endangered by Global Warming, Washington Post, A14, Sunday, June 17, 2007.

<sup>28</sup> See A.K. Gosain, Sandhya Rao, and Debajit Basuray, *Climate Change Impact Assessment on Hydrology of Indian River Basins*, CURRENT SCIENCE, Vol. 90, No. 3, (February 10, 2006). The studies cover the Krishna and the Mahanadi river basins, but as the authors point out, India comprises of thirteen major river basins and much more works needs to be done to determine the impact of climate change on all of them.

<sup>29</sup> Jayant Sathaye, P.R. Shukla and N.H. Ravindranath, *Climate change, sustainable development and India: Global and national concerns*, Current Science, Vol. 90, No. 3, February 10, 2006.

<sup>30</sup> N.H. Ravindranath, N.V. Joshi, R. Sukumar and A. Saxena, *Impact of Climate Change on Forests in India*, Current Science, Vol. 90, No. 3, February 10 2006.

<sup>31</sup> Sumana Bhattacharya, C. Sharma, R.C. Dhiman and A.P. Mitra, Climate change and malaria in India, Current Science, Vol. 90, No. 3, 10 February, 2006. See also, Health Ministry Warns of Spurt in Diseases, The Indian Express, Wednesday, May 16, 2007.

<sup>32</sup> A.S. Unnikrishnan, K. Rupa Kumar, Sharon E. Fernandes, G.S. Michael and S.K. Patwardhan, *Sea level changes along the Indian Coast: observations and projections*, Current Science, Vol 90., No. 3, February 10, 2006. The authors predict that the intensity and number of cyclone activities will rise in the Bay of Bengal and the Arabian Sea between 2041 and 2060.

Supreme Court of India has held to be an integral part of Article 21,<sup>33</sup> including rights to livelihood,<sup>34</sup> health,<sup>35</sup> and basic necessities.<sup>36</sup> Violation of fundamental rights is unconstitutional, if abridged by the State<sup>37</sup> without following “procedure established by law.”<sup>38</sup> Since there is no procedure of law by which citizens can be denied these rights in the context of climate change, contravention of the rights constitutes a constitutional violation.

This emerging constitutional challenge is theoretically problematic, because fundamental rights bind only the Republic of India<sup>39</sup> and not foreign states. But, at this point many industrialized nations that are responsible for the dangerous levels of GHG accumulations are foreign states, as affirmed in the Kyoto Protocol.<sup>40</sup> There is no precedence of citizens of India claiming redress from foreign nations for constitutional violations.

At the most, affected citizens could pursue statutory remedies in certain jurisdictions. For instance, the U.S. Alien Torts Claim Act provides for foreign nationals to bring action against U.S. government for acts committed abroad.<sup>41</sup> However, claimants must prove violation of international law<sup>42</sup> and not of their own domestic law, not even the Constitution. Thus, in this case Indian citizens would have to demonstrate that the U.S. government violated international

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<sup>33</sup> Article 21 states that “[n]o person shall be deprived of his life or personal liberty except according to procedure established by law.”

<sup>34</sup> *Hoskot v. State of Maharashtra*, A.I.R. 1978 S.C. 1533.

<sup>35</sup> *Bandhua Mukti Morcha v. India* A.I.R. 1984 S.C. 802.

<sup>36</sup> *Olga Tellis v. Bombay Municipal Corporation*, A.I.R. 1985 S.C. 180.

<sup>37</sup> Article 12 defines State to include “the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India.”

<sup>38</sup> Under Article 21 read with Article 12 (2), judicial review of governmental action may be sought if a domestic law (defined under Article 13 (3) to include a orders, notifications, bye-laws, rules, etc.) contravenes the right to life and personal liberty without complying with appropriate legal procedure. *See generally*, S.P. Sathe, *Judicial Activism: The Indian Experience*, 6 WASH. U. J. L. & POL’Y 29, 38 (2001), explaining the judicial review under the Indian Constitution.

<sup>39</sup> *Supra* note 37.

<sup>40</sup> *Supra* note 2.

<sup>41</sup> 28 U.S.C. §1350 (1994)

<sup>42</sup> *Ibid.*

law in causing climate change in India,<sup>43</sup> a claim that presents a range of evidentiary and jurisprudential problems<sup>44</sup> which most of the affected Indians will find insurmountable.

Under these circumstances, judicial review under the Indian Constitution appears to be an important, perhaps the best, venue for citizens to claim protection against and redress for violation of their constitutional rights by acts foreign entities or states.

### **But, can the Indian Judiciary Intervene?**

The Indian judiciary is well placed to address constitutional challenges arising from climate change for several reasons. Firstly, the Court has waived “ripeness” requirements for bringing an action, on the ground that in a country where most people are unaware of their rights violations should be addressed *before* actual violation occurs.<sup>45</sup> Thus, the presence of substantial threat of climate-related violations should be sufficient to invoke the Courts writ jurisdiction under Article 32.<sup>46</sup>

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<sup>43</sup> For a discussion of the Alien Torts Claims, its scope and limits, see, Anthony D’Amato, *The Alien Tort Statute and the Founding of the Constitution*, 82 AM. J. INT’L L. 62 (1998); William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the “Originalists,”* 19 Hastings Int’l & Comp. L. Rev. 221 (1996). For a detailed analysis of the potential bringing environmental claims under the Act, see, Russell Unger, *Brandishing the Precautionary Principle Through the Alien Tort Claims Act*, 9 N.Y.U. ENV’T L. J. 638 (2001).

<sup>44</sup> The case brought by the Inuits against the United States for causing the problem demonstrates the difficulties in litigating the claim. For a discussion of the suit and the effect of litigation, see, Hari M. Osofsky, *The Inuit Petition as a Bridge? Beyond Dialectics of Climate Change and Indigenous People’s Rights*, 31 AM. INDIAN L. REV. 675 (2006-2007). Further, some scholars pose intergenerational equity question of imposing liability on American not responsible for the problem. This questions has been raised in a draft article that is published for comments only—Eric A. Posner and Cass R. Sunstein, *Climate Change Justice*, John M. Olin Las & Economics Working Paper No. 354 (2D Series); Public Law and Legal Theory Working Paper No. 177, accessed at [http://ssrn.com/abstract\\_id=1008958](http://ssrn.com/abstract_id=1008958).

<sup>45</sup> See *Basheshar Nath v. Commissioner of Income Tax*, A.I.R. 1959 S.C. 149, holding that waiver of fundamental rights could not be upheld in a country where many people were ill-informed about their rights. See also Sathe, *supra* note 38, 67.

<sup>46</sup> Article 32 (1) states: [t]he right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed. Article 32 provides for writ petitions such as mandamus and habeas corpus.

Secondly, the Court has the authority determine whether an injury has occurred,<sup>47</sup> without relying on statutory enactments.<sup>48</sup> Further, petitioners need not satisfy the other two standing requirements under U.S. law, causation and redressability (remedy).<sup>49</sup>

Thirdly, the Court can provide broad remedies, by issuing a writ of mandamus not only ordering the government to perform non-discretionary functions, or enjoining it from performing a statutorily prohibited action, but also requiring it to perform *discretionary* functions.<sup>50</sup> Moreover, the Court can issue “continuing mandamus,”<sup>51</sup> obligating the government to take specific actions and report progress on a regular basis,<sup>52</sup> as it has in the past.<sup>53</sup>

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<sup>47</sup> The Court has held that it has the authority to “decide whether proper procedure was prescribed by the legislature and followed by the executive” under Article 21. Sathe, *supra* note 38, 67.

<sup>48</sup> This position differs from the U.S. Standing requirement, where injury-in-fact is determined on the basis of statutory provisions. In fact, in a recent climate-related litigations, *Massachusetts v. U.S. Environmental Protection Agency*, 127 S. Ct. 1438 (2007), the U.S. Supreme Court held that injury-in-fact involved a substantive test based on statutory rights and not on judicial determination of actual injury. See *Access to Courts After Massachusetts v. EPA: Who Has Been Left Standing?* 37 ENVTL L. REP. 10692 (September 2007), discussing briefly the development of standing jurisprudence in the United States, leading up to the Supreme Court’s recent decision regarding the power of EPA to regulate carbon dioxide emissions.

<sup>49</sup> See *Lujan v. Defender’s of Wildlife*, 504 U.S. 555 (1992), explaining each of the tests. Although the Indian judiciary followed a three prong test similar to the United States law, it relaxed these requirements in *S.P. Gupta v. President of India*, A.I.R. 1982 S.C. 149, in which the executive arbitrarily transferred judges for their opinions, threatening the independence of the judiciary. The Court not lowered standing requirements, but also held that the fundamental right to freedom of speech and expression enshrined in Art. 19(1) of the Constitution included the right to information. Further, the Court ruled that the Government was required to consult with the Chief Justice and other judges before appointing judges, even though the final decision remained with the executive. See also Sathe *supra* note 38, 70, 96 and 102.

<sup>50</sup> Sathe, *supra* note 38, 23.

<sup>51</sup> *Ibid*, 82.

<sup>52</sup> Sathe, *supra* note 38, discussing the orders issued by the Court to the Central Bureau of Investigation, in *Vineet Narain v. Union of India*, A.I.R. 1996 S.C. 3386 and in *Union of India v. Sushil Kumar Modi*, A.I.R. 1997 S.C. 314.

<sup>53</sup> For instance in *Kishen v. State of Orissa*, A.I.R. 1989 S.C. 677, the Court ordered the Government to prevent death by poverty and starvation, Similarly, in *Azad Riksha Pullers case*, A.I.R. 1981 S.C. 14, the Court ordered the Punjab National Bank to give loans to auto riksha pullers, following a government order that only owners of rikshas could legally ply the vehicles. Instead of striking down the Government order, the Court arrangements for the majority of auto riksha wallahs, who did not own a vehicle, to acquire rikshas.

Finally, any person with “sufficient interest”<sup>54</sup> in helping the poor and vulnerable sections of the population can seek judicial review.<sup>55</sup> In the alternative, the Court can assume *suo moto* jurisdiction by treating letters or newspaper reports as writ petitions.<sup>56</sup>

In addition to the above discussed procedural flexibilities, generally known as public interest litigation or epistolary jurisdiction, the Court’s substantive interpretation fundamental rights, to include a range of ancillary rights—livelihood,<sup>57</sup> health,<sup>58</sup> basic necessities,<sup>59</sup> travel abroad<sup>60</sup> and privacy<sup>61</sup>--based on non-binding constitutional law provisions<sup>62</sup> and foreign decisions and international law and principles,<sup>63</sup> also provide adequate room for a constitution claim.

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<sup>54</sup> As a result, non-governmental organizations and public interest lawyers have filed many writ petitions on behalf of those affected, which the Court had balanced by allowing only genuine petitions and not mala fide actions. Sathe, *supra* note 38, 81.

<sup>55</sup> See *Bandhua Mukti Morcha v. India*, A.I.R. 1984 S.C. 802. The Court observed that judicial review proceeding to enforce fundamental rights was not limited to any person or proceedings under Article 32(1) of the Constitution. The Court has taken such a broad approach to ensure that rights of Indians who are not in a position to claim fundamental rights protection enjoy full constitutional protection. Judges in the Supreme Court, notably Justice P.N. Bhagwati, view public interest litigation as a means for poor, under-informed, and underprivileged Indians to access expensive judicial systems, and the judiciary must therefore open up access through flexible rules. See P.N. Bhagwati, *Judicial Activism and Public Interest Litigation*, 23 COLUM. J. TRANSNAT’L L. 561 (1085). See also Jeremy Cooper, *Poverty and Constitutional Justice*, 44 MERCER L. REV. 611 (1993).

<sup>56</sup> See *Sunil Batra v. Delhi Administration*, A.I.R. 1978 S.C. 1675, in which the Court treated a letter from a prisoner complaining about prison conditions as a writ petition seeking to enforce fundamental rights. See also *P.U.D.R. v. India* A.I.R. 1982 S.C. 1473.

<sup>57</sup> *Hoskot v. State of Maharashtra*, A.I.R. 1978 S.C. 1533.

<sup>58</sup> *Bandhua Mukti Morcha v. India* A.I.R. 1984 S.C. 802.

<sup>59</sup> *Olga Tellis v. Bombay Municipal Corporation*, A.I.R. 1985 S.C. 180

<sup>60</sup> See *Satwant Singh v. Asst. Passport Officer*, A.I.R. 1967 S.C. 1836; *Maneka Gandhi v. Union of India*, A.I.R. 1978 S.C. 597, where the petitioner argued that by impounding her passport, the Government had violated her Art. 21 right to personal liberty.

<sup>61</sup> See *Kharak Singh v. State of U.P.*, A.I.R. 1963 S.C. 1295, holding that personal liberty implied the right to privacy. See also Sathe, *supra* note 38, 51-57, for a detailed discussion on the interpretation of Article 21 by the Supreme Court.

<sup>62</sup> Directive principles contained in Part IV of Constitution, Articles set out non-binding goals, such as free legal aid, gender non-discrimination, compulsory education, and provision for livelihood, for the Government to implement. Article 37 states: [t]he provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws. See also *Andhra Pradesh Pollution Control Board v. M. Nayuda* (1999) 2 S.C.C. 718 (explain case); *M.C. Mehta v. Union of India*, (1992) 2 S.C.C. 256; *Sachidananda Pandey v. State of West Bengal*, A.I.R. 1987 S.C. 1109.

<sup>63</sup> See *Indian Council for Enviro-Legal Action*, (1996) 5 S.C.C. 212, holding that the polluter pays principle was law of the land; *Vellore Citizen’s Welfare Forum v. Union of India*, (1996) 5 S.C.C. 647, holding the precautionary principle was part of India’s environmental laws; *M.C. Mehta v. Kamal Nath*, *infra* note 69, using the Roman law

The possibility of successfully proceeding with a climate change claim also appears favorable in light of the Court's invocation of epistolary jurisdiction to address several environmental concerns, including protecting the Taj Mahal from coal and coke pollution;<sup>64</sup> cleaning up the Ganga;<sup>65</sup> relocating hazardous industries in Delhi;<sup>66</sup> curbing vehicular pollution;<sup>67</sup> requiring compulsory environmental education;<sup>68</sup> and re-directing an illegally diverted river,<sup>69</sup> among others.<sup>70</sup> The Court has also proven adept in catalyzing executive action on several issues.<sup>71</sup>

Thus, theoretically the Indian judiciary has the capacity to address potential climate change related violations of fundamental rights.

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doctrine of public trust, as applied by the Supreme Court of California in *National Audubon Society v. Superior Court* 33 Cal. 3d 419 (1983). Also, for a study of trends in the Indian judiciary's use of international and foreign decisions, see, Adam M. Smith, *Making Itself at Home Understanding Foreign Law in Domestic Jurisprudence: The Indian Case*, 24 BERKELEY J. INT'L L. 218, 240 (2006). The author provides statistics that demonstrate that the Supreme Court's reliance on foreign law, not just British law, has declined since 1990s, although it relied heavily on Privy Council decisions in the 1950s.

<sup>64</sup> M.C. Mehta v. Union of India, (1997) 2 SCC 353.

<sup>65</sup> M.C. Mehta v. Union of India, (1998) 6 S.C.C. 63.

<sup>66</sup> M.C. Mehta v. Union of India, A.I.R. 1996 5 S.C.C. 281. The Court ordered the closure and relocation of more than 1300 major polluting hazardous industries from Delhi to sites in neighboring states. See M.C. Mehta v. Union of India (1998) 6 S.C.C. 63.

<sup>67</sup> M.C. Mehta v. Union of India, (1999) 6 S.C.C. 12; M.C. Mehta v. Union of India, (2002) 4 S.C.C. 359. In both cases, the Court ordered the Government to implement Euro I and II standards for reducing automobile pollution. Further, in a far reaching case, the Court ordered that all public buses be run on compressed natural gas to reduce pollution. See

<sup>68</sup> M.C. Mehta v. Union of India, A.I.R. 1988 S.C. 103; M.C. Mehta v. Union of India (1998) 6 S.C.C. 63.

<sup>69</sup> M.C. Mehta v. Kamal Nath, A.I.R. 2000 6 S.C.C. 213, in which Mehta challenged the diversion of the river Beas by a Hotel, in which close relatives of Kamal Nath, the Minister of Environment and Forests, held shares. The Court held that disturbing the "basic environment" such as air and water constituted a violation of the right to life, which encompassed preservation of ecological balance. Incidentally, Kamal Nath is now the Minister of Trade, representing India in the UK led coalition GLOBE, to address the problem of global warming and climate change. See G8 + 8 Climate Change Dialogue, Brussels Legislators Forum, GLOBE International, at [www.globeinternational.org](http://www.globeinternational.org).

<sup>70</sup> An overview of all the cases brought by M.C. Mehta regarding environmental protection at the M.C. Mehta Environmental Foundation, <http://www.mcmef.org/landmark.htm>.

<sup>71</sup> See M.C. Mehta v. Union of India (1998) 6 S.C.C. 63 (Delhi Pollution Case), in which the Court set up a Committee to advise it on shifting the implications of shifting from traditional fuel to compressed natural gas (CNG) for public buses, and ordered all related government agencies to coordinate with each other, and monitored the implementation by requiring periodic requirements. Similarly, in T.N. Godavarman Thirumulpad v. Union of India, (2006) 5 SCC 57, the Court issued a series of orders regarding the management of national forests.

### **Limits of Judicial Intervention**

Although the Court could assume jurisdiction to address the problem of potential violation of fundamental rights because of climate change, it will not be able to provide adequate remedies within the current framework of its jurisprudence, since Court has no jurisdiction over these States under the Indian Constitution. An Article 32 judicial review is available only in the case of violation of fundamental rights by Indian governments.<sup>72</sup> Thus, at this juncture the Court can at the most direct the Government's international negotiations. In such an event, the Court will be intervening with the Government's exercise of foreign affairs powers.

The Constitution vests foreign affairs powers exclusively with the Central government.<sup>73</sup> It grants the Parliament, which is the legislative branch,<sup>74</sup> the power to enact laws regarding foreign affairs,<sup>75</sup> including conclusion of legal arrangements.<sup>76</sup> However, in practice the Executive<sup>77</sup> enters into and implements treaties and international obligations,<sup>78</sup> and the

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<sup>72</sup> Article 12 states: In this Part, unless the context otherwise requires, "the State" includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of Government of India. "In this Part" refers to the section on Fundamental Rights.

<sup>73</sup> The subject matters with respect to which the State and Central government have jurisdiction are listed in the Seventh Schedule. List I sets out areas for the Central Government, List II, the States, and List III for both the State and Central governments, even though the Central government has preemptory powers in case of overlap or conflict. The Central government also has residuary powers regarding subject matters that are not covered in Lists II and III. See Articles 246 and 254.

<sup>74</sup> The Parliament is composed of the President and two Houses—the Council of States and House of People. See Article 79.

<sup>75</sup> However, because the President heads the Executive branch and is also part of the Legislature, the division of powers under the Indian Constitution is considered a mix of both the British and the U.S. systems. See Thomas M. Franck and Arun K. Thiruvengadam, *International Law and Constitution-Making*, 2 CHINESE J. INT'L. L. 468,483 (2003).

<sup>76</sup> List I, Item 10 lists foreign affairs as follows "foreign affairs; all matters which bring the union into relation with any foreign country." A series of foreign affairs related powers are listed in List I—preventive detention with respect to foreign affairs (Item 9); treaty-making and implementation (Item 14); "foreign jurisdiction" (Item 16); and foreign exchange and foreign loans (Items 36, 37).

<sup>77</sup> The executive branch is headed by the President. The President is advised by a Council of Ministers, headed by the Prime Minister. See Article 74.

<sup>78</sup> A similar practice has been observed in the United States. See G. Edward White, *The Transformation of the Constitutional Regime of Foreign Relations*, 85 VA. L. REV. 1, 4-5 (1999), arguing against exclusive Federal Executive authority to pursue foreign affairs.

Parliament has the power to enact executing domestic legislation.<sup>79</sup> No provision of the Indian Constitution explicitly grants the judiciary the authority to review matters related to foreign affairs. In fact, the judiciary is specifically excluded from adjudicating international disputes,<sup>80</sup> except for advising the President upon request.<sup>81</sup>

Yet, as argued by scholars the Indian Supreme Court has placed checks on the executive treaty-making power in the past.<sup>82</sup> For instance, in *Madhav Rao Scindia v. Union of India*,<sup>83</sup> the Court held that the government does not have the authority to use its foreign affairs provision to unilaterally withdraw recognition of royalty status to former princes.<sup>84</sup> Thus, unlike in the United States,<sup>85</sup> the judiciary has not concluded that foreign affairs are a prerogative of executive branch subject only to limited intervention from the legislative branch.

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<sup>79</sup> See Franck and Thiruvengadam, *supra* note 75, 483-484 (2003). According to the authors, the Indian practice bears the mark of British practice. They note that by reading Article 73, 246, 253 and Entry 14 of List I, Schedule VII, that “the executive power of the Union government is co-extensive with the legislative power in the matter of entering into, and implementation of, treaties.”

The Indian position on foreign affairs powers resembles that of the United States to the extent that the Congress, the legislative and executive branches both have some powers related to foreign affairs, which they could exercise in cooperation, or not. However, the extent of power of each branch remains subject to discussion. Also controversial is the extent of foreign policy powers relegated by States (which in India is not a concern since States are not vested with foreign affairs powers under Lists II or III of the Seventh Schedule to the Indian Constitution). For a discussion on the evolution of foreign affairs jurisprudence in the United States, see, White, *supra* note 78.

<sup>80</sup> Article 363, which reads as follows: 363. Bar to interference by courts in disputes arising out of certain treaties, agreements, etc.—(1) Notwithstanding anything in this Constitution but subject to the provisions of article 143, neither the Supreme Court nor any other court shall have jurisdiction in any dispute arising out of any provision of a treaty, agreement, covenant, engagement, *sanad* or other similar instrument which was entered into or executed before the commencement of this Constitution by any Ruler of an Indian State and to which the Government of the Dominion of India or any of its predecessor Governments was a party and which has or has been continued in operation after such commencement, or in any dispute in respect of any right accruing under or any liability or obligation arising out of any of the provisions of this Constitution relating to any such treaty, agreement, covenant, engagement, *sanad* or similar instrument.

The limitation on the jurisdiction is also reiterated in the provision to Article 131, which provides for original jurisdiction of the Supreme Court.

<sup>81</sup> Article 143 reads as follows: Power of President to consult Supreme Court.—(1) If at anytime it appears to the President that a question of law or fact has arisen, or it is likely to arise, which is of such a nature and of such public importance that it is expedient to obtain the opinion of the Supreme Court upon it, he may refer the question to that Court for consideration and the Court may, after such hearing as it thinks fit, report to the President its opinion thereon.

<sup>82</sup> See Franck and Thiruvengadam, *supra* note 75.

<sup>83</sup> A.I.R. 1971 S.C. 530 (2003).

<sup>84</sup> See Burt Neuborne, *The Supreme Court of India*, 1 INT’L J. CONST. L. 476, 487-492 (2003).

<sup>85</sup> In the United States, foreign matters are generally excluded from judicial review under the political question doctrine. However, recent cases *United States v. Alvarez-Machain* and *Hamdi*, and the position of noted scholars in

Further, the Supreme Court's reasoning for developing epistolary jurisdiction supports an argument in favor of judicial intervention in foreign affairs. The judiciary interpreted *locus standi* liberally, because the Court believed that the promises of a constitutional democracy were beyond the reach of many Indians due to financial and cultural constraints.<sup>86</sup> Judges who pioneered public interest litigation reasoned that in a society where oppression and poverty were cultural norms, most people would not have the knowledge or the means to claim their constitutional rights.<sup>87</sup>

None of these conditions have changed, despite India's economic growth. India remains home to some of the poorest people in the world.<sup>88</sup> It contains some of the most polluted and hazardous sites on the planet.<sup>89</sup> Administrative systems remain corrupt<sup>90</sup> and access to courts remains abysmal, expensive and slow.<sup>91</sup> In other words, a large percentage of Indians remain vulnerable to climate change-related violations of their fundamental rights, without redress.

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favor judicial intervention constant bring the question back for reconsideration. For an overview of the U.S. position, see, THOMAS FRANCK, *POLITICAL QUESTIONS/JUDICIAL ANSWERS: DOES THE RULE OF LAW APPLY TO FOREIGN AFFAIRS?* (1992). See also Anne-Marie Slaughter Burley, *Are Foreign Affairs Different?* Book Review, 106 HARV. L. REV. 1980 (1993), reviewing the implications for Thomas Franck's argument against the political question doctrine limitation on judicial review. See also Jide Nzelibe, *The Uniqueness of Foreign Affairs*, 89 IOWA L. REV. 941 (2004), for an overview of the various issues related to foreign affairs powers of the judiciary and the need for a more reasoned approach that would allow the judiciary to address foreign affairs.

<sup>86</sup> See also Ashutosh Varshney, *Democracy vs. Growth in India*, FOREIGN AFFAIRS, 93 (March/April 2007), discussing current challenges to democracy in India.

<sup>87</sup> *Ibid.* See also Maureen B. Callahan, *Cultural Relativism and the Interpretation of Constitutional Texts*, 30 WILLAMETTE L. REV. 609 (1994), arguing drafters of the Indian Constitution sought to transform the society.

<sup>88</sup> United Nations Development Report, 2006-2007

<sup>89</sup> Recent FT reports.

<sup>90</sup> See generally, PRATAP BHANU MEHTA, *THE BURDEN OF DEMOCRACY*, 2003. See also, Toral Patel, *Corrupt Practices in India: No Payoff*, 20 LOY. L.A. INT'L & COMP. L. J. 389, 398, 1998. But see Report on the Transparency International Global Corruption Barometer, Transparency International, 7<sup>th</sup> December 2006, noting, however, some improvements; Wolfgang Schurer, *A Geopolitical and Geo-Economic Overview: On the Rise of China and India as Two Asian Giants*, 29-SUM FLETCHER F. WORLD AFF. 145, 158 (2005), noting that despite problems of administrative corruption the "new cabinet in New Delhi has an impeccable anti-corruption record and that India is well on its way to building both domestic and international trust in its legal and regulatory climate."

<sup>91</sup> See Ashish S. Prasad and Violeta I. Balan, *Strategies for U.S. Companies to Mitigate Legal Risks from Doing Business in India*, CORPORATE LAW AND PRACTICE COURSE HANDBOOK SERIES, PLI ORDER NO. 11926, (February-March, 2007).

Thus, the Indian judiciary would be justified in exercising its jurisdiction to intervene in foreign affairs, to safeguard climate change related violations within Article 32.

However, short of directing the Government international climate negotiations and policies, there is little that the Indian judiciary can do by way of shielding fundamental rights from climate change violations, without risking its legitimacy.<sup>92</sup> If and when the violations actually occur, the Court could order the Government to pursue international adjudication, but as current evidence suggests, international adjudication has limited utility.<sup>93</sup> International principles under which remedy could be claimed, such as the duty to prevent transboundary pollution, even though interpreted as customary international law in the Trail Smelter Arbitration,<sup>94</sup> are not complied with by States.<sup>95</sup>

At the most, the Indian judiciary could follow the lead of the U.S. Ninth Circuit, which in a 2006 decision established liability of foreign entities for acts committed within their territory, but which had consequences within the United States. In *Pakootas v. Teck Cominco Metals Ltd.*,<sup>96</sup> the Court held that smelter industries that released hazardous waste into the Washington River, with proper permits from Canadian environmental authorities, were liable under a U.S. law on

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<sup>92</sup> As such there are criticisms that the judiciary has ignored the separation of powers doctrine. See Armin Rosencranz and Michael Jackson, *The Delhi Pollution Case: The Supreme Court of India and the Limits of Judicial Power*, 28 Colum. J. Envtl. L. 223 (2003), arguing that although intervention to abate Delhi's pollution was timely, the Court undermined the development of administrative capacity to address environmental matters by usurping executive functions. See also, Peter Waldman, *Jurist's Prudence India's Supreme Court Makes Rule of Law A Way of Governing: Splintered Political System Leaves Judges to Battle Corruption and Pollution*, THE WALL STREET JOURNAL, Monday, May 6, 1996.

<sup>93</sup> See generally CESARE P. ROMANO, THE PEACEFUL SETTLEMENT OF INTERNATIONAL ENVIRONMENTAL DISPUTES 39-41 (2000).

<sup>94</sup> See Trail Smelter Arbitration (US v. Canada), Convention for Settlement of Difficulties Arising from Operation of Smelter at Trail, B.C.U.S. Treaty Series No. 893, signed at Ottawa, April 15, 1935, ratifications exchanged Aug. 3, 1935, <http://www.lfip.org/laws666/trailsm.htm>.

<sup>95</sup> Daniel Bodansky, *Customary (And Not So Customary) International Environmental Law*, 3 IND. J. GLOBAL LEGAL STUD. 105, 116 (1995).

<sup>96</sup> 452 F. 3d 1066 (2006).

hazardous waste.<sup>97</sup> The Court held that even though the waste was released on the Canadian side the companies responsible for the pollution were liable to clean up the waste in the United States, since the effects were felt within the U.S. It also held that the Environmental Protection Agency had a non-discretionary duty to enforce CERCLA against the companies.<sup>98</sup>

In effect, the U.S. court extended the scope of a national legislation to a foreign entity, for acts committed outside of the United States on the ground that the effects were felt in the United States. In arriving at the conclusion, the Court rejected the companies' argument that they were not responsible for the flow of the river, which essentially carried the waste from Canadian soil, and noted that Washington taxpayers ought not to bear the economic burden for external actions.<sup>99</sup>

While the case reflects a long history of cross-border pollution involving Canada and United States, including failed diplomatic interventions to adequately address the problem, the rationale for the judgment nevertheless provides an important lesson. It demonstrates that domestic legislation can be the most accessible safeguard of citizens' rights against acts of foreign entities.

Thus, the Court order the Indian government to pass legislation on climate change that hold persons or States responsible for climate change liable to redress constitutional rights violations, and compensate those who suffer economic losses consequently. However, such legislation can be diplomatically undesirable. Moreover, the Government has traditionally been reluctant to enact any legislation that could curb development, or been unsuccessful in litigating on behalf of those affected, as demonstrated by two critical cases discussed below.

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<sup>97</sup> Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §9603.

<sup>98</sup> *Supra* note 96.

<sup>99</sup> For an analysis of the history of smelter waste-related disputes between U.S. and Canada and the Ninth Circuit decision, see, Michael J. Robinson-Dorn, *The Trial Smelter: Is What's Past Prologue? EPA Blazes a New Trial for CERCLA*, 14 N.Y.U. ENVIRONMENTAL LAW JOURNAL 233 (2006).

The Bhopal gas leak incident<sup>100</sup> illustrates the inability of the government and the legal system to adequately deliver justice to citizens. Following the gas leak, the Indian Government passed the Bhopal Act<sup>101</sup> to consolidate the thousands of civil suits brought before Indian and U.S. courts and to represent the interest of its citizens against a foreign entity, based on the *parens patriae* doctrine.<sup>102</sup> The Act not only allowed the Government to act on behalf of its citizens, but also provided mechanisms for distribution of compensation among victims.

However, the litigation remained contentious because the Government brought an action before the District Court of New York instead of its own courts, on the ground that a foreign entity was involved and that its own courts lacked the capacity to redress the matter.<sup>103</sup> However, the New York court dismissed the claim for *forum non conveniens* reasons.<sup>104</sup> Eventually, the case was brought before the Madhya Pradesh High Court, based on the Indian rule of absolute liability.<sup>105</sup> But, after much bargaining on both sides, the Indian government settled the matter in 1989, with Union Carbide Company agreeing to government \$465 million, of which the Indian subsidiary paid \$45 million.

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<sup>100</sup> The Bhopal gas leak case involves the leakage of methyl isocyanate from a Union Carbide India Limited plant in India in 1984, killing 2,100 people and injuring 200,000, resulting in a tort claim.

<sup>101</sup> The Bhopal Gas Leak Disaster (Processing of Claims) Act of 1985.

<sup>102</sup> For an overview of Bhopal, the role of the Government, and the aftermath, see, Tim Covell, *The Bhopal Disaster Litigation: Its Not Over Yet*, 16 N.C. J. INT'L L. & COM. REG. 279 (1991).

<sup>103</sup> The Union Carbide Company held nearly half the shares in the company.

<sup>104</sup> *In re Union Carbide Corp. Gas Plant Disaster*, 634 F. Supp. 842 (S.D.N.Y. 1986); affirmed in 809 F.2d 195 (2d Cir.) (1987).

<sup>105</sup> Based on the strict liability rule, under the absolute liability rule any multinational enterprise carrying on hazardous activities is liable for damage resulting from such activity, and cannot claim any of the exceptions available under the original rule. See *M.C. Mehta v. Union of India (Oleum Gas Leak case)*, (1987) A.I.R. (S.C.) 1086. For a discussion of the settlement process, see, Covell, *supra* note 102.

The settlement not only led to criticisms about the government bargaining away the right to justice of thousands of victims, but also the actual distribution of compensation, especially since a large portion of the victims and their families have not received any to this day.<sup>106</sup>

Similarly, *Narmada Bachao Andolan v. Union of India and Others*,<sup>107</sup> involving the damming of the Narmada River, popularly known as the Sardar Sarovar or the Narmada Dam projects,<sup>108</sup> showcases the inadequacy of legal protection for Indians affected by natural resource abuses. Most people displaced by rising water levels remain without adequate compensation, primarily because the issue of land-related displacement, which is governed by the British-era Land Acquisition Act, 1894,<sup>109</sup> confers on the government the right to take private property in public interest, by paying compensation at market value.<sup>110</sup>

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<sup>106</sup> A chronology of the case and its present status has been posted by Union Carbide Company at <http://www.bhopal.com/chrono.htm>. See also, World “failed” Bhopal Gas Victims, Monday 29<sup>th</sup> November, 2004, [http://news.bbc.co.uk/2/hi/south\\_asia/4050739.stm](http://news.bbc.co.uk/2/hi/south_asia/4050739.stm)

<sup>107</sup> *Narmada Bachao Andolan v. Union of India and Others*, A.I.R. 1994 S.C. 319. In this case, representatives of people who stood to be displaced by the dam construction; several villages were set identified for flooding, brought a public interest litigation arguing violation of fundamental rights because of the project.

<sup>108</sup> The Sardar Sarovar project began in 1946, prior to Independence, but ran into problems with respect to rights of riparian states, the height of the dam, costs, and power distribution. The Narmada Water Dispute Tribunal was established to resolve the issues, which reviewed environmental, social and economic impact statements before granting a Final Award, specifically requiring the Government to allocate alternative lands to people whose lands would be submerged, one year before carrying out the submergence, even though no specifications were made with respect to place of rehabilitation. The State of Gujarat as the main beneficiary was required to take on much of the burden. The World Bank entered into a loan arrangement in 1985 with the Indian government to fund large portions of the dam, which accelerated the project. However, the rehabilitation process lagged behind critically, especially since many of the displaced either did not own the land they depended on, or did not possess the proper land transfer papers. As villages flooded, large communities were left without remedy. The apathy of the situation commanded international attention, resulting finally in the World Bank establishing an independent fact finding committee, which concluded that the environmental and social impacts of the dam far exceeded the benefits. In light of the report and internal and international pressure, the Bank withdrew from the Project in 1993. The Government of India, however, sought to continue. The issue is far from settled as documentation regarding those affected continues to present increasing evidence of a severely botched effort to balance environmental, social, and economic concerns. In fact, the protests surrounding the Narmada Dam project resulted in the creation of a World Commission on Dams, which reported that large dams were unviable development solutions. See Komala Ramachandra, *Sardar Sarovar: An Experience Retained?* 19 HARV. HUM. RTS. J. 275 (2006). See also <http://narmada.org>

<sup>109</sup> A copy of the legislation is available at, <http://punjablaws.gov.pk/laws/12.html>, last visited 10 October 2007.

<sup>110</sup> For a discussion of the problems with the land acquisition law in India and takings jurisprudence, see, See generally Pooja Mehta, *Internally-Displaced Persons and the Sardar Sarovar Project: A Case for Rehabilitative Reform in Rural India*, 20 AM. U. INT’L. L. REV. 613 (2005). See also S. PARASURAMAN, *THE DEVELOPMENT DILEMMA: DISPLACEMENT IN INDIA*, 40-41; 58 (1992).

Moreover, given the complex caste system and the remnants of a near feudal-like land ownership system in India, especially in rural areas, many farmers either lease or simply work on the land, and may not be entitled to compensation.<sup>111</sup> Rehabilitation is also plagued by administrative gaps and delays, as State governments fail to fully and timely comply with awards given by the Narmada Tribunal, and limited judicial intervention.<sup>112</sup>

Both Bhopal and Narmada are but two well-known instances of administrative failures and judicial inefficacy to prevent, protect against and adequately redress constitutional violations of thousands of Indians. Rights violations occur routinely in India,<sup>113</sup> and there is no indication at this point that such violations will be prevented or compensated when climate change-related catastrophes unravel, especially if the incidents in the Sunderbans are any indication.<sup>114</sup> More importantly, the Indian judiciary, which has earned the title of Supreme Court for Indians,<sup>115</sup> may be facing the limits of its capacity to deliver justice.

### **Conclusion:**

India's participation is considered to be critical to the future of an effective international climate regime. This view stems from concerns about the potential effects that a rapidly growing hydrocarbon economy of billion people, can have on the global climate and on efforts by other nations to reduce carbon dioxide emissions. This is a legitimate concern and one that requires

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<sup>111</sup> See generally Gary Jeffrey Jacobsohn, *The Permeability of Constitutional Borders*, 82 TEX. L. REV. 1763, 1767(2004), referring to India as an “essentially feudal society.” Property rights were initially part of fundamental rights, but have since then been repealed. Yet, the zamindari system that was recognized by the British government in India perpetuated a feudal approach to land ownership. Amendments in several states to redistribute the land by abolishing this system through a series of constitutional amendments have led to constitutional challenges based on the amount of compensation, which is now generally not subject to challenge. For a discussion of the key cases that shaped the constitutional jurisprudence of property in India, see, Neuborne, *supra*, note 84, 490. See also Thomas Allen, *Commonwealth Constitutions and Right not to be Deprived of Property*, 42 INT’L & COMP. L. Q. 523 (1993), discussing the challenges that judiciaries face in interpreting property rights and the role the influence of property jurisprudence among Commonwealth countries, including India.

<sup>112</sup> Mehta, *supra* note 104.

<sup>113</sup> Neuborne, *supra* note 105.

<sup>114</sup> *Supra* notes 21 and 22.

<sup>115</sup> Upendra Baxi, *Constitutionalism as a Site of State Formative Practices*, 21 CARDOZO L. REV. 1183, 1205 (2000).

attention. However, the urgency of the concern does not justify the lack of attention to the potential effect that the absence of an effective international climate regime presents to constitutionally guaranteed rights of millions of Indians.

This emerging constitutional challenge in the case of climate change illustrates that by focusing on limiting international obligations, States may actually be endangering their basic legal document, the Constitution, even in countries where judicial review is very expansive. In light of this challenge, India and other nations will have to determine a way to preserve their Constitution, when giving full effect to its provisions is jeopardized by events beyond their control and when such events can be managed only via international law, for what is at threat is not just our economics, but the structural beams of modern civilization.