India’s Constitutional Challenge: 
A Less Visible Climate 
Change Catastrophe

Deepa Badrinarayana*

I. INTRODUCTION

New battle lines are being drawn as nations prepare to negotiate a climate regime beyond 2012 in Copenhagen in December 2009. The Government of India has, since its accession to the Kyoto Protocol in August 2002, taken several policy measures towards mitigating climate change. However, these measures pay lip service to the alarming ramifications under the Indian constitution, especially when considered in the light of India’s formal position in international forums, supporting an equal right to emit carbon dioxide and rejecting timetables for emissions reduction.

India’s position internationally is inadequate because it does not effectively articulate the grave internal economic and equitable problems that will be exacerbated by climate change. Some of the poorest people in India, whose headcount enables the Indian government to tout low per capita greenhouse gas (GHG) emissions, will not benefit from the low per capita use argument. In fact, India’s poorest will pay the highest price if climate change occurs.

With a new U.S. administration in place, the Indian government may feel particularly compelled to re-examine its earlier position rejecting binding emission reduction targets, because the Obama administration is committed to implementing domestic policies and laws to reduce greenhouse gas emissions. This will not be effortless considering the economic challenges and the historically high contributions of developed countries. Nevertheless, Indians would be well served if, as it gears up for the negotiations, the Indian government is

* Assistant Professor of Law, Chapman University School of Law, Orange, California. This article is based on a law review article, Deepa Badrinarayana, The Emerging Constitutional Challenge of Climate Change: India in Perspective, 19 FORDHAM ENVTL. L. REV. 1 (2009), and a forthcoming book chapter in CLIMATE LAW AND DEVELOPING COUNTRIES: LEGAL AND POLICY CHALLENGES FOR THE WORLD COMMUNITY (Benjamin Richardson, Stepan Wood, Heather McLeod-Kilmurray & Yves Le Bouthillier eds., forthcoming). Thanks to Professor C. Raj Kumar for inviting me to contribute to the inaugural issue of this journal. The author would like to dedicate this piece to her family.
guided by the underlying constitutional challenge of climate change, which is discussed in this article.

The first part provides a brief overview of India’s climate position, which it articulated during the Kyoto negotiations. The second and third sections briefly discuss how constitutional rights could be infringed. The fourth and fifth parts assess the limits to which constitutional protection could be pushed, especially because even public interest litigation may be ineffective. The final parts consider more broadly potential strategies that the government could adopt to preserve and pursue effective constitutional governance.

II. INDIA’S CLIMATE POSITION IN PERSPECTIVE

India has categorically rejected the view that it must accept a legal imposition to reduce greenhouse gas emissions as part of global efforts to reduce climate change. In 1994, when the initial negotiations commenced, India’s position could not have been stronger. In comparison to most developed countries, India’s past and present emissions have been negligible. But, since India’s economic liberalization there have been visible shifts. As India’s gross domestic product has grown, and as it continues to grow despite the recent global economic meltdown, so have its GHG emissions; India is now among the five top GHG emitters in the world.

India’s growing emissions have drawn the country into the center of the climate conundrum. On the one hand, India’s carbon emissions remain low in comparison to countries such as the United States. For instance, between 1994 and 2004, India’s cumulative carbon dioxide emission was 5.7 tonnes per person, whereas the United

---

1 The six greenhouse gases are carbon dioxide, methane, nitrous oxide, CFC-12, HCFC-22, perfluoro methane, and sulfur hexafluoride; only the former three are naturally occurring. Central focus has, however, been on reducing carbon dioxide emissions. For an overview of the effect of each greenhouse gas, see Mark Maslin, Global Warming, A Very Short Introduction 16-17 tbl.1 (2007).

2 See World Res. Inst., Cumulative Emissions, Concentrations, and Temperature Increases, Climate Analysis Indicators Tool, http://cait.wri.org/cait.php?page=compcoun (last visited June 30, 2009) (showing that India was ranked twelfth in the world for GHG emissions in 1988, that it rose to ninth place in 1993 and has, since 1994, risen to fifth position).


States emitted 128.7 tonnes per person. Of course, we must keep in mind that vast disparities in this context are unsurprising given that, in 2000, the United States constituted approximately 22% of the world economy whereas India comprised 4.34%. Despite this, however, India remains a major contributor to the climate change problem, especially when viewed from the lens of poorer countries in Africa and other parts of the world such as Bangladesh.

The government has met this challenge halfway by undertaking several voluntary actions, including the promotion of renewable energy and investments in clean development technologies to stem emission growth. The exploration of alternatives such as solar, wind, hydropower and biogas by the Ministry of New and Renewable Energy exemplifies such voluntary government intervention.

New policies, laws, and administrative agencies have also been lined up. Examples include the Eleventh Five Year Plan, which specifically refers to the need for addressing climate change; the Energy Conservation Act (ECA), 2001, which promotes efficient use of energy; the National Tariff Policy, 2006, which supports the purchase of a mandated percentage of energy from renewable sources by State Regulatory Commissions (SERCs); and the Bureau of Energy Efficiency (BEE), which is responsible for drafting voluntary and mandatory energy efficiency and conservation standards.

In addition, a number of special committees have been established. Notable among these are the Expert Committee on Climate Change, headed by Dr. Rajendra Pachauri, the Chairperson of the Intergovernmental Panel on Climate Change (IPCC), and the Prime Minister’s Council on Climate Change, which, in June 2008,

---

6 World Res. Inst., supra note 2.
7 Id.
8 As of 2005, Bangladesh emitted 0.4% of world’s GHGs; India emitted 2.16%. See id.
14 For more information see Intergovernmental Panel on Climate Change, http://www.ipcc.ch (last visited June 8, 2009) (The intergovernmental panel was established by the World Meteorological Organization and the United Nations Environmental Programme to study
released the long anticipated National Action Plan on Climate Change. The Plan primarily focuses on energy efficiency, sustainability, and protection of the Himalayan glaciers.\textsuperscript{15}

Meeting the problem halfway, however, may not even deliver a third of the results,\textsuperscript{16} especially when one considers the growth in non-renewable energy demand and competing policies that have been adopted to meet development goals, including expansion of hi-tech industries, increased urbanization, and infrastructure growth.\textsuperscript{17} The International Energy Agency estimates that India’s energy demand could grow at a rate of 3.3% per year, leading to a 20% increase in demand by oil by 2030.\textsuperscript{18}

Incentives to accelerate growth are also evident in legislation such as The Indian Electricity Act, 2003, which provides incentives such as fixed returns on investment and open market pricing, and in policies such as an Open Skies Policy and an Airport Economic Regulatory Authority, under consideration to improve air travel and related infrastructure. Even the Draft Report of the Expert Committee on Integrated Energy Policy, which reiterates the importance of developing solar energy, places emphasis on privatizing coal production to increase investment and output.\textsuperscript{19}

Environmental legislations, which one might expect to be employed to mitigate climate change, have instead been amended with the goal of expediting clearances for development projects. For example, based on recommendations by the Govindrajan Committee,\textsuperscript{20} the

the effects of GHGs on climate change. The group includes scientists from different countries, and its findings have influenced international law and policy formation.).


\textsuperscript{16} See Ministry of New & Renewable Energy, supra note 9 (estimating that only between five and six percent of India’s energy needs will be produced through renewable resources for the foreseeable future).


environmental impact legislation\textsuperscript{21} now mandates administrative agencies to conclude decision-making between 30 and 120 days.\textsuperscript{22} These changes occur even as environmental impact assessment (EIA) is being sought as an important tool to address climate impacts in other countries, as demonstrated by a decision of the U.S. District Court of Southern California\textsuperscript{23} and measures in Australia.\textsuperscript{24}

These contrasts and contradictions in policies are neither new nor unprecedented; the world has spent a good part of the last century trying to arrive at a model for sustainable development. What makes climate change so dramatic is the potential sweeping and irretrievable threat that it poses to what has been considered the foundation of democratic republics — the constitution. It is in light of the constitutional threat, which is discussed below, that India's position needs to be reviewed and evaluated.

III. THE CONSTITUTIONAL DIMENSION OF CLIMATE CHANGE

India's constitutional jurisprudence is remarkable. Few judiciaries in the world have delivered such empathetic and literal constitutional protection to the people of a country as the Indian Supreme Court. Taking into account the abysmal lack of legal rights awareness of most Indians and the routine irreverence by those who are in a position to realize these rights, the Court read into Article 21 of the Constitution,\textsuperscript{25} numerous ancillary rights based on other provisions of the Constitution,\textsuperscript{26} international law, and on occasions, foreign ju-


\textsuperscript{22} For an overview of old and new legislative provisions, see PLANNING COMM'N, supra note 10, at 192.

\textsuperscript{23} Border Power Plant Working Group v. Dept' of Energy, 260 F. Supp. 2d 997 (S.D. Cal. 2003) (holding that the government was required to consider the climate impact of construction of a utility plant before permitting the project).

\textsuperscript{24} CLIMATE LAW IN AUSTRALIA (Tim Bonyhady & Peter Christoff eds., 2007).

\textsuperscript{25} See INDIA CONST. art. 21 ("No person shall be deprived of his life or personal liberty except according to procedure established by law.").

dicial decisions. These rights include livelihood, health, basic necessities, travel abroad, and privacy.

A good number of these decisions favored citizens’ rights to sound environmental conditions over developmental priorities. Examples include protection of the Taj Mahal from coal and coke pollution, cleaning up the Ganga river, relocation of hazardous industries in Delhi, curbing vehicular pollution, requiring compulsory environ-

---

27 See Andhra Pradesh Pollution Control Board v. M. Nayudu (1999) 2 S.C.C. 718 (explaining in detail the evolution of the precautionary principle in response to a challenge brought against the Andhra Pradesh Pollution Control Board by a vegetable oil industry for rejecting permit to site the industry close to a water reservoir); M.C. Mehta v. Kamal Nath, (1997) 1 S.C.C. 358 (using the Roman law doctrine of public trust, as applied by the Supreme Court of California in Nat’l Audubon Soc’y v. Superior Court, 33 Cal. 3d 419 (1983)); Vellore Citizen’s Welfare Forum v. Union of India, (1986) 5 S.C.C. 647 (holding that the precautionary principle was part of India’s environmental laws); Indian Council for Enviro-Legal Action, (1996) 5 S.C.C. 212 (holding that the polluter pays principle was law of the land); Adam M. Smith, Making Itself at Home Understanding Foreign Law in Domestic Jurisprudence: The Indian Case, 24 BERKELEY J. INT’L L. 218 (2006) (providing statistics demonstrating 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).


31 See Maneka Gandhi v. Union of India, A.I.R. 1978 S.C. 597 (petitioner argued that by impounding her passport the Government had violated her Article 21 right to personal liberty); Sattaur Singh v. Assistant Passport Officer, A.I.R. 1967 S.C. 1836.


35 M.C. Mehta v. Union of India, (1996) 5 S.C.C. 231 (ordering the closure and relocation of more than 1300 major polluting hazardous industries from Delhi to sites in neighboring states); see also M.C. Mehta v. Union of India (1998) 6 S.C.C. 63.

mental education, and re-directing an illegally diverted river, to name a few.

In light of these decisions, it is implausible that climate change impacts will not dilute, or even dissipate, Article 21 rights. According to the IPCC, glacial melts in the Himalayan region can irreversibly increase floods, trigger avalanches and landslides, and lead to species extinction. National studies deliver equally grave news; scientists predict that food security, health, and ecosystem concerns will increase dramatically.

Early indications of climate-related changes have already been reported in vulnerable areas: the Gangotri, which is a source of the perennial and holy river Ganga, has receded by thirty metres, endangering water supply in the dry season; and, in early 2007, farmers in the Sunderbans reportedly lost or temporarily could not use ancestral agricultural land that was part of an island that was submerged due to rise in water level. If such incidents become more frequent, the right to livelihood of nearly sixty-five percent of India’s population — which is dependent on agriculture, forestry and fisheries for a living — would be threatened.

It is therefore inconceivable that climate change would not present a tangible threat to Article 21 fundamental rights, as interpreted by Indian courts and, therefore, not justify judicial intervention. In fact, the nature of public interest litigation lends itself to judicial action on climate change for several reasons.


39 For an overview of all cases brought by M.C. Mehta, see M.C. Mehta Env’tl. Found., Land Mark Cases, http://www.mcnef.org/landmark.htm (last visited June 8, 2009).


For one, locus standi has been liberally interpreted because the Court believed that the promises of a constitutional democracy were imperiled by financial and social constraints faced by the people. Judges who pioneered public interest litigation reasoned that in a society where oppression and poverty were cultural norms, most people did not have the knowledge or the means to claim their constitutional rights. None of these conditions have changed, despite India's economic growth. India remains home to some of the poorest people in the world. It contains some of the most polluted and hazardous sites on the planet. Administrative systems remain prone to corruption, while access to the courts remains abysmally expensive and slow.

The Court has also waived "ripeness" requirements for commencing judicial action, on the ground that, in a country where most people are unaware of their rights, violations should be addressed before they occur. Thus, the presence of substantial potential threats of climate-related violations should be sufficient to invoke the Court's writ jurisdiction under Article 32.

44 Ashutosh Varshney, India's Democratic Challenge, FOREIGN AFF., Mar.-Apr. 2007, at 93.
45 Id.; see also Maureen B. Callahan, Cultural Relativism and the Interpretation of Constitutional Texts, 30 WILLAMETTE L. REV. 609 (1994).
50 See Bhashkar 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 32, at 67.
51 Article 32(1) states: "The 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. INDIA CONST. art. 32.
Further, unlike in the United States the Court has the authority to determine whether an injury has occurred\textsuperscript{52} without relying on statutory enactments.\textsuperscript{53} Further, petitioners need not satisfy any additional standing requirements such as causation and redressability (remedy),\textsuperscript{54} both of which are required in U.S. courts. Further, any person with "sufficient interest"\textsuperscript{55} in helping poor and vulnerable sections of the population can seek judicial review.\textsuperscript{56} In the alternative, the Court can assume suo motu jurisdiction by treating newspaper reports or letters as writ petitions; the latter is also known as "epistolar jurisprudence."\textsuperscript{57} Finally, the Court can provide broad remedies; it can issue a writ of mandamus not only ordering the Government to perform non-discretionary functions, or enjoining it from performing statutorily prohibited actions, but also requiring it to perform discretionary functions.\textsuperscript{58} The judiciary could also issue "continuing mandamus,"\textsuperscript{59} obliging the Government to take specific actions and report

\textsuperscript{52} 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. See Sathe, \textit{supra} note 32.


\textsuperscript{55} Consequently, 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. See Sathe, \textit{supra} note 32, at 81.

\textsuperscript{56} \textit{Bandhua Mukti Morcha v. India}, A.I.R. 1984 S.C. 802 (observing 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. Some judges in the Supreme Court, notably Justice P.N. Bhagawati, 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. P.N. Bhagawati, \textit{Judicial Activism and Public Interest Litigation}, 23 COLUM. J. TRANSNAT'L L. 561 (1985); Jeremy Cooper, \textit{Poverty and Constitutional Justice}, \textit{44 MERCER L. REV.} 611 (1992).

\textsuperscript{57} \textit{Sunil Batra v. Delhi Administration}, A.I.R. 1978 S.C. 1675 (treating a letter from a prisoner complaining about prison conditions as a writ petition seeking to enforce fundamental rights); see also \textit{People's Union for Democratic Rights v. Union of India}, A.I.R. 1982 S.C. 1473.

\textsuperscript{58} Sathe, \textit{supra} note 32.

\textsuperscript{59} Id.
progress on a regular basis, as it has in the past. Thus, the potential for judicial review is promising.

Nevertheless, more disconcerting than the link between climate change and the constitution are the limitations of remedies at the Court’s disposal. For one, any effort by the judiciary to actively exercise jurisdiction over the problem may undermine its institutional legitimacy. Despite the court’s worldwide recognition, the judiciary has not been immune to criticism especially on grounds that it has on several occasions encroached on executive powers, thereby undermining constitutional separation of powers.

Even if the Court were to assume jurisdiction over potential climate-related Article 21 violation claims, the extent of remedies at its disposal appear greatly limited, because of the global nature of the problem and the complexity of corresponding scientific data. The first roadblock would be the responsibility of foreign industrialized nations that have admitted responsibility to the problem; within the scope of its Article 32 judicial review powers, the Court can only pro-

---


61 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 Rikshaw Pullers Case, A.I.R. 1981 S.C. 14, the Court ordered the Punjab National Bank to give loans to auto rikshaw pullers, following a government order that only owners of rikshaws could legally ply the vehicles.


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

64 As such there are criticisms that the judiciary has ignored the separation of powers doctrine. See Lavanya Rajamani, Public Interest Environmental Litigation in India: Exploring Issues of Access, Participation, Equity, Effectiveness and Sustainability, 19 J. ENVTL. L. 233 (2007) (arguing the need for cautious judicial intervention based on two case studies involving municipal solid waste management and the Delhi Vehicle Pollution cases); Armin Roseneranz & 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 Supreme Court undermined the development of administrative capacity to address environmental matters by usurping executive functions).
tect the constitutional rights of Indians against actions of the Indian government and not these other countries.65

Possible redress via the Indian government would also be highly contentious, because any effective remedy must necessarily include an international component. But foreign affairs powers are vested in the central government.66 The Executive67 enters into and implements treaties and international obligations,68 and the Parliament69 can enact laws regarding foreign affairs70 and conclude legal arrangements.71 In this context, the power of the judiciary under Article 363 appears to be limited to advising the President upon request.72 The only occasion on which the Supreme Court checked executive treaty-making powers73 was in Madhav Rao Scindia v. Union of India,74 where the Court held that the government did not have the authority to use its foreign affairs provision to unilaterally withdraw recognition of royalty status to former princes.75 Judicial

65 Article 12 states: "...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." INDIA CONST. art. 12.

66 The subject matters with respect to which the state and central governments have jurisdiction are listed in the Seventh Schedule. See INDIA CONST. arts. 246 & 244.

67 The Executive branch is headed by the President. The President is advised by a Council of Ministers, headed by the Prime Minister. INDIA CONST. art. 74.

68 See Edward G. White, The Transformation of the Constitutional Regime of Foreign Relations, 85 Va. L. Rev. 1, 4-5 (1999) (showing that a similar practice has been observed in the United States, arguing against exclusive federal executive authority to pursue foreign affairs).

69 The Parliament is composed of the President and two Houses — the Council of States and the House of the People. See INDIA CONST. art. 79.


71 List I, Item 10 defines 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 18); and foreign exchange and foreign loans (Items 36 & 37). INDIA CONST. list I.

72 Article 143 reads as follows:

Power of President to consult Supreme Court. — (1) If at any time 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.

INDIA CONST. art. 143.

73 Franck & Thiruvengadam, supra note 70.


review of foreign affairs in India, unlike in the United States, appears not to have required close scrutiny.

The Indian judiciary does not enjoy the availability of extensive legislative measures through which it can compel compliance from an international entity. For instance, in the United States, in *Pakootas v. Tech Cominco Metals Ltd.*, the Ninth Circuit, exercising its appellate authority, 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 hazardous waste. The Ninth Circuit held that even though the waste was released on the Canadian side, the companies responsible for the pollution were liable under U.S. law to clean up the waste in the United States where the effects were felt, as the waste migrated to the U.S. banks of the river. It also held that the U.S. Environmental Protection Agency had a non-discretionary duty to enforce domestic environmental legislation against the companies.

In effect, the circuit court extended the application of a domestic statute to a foreign entity for permitted acts committed outside of the United States, on the ground that the effects were felt in the United States. In arriving at this 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.

But, it is unlikely that the Court could order the Parliament to enact such an overarching legislative framework. In any case, such legislation would not only bring attention back to separation of power

---

76 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*, 504 U.S. 656 (1992), and *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), and the position of noted scholars in favor judicial intervention, constantly 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); Annelise Marie Slaughter Burley, *Are Foreign Affairs Different?*, 106 Harvard L. Rev. 1880 (1993) (book review) (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) (presenting 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).

77 452 F. 3d 1066 (2006).


concerns, but it is also equally unlikely that the government would favor or support such a legislative proposal.

IV. THE ROAD AHEAD

India's participation is critical to the future of an effective post-2012 international climate regime. This view stems from concerns about the potential effects that a rapidly growing carbon economy of a billion people can have on the global climate and on efforts by other nations to reduce GHG emissions. This is a legitimate concern and one that requires attention. While playing its part in the negotiation of this international regime, the Indian government must also be spurred to action by considering the threat that the absence of an effective regime presents to the constitutionally guaranteed rights of its citizens, and its own potential domestic liability for climate induced harm.

This emerging domestic constitutional challenge in the case of climate change illustrates that by focusing substantially on limiting their international obligations, states may not be able to fulfill their constitutional mandates, even in countries such as India where the right to judicial review of government action or inaction is very expansive. In light of this challenge, India and other nations will have to determine a way to preserve their constitutional integrity in situations where its protections are jeopardized by events beyond their control and where such events can be managed only by means of international law. Moreover, as nations head to Copenhagen, it might be well worth to keep in mind that nations are formed by people, and people have rights that are complex, and preserving those rights under a constitutional mandate deserves nuanced and singular attention.