

India

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(A) Introduction¹

Legal system

- 7.01 India is a parliamentary democracy governed by a lengthy written constitution widely perceived to be a 'living instrument', having been amended over a hundred times since its adoption in 1950.² India has, in part, a common law legal system, a legacy of its colonial past. The principal sources of law are: (i) legislation, including statutes passed by the Parliament and state legislatures, and subordinate legislation such as rules, notifications and orders passed under the statutes; and (ii) common law to be found in decided cases developed by courts through a reliance on precedent. Much of the law of tort and administrative law is common law based.
- 7.02 The Indian judicial system consists of a Supreme Court that sits in Delhi, and has original, appellate and advisory jurisdiction, and twenty-one High Courts spread across the territory of India.³ In addition, there are several specialised tribunals including the recently constituted National Green Tribunal. The law declared by the Supreme Court is binding on all courts within the territory of India.⁴

¹ This section draws on L. Rajamani, 'India and Climate Change: What India Wants, Needs and Needs to Do', *India Review*, 8(3) (2009), 340–74.

² The Constitution of India, 1950, available at <http://indiacode.nic.in/coiweb/welcome.html>.

³ See for further information on the Indian Court system www.indiancourts.nic.in/index.html.

⁴ Article 141, The Constitution of India, 1950.

Policy context

- 7.03 India is on a mission to develop. Economic growth, and with it, poverty eradication, energy security and provision of universal access to energy, are central and enduring preoccupations of the Indian government. Justifiably so: India is placed 134th on the Human Development Index,⁵ 41.6 per cent of its population lives on less than US\$ 1.25 a day,⁶ and an estimated 44 per cent does not have access to electricity.⁷ India's developmental mission, as framed, however, may well leave large carbon footprints, and ultimately weaken its ability to develop.
- 7.04 If India's current growth rate continues,⁸ energy demand will more than double by 2020.⁹ In addition, if India's targets on poverty, unemployment and literacy in its 11th five year plan¹⁰ – some more ambitious than the Millennium Development Goals ('MDGs')¹¹ – are to be met, and energy provided to the nearly 500 million Indians without access to electricity, this will lead to much greater energy use.¹² India will soon be a significant contributor to climate change.¹³ India is predicted by some estimates

⁵ *Human Development Report: Overcoming Barriers* (2009), available at <http://hdr.undp.org/en/statistics/>.

⁶ *Ibid.*

⁷ *Human Development Report: Fighting Climate Change*, 2007, available at <http://hdr.undp.org/en/reports/>.

⁸ See *Economic Surveys*, Ministry of Finance, Government of India for current growth rate, available at www.finmin.nic.in.

⁹ See *India Country Presentation*, Dialogue on Long-term Cooperative Action to Address Climate Change by Enhancing Implementation of the Convention, First Workshop, 15–16 May 2006, available at www.unfccc.int/meetings/dialogue/items/3669.php.

¹⁰ *Towards Faster and More Inclusive Growth: An Approach to the 11th Five Year Plan*, Planning Commission, Government of India (2006), p. 98, available at www.planning-commission.nic.in. An approach to the 12th Five Year Plan set to commence in 2012–13 is currently under preparation.

¹¹ *India's Initial National Communication to the United Nations Framework Convention on Climate Change*, Ministry of Environment and Forests, Government of India (2004), Table 6.1, pp. 192–3, available at www.unfccc.int.

¹² See *Integrated Energy Policy*, Planning Commission, Government of India (August 2006), pp. xiii and 18–32, noting that to sustain 8 per cent growth through 2031 India would need to increase its energy supply by 3–4 times, and its electricity supply by 5–7 times. Available at www.planningcommission.nic.in.

¹³ The rate of growth of GHG emissions in India is approximately 4.6 per cent annually as compared to a world average of 2 per cent. See Subhodh Sharma, Sumona Bhattacharya

to become the third largest emitter by 2015,¹⁴ and with the United States, European Union, China and Russia, to account for two-thirds of global greenhouse gases ('GHGs').¹⁵

Emissions profile and energy mix

- 7.05 India's energy use is currently at a low per capita emissions rate of 1.5 metric tons annually,¹⁶ and a cumulative share of 4.6%.¹⁷ Of India's net CO₂ Eqv emissions, 58% can be sourced to the energy sector, 22% to industry, 17% to agriculture and 3% to waste. Of the emissions from the energy sector, 37.8% can be sourced to electricity, 7.5% to transport and 7.2% to residential uses.¹⁸
- 7.06 Coal is the mainstay of India's energy supply, accounting for 53% of installed generation capacity.¹⁹ Hydro accounts for 22.8%, gas for 10.3%, wind for 7.2%, nuclear for 2.8% and other renewables for 2.9%.²⁰ Coal, not surprisingly, also accounts for 40% of India's energy consumption, combustible renewables and waste for 27%, oil for 24%, natural gas for 6%, hydroelectric power for 2% and nuclear for 1%.²¹ India has large reserves of coal, but limited reserves of oil. The majority of India's substantial oil requirements is imported from the Middle East.²²

and Amit Garg, 'Greenhouse Gas Emissions from India: A Perspective', *Current Science*, 90 (2006), 326–33.

¹⁴ Executive Summary, *World Energy Outlook* (2007), p. 49, available at www.iea.org/Textbase/npsum/WEO2007SUM.pdf.

¹⁵ Executive Summary, *World Energy Outlook* (2008), p. 12, available at www.worldenergy-outlook.org/docs/weo2008/WEO2008_es_english.pdf.

¹⁶ *India: Greenhouse Gas Emissions 2007*, Indian Network for Climate Change Assessment, Ministry of Environment and Forests, Government of India (May 2010), p. i. All Ministry of Environment and Forests documents on climate change are available at <http://moef.nic.in/modules/about-the-ministry/CCD/>.

¹⁷ The global average per capita rate is 4.5 metric tons, India's per capita rate is low compared to most industrialised countries and less than half of China's 3.8 metric tons rate. The USA has a per capita emissions rate of 20.6, Australia of 16.2 and Canada of 20 (see n. 7 above).

¹⁸ See n. 16 above.

¹⁹ R. Tongia, M. Saquib, H. S. Ramakrishna, *Indian Power Supply Position 2010*, CSTEP Working Paper, WP 1–30.8.2010 (Bangalore, 2010), p. 6, available at www.cstep.in/node/213.

²⁰ *Ibid.*

²¹ *Country Analysis Briefs: India, 2010*, Energy Information Administration (2010), available at www.eia.doe.gov/emeu/cabs/India/Full.html.

²² *Ibid.*

- 7.07 The Indian government, recognising electricity supply as central to sustained growth, global competitiveness and rural development, set itself the targets of providing electricity to all by 2010, and meeting full demand by 2012.²³ To meet these targets, the National Electricity Policy advocates 'maximum emphasis' on feasible hydro potential, significant increase in nuclear capacity, full exploitation of feasible non-conventional energy resources, but with recognition, however, that coal will continue 'to remain the primary fuel'.²⁴

Climate risks

- 7.08 In the words of India's Environment Minister, Jairam Ramesh, 'no country in the world is as vulnerable, on so many dimensions, to climate change as India. Whether it is our long coastline of 7000 kms, our Himalayas with their vast glaciers, our almost 70 million hectares of forests (which incidentally house almost all of our key mineral reserves) – we are exposed to climate change on multiple fronts'.²⁵ The Indian Network for Climate Change Assessment ('INCCA'), a network of 120 institutions and 220 scientists across India, predicts that: the annual mean surface air temperature in India is likely to rise by 1.7°C and 2.0°C in the 2030s; melting glaciers will increase flood risk and decrease water supply; sea level rise (rate of 1.3 mm/year) will threaten coastal regions; monsoons, on which agriculture depends, will become more erratic and rain less plentiful; and incidence of malaria and other vector-borne diseases will increase, as will heat-related deaths and illnesses.²⁶ The INCCA also highlights prospective threats to food and water security: by 2080–2100, there is a probability of 10–40 per cent loss in crop production, and before 2025 India is likely to reach a state of water stress.²⁷
- 7.09 India's economy is also likely to be significantly impaired by the impacts of climate change. The Stern Review notes that even a

²³ *National Electricity Policy*, Ministry of Power, Government of India (2005), s. 2, available at http://powermin.nic.in/whats_new/national_electricity_policy.htm.

²⁴ *Ibid.*

²⁵ Indian Network for Climate Change Assessment, *Climate Change and India: A 4X4 Assessment – A Sectoral and Regional Analysis for 2030s*, Ministry of Environment and Forests, Government of India (16 November 2010), p. 3.

²⁶ See generally *Ibid.* ²⁷ *Ibid.*

small change in temperature could have a significant impact on the Indian monsoon, resulting in up to a 25 per cent reduction in agricultural yield.²⁸ A 2–3.5°C temperature increase could cause as much as a 0.67 per cent loss in GNP, and a 100 cm increase in sea level could cause a loss of 0.37 per cent in GNP.²⁹ Recent Indian research found that southwest monsoon rainfall had decreased by 4.7 per cent between 1965 and 2006, as compared to 1931–64.³⁰ A quarter of the Indian economy is dependent on agriculture, and any impact on this sector will fundamentally impair India's ability to meet its development goals. Climate change, therefore, is an issue that is increasingly being taken seriously by India.

International negotiating position, actions and partnerships

- 7.10 In international fora, India, a Party to the Framework Convention on Climate Change ('FCCC')³¹ and its Kyoto Protocol,³² has consistently rejected legally binding quantitative GHG mitigation targets.³³ India argues that, given its limited role in contributing to the problem, its overriding development needs, and the historical responsibility of developed countries, India cannot be expected to take on mitigation targets.³⁴ India is also opposed to establishing a quantitative long-term global goal or a peaking year, unless it is accompanied by an appropriate burden-sharing arrangement based on equity and differential treatment for developing countries.³⁵

²⁸ Executive Summary, *Stern Review on the Economics of Climate Change* (2006), p. 6, available at www.hm-treasury.gov.uk.

²⁹ J. Roy, 'A Review of Studies in the Context of South Asia with a Special Focus on India: Contribution to the Stern Review' (2006), available at www.hm-treasury.gov.uk/media/5/0/roy.pdf.

³⁰ Ministry of Earth Sciences, Government of India, Press Release, 11 August 2010, available at www.pib.nic.in/release/release.asp?relId=64577.

³¹ United Nations Framework Convention on Climate Change, 29 May 1992, *International Legal Materials*, 31 (1992), 849.

³² Kyoto Protocol to the United Nations Framework Convention on Climate Change, 10 December 1997, *International Legal Materials*, 37 (1998), 22 (the 'Kyoto Protocol').

³³ See for a representative sample, *Climate Change Negotiations: India's Submissions to the UNFCCC*, Ministry of Environment and Forests, Government of India (August 2009).

³⁴ *Ibid.*

³⁵ See Letter by Jairam Ramesh, Minister of State for Environment and Forests, Letter to the Members of Parliament: Cancun Agreements, 20 December 2010, on file with authors.

- 7.11 Nevertheless, in 2007, India promised that its per capita emissions would not exceed the levels of developed countries.³⁶ India believes that this will incentivise developed countries to achieve timely reductions in their per capita emissions.³⁷ The OECD average per capita emissions is 13.2.³⁸
- 7.12 India has also offered to embark on a path of decarbonisation. Decarbonisation, according to India, refers to an economy with lower carbon intensity over time.³⁹ Decarbonisation includes enhanced energy efficiency, a shift in primary energy use from fossil fuels to renewable energies (including hydropower) and nuclear energy, and changes in production and consumption patterns.⁴⁰ In 2010, India crystallised its offer to decarbonise into a voluntary undertaking under the non-binding Copenhagen Accord⁴¹ to 'endeavour to reduce the emissions intensity of its GDP by 20–25 percent by 2020 in comparison to the 2005 level'.⁴² This undertaking has been mainstreamed into the FCCC process through an information document taken note of⁴³ by the Cancun Agreements, 2010.⁴⁴
- 7.13 India is an enthusiastic participant in the Clean Development Mechanism;⁴⁵ 21.2 per cent of all registered projects are from India (second only to China at 44.4 per cent, and followed by Brazil at 6.2 per cent); 10.8 per cent of all expected certified

³⁶ PM's Intervention on Climate Change at Heiligendamm, Meeting of G8 + 5, Heiligendamm, Germany, 8 June 2007, available at www.pib.nic.in.

³⁷ PM's address at the 95th Indian Science Congress, 3 January 2008, available at www.pib.nic.in.

³⁸ *Human Development Report: Fighting Climate Change* (see n. 7 above).

³⁹ 'Dealing with the Threat of Climate Change', India Country Paper, the Gleneagles Summit, 2005.

⁴⁰ *Ibid.*

⁴¹ Decision 2/CP.15, Copenhagen Accord, FCCC/CP/2009/11/Add.1 (30 March 2010), p. 4 ('Copenhagen Accord').

⁴² India – Letter to the Executive Secretary, 30 January 2010, available at www.unfccc.int/files/meetings/application/pdf/indiacphaccord_app2.pdf.

⁴³ See 'Compilation of Information on Nationally Appropriate Mitigation Actions to be Implemented by Parties Not Included in Annex I to the Convention', FCCC/AWGLCA/2011/INF.1 (18 March 2011), p. 26.

⁴⁴ Decision 1/CP.16, 'The Cancun Agreements: Outcome of the Work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention', FCCC/CP/2010/7/Add.1 (15 March 2011), at para. 49.

⁴⁵ Article 12, the Kyoto Protocol.

emissions reductions (CERs) are from India (as compared to 63.7 per cent from China and 4.7 per cent from Brazil).⁴⁶

- 7.14 India is part of several bilateral and plurilateral arrangements on climate change and energy. India is a part of the Asia Pacific Partnership on Clean Development and Climate,⁴⁷ the Carbon Sequestration Leadership Forum,⁴⁸ the Methane to Markets Partnership⁴⁹ and the International Partnership for a Hydrogen Economy.⁵⁰ India has bilateral partnerships with the European Union (EU),⁵¹ the United States (USA)⁵² and the United Kingdom (UK)⁵³ on climate research and technology. India also participates in meetings of the G20, G8+5 and the Major Economies Forum⁵⁴ that seek to resolve political issues and provide stimulus to the climate negotiations. In the negotiations, India is part of the BASIC (Brazil, South Africa, India and China) group,⁵⁵ which itself is part of the G77/China, a large coalition of developing countries.⁵⁶

Domestic policies and measures

- 7.15 India launched its National Climate Change Action Plan in 2008 bringing together existing and proposed efforts at decarbonisation under eight national missions: solar energy; enhanced energy efficiency; sustainable habitats; water; the Himalayan ecosystem; 'Green India'; sustainable agriculture; and strategic knowledge for climate change.⁵⁷ These missions are intended to assist India

⁴⁶ CDM Statistics, available at www.cdm.unfccc.int.

⁴⁷ Further details available at www.asiapacificpartnership.org/.

⁴⁸ Further details available at www.cslforum.org/.

⁴⁹ Further details available at www.methanetomarkets.org/.

⁵⁰ Further details available at www.iphe.net/.

⁵¹ 'India-EU Strategic Partnership Joint Action Plan', available at www.ec.europa.eu.

⁵² 'Overview of the US-India Climate Change Partnership', US Department of State, available at www.state.gov.

⁵³ 'Working with Developing Countries – India', Department for Environment, Food and Rural Affairs, Government of the UK, available at www.defra.gov.uk.

⁵⁴ Further details available at www.majoreconomiesforum.org/.

⁵⁵ India hosted the Sixth BASIC Ministerial Meeting, 26–27 February 2011; further details available at <http://moef.nic.in/downloads/public-information/BASIC-Stat-6.pdf>.

⁵⁶ Further details available at www.g77.org/.

⁵⁷ *National Action Plan on Climate Change*, Prime Minister's Council on Climate Change, Government of India (2008), available at <http://www.pmindia.nic.in/Pg01-52.pdf>.

in adapting to climate change, as well as in launching its economy on a path that 'would progressively and substantially result in mitigation through avoided emissions'.⁵⁸ The Plan, an initial cut at addressing the issue, does not contain any mechanisms to estimate the cost of climate change impacts or compliance. Neither does it mainstream climate change factors into development planning, as evidenced by the fact that no reference is made to how this Action Plan is qualified by, or qualifies, India's Integrated Energy Policy.⁵⁹

7.16 In the years since the release of the Plan, there have been several developments. The Indian government is in the process of developing a 'roadmap for low carbon development'.⁶⁰ The relevant Ministries have developed comprehensive mission documents detailing objectives, strategies, plans of action, timelines, and monitoring and evaluation criteria.⁶¹ There are several noteworthy initiatives contained in these missions, including: the creation of a market – a perform, achieve and trade mechanism – in energy savings certificates; the adoption of a target to generate 20,000 MW of solar power by 2022; and a commitment to double the area to be afforested in the next ten years, taking the total to 20 million ha.⁶² In addition, the Indian government has announced a levy – a clean energy tax – of US\$ 1 per ton on coal.⁶³ State-level action plans on climate change are also in preparation.

7.17 India's domestic climate policy interventions can be located squarely within the logic of a co-benefits approach – an approach that seeks to exploit synergies between development and climate change. Given India's development imperatives, it has chosen to channel its limited resources into areas that have significant co-benefits. Hence the emphasis in India's domestic policy interventions on energy efficiency, conservation, and diversification of energy sources (with the promotion of renewable energies as an element). These interventions deliver climatic benefits, but

⁵⁸ *Ibid.*, p. 6. ⁵⁹ See n. 12 above.

⁶⁰ See generally *India: Taking on Climate Change – Post-Copenhagen Domestic Actions*, Ministry of Environment and Forests, Government of India (30 June 2010).

⁶¹ *National Action Plan on Climate Change* (see n. 57 above), pp. 2 and 47; see also Press Information Bureau Release, Ministry of Environment and Forests, Finalisation of the Eight National Missions, 11 August 2010.

⁶² See n. 60 above, p. 5. ⁶³ *Ibid.*, p. 2.

also enhance energy security, lead to greater energy availability and access, and accelerate development.

(B) Public law

*The constitutional framework, environmental rights and international law*⁶⁴

7.18 The Constitution of India, in Part III, titled 'Fundamental Rights', creates a regime of protection for a privileged set of rights. Laws inconsistent with or in derogation of these rights are void to the extent of their inconsistency.⁶⁵ The centrepiece of these fundamental rights is the right to life and liberty.⁶⁶ This right has over the years been extended through judicial creativity to cover unarticulated but implicit rights such as the right to live with human dignity,⁶⁷ the right to livelihood,⁶⁸ the right to education,⁶⁹ the right to health and medical care of workers,⁷⁰ and most importantly for current purposes, the 'right of enjoyment of pollution-free water and air'.⁷¹

7.19 Although, thus far, no climate-related claim has been brought before the Supreme Court, it is likely, should such a claim be brought – given the Court's jurisprudence and its expansionist proclivities – that it would either interpret the environmental right to include a right to climate protection or apply a human rights optic to climate impacts.

⁶⁴ This subsection draws from L. Rajamani, 'The Right to Environmental Protection in India: Many a Slip between the Cup and the Lip?', *Review of European Community And International Environmental Law*, 16 (2007), 274.

⁶⁵ Article 13(2), The Constitution of India, 1950.

⁶⁶ Article 21, *Ibid.*

⁶⁷ *Francis Coralie Mullin v. The Administrator, Union Territory of Delhi* (1981) 1 SCC 608, at paras. 7 and 8.

⁶⁸ *Olga Tellis v. Bombay Municipal Corporation* (1985) 3 SCC 545, at para. 32.

⁶⁹ *Mohini Jain v. State of Karnataka* (1992) 3 SCC 666, at para. 12, and *J. P. Unni Krishnan v. State of Andhra Pradesh* (1993) 1 SCC 645, at para. 166, before the introduction of Article 21A.

⁷⁰ *Consumer Education and Research Centre v. Union of India* (1995) 3 SCC 42, at paras. 24 and 25.

⁷¹ *Subash Kumar v. State of Bihar* (1991) 1 SCC 598, at para. 7. See also *M. C. Mehta v. Union of India* (1992) 3 SCC 256, at para. 2, and *Virender Gaur v. State of Haryana* (1995) 2 SCC 577, at para. 7.

- 7.20 There are many different formulations of the constitutionally protected environmental right in India. Some of these formulations are expansive in that they can readily encompass protection against new forms of environmental harm. Other formulations are more limiting. The less expansive definitions define the environmental right in the context of either pollution or health. So, for instance, in relation to pollution, the environmental right has been characterised as the right to 'pollution-free air and water',⁷² 'fresh air, clean water',⁷³ 'pollution-free environment'⁷⁴ and 'clean environment'.⁷⁵ It has been defined in the context of human health, as for instance, the right to a 'humane and healthy environment',⁷⁶ a 'hygienic environment'⁷⁷ and 'sanitation'.⁷⁸ It may be difficult in the context of these formulations to argue for an expansion of the environmental right to include climate protection, given that GHGs are not generally considered pollutants and do not typically contribute to localised pollution resulting in identifiable health impacts.
- 7.21 However, the constitutionally protected environmental right has also been characterised as the right to: 'environmental protection and conservation of natural resources';⁷⁹ 'live in a healthy environment with minimal disturbance of [the] ecological balance';⁸⁰ a 'decent environment';⁸¹ and a 'living atmosphere congenial to human existence'.⁸² These formulations leave ample scope for value judgements and judicial discretion, and hence admit the possibility of protecting against threats to the climate. Climate

⁷² *Charan Lal Sahu v. Union of India* (1990) 1 SCC 613, at para. 137.

⁷³ *Narmada Bachao Andolan v. Union of India* (2000) 10 SCC 664, at para. 244.

⁷⁴ *Vellore Citizens Welfare Forum v. Union of India* (1996) 5 SCC 647, at paras. 16 and 17.

⁷⁵ *Ibid.*

⁷⁶ *K. M. Chinnappa and T. N. Godavarman Thirumulpad v. Union of India* (2002) 10 SCC 606, at para. 18, and *State of MP v. Kedia Leather and Liquor Ltd* (2003) 7 SCC 389, at para. 9.

⁷⁷ *Virender Gaur and Ors v. State of Haryana and Ors* (1995) 2 SCC 577, at para. 7.

⁷⁸ *K. M. Chinnappa and T. N. Godavarman Thirumulpad v. Union of India* (2002) 10 SCC 606, at para. 18.

⁷⁹ *Intellectuals Forum, Tirupathi v. State of AP* (2006) 3 SCC 549.

⁸⁰ *Rural Litigation and Entitlement Kendra v. State of UP* (1985) 2 SCC 431, at para. 12. See also *Narmada Bachao Andolan v. Union of India* (2000) 10 SCC 664, at para. 120, and *Virender Gaur and Ors v. State of Haryana and Ors* (1995) 2 SCC 577, at para. 7.

⁸¹ *Shantistar Builders v. Narayan Khimala Totame and Ors* (1990) 1 SCC 520, at para. 9.

⁸² *Virender Gaur and Ors v. State of Haryana and Ors* (1995) 2 SCC 577, at para. 6.

change will undoubtedly disturb the ecological balance, however that term is defined. It will also render the atmosphere less 'congenial' to human existence. The inhabitants of the Sundarbans, at the frontline of climate change, can testify to this.

- 7.22 Even if the Supreme Court is reluctant to extend the environmental right to cover climate protection, it will likely be impressed with an approach that applies a human rights (in the Indian context, a 'fundamental rights') optic to climate impacts. A host of rights and progressive realisation towards them, such as the rights to life, health and water, among others, will be at risk from climate impacts. There is a burgeoning and ever-persuasive literature arguing the case.⁸³ These rights – to life, health and water – are, as we have seen, constitutionally protected in India. The Supreme Court would need but little persuasion to read climate impacts as threatening these rights.
- 7.23 The environmental right is complemented by relevant provisions of the Directive Principles of State Policy,⁸⁴ in particular Articles 47⁸⁵ and 48A⁸⁶ which articulate the duties of the State with respect to public health and environmental protection. Although the Directive Principles of State Policy are not intended to be 'enforceable by any court', they are nevertheless 'fundamental in the governance of the country' and it is 'the duty of the State to apply these principles in making laws'.⁸⁷ In addition to the relevant Directive Principles of State Policy, the Constitutional schema also includes Article 51A(g) which imposes a duty on citizens to protect and improve the environment.⁸⁸
- 7.24 India, one of the first jurisdictions to embrace an environmental right, is perceived as having 'fostered an extensive

⁸³ See e.g. S. Mcinerney-Lankford, M. Darrow and L. Rajamani, *Human Rights and Climate Change: A Review of the International Legal Dimensions* (World Bank, 2011); Stephen Humphreys, *Climate Change and Human Rights: A Rough Guide* (The International Council on Human Rights Policy, 2008); C. Bals, S. Harmeling and M. Windfuhr, *Climate Change, Food Security and the Right to Adequate Food* (Bonn: Germanwatch e.V., 2008); *Climate Wrongs and Human Rights: Putting People at the Heart of Climate Change* (OXFAM Report, 2008); and *Protecting Health from Climate Change* (World Health Organization, 2008).

⁸⁴ Part IV, Articles 36–51, The Constitution of India, 1950.

⁸⁵ Article 47, *ibid.* ⁸⁶ Article 48A, *ibid.*

⁸⁷ Article 39, *ibid.* ⁸⁸ Article 51A(g), *ibid.*

and innovative jurisprudence on environmental rights'.⁸⁹ The courts have fleshed out the environmental right by integrating into Indian environmental jurisprudence numerous principles of international environmental law.⁹⁰ These include the polluter pays principle,⁹¹ the precautionary principle,⁹² the principle of inter-generational equity,⁹³ the principle of sustainable development⁹⁴ and the notion of the State as a trustee of all natural resources.⁹⁵ The Supreme Court has held these principles to be 'essential features of sustainable development',⁹⁶ 'imperative for preserving ecology'⁹⁷ and 'part of environmental law of India'.⁹⁸ The Court requires these principles to be 'applied in full force for protecting the natural resources of this country'.⁹⁹ The constitutionally protected environmental right complemented by these principles of international environmental law provides a fertile breeding ground for ambitious rights-based climate claims.

- 7.25 The principles, in particular, of precaution, public trust and inter-generational equity, as interpreted by the Indian courts, will prove useful to prospective rights-based climate claimants. The precautionary principle requires the State to take environmental measures 'to anticipate, prevent and attack' the causes of

⁸⁹ Michael R. Anderson, 'Individual Rights to Environmental Protection in India' in A. Boyle and M. R. Anderson (eds.), *Human Rights Approaches to Environmental Protection* (Oxford University Press, 1996), p. 199.

⁹⁰ For instance principles that are contained in Principles 3, 4, 15 and 16, Rio Declaration on Environment and Development, 1992.

⁹¹ *Indian Council for Enviro-legal Action v. Union of India* (Bichhri Case) (1996) 3 SCC 212. See also *M. C. Mehta v. Kamal Nath* (2000) 6 SCC 213, at 220.

⁹² *Vellore Citizens' Welfare Forum v. Union of India* (1996) 5 SCC 647. See also *Narmada Bachao Andolan v. Union of India* (2000) 10 SCC 664, at 727.

⁹³ *State of Himachal Pradesh v. Ganesh Wood Products* (1995) 6 SCC 363. See also *Indian Council for Enviro-legal Action v. Union of India* (CRZ Notification case) (1996) 5 SCC 281.

⁹⁴ *M. C. Mehta v. Union of India* (Taj Trapezium Case) (1997) 2 SCC 353, at 381. See also *Narmada Bachao Andolan v. Union of India* (2000) 10 SCC 664, at 727.

⁹⁵ *M. C. Mehta v. Kamal Nath* (1997) 1 SCC 388.

⁹⁶ *Vellore Citizens' Welfare Forum v. Union of India* (1996) 5 SCC 647, at para. 11.

⁹⁷ *Karnataka Industrial Areas Development Board v. C. Kenchappa and Ors* (2006) 6 SCC 371, at para. 32.

⁹⁸ *Research Foundation for Science Technology & National Resource Policy v. Union of India and Anor* (2005) 13 SCC 186, at para. 24.

⁹⁹ *Intellectuals Forum, Tirupathi v. State of AP* (2006) 3 SCC 549, at para. 63.

environmental degradation.¹⁰⁰ It posits further that, 'where there are threats of serious and irreversible damage, lack of scientific certainty should not be used as a reason for postponing measures to prevent environment degradation'.¹⁰¹ Finally, it lays the onus of proof on the actor or the developer/industrialist to demonstrate that the proposed action is 'environmentally benign',¹⁰² an unusual and controversial interpretation of the principle. Climate change falls neatly into the category of threats that it would be wise to take early action on. This principle could be used to argue the case for ambitious mitigation and adaptation intervention, and to challenge State action that falls short.

- 7.26 The doctrine of public trust would add further weight to the argument. This doctrine places an affirmative duty on the State as a trustee of certain public resources to protect resources like air, sea, water and the forests for the enjoyment of the general public.¹⁰³ The Court envisages that this doctrine would be equally appropriate 'in controversies involving air pollution, the dissemination of pesticides, the location of rights of ways for utilities, and strip mining of wetland filling on private lands in a state where governmental permits are required'.¹⁰⁴ The issue of climate change could well engage the duty of a state as trustee to protect the atmosphere from indiscriminate GHG emissions.

- 7.27 The principle of inter-generational equity may also be of assistance.¹⁰⁵ The principle, formulated originally in the context of forest resources, holds that 'the present generation has no right to deplete all the existing forests and leave nothing for the next and future generations'.¹⁰⁶ Climate change presents the ultimate

¹⁰⁰ *Vellore Citizens' Welfare Forum v. Union of India* (1996) 5 SCC 647, at para. 11, and *S. Jagannathan v. Union of India* (1997) 2 SCC 87, at para. 41. See also *Karnataka Industrial Areas Development Board v. C. Kenchappa and Ors* (2006) 6 SCC 371, at para. 32.

¹⁰¹ *Ibid.*, at para. 11. ¹⁰² *Ibid.*

¹⁰³ *M. C. Mehta v. Kamal Nath* (1997) 1 SCC 388, at para. 25; see also *Intellectuals Forum, Tirupathi v. State of AP* (2006) 3 SCC 549, at paras. 59 and 60, and *Karnataka Industrial Areas Development Board v. C. Kenchappa and Ors* (2006) 6 SCC 371, at paras. 32–7.

¹⁰⁴ Citing Joseph Sax, *ibid.*, at para. 22.

¹⁰⁵ *State of Himachal Pradesh v. Ganesh Wood Products* (1995) 6 SCC 363, at para. 46.

¹⁰⁶ *Ibid.* See also *Indian Council for Enviro-legal Action v. Union of India* (1996) 5 SCC 281, at para. 26; *AP Pollution Control Board v. M. V. Nayudu and Ors* (1999) 2 SCC 718, at para. 52; *T. N. Godavarman Thirumulpad v. Union of India and Ors* (2006) 1 SCC 1, at paras. 88, 89.

'inter-generational' problem. Current generations inherited the problem, are exacerbating it, and will likely leave a legacy that imposes severe burdens of protection and sacrifice on future generations. All three principles – precaution, public trust and inter-generational equity – are to varying degrees recognised in the FCCC as well.¹⁰⁷ These principles offer powerful building blocks in a rights-based claim seeking more aggressive State action on climate change. The Indian courts would likely provide a nurturing environment for such claims.

- 7.28 Rights-based claims relating to mitigation, however, may prove difficult to sustain. The principal hurdle in sanctioning State action relating to mitigation as insufficient or requiring the State to take further action will be in identifying benchmarks. How much action is appropriate for a country like India, given its, thus far, limited contribution to the problem, and its limited ability, on its own, over time, to resolve the problem? If the international regime had reached an equitable and effective burden-sharing agreement, and the Indian government was falling short of its just share of the burden, a claim may lie. However, in the absence of such an agreement, the Court would need to substitute its judgement for that of the international community, as well as that of the executive, which it may be reluctant to do. The reluctance may stem from concerns about intervening in an intensely political and polarised North-South climate debate as well as, albeit less so, stepping on the executive's toes. In the Court's jurisprudence, '[a]n excessively political role identifiable with political governance betrays the court into functions alien to its fundamental character, and tends to destroy the delicate balance envisaged in our constitutional system between its three basic institutions'.¹⁰⁸
- 7.29 Rights-based claims relating to adaptation may fare better. A claim may lie for instance where the government is not taking the necessary action to adapt to predicted climate change in particularly vulnerable areas such as the Sunderbans, and the resulting climate impacts breach the claimant's protected rights to life, health, water etc.¹⁰⁹ In the case of adaptation, since core human

rights are implicated, rather than the right to environment, which is subject to limits in the service of development, claims may prove more successful.

- 7.30 Rights-based claims relating to adaptation may also be able to press international law into service. Article 51(c) of the Indian Constitution requires the State to 'foster respect for international law and treaty obligations'.¹¹⁰ Implicit in this Article, according to the Supreme Court, is that '[a]ny International Convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into these [Article 21 etc] provisions to enlarge the meaning and content thereof, to promote the object of the constitutional guarantee'.¹¹¹
- 7.31 The core human rights threatened by climate impacts are protected under several human rights treaties that India is a Party to, including the International Covenant on Civil and Political Rights¹¹² and the International Covenant on Economic, Social and Cultural Rights.¹¹³ India has an obligation under these treaties to respect, protect and fulfil the rights contained in them. This obligation is binding on every State Party, India included, and must be given effect to in good faith.¹¹⁴ India is, also, as we have seen, a Party to the FCCC and its Kyoto Protocol.
- 7.32 India's treaty commitments read together arguably require it to approach climate change not just as a global environmental problem but also as a human rights issue. Such an approach would have substantive and procedural implications. Substantively, India may be required to devote greater resources to adaptation so as to lessen the human cost of climate impacts. Procedurally, India may be required to integrate the human rights implications of climate impacts into its planning and policy-making processes. India's treaty obligations could be thus interpreted by the Supreme Court to 'enlarge the

¹⁰⁷ Article 3, FCCC.

¹⁰⁸ *Bandhua Mukti Morcha v. Union of India* (1984) 3 SCC 161, at 232.

¹⁰⁹ See e.g. 'Sunderbans' Stoic Settlers Bear Witness to Climate Change', *The Pioneer*, 25 April 2011.

¹¹⁰ Article 51(c), The Constitution of India, 1950.

¹¹¹ *Vishaka v. State of Rajasthan* (1997) 6 SCC 241, at para. 7.

¹¹² International Covenant on Civil and Political Rights, 1966, reprinted in *International Legal Materials*, 6 (1967), 368.

¹¹³ International Covenant on Economic, Social and Cultural Rights, 1966, reprinted in *International Legal Materials*, 6 (1967), 360.

¹¹⁴ Article 26, Vienna Convention on the Law of Treaties, 1969, reprinted in *International Legal Materials*, 8 (1969), 679. See also CCPR General Comment 31, CCPR/C/21/Rev.1/Add.13.

meaning and content' of the constitutional guarantees, inter alia to life, health and water.

*Judicial activism and public interest litigation*¹¹⁵

- 7.33 The Indian judiciary is an extraordinary institution. It is, unlike in societies more deferential to separation of powers, a dynamic actor that shapes law, evolves policy, and plays a central determinative role in the governance of modern India. The Court plays this role primarily through the exercise of its self-fashioned public interest jurisdiction.
- 7.34 The origins of public interest jurisdiction in India can be traced to the late 1970s, early 1980s, and in particular the case of *S. P. Gupta v. Union of India* in which Justice Bhagwati relaxed the rule of *locus standi* and opened up the doors of the Supreme Court to public-spirited citizens – both those wishing to espouse the cause of the poor and oppressed (representative standing) and those wishing to enforce performance of public duties (citizen standing).¹¹⁶
- 7.35 Public interest litigation in India can be pursued either in the High Court or Supreme Court. If the complaint is of a legal wrong, Article 226 of the Constitution permits recourse to the High Court of the state. If the complaint alleges a violation of fundamental rights, Article 32 of the Constitution permits direct recourse to the Supreme Court. For violations of fundamental rights, the Supreme Court may issue an order, direction or writ, including a writ in the nature of *habeas corpus*, *quo warranto*, *mandamus*, prohibition or *certiorari*.¹¹⁷ The High Courts can pass similar orders for enforcement of fundamental rights as well as of other legal rights.¹¹⁸
- 7.36 At the behest of public-spirited individuals, the courts have passed (and continue to pass) orders in a range of cases. In the

¹¹⁵ This subsection draws on L. Rajamani and A. Sengupta, 'The Supreme Court' in N. G. Jayal and P. B. Mehta (eds.), *Oxford Companion to Politics in India* (Oxford University Press, 2010), p. 80, and L. Rajamani, 'Public Interest Environmental Litigation in India: Exploring Issues of Access, Participation, Equity, Effectiveness and Sustainability', *Journal of Environmental Law*, 19 (2007), 293–321.

¹¹⁶ *S. P. Gupta v. Union of India*, 1981 Supp SCC 87, at 233.

¹¹⁷ Article 32, The Constitution of India, 1950.

¹¹⁸ Article 226, *ibid*.

environmental field the Supreme Court, for instance, has passed hundreds of orders inter alia to protect the Taj Mahal from corrosive air pollution,¹¹⁹ rid the river Ganges of trade effluents,¹²⁰ address air pollution in Delhi and other metropolitan cities,¹²¹ protect the forests and wildlife of India,¹²² and clear cities of their garbage.¹²³

- 7.37 The power of public interest litigation in India lies in its freedom from the constraints of traditional judicial proceedings. Public interest litigations in India have come to be characterised by a collaborative approach, procedural flexibility, judicially supervised interim orders and forward-looking relief. Judges in their activist avatar reach out to numerous parties and stakeholders, form fact-finding, monitoring or policy-evolution committees, and arrive at constructive solutions to the problems flagged for their attention by public-spirited citizens. Judges have tremendous power, in particular in public interest litigations, to design innovative solutions, direct policy changes, catalyse law-making, reprimand officials and enforce orders.
- 7.38 The Supreme Court is constitutionally empowered to 'make such order as is necessary for doing complete justice in any cause or matter pending before it'.¹²⁴ Judges are not hesitant to exercise this power in what they perceive as the public interest. The discretion and flexibility that the courts have arrogated to themselves in the context of public interest jurisdiction will enable them, when faced with a climate case, to tailor solutions to problems, evolve policy where a vacuum exists, and govern when they perceive a governance deficit. The case of *T. N. Godavarman v. Union of India* is a case in point. The Supreme Court defined a 'forest' in the absence of a definition in the Forest (Conservation) Act, 1980,¹²⁵ and in so doing, the Court extended the protective framework of the statute to *all* forests, irrespective of the nature of their ownership or classification.¹²⁶ It has since taken over the

¹¹⁹ *M. C. Mehta v. Union of India* (Taj Trapezium Case), W.P. No. 13381/1984.

¹²⁰ *M. C. Mehta v. Union of India* (Ganga Pollution Case), W.P. No. 3727/1985.

¹²¹ *M. C. Mehta v. Union of India* (Delhi Vehicular Pollution Case), W.P. No. 13029/1985, and *M. C. Mehta v. Union of India* (Delhi Industrial Relocation Case), W.P. No. 4677/1985.

¹²² *T. N. Godavarman Thirumulpad v. Union of India*, W.P. No. 202/1995.

¹²³ *Almitra Patel v. Union of India*, W.P. No. 888/1996.

¹²⁴ Article 142, The Constitution of India, 1950.

¹²⁵ (1997) 2 SCC 267, at 269.

¹²⁶ *Ibid*.

governance of the forests in India and passed numerous significant orders, including: that no forest, national park or wildlife sanctuary can be de-reserved without its explicit permission; and no non-forestry activity will be permitted in a national park or wildlife sanctuary even if prior approval under the Forest (Conservation) Act, 1980 has been obtained. It has also imposed complete bans on the movement of cut trees and timber from some states, and on felling of trees in 'any forest, public or private' in various hill regions.¹²⁷

- 7.39 In the recent past, the judiciary, has, however, struck a cautionary note. In *Divisional Manager, Aravalli Golf Club and Anor v. Chander Hass*, the Court chastised the judiciary for overreach, and advocated judicial self-restraint.¹²⁸ In *State of Uttaranchal v. Balwant Singh Chaufal*, the Supreme Court directed the High Courts to formulate rules to encourage genuine public interest litigations, and discourage those filed for extraneous reasons.¹²⁹ Although some limits to the use of public interest litigations may be in the offing, these will likely only weed out those claims that are filed for private reasons, personal gain and such like. The public interest culture, although straining the judicial system to its limits, is still alive and well.

Environmental law and regulation

- 7.40 India has a wide array of environmental laws,¹³⁰ and an extensive network of Central and State Pollution Control Boards, among other regulatory authorities, to govern them.¹³¹ The laws most relevant for current purposes are: the National Green Tribunal Act, 2010; the Environment (Protection) Act, 1986; the Air (Prevention and Control of Pollution) Act, 1981; and the Forest (Conservation) Act, 1980. Together these laws offer liberal access to litigants, a principled and environmentally benevolent framework, and numerous hooks for climate liability.

¹²⁷ Orders in n. 122 above. ¹²⁸ (2008) 1 SCC 683.

¹²⁹ (2010) 3 SCC 402.

¹³⁰ All environmental legislations are available at <http://envfor.nic.in/legis/legis.html>.

¹³¹ See e.g. the website of the Central Pollution Control Board, Government of India, www.cpcb.nic.in/.

- 7.41 The newly constituted National Green Tribunal has jurisdiction over 'all civil cases where a substantial question relating to environment (including enforcement of any legal right relating to environment) is involved' and arises in the context of a defined set of environmental laws, including those listed above.¹³² The Tribunal is empowered to hear appeals brought by 'any person aggrieved' by the decisions or orders of authorities under the air, water, biodiversity, environment and forest legislations.¹³³ In addition to the customary extension of 'person' to artificial juridical persons,¹³⁴ there is reason to believe that the courts, as they have in the past, will read 'aggrieved person' expansively. In *Prafulla Samantara v. Union of India*¹³⁵ the Delhi High Court held that the term 'aggrieved persons' includes 'public spirited interested persons, environmental activists or other such voluntary organisations working for the betterment of the community as a whole'.¹³⁶ A range of actors will in theory be able to approach the National Green Tribunal. It is worth noting, however, that the National Green Tribunal (Practices and Procedures) Rules, 2011, impose various burdensome procedural requirements, which may in practice deter claimants from appearing in person.¹³⁷ Nevertheless, dedicated climate litigants are likely to bring their claims before the Tribunal. Appeals lie from this Tribunal to the Supreme Court.¹³⁸
- 7.42 The Tribunal, while passing an order, is required to apply the principles of sustainable development, precaution and polluter pays.¹³⁹ These principles, discussed earlier, have been fleshed out in case law, and are considered part of the law of the land. The application of the precautionary principle, in particular, may prove beneficial to climate litigants. The Tribunal also has far-ranging powers to order relief and compensation to victims of pollution or environmental damage, for restitution of damaged property, and even for restitution of the damaged environment.¹⁴⁰

¹³² Section 14, National Green Tribunal Act, 2010.

¹³³ Section 16, *ibid.* ¹³⁴ Section 2(j), *ibid.*

¹³⁵ W.P.N. 3126/2008, Order dated 6 May 2009. ¹³⁶ *Ibid.*

¹³⁷ See e.g. Rules 8 and 13, National Green Tribunal (Practices and Procedures) Rules, 2011, available at <http://moef.nic.in/modules/recent-initiatives/NGT/>.

¹³⁸ Section 22, National Green Tribunal Act, 2010.

¹³⁹ Section 20, *ibid.* ¹⁴⁰ Section 15, *ibid.*

- 7.43 The Environment (Protection) Act, 1986, empowers the Central Government to take all necessary measures for protecting and improving the environment, and preventing, controlling and abating environmental pollution.¹⁴¹ The central government has issued several pieces of secondary legislation to regulate different aspects of the environment, including the Environment Impact Assessment notifications that may prove useful to climate litigants.
- 7.44 The Environment Impact Assessment regime in India requires a certain defined set of projects to obtain environmental clearances from either the Ministry of Environment and Forests or the state-level Environment Impact Assessment Authority, depending on the size of the project, before commencing operations.¹⁴² These authorities rely on data gathered and scrutinised by expert appraisal committees.¹⁴³ The expert appraisal committees are required to take account inter alia of the outcomes of public consultations in arriving at their recommendations.¹⁴⁴ Such public consultations provide avenues for civil society to introduce climate considerations into the decision-making process. Expert appraisal committees are also permitted to consider documents other than those submitted by the project proponent while making recommendations.¹⁴⁵ These documents could include evidence relating to the potential climate impacts of the project.
- 7.45 Any 'aggrieved person' can challenge the grant or denial of environmental clearances before the National Green Tribunal.¹⁴⁶ Clearances have been quashed before other fora on grounds such as: 'crucial impacts' were not taken into account;¹⁴⁷ public

¹⁴¹ Section 3, Environment (Protection) Act, 1986.

¹⁴² Gazette Notification for Environmental Impact Assessment, Ministry of Environment and Forests, Order, New Delhi, 14 September 2006. The following categories of projects, some if of a certain scale, require environmental clearances: mining, extraction of natural resources and power generation, primary processing, materials production and processing, building/construction/area/township development projects, oil/gas transportation, hazardous waste, manufacturing/fabrication and physical infrastructure.

¹⁴³ Section IV, *ibid.* ¹⁴⁴ Section III, *ibid.* ¹⁴⁵ Section IV, *ibid.*

¹⁴⁶ Section 16(h) and (i), National Green Tribunal Act, 2010.

¹⁴⁷ *Vimal Bhai v. Union of India*, Appeal Nos. 8, 9 and 10 of 2007, National Environmental Appellate Authority, Order dated 15 September 2010; *Pratap Singh Thakur v. MoEF*, Appeal No. 34 of 2009, National Environmental Appellate Authority, Order dated 30 August 2010. NEAA orders available at <http://ercindia.org/neaa.php>.

consultation procedure was improperly followed;¹⁴⁸ environmental impact was too great;¹⁴⁹ information submitted was false;¹⁵⁰ decision-granting clearance was not reasoned;¹⁵¹ and data provided was inadequate to judge the environmental impact.¹⁵² In cases where clearances have been granted without due consideration of GHG intensity or footprints of particular projects, litigants could challenge the clearance on the grounds that these 'crucial impacts' were not taken into account. It is worth noting that notwithstanding this seemingly progressive framework, only 1 per cent of applications for environmental clearances are currently rejected.¹⁵³ To take an example, of the fifty-eight coal mining projects seeking environmental clearances in 2009–10, thirty-one were approved, none were rejected, and the rest are pending.¹⁵⁴

- 7.46 The Air (Prevention and Control of Pollution) Act, 1981, defines air pollutant as 'any solid, liquid or gaseous substance including noise present in the atmosphere in such concentration as may be or tend to be injurious to human beings or other living creatures or plants or property or environment'.¹⁵⁵ Although this has yet to be done, arguably, GHGs could be covered, through judicial interpretation, under this definition, and regulated. The American Environment Protection Agency, following the landmark case of *Massachusetts v. EPA*,¹⁵⁶ found that GHG emissions from moving vehicles are 'reasonably likely' to threaten public health and welfare, therefore certified six GHGs as pollutants, and proceeded

¹⁴⁸ *Prafulla Samantra v. Union of India*, Appeal No. 18 of 2009, National Environmental Appellate Authority, Order dated 15 September 2010.

¹⁴⁹ *Gomantak Shetkari Sangathana v. Union of India*, Appeal No. 30 of 2009, National Environmental Appellate Authority, Order dated 15 July 2010.

¹⁵⁰ *T. Mohana Rao v. Union of India*, Appeal Nos. 1–6 of 2010, National Environmental Appellate Authority, Order dated 14 July 2010.

¹⁵¹ *Utkarsh Mandal v. Union of India*, W.P. No. 9340/2009 & C.M. Appl. Nos. 7127/09, 12496/2009, Decision dated 26 November 2009.

¹⁵² *Balachandra Bhikaji Nalwade v. Union of India & Others*, W.P. No. 388/2009, Decision dated 18 July 2009.

¹⁵³ Tabulated based on information provided to Shibani Ghosh by the Ministry of Environment and Forests in response to a series of Right to Information applications filed in 2010. See Press Note, 'There is Still Only One in a Hundred Chance of Having Your EC Rejected', available at www.ercindia.org.

¹⁵⁴ *Ibid.*, Ministry of Environment and Forests Letter dated 15 November 2010.

¹⁵⁵ Section 2(a), Air (Prevention and Control of Pollution) Act, 1981.

¹⁵⁶ *Massachusetts v. EPA*, 549 US 497 (2007); see Chapter 20.

to regulate these under the Clean Air Act, 1970.¹⁵⁷ A similar interpretation to 'air pollutants' under the Air (Prevention and Control of Pollution) Act, 1981, would permit relevant authorities under this legislation to inter alia lay down 'standards for emission of air pollutants into the atmosphere from industrial plants and automobiles or for the discharge of any air pollutant into the atmosphere from any other source whatsoever not being a ship or an aircraft'.¹⁵⁸

- 7.47 The Forest (Conservation) Act, 1980,¹⁵⁹ restricts the conversion of forestland to non-forest use. State governments have to seek prior approval from the central government before de-reserving forestland, permitting non-forest use, or assigning it for private use.¹⁶⁰ The Supreme Court has carved a role for itself in forest conservation.¹⁶¹ State governments are required to obtain permission from the Supreme Court for de-reserving forestland.¹⁶² The central government relies on the recommendations of a government-appointed Forest Advisory Committee in making decisions relating to such approvals.¹⁶³ The Committee can consider, inter alia, the potential climate impacts caused by the diversion of forest land to non-forest purposes, for instance the impacts attributable to the submergence of forest land by a hydro power project. 'Aggrieved persons' can challenge approvals, possibly on climate-related grounds, granted by the Central Government, before the National Green Tribunal.¹⁶⁴

Judicial review

- 7.48 Public bodies take numerous decisions, in the course of exercising their functions, that will likely have an impact, direct or indirect, on climate change. They may take decisions approving the setting-up of coal-based power plants or permitting forestland

to be cleared for mining. Climate litigants may wish to challenge such decisions by seeking judicial review of administrative action. There are various techniques available to do so – writs, appeals for review, references to courts, injunctions, declarations, suits for damages for tortious actions (of government bodies/employees), etc. Of these, the technique most favoured is that of writs.¹⁶⁵ The two most relevant, for current purposes, would be that of *mandamus*¹⁶⁶ and *certiorari*.¹⁶⁷ A writ of *mandamus* may be issued to compel the performance of a public legal duty by a public authority¹⁶⁸ while the writ of *certiorari* may be issued to quash a decision of a body, administrative or quasi-judicial, that affects the rights or interests of any person.¹⁶⁹

Grounds for judicial review

- 7.49 Judicial review of administrative action can be sought on several grounds, including:¹⁷⁰ illegality; irrationality; proportionality; and procedural impropriety.
- 7.50 *Illegality*: The decision of an administrative body or the exercise of its discretionary powers may be considered illegal if the body acted without jurisdiction, failed to exercise its jurisdiction, or abused its jurisdiction or discretionary powers.¹⁷¹ In the climate context, abuse of discretionary power due to non-inclusion of relevant considerations and non-application of mind by the administrative body may prove useful. If the statute lays down considerations, express or implied, which have to be taken into account by an administrative body while exercising its discretionary powers, the non-inclusion of such relevant considerations would render the decision illegal.¹⁷² Even if the statute does

¹⁵⁷ See Chapter 20.

¹⁵⁸ Section 17(g), Air (Prevention and Control of Pollution) Act, 1981.

¹⁵⁹ For a comprehensive study of the Supreme Court's interventions in the area of forest regulation, see generally R. Dutta and B. Yadav, *Supreme Court on Forest Conservation*, 3rd edn (Delhi: Universal Law Publishing, 2011).

¹⁶⁰ Section 2, Forest (Conservation) Act, 1980.

¹⁶¹ *T. N. Godavarma Thirumulpad v. Union of India*, W.P. No. 202/1995.

¹⁶² *Ibid.* ¹⁶³ Section 3, Forest (Conservation) Act, 1980.

¹⁶⁴ Section 16(e), National Green Tribunal Act, 2010.

¹⁶⁵ G. P. Singh and A. Aradhe, *M. P. Jain & S. N. Jain: Principles of Administrative Law*, 6th edn (LexisNexis Butterworths Wadhwa Nagpur, 2010), p. 495.

¹⁶⁶ *Comptroller and Auditor-General of India v. K. S. Jagannathan* (1986) 2 SCC 679.

¹⁶⁷ *T. C. Basappa v. T. Nagappa* AIR 1954 SC 440.

¹⁶⁸ M. P. Jain, *M. P. Jain & S. N. Jain: Principles of Administrative Law*, 6th (enlarged) edn, 2 vols. (LexisNexis Butterworths Wadhwa Nagpur, 2007 (reprinted 2010)), vol. II, p. 2149.

¹⁶⁹ *Ibid.*, p. 2177.

¹⁷⁰ *Tata Cellular v. Union of India* (1994) 6 SCC 651.

¹⁷¹ I. P. Massey, *Administrative Law*, 7th edn (Lucknow: Eastern Book Company, 2008), pp. 394–6.

¹⁷² *Ranjit Singh v. Union of India* AIR 1981 SC 461; *K. Shanmugam v. SKVS (P) Ltd* AIR 1963 SC 1626; *Sachidananda Pandey v. State of West Bengal* AIR 1987 SC 1109.

not lay down such considerations but provides general powers to the body, the courts may still read in relevant considerations and quash the decision of the body.¹⁷³ Relevant considerations may also be gauged from the facts and circumstances of the case, the aims and objectives of the statute and the impact of the decision/action.¹⁷⁴ In the context of decisions affecting the environment, the latest scientific data and technical reports testifying, for instance, to adverse environmental impacts of a project are relevant considerations that the decision-making authority is required to take account of.

- 7.51 An administrative decision can also be challenged when the authority has not applied its mind to relevant considerations,¹⁷⁵ when it acts mechanically,¹⁷⁶ or it acts under dictation.¹⁷⁷ If the government mechanically permits an industry or process without applying its mind to the potential climate impacts, its decision may be challenged before the courts as illegal.
- 7.52 *Irrationality* (or *Wednesbury* unreasonableness): A further ground on which an administrative decision can be challenged is irrationality. For an administrative decision to be considered irrational, the court has to hold, on material, that the decision is so outrageous as to be in total defiance of logic or moral standards.¹⁷⁸ The intervention of the court in such cases is limited to an examination of the decision-making process, not the decision. If the court finds that the administrator acted illegally, did not perform his/her primary role well, either omitted relevant factors or took irrelevant factors into consideration, or his/her view is one which no reasonable person could have taken, then the court may quash the decision as being arbitrary and in violation of Article 14 of the Constitution.¹⁷⁹ In a climate context, if it can

be shown that the authority, despite enjoying the discretion, did not consider relevant climate change policies and reports while granting regulatory approvals or making policy choices, a case for irrationality could be made.

- 7.53 *Proportionality*: The test of proportionality permits the courts to undertake a closer scrutiny of the administrative decision-making process than that merited by the *Wednesbury* test. Since this necessarily leads to a greater intervention in what is otherwise the executive's domain, the courts apply the test of proportionality principally in the context of fundamental rights.¹⁸⁰ The Supreme Court explains 'proportionality' as 'whether, while regulating exercise of fundamental rights, the appropriate or least restrictive choice of measures has been made by the legislature or the administrator so as to achieve the object of the legislation or the purpose of the administrative order, as the case may be'.¹⁸¹ In recent years, the Supreme Court has held in some cases that the *Wednesbury* test has given way to the proportionality test.¹⁸² But this position remains contested.¹⁸³ As climate-related claims are likely to be founded on the fundamental right to life, the courts are likely to apply the proportionality test.
- 7.54 *Procedural impropriety*: A decision of an administrative body can be reviewed on the ground that the procedure as stated in the law has not been followed. If a statute prescribes a procedure for exercise of power, the statutory authority must exercise its power in a manner prescribed or not at all.¹⁸⁴ Even if there is no statutory requirement, administrative bodies are expected to be just, fair and reasonable in their dealings or they could fall foul of Articles 14, 19 and 21 of the Constitution which have been read together to provide protection to the principles of natural justice.¹⁸⁵

¹⁷³ *Siddharam Satlingappa Mhetre v. State of Maharashtra* AIR 2011 SC 312.

¹⁷⁴ G. P. Singh and A. Aradhe, M. P. Jain & S. N. Jain: *Principles of Administrative Law*, p. 640.

¹⁷⁵ *Kanchanlal Maneklal Chokshi v. State of Gujarat* AIR 1979 SC 1945.

¹⁷⁶ *Chairman, Board of Mining Examination v. Ramjee* (1977) 2 SCC 256, at 262.

¹⁷⁷ *State of NCT of Delhi v. Sanjeev* (2005) 5 SCC 181, at 190.

¹⁷⁸ *Indian Railway Construction Co. Ltd v. Ajay Kumar* (2003) 2 SCC 579, at 591 (following Lord Diplock in *Council of Civil Service Unions v. Minister for the Civil Service* [1984] 3 All ER 935); *Chairman, All India Railway Rec. Board v. K. Shyam Kumar* (2010) 6 SCC 614.

¹⁷⁹ *Om Kumar v. Union of India* (2001) 2 SCC 386, at 411.

¹⁸⁰ *Union of India v. G. Ganayutham* (1997) 7 SCC 463.

¹⁸¹ *Om Kumar v. Union of India* (2001) 2 SCC 386, at 399.

¹⁸² *State of UP v. Sheo Shanker Lal Srivastava* (2006) 3 SCC 276; *Indian Airlines Ltd v. Prabha D. Kanan* (2006) 11 SCC 67; *State of Madhya Pradesh v. Hazarilal* (2008) 3 SCC 273.

¹⁸³ *Chairman, All India Railway Rec. Board v. K. Shyam Kumar* (2010) 6 SCC 614.

¹⁸⁴ *Indian Banks' Association, Bombay v. M/s Devkala Consultancy Service* AIR 2004 SC 2615.

¹⁸⁵ *Maneka Gandhi v. Union of India* AIR 1978 SC 597.

Other aspects of judicial review

- 7.55 Writs are commonly dismissed on the ground that the plaintiff lacks standing, there is unreasonable delay, or that an alternative efficacious remedy exists. Cases raising climate claims are unlikely to be affected by these grounds. First, Indian courts take, as we have seen, a liberal approach to standing.¹⁸⁶ Second, Articles 32 and 226 of the Constitution do not prescribe a reasonable timeframe within which a case must be brought before the court. Besides, in climate and environmental claims, the cause of action will likely be ongoing, and if there is illegality it is likely to be continuing.¹⁸⁷ Third, as one of the issues in a climate claim is likely to be the violation of the fundamental right to life, the existence of an alternative efficacious remedy is not a ground for the court to reject a writ before it.¹⁸⁸

(C) Private law

- 7.56 There have been no significant private law claims in India based on allegations of actual or anticipated damage from climate change. However, should claimants be inclined to bring such claims, the two torts that offer promise are nuisance and negligence. The essential elements of both torts are drawn from the common law principles of tort evolved by the courts in England, and applied to the extent of their suitability and applicability to Indian conditions.¹⁸⁹

Nuisance

- 7.57 Although there is no strict definition of the tort of nuisance, it may be defined as 'an inconvenience that materially interferes with the ordinary physical comfort of human existence'.¹⁹⁰ The

Supreme Court has identified the essential elements of nuisance as an unlawful act, and damage, actual or presumed.¹⁹¹

- 7.58 There are two kinds of nuisance – public nuisance and private nuisance. Public (or common) nuisance according to the Indian Penal Code, 1860 is an act or illegal omission which 'causes any common injury, danger or annoyance to the public or to the people in general who dwell or occupy property in the vicinity, or which must necessarily cause injury, obstruction, danger or annoyance to persons who may have occasion to use any public right'.¹⁹² Private nuisance affects one or more individuals rather than a large group.
- 7.59 Public nuisance may offer some (limited) hope to climate litigations. For a claim to be successful the damage need not already have occurred. It is sufficient if there is an imminent danger to the health or the physical comfort of the community in the locality in which the trade or occupation causing the nuisance is conducted.¹⁹³ In *Kuldip Singh v. Subhash Chander Jain*, the Supreme Court held that '... a future nuisance to be actionable must be either imminent or likely to cause such damage as would be irreparable once it is allowed to occur ...'.¹⁹⁴ This will prove useful in climate-related litigation, as the damage, while not imminent, is potentially irreparable.
- 7.60 Both civil and criminal remedies are available in public nuisance cases. The Code of Civil Procedure, 1908, provides that the Advocate General or, with the permission of the court, even persons to whom no damage has been caused, can file a suit.¹⁹⁵ This may prove useful to civil society in filing climate-related claims. However, this provision is not widely used in this fashion due to the lengthy delay in bringing civil proceedings to a close, and the liberal access provided to higher courts in India. Cases of public nuisance can also be pursued and addressed under criminal law.¹⁹⁶

¹⁸⁶ G. P. Singh and A. Aradhe, *M. P. Jain & S. N. Jain: Principles of Administrative Law*, pp. 550–3.

¹⁸⁷ *H. D. Vora v. State of Maharashtra* AIR 1984 SC 866.

¹⁸⁸ *Mumtaz Post Graduate Degree College v. Vice Chancellor* (2009) 2 SCC 630.

¹⁸⁹ *Rajkot Municipal Corporation v. Manjulben Jayantilal Nakum* (1997) 9 SCC 552; *Gujarat State Road Transport Corporation v. Ramanbhai Prabhatbhai* (1987) 3 SCC 238.

¹⁹⁰ *Vasant Manga Nikumba v. Baburao Bhikanna Naidu (Deceased)* by LRs. 1995 Supp. (4) SCC 54, at 56.

¹⁹¹ *Rafat Ali v. Sugni Bai* AIR 1999 SC 283 (quoting from *Halsbury's Laws of England*).

¹⁹² Section 268, Indian Penal Code, 1860. The texts of all Indian laws are available at <http://indiacode.nic.in/>.

¹⁹³ *Suhelkhan Khudyarkhan v. State of Maharashtra* (2009) 5 SCC 586.

¹⁹⁴ AIR 2000 SC 1410. ¹⁹⁵ Section 91, Code of Civil Procedure, 1908.

¹⁹⁶ Chapter XIV, Indian Penal Code, 1860; Sections 133–144, Code of Criminal Procedure, 1973; and special or local laws. See *Suhelkhan Khudyarkhan v. State of Maharashtra* (2009) 5 SCC 586.

- 7.61 In a landmark case on nuisance, the Supreme Court directed a municipality to remove the public nuisance caused due to lack of sanitation and drainage facilities and improper disposal of factory effluents.¹⁹⁷ The municipality pleaded lack of funds but the Supreme Court held that financial inability did not exonerate the municipality from statutory liability.¹⁹⁸
- 7.62 The law of public nuisance may therefore offer some promise for climate litigants. While it may be difficult to prove imminent danger related to GHG emissions, it may be possible to demonstrate irreparable damage. It could also be argued that since emission of pollutants constitutes a nuisance, by logical extension emission of GHGs can also be construed to be a nuisance.

Absolute liability

- 7.63 The Supreme Court in a landmark decision in 1987 fashioned a new rule of tortious liability that has come to be characterised as 'absolute liability'.¹⁹⁹ The court held that where an enterprise is engaged in a hazardous or inherently dangerous industrial activity and harm results on account of an accident in the operation of such hazardous or inherently dangerous activity, the enterprise is strictly and absolutely liable to compensate all those who are affected by the accident.²⁰⁰ Unlike the principle laid down in *Rylands v. Fletcher*, the absolute liability principle does not require an 'escape' of the thing (causing the harm) from the premises. Further, the enterprise is held liable irrespective of the care taken by it to prevent the accident.²⁰¹ Indeed none of the exceptions allowed by the rule of strict liability in *Rylands* apply in the case of absolute liability.²⁰² The justification for this type of liability is that a non-delegable duty is owed to the community to ensure that highest standards of safety are maintained.²⁰³ In addition, the enterprise alone is in a position to prevent and discover any harm and send out warning signals against potential

- harm.²⁰⁴ The court, to achieve deterrence, also held that the quantum of compensation should depend on the 'magnitude and capacity' of the enterprise.²⁰⁵
- 7.64 In *Indian Council for Enviro-Legal Action v. Union of India*²⁰⁶ the Supreme Court held chemical industry units absolutely liable for discharging waste in the surrounding areas, polluting the soil and water, and thereby adversely affecting people living in the vicinity. The Supreme Court also, for the first time, relied on the principle of 'polluter pays' and held the industries responsible not only for compensating the victims but also for repairing the damage caused to the environment and restoring the water and soil to the condition it was in before the units commenced their operations.²⁰⁷ In *Deepak Nitrite v. State of Gujarat*, the Court broadened the basis of compensation and held that 'compensation to be awarded must have some broad correlation not only with the magnitude and capacity of the enterprise, but also with the harm caused by it'.²⁰⁸
- 7.65 These cases, and concepts – both of absolute liability and polluter pays – are useful tools in the arsenal of public interest environmental litigants. However, since claims can only be brought once the damage has been caused, they may prove useful only in a subset of climate-related claims.

Negligence

- 7.66 Negligence is both a tort and a crime (some forms of it are offences under the Indian Penal Code).²⁰⁹ As a tort, it has been defined as the breach of duty caused by the omission to do something that a reasonable man, guided by those considerations that ordinarily regulate the conduct of human affairs, would do, or doing something that a prudent and reasonable man would not

¹⁹⁷ *Municipal Council, Ratlam v. Vardichan* (1980) 4 SCC 162, at 163–4.

¹⁹⁸ *Ibid.*, at 170.

¹⁹⁹ *M. C. Mehta v. Union of India* (1987) 1 SCC 395.

²⁰⁰ *Ibid.*, at 421. ²⁰¹ *Ibid.*

²⁰² *Ibid.* ²⁰³ *Ibid.*, at 420–1.

²⁰⁴ *Ibid.* ²⁰⁵ *Ibid.*

²⁰⁶ (1996) 3 SCC 212, at 246; see application of the principle in *Jaipur Golden Gas Victims v. Union of India* 164 (2009) DLT 346; *Nagrik Sangarsh Samiti and Ors v. Union of India and Ors*, W.P. No. 3499/2005 MANU/DE/0965/2010; *State of J & K v. Zarda Begum and Ors* 2003 (1) JKJ 706.

²⁰⁷ *Indian Council for Enviro-Legal Action v. Union of India* (1996) 3 SCC 212, at 247–8.

²⁰⁸ (2004) 6 SCC 402, at 407.

²⁰⁹ Sections 269, 284–289 and 304A, Indian Penal Code, 1860.

do.²¹⁰ The Supreme Court has identified the elements of negligence as:

... whether the defendant owed a duty of care to the plaintiff, whether the plaintiff is a person or a class of persons to whom the defendant owed a duty of care, whether the defendant was negligent in performing that duty or omitted to take such reasonable care in the performance of the duty, whether damage must have resulted from that particular duty of care which the defendant owed to the particular plaintiff or class of persons.²¹¹

- 7.67 The plaintiff has to establish that the defendant owes a duty of care. This requires the plaintiff to demonstrate foreseeability of the damage, a sufficiently proximate relationship between the parties, and that it is just and reasonable to impose such a duty.²¹² In addition there ought not to be any policy considerations that negative the existence of such a duty. The courts have held the concept of duty of care to be a fluid one, 'influenced and transformed by social, economic and political development'.²¹³
- 7.68 The breach of the duty of care has to lead to some damage – whether in the form of economic loss or damage to person or property. A cause of action for negligence only arises when damage occurs²¹⁴ and not on the date on which the negligent act took place.²¹⁵
- 7.69 The defendant's negligent act must have caused the damage. However, the defendant does not have to be wholly responsible for the damage. The courts have relaxed the causal rules in some instances. In the case of *Jaipur Golden Gas Victims v. Union of India*,²¹⁶ the Delhi High Court, relying on English²¹⁷

²¹⁰ G. P. Singh, *Ratanlal & Dhirajlal: The Law of Torts*, 26th edn (LexisNexis Butterworths Wadhwa Nagpur, 2010), p. 474.

²¹¹ *Rajkot Municipal Corporation v. Manjulben Jayantilal Nakum and Ors* (1997) 9 SCC 552, at 597–8.

²¹² *Ibid.*, at 579–80.

²¹³ *Jay Laxmi Salt Works (P) Ltd v. State of Gujarat* (1994) 4 SCC 1, at 12.

²¹⁴ *Kishorilal v. Chairman Employees State Insurance Corpn* (2007) 4 SCC 579.

²¹⁵ *Jay Laxmi Salt Works (P) Ltd v. State of Gujarat* (1994) 4 SCC 1, at 17.

²¹⁶ *Jaipur Golden Gas Victims v. Union of India* 164 (2009) DLT 346.

²¹⁷ *Bonnington Castings Ltd v. Wardlaw* [1956] AC 613; and *McGhee v. National Coal Board* [1973] 1 WLR 1, HL.

and Canadian cases,²¹⁸ held that the claimant does not have to prove that the defendant's breach of duty was the sole, or even the main, cause of damage, provided he/she can demonstrate that it made a material contribution to the damage. Although the Court borrowed and applied concepts from foreign law, it did not analyse these in sufficient detail or depth to permit sensible predictions on the direction in which causal rules will evolve. Suffice to say that the cases that the Court borrowed from find causation where a material contribution to the damage exists. They also equate a 'material contribution to the damage' to a 'material increase in the risk' of the damage occurring. This might prove helpful in climate claims, where proof of causation, given multiple contributory factors and difficulties in attribution, hampers litigation. For instance, claims against power plants arguing that their indiscriminate GHG emissions, among other causes, have materially increased the risk of climate change and extreme weather events occurring, may, in the event of such events occurring, help locate liability and obtain compensation for victims.

- 7.70 For a climate claim based on negligence to be successful, the claimant would first have to establish proximity and foreseeability of damage. The person causing the GHG emission would have to be aware of the foreseeable damage that could be caused due to increased GHG emissions. Although the damage suffered by the plaintiff as a result of climate change (higher risk of disease, rising sea level, increases in extreme weather conditions etc.) may have several contributory factors, the relaxed causal rules in operation may allow the claim of the plaintiff to proceed.

- 7.71 Where negligence is proven, the courts can award damages that could be nominal, substantial or exemplary.²¹⁹ An injunction may also be sought to prevent the further infringement or disturbance of a right or prevent continued breach of duty of care leading to negligence.²²⁰

²¹⁸ *Jon Athey v. Ferdinando Leonati & Kevin Johnson* [1996] 3 SCR 458; and *Resurface Corp. v. Hanke* [2007] 1 SCR 333.

²¹⁹ G. P. Singh, *Ratanlal & Dhirajlal: The Law of Torts*, pp. 209–11.

²²⁰ Governed by provisions of the Specific Relief Act, 1963 and the Code of Civil Procedure, 1908.

(D) Other law

Criminal law

- 7.72 The Indian Penal Code, 1860, imposes a punishment on any person (including company, association etc.) who voluntarily vitiates the air in a manner which makes it harmful to the health of persons residing or carrying on business in the area.²²¹ This provision may be of limited use to climate litigants, for not only is there a requirement of physical proximity, but the fine that can be imposed is a mere 500 Rupees (approximately US\$ 10).

Competition law

- 7.73 Although the Competition Act was passed by Parliament in 2002, significant provisions of the Act such as Sections 3 (prohibition of anti-competitive agreements) and 4 (prohibition of abuse of dominant position) came into force only in 2009. The legislation is therefore recent and is yet to reach a stage when it can be creatively interpreted so as to prohibit competitive advantage that might be enjoyed by industries that are emission-intensive.

World heritage

- 7.74 India has twenty-three cultural sites and five natural sites that are part of the list of World Heritage Sites.²²² Changes in temperature and rising sea levels will likely have an adverse impact on historical monuments as well as the floral and faunal diversity of the heritage sites.²²³ One of the natural sites in India is the Sunderbans in West Bengal, featured on the cover of this book. Projected sea level rise due to climate change is the single largest threat to it.²²⁴ The mangroves forests of Sunderbans are known for their biodiversity, and increased salinity in the water would threaten their continued existence.²²⁵ The World Heritage

²²¹ Section 278, Indian Penal Code, 1860.

²²² A list of properties in India inscribed in the World Heritage List is available at <http://whc.unesco.org/en/statesparties/in>.

²²³ UNESCO, *Case Studies on Climate Change and World Heritage* (2007), pp. 12–14.

²²⁴ Note 25 above, at 97.

²²⁵ UNESCO, *Case Studies on Climate Change and World Heritage* (2007), p. 36.

Convention, 1972, ratified by India in 1977, obliges States to protect and conserve the identified heritage sites.²²⁶ This arguably includes action to reduce the impact of climate change on these sites.²²⁷

Unfair trade practices

- 7.75 Under Indian law, if any false or misleading statement about the standards, quality, composition, quantity etc. of a product is made orally, verbally or through visible representation, then it constitutes an unfair trade practice.²²⁸ A complaint against unfair trade practices can be made at specialised fora constituted under the Consumer Protection Act, 1986, by a consumer to whom such a good was sold, by a recognised consumer association, or even by the central or state governments.²²⁹ Orders can be issued by the competent forum for discontinuation of such practices.
- 7.76 There is no special law relevant to the field of advertising. However, the Advertising Council of India, a voluntary organisation of the advertising sector, has formulated a Code for Self-Regulation in Advertising.²³⁰ The Code states, inter alia, that: advertisements cannot distort facts or mislead consumers; they cannot abuse the lack of knowledge or experience of a consumer; and should not contain anything that is in breach of the law or omit anything that the law requires. Violation of the Code can be challenged before the Consumer Complaints Council set up under the Code. If the Council upholds a complaint against an advertiser and the advertiser does not comply with the Council's decision, the Council can report to the concerned government agency.²³¹

²²⁶ Articles 4, 5, World Heritage Convention, 1972.

²²⁷ Presentation by Janhwi Sharma, 'ASI and World Heritage', International Conference on Asian World Heritage Cities, 18–20 April 2010.

²²⁸ Section 2(1)(r)(1), Consumer Protection Act, 1986.

²²⁹ Section 12(1), *ibid*.

²³⁰ Available at www.ascionline.org/regulation/ASCI_Code_of_Self_Regulation.pdf.

²³¹ The procedure for processing a complaint against an advertisement, for contravention of the Code, is available at www.ascionline.org/procedure/procedure_1.htm.

- 7.77 The provisions of the Consumer Protection Act and the Code can be relied on in cases where companies such as those selling automobile as well as electrical and electronic equipment make claims with regard to their emissions, fuel/energy efficiency or their impact on the climate that may be false or misleading.

(E) Practicalities

- 7.78 This section provides an overview of the procedural aspects of the law and analyses whether the current state of law is procedurally amenable to climate claims.

Founding jurisdiction for a claim

- 7.79 The Civil Procedure Code, 1860, is the principal procedural legislation with regard to civil suits in India and therefore any tort-based climate change claim would be governed by it. For a person to be made a party to a civil suit, residence or domicile in India is not necessary. If the cause of action has arisen in India, the immoveable property with regard to which a compensation claim has been made is situated in India or if the defendant carries on business in India,²³² the suit can be brought before the appropriate civil court in India irrespective of the nationality or domicile of the defendant.
- 7.80 Criminal offences under the Indian Penal Code, 1860 can be tried either at the court in whose local jurisdiction the cause of action has arisen or at the court in whose local jurisdiction the consequences have been suffered.²³³ Therefore offences such as public nuisance and criminal negligence can be tried in Indian courts, if the act causing the nuisance or the criminally negligent act has been committed in India or if the impact of the act is felt in India. The residence, domicile and citizenship of the person responsible for the act are not relevant. The provisions of the Indian Penal Code, 1860, are equally applicable if the offences are committed outside India by an Indian citizen.²³⁴

²³² Section 19, Code of Civil Procedure, 1908.

²³³ Section 179, Code of Criminal Procedure, 1973.

²³⁴ Section 4, Indian Penal Code, 1860.

Enforcement

- 7.81 There are many ways in which a civil decree can be enforced in India – delivery of property; attachment and sale of property; appointment of receiver; arrest and detention in prison (if certain conditions are met).²³⁵ Decrees passed by foreign courts can be executed by Indian courts as if they were decrees passed by an Indian court if the foreign court is of a 'reciprocating territory'.²³⁶ However, if the decree is not conclusive the Indian courts can refuse to execute it.²³⁷ An arbitral award can be executed in the same way as any other civil decree.
- 7.82 Foreign arbitral awards can be enforced in India under the Arbitration and Conciliation Act, 1996. The court can refuse to enforce an award on certain grounds such as the enforcement of the award is contrary to public policy, the agreement for arbitration is not valid in law or the subject matter is not capable of settlement through arbitration in India. If the court makes a finding that the arbitral award is enforceable, then it is deemed to be a decree of the court.²³⁸

Ancillary orders

- 7.83 The Code of Civil Procedure, 1908 recognises the inherent power of courts to issue such orders as are necessary to meet the ends of justice.²³⁹ Among other orders, Indian courts have the power to issue temporary injunctions²⁴⁰ to restrain a defendant from causing any injury to the plaintiff or breach of contract during the continuance of suit proceedings.²⁴¹ They can issue injunction orders to restrain the commission of any act that is likely to damage property that is the subject matter of a suit.

²³⁵ Section 51 read with Order XXI, Code of Civil Procedure, 1908.

²³⁶ Section 44A, *ibid.*

²³⁷ Section 13, *ibid.* (explaining that a foreign decree can be found to be inconclusive on grounds such as incompetence of the decreeing court, violation of principles of natural justice, etc.).

²³⁸ Sections 49, 58, Arbitration and Conciliation Act, 1996.

²³⁹ Section 151, Code of Civil Procedure, 1908.

²⁴⁰ Sections 37–42, Specific Relief Act, 1963, and Order XXXIX, Code of Civil Procedure, 1908.

²⁴¹ Order XXXIX, Rule 2, *ibid.*

Courts can also pass interlocutory orders preserving property that is the subject matter of a suit or for inspecting and authorising a person to enter any property to take samples or undertake experiments necessary to bring to light full information and evidence.²⁴²

Litigation costs

- 7.84 Costs of litigation are generally borne by the litigants unless a person is entitled to legal services from the State.²⁴³ The courts have discretion to award costs.²⁴⁴ In case the court decides not to award costs then it has to state the reasons in its order.²⁴⁵ The court can also impose costs in cases of proven false and vexatious claims²⁴⁶ and deliberate delay.²⁴⁷

Obtaining information

- 7.85 In a civil suit, parties have to file copies of documents relied on by them to the court.²⁴⁸ The court has the power to order discovery either on its own or in response to an application filed with it. It can issue necessary directions with regard to delivery and answering of interrogatories (set of questions filed by either party), inspection, production, impounding and return of documents or other objects.²⁴⁹ It can even issue summons to a person required to give evidence or produce documents.²⁵⁰ In a criminal case, whenever the court or the officer in charge is of the opinion that certain documents or any other things are necessary for the case, summons or order may be issued.²⁵¹ Electronic records can also be summoned by the court.
- 7.86 The Indian Evidence Act, 1872 imposes certain restrictions on the disclosure of information derived from unpublished official records relating to affairs of the State and communication made

²⁴² Order XXXIX, Rule 7, *ibid.*

²⁴³ The Legal Services Authorities Act, 1987, in Section 12, lays down the criteria for providing legal services.

²⁴⁴ See Order XXA and Section 35, Code of Civil Procedure, 1908.

²⁴⁵ *Ibid.* ²⁴⁶ Section 35A, *ibid.*

²⁴⁷ Section 35B, *ibid.* ²⁴⁸ Order VII, Rule 14, *ibid.*

²⁴⁹ Section 30 read with Order XI, *ibid.*

²⁵⁰ *Ibid.* ²⁵¹ Section 91, Code of Criminal Procedure, 1973.

in official confidence.²⁵² However, if there is a conflict between the provisions of the Right to Information Act, 2005²⁵³ and the Indian Evidence Act, 1872, the former will override the latter.²⁵⁴

- 7.87 The Right to Information Act, 2005 provides statutory recognition to a hitherto uncoded fundamental right to information.²⁵⁵ This legislation is intended to promote transparency and accountability in the governance of the country.²⁵⁶ Citizens can file Right to Information applications seeking information from public authorities, i.e. government bodies and bodies that are owned, controlled or substantially financed by the government.²⁵⁷ Information can also be obtained from private bodies as long as these can be lawfully accessed by a public authority.²⁵⁸ Certain types of information are exempt from disclosure such as trade secrets, intellectual property etc.²⁵⁹ However, even exempt information can be provided if public interest warrants disclosure.²⁶⁰ The Right to Information Act, 2005 lays down a strict timeline within which the information has to be provided,²⁶¹ and non-compliance with the timeline, without reasonable cause, can lead to individual liability of the concerned official.²⁶²
- 7.88 The Right to Information Act, 2005 can be a useful mechanism to obtain information on actions initiated by government agencies to respond to climate change;²⁶³ on reasons, if on record, for governmental inaction; on decisions taken by such agencies which may result in GHG emissions or reduction in carbon sink, etc. This information would be admissible as evidence in litigation, and as the source would be the government, it would be difficult for the government to challenge its authenticity/accuracy.

²⁵² Sections 123, 124, Indian Evidence Act, 1872.

²⁵³ See paras. 7.87–7.90, below.

²⁵⁴ Section 22, Right to Information Act, 2005.

²⁵⁵ *State of Uttar Pradesh v. Raj Narain* AIR 1975 SC 865.

²⁵⁶ Preamble, Right to Information Act, 2005.

²⁵⁷ Section 2(h), *ibid.* ²⁵⁸ Section 2(f), *ibid.*

²⁵⁹ Section 8(1)(d), *ibid.* ²⁶⁰ Section 8(1)(d), (2), *ibid.*

²⁶¹ Section 19(1), (3), *ibid.* ²⁶² Section 20(1), (2), *ibid.*

²⁶³ The Right to Information Initiative of the Climate Revolution, a Gurgaon-based organisation, has filed several applications with the Ministry of Environment and Forests, the Prime Minister's Office and other government departments seeking information relating to the government's policy on climate change. The information received is publicly available at <http://climatrevolution.net/rti/>.

- 7.89 Government bodies are under an obligation to retain documents for a certain period of time. Each department is expected to formulate 'weeding out' rules clearly stating the length of time a type of record is to be maintained.²⁶⁴ Companies are also required to retain certain records for a stipulated length of time.²⁶⁵
- 7.90 Under the Right to Information Act, 2005, public authorities are under an obligation to *suo moto* disclose information relating to them – such as details about their organisation, functions, work practices, budget, remuneration of employees, recipients of concessions, minutes of meetings etc.²⁶⁶ The Companies Act, 1956 and other provisions of corporate law require companies to disclose certain information about the company.²⁶⁷ For instance, when there is a public issue of shares, the offer document would include important up-to-date information about the company – its history and corporate structure, shareholders agreements, details about the management etc. According to the disclosure requirements, the corporate structure must include information about environmental issues.

Conclusion

- 7.91 Climate-related claims have yet to be litigated in India. There are a few cases in which climate change is referred to, but only in passing. This situation may, however, be set to change. Climate change and its impacts are rapidly capturing the popular imagination in India. There is a growing recognition of the importance and urgency of the climate challenge, and a slew of climate policies and initiatives have been launched in response. India has an engaged and proactive civil society, an activist judiciary, a progressive body of enviro-legal jurisprudence and an unparalleled culture of public interest litigation.
- 7.92 There are several hooks in Indian law for climate-related claims to be litigated. It is but a question of time before these hooks are raised and explored before the courts. Of these hooks however,

²⁶⁴ The Public Records Act, 1993.

²⁶⁵ Companies (Preservation and Disposal of Records) Rules, 1966.

²⁶⁶ Section 4, Right to Information Act, 2005.

²⁶⁷ Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009.

the constitutional rights-based ones – whether in relation to an environmental right, or core rights to life, health, etc. – are most likely to be explored first. Not least because other cases can take up to fifteen years to be disposed of.²⁶⁸ Constitutional rights-based avenues, given the rich culture of judicial activism and public interest litigation prevalent in India, offer the most promise, and are therefore well worth tracking.

²⁶⁸ National Litigation Policy, Ministry of Law and Justice, Government of India (23 June 2010). There are currently 54,600 cases pending before the Supreme Court, and 41,83,731 cases before the High Courts (*Court News*, July–September 2010, available at http://supremecourtindia.nic.in/courtnews/2010_issue_3.pdf).