

CLIMATE CHANGE LITIGATION IN INDIA: SEEKING A NEW APPROACH THROUGH THE APPLICATION OF COMMON LAW PRINCIPLES

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ABSTRACT

The increase in the number of climate change litigation has come under the public scanner in recent times. Climate change litigation is marred by the scientific, economic, political questions which are considered as significant impediments in devising apposite litigation strategy. This paper is an attempt at identifying the present legal position of climate change litigation in India and mapping an overall prospective future. For the same, the author has confined his study to two legal systems of the world- the Unites States of America and India. The article argues that climate claims will have a strong footing in India in years to come depending upon working out an objective legal strategy based on some of the common law principles like public nuisance and negligence. Although, for critiques climate change litigation based on common law theory may still appear uncertain, the potentiality of such suits cannot be overlooked in providing a new dimension in entire climate change discussion.

I.] INTRODUCTION

An appropriate legal strategy needs to be structured in order to deal with climate change problem and the same may prove to be a key assignment for the legal fraternity in years to come. The role of the judiciary is particularly important in interpreting the existing laws for formulating a new legal approach in the backdrop of growing impact of greenhouse gas emissions, and the ever increasing economic activities affecting every facet of human productivity, daily life and ongoing global climate change negotiations.

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Although, the basic mechanism of how carbon dioxide and other greenhouse gases warm the planet has been well known to us for decades,¹ climate change emerged as a firm international agenda only by the late 1980s.² Thereafter, it took the international community more than a decade to develop a comprehensive legal framework to address the climate change issue globally.³ India's thriving economy and steadily growing emissions have made India one of the key players in climate change politics. This, in fact, underplays a critical fact, i.e. India's legal system has still not woken up to the scope of climate change litigation. Furthermore, the inability of the Indian judiciary's to handle such issues is another area of concern which has to be addressed adequately. It can be argued that common law actions like public nuisance or negligence can be the effective tools in the hands of judges to address the climate change issue in India particularly in the absence of articulated legislative provisions. A wide array of scholars, attorneys, and affected people are looking into the viability of these actions now.

This paper aims at identifying the present legal position of climate change litigation in India and mapping an overall prospective future. I have confined my study to two different legal systems in the world, United States of America and India because the first appropriately represents the affluent North and the latter its wanting Southern counterparts. These two prominent common law countries riding on the ethic of democracy have tremendous potentiality to shape world's legal ideas.

1 David Hunter, James Salzman and Durwood Zaelke, *International Environmental Law And Policy* (2002, 2nd ed.), at 590.

2 David Freestones, *The International Climate Change legal and Institutional Framework: An Overview*, in *Legal Aspects Of Carbon Trading: Kyoto, Copenhagen And Beyond* (David Freestones et al. eds., 2009) at 5.

3 1992 United Nations Framework Convention on Climate Change, 1771 UNTS 107; S. Treaty Doc No. 102-38; U.N. Doc. A/AC.237/18 (Part II)/Add.1; 31 ILM 849 was adopted at the United Nations Conference on Environment and Development (UNCED) that set forth a structure for the control and reduction of greenhouse gases for the first time. In 1997, 160 nations met in Kyoto to negotiate reductions in greenhouse gas emissions pursuant to the terms of the 1992 United Nations Framework Convention on Climate Change. The resulting agreement named Kyoto Protocol to the United Nations Framework Convention on Climate Change, UN Doc FCCC/CP/1997/7/Add.1, Dec. 10, 1997; 37 ILM 22 (1998) sets forth specific limits on emissions and probably most debated international environmental law document at present.

Part I of this article initiates the debate by marking out the increasing popularity of climate change litigation worldwide and its conceivable future in India. Part II further narrates the potentiality of such litigation. Part III seeks to draw a broad framework for climate change litigation by discussing some of the cases that originated in United States of America. Part IV takes the discussion forward by analysing the feasibility of applying US experiences on Indian litigation scheme. Part V focuses on social and ethical aspects that influence climate change litigation and finally, Part VI concludes the paper.

II.] CLIMATE CHANGE LITIGATION: POTENTIALITY AND POSSIBILITY

Climate change litigation finds its roots in liability claims as civil society is becoming aware of the fact that human actions and the emission of certain greenhouse gases into the atmosphere can lead to grim consequences for the environment, property and human health. It creates the possibility of future litigation against governments or corporations engaged in commercial activities. Once commenced, it raises whole new legal challenges of which both plaintiffs and the defendants must be aware.⁴ Climate change litigation can be spawned from:

- (a) a cause of action based on nuisance or negligence where climate change is the causal factor, which may raise liability issues;
- (b) an administrative law claim against a public authority challenging any action, inaction, breach of statutory duty or constitutional law or otherwise a failure on the part of the authority to regulate greenhouse gas emission properly;
- (c) other legal causes of action arising out of growing public awareness of climate change matters which can include alleged breaches of advertising regulations and standards in the course of making claims in respect of climate change, or alleged failure by companies, their directors or officers to adequately report climate change and other environmental impacts affecting company performance which can

4. Jose A Cofre, Nicholas Rock, Paul watchman, Dewey & LeBoeuf, *Climate Change Litigation*, in *Climate Change: A Guide To Carbon Law And Practice* (Paul Q Watchman ed. 2008) at 280.

lead to shareholders derivative actions or other regulatory actions that are consequential in nature.⁵

In India, the first two possibilities are already being explored but in entirely different environmental contexts and not as part of climate change litigation. Broadly speaking, in India the citizen has a choice of the following remedies to obtain redress in case of violation of his/her environmental right:

- (a) A common law action against the polluter including nuisance and negligence;
- (b) A writ petition to compel the authority to enforce the existing environmental laws and to recover clean up costs from the violator; or
- (c) Redressal under various Environmental Statutes like Environment (Protection) Act, 1986, Water (Prevention and Control of Pollution) Act of 1974, Air (Prevention and Control of Pollution) Act of 1981 etc.; or
- (d) Compensation under Public Liability Insurance Act, 1991 or the National Environment Tribunal Act, 1995 in the event of damage from a hazardous industry accident.⁶

Actions of nuisance and negligence are very common in India when it comes to check environmental pollution in the present scenario.⁷ But unfortunately, none of them have been used so far to include climate litigation purely. Nuisance can be of two types, private or public. A private nuisance takes place when one uses one's property in a manner that harms the property interests of others. Theoretically, if a company uses its property in a way that harms others' property interests by contributing to global warming, it can be held liable under private nuisance. Climate change, however, is a broad problem that has less to do with defendants' use of their property and that involves much less direct "annoyance" with

5. *Ibid*, 230.

6. Shyam Divan, Armin Rosencranz, *Environmentallaw And Policy In India: Cases, Materials And Statutes*, (2002, 2nd ed.) at 87.

7. Among all these remedies, the writ jurisdiction is more popular. The action in tort is rarely used and the statutory remedies are largely untried.

“neighbours.” Therefore, private nuisance does not seem like a good option for a climate change lawsuit. Public nuisance is a more appropriate remedy for climate change cases.⁸

III.] DRAWING INSPIRATION FROM AFFLUENCE: DOES THE MODEL WORK FOR US?

Over the last decade, the number of cases involving climate change has increased noticeably. Several cases have already been filed in national and international tribunals worldwide. United States has experienced a surge of this kind of litigation. *Massachusetts v. EPA*⁹ was one such case and the U.S. Supreme Court’s decision in the same has significantly altered the Government policy and re-drawn the litigation landscape. Massachusetts and several others brought claims against the U.S. Environmental Protection Agency (EPA) challenging the agency’s decision not to regulate GHG emissions from motor vehicles under the Clean Air Act, 1963. Massachusetts contended that under the Clean Air Act, EPA had the responsibility to regulate any air pollutant including greenhouse gases that can “reasonably be anticipated to endanger public health or welfare.”¹⁰ The U.S. Supreme Court decided that the Clean Air Act, 1963 does give EPA the power to regulate.

This case is a typical example where the Supreme Court of U.S.A. decided an administrative law question whereby avoiding a much disputed issue of scientific evidence for climate change.¹¹ Although, administrative law cases are not subject to Daubert Standard¹² and the Federal Rules of

8. David A. Grossman, *Warming Up to a Not-So-Radical Idea: Tort-Based Climate Change Litigation*, 28 Colum. J. Envtl. L. 1, (2003) at 52.

9. 549 U.S. 497 (2007).

10. Sec. 202 (a) of Clean Air Act, 1963 [provides that “the Administrator shall by regulation prescribe (and from time to time revise) in accordance with the provisions of this section, standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare”.]

11. Ryan Hackney, *Flipping Daubert: Putting Climate Change Defendants in the Hot Seat*, 40 Envtl. L. (2010) at 255.

12. *Id* at 265-269 (In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), the US Supreme Court established Daubert standard for the admissibility of scientific expert testimony. Daubert replaced the previous Frye Standard of “general acceptance

Evidence, they do help in making up the backdrop of climate change litigation in which common law actions proceed.¹³ However, establishing scientific evidence in climate change litigation is an important step in deciding the standing of the parties.

In U.S.A., for climate change cases the courts are still reluctant to touch the scientific question. Dealing with nuisance is, though, not uncommon there. The first of such kind brought on the common law action of public nuisance was *Connecticut v. American Electric Power Co.*¹⁴ In 2004, a coalition of states, private land trusts, and New York City sued a group of major electric power companies for their perpetration of climate change. They alleged that these power companies are the largest emitters of greenhouse gases (GHG) in the United States, collectively emitting 650 million tons of carbon dioxide each year; that carbon dioxide is the primary GHG; and that GHGs trap atmospheric heat and cause global climate change, which is an ongoing public nuisance that must be abated under federal or state common law. Plaintiffs sought a court order requiring defendants to cap and reduce their GHG emissions.¹⁵

The United States District Court for the Southern District of New York dismissed this case in 2005 as a non-justiciable political question before any scientific evidence could be presented.¹⁶ However, in September 2009, restoring the case, the Second Circuit Court of Appeals reversed the District Court's judgment. It held the political question doctrine did not bar the Court from considering the case and all plaintiffs had standing to bring "public nuisance" lawsuit against power companies for injuries caused by climate change.¹⁷ This decision does not address the final position

in the field" with a two-prong test derived from Federal Rule of Evidence 702, which addresses "Testimony by Experts." To be admissible under Daubert, expert testimony must be both reliable and relevant. A court first must ask whether the scientific methodology underlying the testimony is reliable--is it "ground[ed] in the methods and procedures of science" and "supported by appropriate validation." while Daubert challenges have primarily worked to the benefit of defendants, there is no reason why plaintiffs cannot use them in climate change litigation where the plaintiff's position is supported by the weight of the scientific evidence.)

13. *Ibid*, 261

14. 406 F. Supp. 2d 265 (S.D.N.Y. 2005).

15. *Id.*

16. *Ibid*, 271.

17. *Connecticut v. American Electric Power Co.*, 582 F.3d 309, 314-15 (2d Cir. 2009).

though, as rehearing is still pending in the Second Circuit Court where the plaintiffs have opportunity to pursue their claims further.

Another significant case on climate change based on the ground of nuisance is *Comer v. Murphy Oil USA*¹⁸ where a three-member panel of the Fifth Circuit Court revived a lawsuit filed by residents along the Mississippi Gulf coast against several corporations in the energy and fossil fuels industries, alleging they were responsible for property damage caused by Hurricane Katrina. Initially in 2007, the plaintiffs sought damages under the tort theories of unjust enrichment, civil conspiracy and aiding and abetting, public and private nuisance, trespass, negligence, and fraudulent misrepresentation and concealment. At the district court level, the defendants were successful in dismissing plaintiffs' complaint. The United States District Court for the Southern District of Mississippi granted the defendants' motions and dismissed the action on the ground that the plaintiffs did not have standing to raise political questions that should not be resolved by the judiciary. The Court also found that the harm was not traceable to individual defendants. On 16 October 2009, the U.S. Court of Appeals for the Fifth Circuit overturned a District Court dismissal in part, holding that the plaintiffs both have standing to raise at least three of the claims (nuisance, trespass, negligence), and that the claims are justiciable only to vacate the panel decision on March, 2010 deciding that it would itself consider the appeal from the District Court *en banc*.¹⁹

This recent development in *Comer v. Murphy Oil USA* is very important because this may set a parameter for climate litigation for the American courts in the future. Also it may provide an answer to the question whether a corporate entity can be made liable for catalysing devastating climatic incidents along with clarifying plaintiff's legal stand to bring a suit for such activities.

It is expected that scientific challenges may continue to affect climate change lawsuits based on public nuisance and negligence actions. It is also argued that plaintiffs may be successful by applying those common law theories. If it happens as expected, the damages and costs of adaptation

18. 585 F.3d 855 (5th Cir. 2009); Full text is available at <http://www.ca5.uscourts.gov/opinions/pub/07/07-60756-CV0.wpd.pdf> (last visited April 22, 2010)

19. See also *Kivalina v. Exxon Mobil Corp.*, et al., 2008 (Federal Common Law Public Nuisance 28 U.S.C. §§ 1331, 2201)

will be enormous and the interest in finding parties to pay those costs will likewise be enormous.²⁰

IV.] LAWS AS THEY STAND: AN UNCULTIVATED QUARTER

Environmental jurisprudence in India is an uneasy mixture of “willingness to protect environment and lack of environmental awareness”, “overabundant legislative efforts and slipshod enforcement process”, “constant gross violation of basic human rights and intense protest by the victims and stake-holders.” These jural opposites, connected to diametrically differing philosophies of democracy and socialism, provide an obscure picture of environmental law in India. The judiciary had remained as a bystander to environmental despoliation for more than two decades since the inception of modern environmentalism on Indian soil. It had started assuming a pro-active role only in 1980s. Since then development of Indian environmental jurisprudence has been heavily influenced by some of the most innovative judgments passed by the Indian courts.²¹

Locus Standi is an essential for initiating legal proceedings. According to the traditional rule, only a person whose own right was in jeopardy was entitled to seek remedy.²² Furthermore the matter that comes before a court must be a justiciable matter. This created hardship because as per this rule, a person claiming a public right or interest had to show that he or she had suffered some special injury over and above what members of the public had in general suffered. Therefore, injuries which are diffuse in nature e.g. air pollution affecting a large community were difficult to redress.²³ This traditional *locus standi* doctrine was also detrimental for the

20. Hackney, *supra* note 12, at 262

21. See, *M.C. Mehta v. Union of India*, AIR 1992 SC 382 (the Court gave direction to broadcast and telecast ecology programmes on the electronic media and include environmental study in school and college curriculum); See also *S. Jagannath v. Union of India*, AIR 1997 SC 811 (prohibiting non-traditional aquaculture along the coast); See also *T.N. Godavarman Thirumulkpad v. Union of India*, AIR 1997 SC 1228 (judicial supervision over the implementation of national forest laws).

22. Divan et al., *supra* note 8, at 134 (Stating that there are several narrow but notable exceptions to this traditional rule. For example, any person can move a writ of *habeas corpus* for the production of a detained person and a minor may sue through his or her parent or guardian.)

23. *Id.*

poor community of India as it disallowed any concerned citizen to sue on behalf of the underprivileged class in the court of law. Till date, the poor and underprivileged are unwilling to assert their environmental rights because of poverty, ignorance or fear of social or economic reprisals from the dominant class of community.²⁴

The liberalisation of the *locus standi* in India came with the emergence of Public Interest Litigation (PIL) which allows any public-spirited individual or institution, acting in good faith to move the Supreme Court and the High Courts for writs under Articles 32 and 226 of the Constitution respectively for judicial redress in public interest in case of violation of fundamental rights of a poor or underprivileged class who because of poverty or disability cannot approach the court. In the last 20 years, judiciary has extended the reach of PIL to the protection of the environment. The judiciary has interpreted Article 21 liberally to include an unarticulated right, i.e. the right to wholesome environment and more precisely right to enjoy pollution-free water and air and more.²⁵ The court has also integrated a right to a wholesome environment with nascent but emerging principles of international environmental law e.g. polluter pays principle,²⁶ the precautionary principle,²⁷ the principle of inter-generational equity,²⁸ the principle of sustainable development²⁹ and the notion of the

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24. Ramchandra Guha, Juan Martinez Alier, *Varieties Of Environmentalism: Essays North And South*, (1997) at 37 (stating that Lawrence Summer's 'the poor sell cheap' principle also has relevance in India. The market through so-called 'hedonic prices', i.e. the decrease in the cost of properties threatened by pollution, would point out that locations where the poor reside are more suitable for toxic waste dumping or setting up polluting industries or constructing large projects than locations where the rich live. Poor people accept cheaply, if not happily, nuisance or risks which other people would be ready to accept only if offered large amount of money.)
 25. Article 21, The Constitution of India; See also *Subash Kumar v. State of Bihar* (1991) 1 SCC 598; See also *Virender Gaur v. State of Haryana*, (1995) 2 SCC 577.
 26. See, *Indian Council for Enviro-legal Action v. Union of India* (Bichhri Case), (1996) 3 SCC 212 (describing polluter pays principle); See also *M.C. Mehta v. Kamal Nath*, (2000) 6 SCC 213, 220.
 27. See, *Vellore Citizens' Welfare Forum v. Union of India*, (1996) 5 SCC 647 (establishing precautionary principle); *Narmada Bachao Andolan v. Union of India*, (2000) 10 SCC 664, 727 (shifting the burden of proof to the industry).
 28. See, *State of Himachal Pradesh v. Ganesh Wood Products* (1995) 6 SCC 363 (establishing principle of inter-generational equity); See also *Indian Council for Enviro-legal Action v. Union of India* (CRZ Notification case), (1996) 5 SCC 281.

state as a trustee of all natural resources.³⁰ Certainly, this list is not exhaustive and represents a small number of environmental cases that have reached the Indian courts. No doubt, there are few more environmental issues in India yet to be included in the domain of PIL and climate change is one of them.³¹

Commenting on public nuisance further, it is known that it arises from an unreasonable interference with the general right of the public. Remedies against public nuisance are therefore, available to every citizen.³² In India, public nuisance so far has covered issues ranging from sewage cleaning problems to brick grinding operations, from hazardous waste management to untreated effluent discharges from factories. But climate change is still unexplored. It has to be further understood that in liability claims proceedings based on nuisance or negligence arising out of global warming, the plaintiff always faces problems establishing his standing because it is extremely difficult to set up a causal connection between the injury suffered by the plaintiff and defendant's emission of greenhouse gases. In United States, to establish standing in a Federal Court, a plaintiff must show that:-

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- (a) a particular injury has been suffered;
- (b) a causal connection exists between the injury and conduct complained of, so that the injury is fairly traceable to the challenged action of the defendant; and
- (c) it must be likely, as opposed to merely speculative, that a favourable court decision will relieve the injury complained of.

In *Massachusetts v. EPA*, Massachusetts was entitled to 'special solicitude' because of State's special quasi-sovereign interest in protecting all the earth and air within its domain. Ruling in favor of Massachusetts,

29. See, *M.C. Mehta v. Union of India* (Taj Trapezium Case), (1997) 2 SCC 353 (establishing principle of sustainable development); See also *Narmada Bachao Andolan v Union of India*, (2000) 10 SCC 664, 727.

30. See, *M.C. Mehta v Kamal Nath*, (1997) 1 SCC 288 (stating that state as a trustee of all natural resources).

31. Lavanya Rajamani, *Public Interest Environmental Litigation in India: Exploring Issues of Access, Participation, Equity, Effectiveness and Sustainability*, Oxford Journal of Environmental Law, Vol 19 No 3, (2007) at 295.

32. *Ibid*, 112.

33. Cofre *et al.*, *supra* note. 6, at 85.

Supreme Court of the United States held that Massachusetts, due to its “stake in protecting its quasi-sovereign interests” as a state, had standing to sue the EPA for potential damage caused to its territory by global warming.³⁴ It is surprising that in *Massachusetts* the question of standing was raised by the respondents first. The respondents used scientific uncertainty regarding climate change together with the alleged overall magnitude of the crisis to dispute petitioners’ claim. They contended that the impacts at state and local levels are too speculative because of the extent of both the space and time involved. Petitioners’ hypotheses, each of which is the subject of an active scientific debate, are reduced to conjecture by the inherent uncertainty of global events that will unfold between now and the time of the predicted injury.³⁵

The petitioners’ disagreement on the issue was prominent as they aptly pointed out issues like rising sea levels, depletion of the ozone layer contributing more to the global warming and melting of glaciers. All these are not trivial in nature and they affect us very adversely. The Supreme Court opined that petitioners had fulfilled the standing requirements. Massachusetts was not precluded from having a standing in the case because of the global nature of climate change.³⁶

The point that is noteworthy here is promoting the idea of environmental trusteeship. State is the trustee of all natural resources within its territory. In India, similar resonance is found in a case where Supreme Court declared that the State is the trustee of all natural resources which are by nature meant for public use and enjoyment. Public at large is the beneficiary of the seashore, running waters, airs, forests and ecologically fragile areas. The State as a trustee is under a legal duty to protect the natural resources.³⁷ This case illustrated a situation where a resort was built by Span Motels, on the bank of the Beas River between Kullu and Manali

34. See, *Massachusetts v. EPA*, *supra* note 10, at 17; Complete text is available at <http://www.supremecourt.gov/opinions/06pdf/05-1120.pdf> (Last visited April 21, 2010).

35. Hari M. Osofsky, *The Intersection of Scale, Science, and Law in Massachusetts v. EPA*, 9 Or. Rev. Int'l L. 233, 245-246 (2007).

36. *Ibid*, 246-247: Although the Court's holding on standing narrowly focuses on the interests of state parties, its approach to them scales down the problem of climate change and its regulation; this “global” phenomenon can cause harm at a state level and choices at a federal level influence the risks faced by states. \

37. *M.C. Mehta v. Kamalnath*, *supra* note 31.

in Himachal Pradesh. After getting the possession of the land which was in fact the part of protected forest, Span Motels carried out dredging and construction of concrete barriers on the bank of the river which in fact, changed the course of river causing ecological trouble. Consequently, Span Motels was directed to pay a pollution fine. Although, this judgment was on a different situation, it is opined that the same principle can be applied to climate change litigation as well. Judiciary in India by and large has placed environmental right on a high pedestal. That an ecological crisis precedes everything is reflected in another groundbreaking judgment by Supreme Court where it remembers the American tradition that puts government above big business, individual liberty above government and environment above all.³⁸

Also, remedies available in India for public nuisance, in general, are impressive. Section 268 of Indian Penal Code, 1860 provides the definition of public nuisance. According to the Section “a person is guilty of a public nuisance who does any act or is guilty of an 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.”³⁹ It again provides in the same Section that “a common nuisance is not excused on the ground that it causes some convenience or advantage.” Persons who conduct ‘offensive’ trades and thereby pollute the air, or cause loud and continuous noises that affect the health and comfort of those dwelling in the neighbourhood are liable to prosecution for causing public nuisance.⁴⁰ This, however, is less attractive because the penalty for is merely Rs. 200, which makes it pointless for a citizen initiate a prosecution under Section 268 of Indian Penal Code, 1860 by a complaint to a magistrate.⁴¹

A much better remedy is available under Section 133 of the Code of Criminal Procedure, 1973 which deals with the Conditional order from a magistrate for removal of nuisance. The Section empowers a magistrate to

38. See, Tarun Bharat Sangh, Alwar v. Union of India (Sariska Case) writ Petition (Civil) No. 509 of 1991.

39. Section 268, of Indian Penal Code, 1860

40. Divan et al., *supra* note 8, at 112.

41. A complaint may be made under Section 190, of the Code of Criminal Procedure, 1973. *Id.*

pass a 'conditional order' for the removal of public nuisance within a fixed period of time. The Magistrate may act on information received from a police report or any other source including a complaint made by a citizen.⁴² This Section provides an independent, speedy and summary remedy against public nuisance.⁴³ In the famous judgement of *Municipal Council, Ratlam v. Vardhichand*,⁴⁴ The Supreme Court of India has interpreted the language as mandatory.⁴⁵ Once the magistrate has before him the evidence of public nuisance, he must order to remove such within a specified time.⁴⁶ This is done with regard to water pollution where the Court directed the municipality to take immediate action to remove the nuisance. The same principle can also be applied in case of air pollution and it is not at all uncommon for the court in India to come down heavily on industries for polluting air. For example in Taj Trapezium Case⁴⁷ the Supreme Court of India forced certain polluting industries to relocate themselves because emission from those factories was damaging Taj Mahal, the famous ancient monument. The establishment of causal connection between the emission from factories and the damage sustained by the monument was relatively easy as the Court relied on an expert's report.⁴⁸

Now, imagine a situation where a town was pristine and pollution free. The people used to enjoy good health, un-contaminated food and water and cool weather even in hot summer. After some time an industrial belt was established nearby. As the industries starts operation the atmospheric pollution is also beginning to pile up. The weather of the locality is showing signs of being altered. The water supply, vegetation and fertility of the land are among things also affected. Health hazards like lung disease has become common. If these facts are provided to the court what it should do? Will it decide the matter simply on the basis of economic gain

42. Section 133, of Code of Criminal Procedure, 1973.

43. Divan et al., *supra* note 8, at 112.

44. AIR 1980 SC 1622.

45. *Id.*

46. *Id.*

47. *M.C. Mehta v. Union of India*, (1997) 2 SCC 353.

48. The court was assisted in its efforts to improve air quality around the Taj Mahal by the reports prepared by the NEERI (National Environment Engineering Research Institute), Gas Authority of India Limited (GAIL) on the supply of fuel gas to industries in the area and the study conducted by the Vardharajan Committee, which was constituted in May 1994, by the Ministry of Environment and Forest of India.

that those industries are generating for the country whereby avoiding the available facts and scientific data? Or will it rely on that data which is 'reliable and relevant' and the report of some expert to establish the causal connection between the industrial activities, atmospheric pollution and the climate change? Or even if the scientific data is unavailable or incomplete can the court still decide that this is a fit case for public nuisance? I have no doubt that the same principle which is used in Ratlam Case or Taj Trapezium Case can be used here as well. Hence, the respective authority has to work diligently to remove the cause of nuisance or court may order the polluting industry to alter its process or shut down or relocate or impose pollution fine on them.

The same can be said about an action for negligence that may be brought to prevent greenhouse gas emission. In an action for negligence, the plaintiff must show that the defendant was under a duty to take reasonable care to avoid the damage complained of and the defendant has made a breach of that duty resulting in the damage to the plaintiff. Negligence theory is closely connected to the concept of product liability as a manufacturer may be held liable in tort when it places a product on the market, knowing that it is to be used without inspection for defects, and the product proves to have a defect that causes injury to a person.⁴⁹

By and large, this type of claim appears to be a suit for a defect in design. The extent of a manufacturer's duty is defined by rational prudence and knowledge of potential risk of a product. It is the duty of the manufacturer to launch that product in the market which is designed safe for consumption by the potential buyer. However, climate change plaintiffs' may stumble at a roadblock if the defendants take the strong argument of state of the art facilities available at their manufacturing site. But at the same time, it is difficult to believe that manufacturers are unaware of the impact of their products on global warming. Though, they can always argue that their duties are usually restricted to those who are likely consumers but, when the products in question are automobiles, power, or fossil fuels, it is fair to say that virtually everyone is a foreseeable user.⁵⁰

An act of negligence may also constitute nuisance if it unlawfully interferes with the enjoyment of another's right in land. It may also breach of the rule of strict liability if the negligent act of defendant allows the

49. Grossman, *supra* note 10, at 47.

50. *Ibid*,48.

escape of any dangerous thing which he has brought on the land. Establishing causal connection between the negligent act and the plaintiff's injury is probably the most problematic link in pollution cases⁵¹ and in climate change matter it is even more difficult because of uncertainty of scientific data.

Further, looking into some of the environmental legislations, I venture to say that there are some provisions that can be very well used by the plaintiff in climate change litigation. For example, Environment (Protection) Act, 1986, an umbrella legislation designed to provide a framework for Central Government coordination of the activities of various central and state authorities established under previous laws, such as Water (Prevention and Control of Pollution) Act of 1974 and Air (Prevention and Control of Pollution) Act of 1981, in Section 2 (a) defines environment which "includes water, air and land, and inter-relationship which exists among and between water, air and land and human beings, other living creatures, plants, micro-organism and property."⁵² Sec. 2 (b) of the Act, provides that "environmental pollutant means any solid, liquid or gaseous substance present in such concentration as may be, or tend to be, injurious to environment"⁵³ In Sec 2 (c) it again provides that "environmental pollution means the presence in the environment of any environmental pollutant."⁵⁴ Air (Prevention and Control of Pollution) Act of 1981 is the principle statute that addresses air pollution problem specifically in India. The definitions of 'air pollutant' and 'air pollution' is very much similar with Environment (Protection) Act, 1986 with only addition that Air Act, 1981 does not provide specific emission norms and the same is provided under Environment (Protection) Act.

Moreover, establishing the causal connection between damage and emission by industries will be much easier if the court looks into the existing emission norms for different localities set by the government under various environmental statutes.

51. Divan et al., *supra* note 8, at 100

52. Sec. 2 (a) of Environment (Protection) Act, 1986

53. *Id.*

54. *Id.*

V.] SOCIAL AND ETHICAL DIMENSION

Climate litigation encompasses ethical, scientific, economic, social, and other complexities of the age. Lawyers bear the responsibility of making their clients aware of how climate change may have an effect on their rights. At the same time, as citizens, we have responsibilities of our own.⁵⁵ We need to be more conscious about intergenerational equity and our present and future responsibility, social, ethical and legal that may determine the potential winners or losers in climate change litigation.⁵⁶

My selection of the United States and India presents an interesting and contrasting social backdrop in this regard. As an ardent supporter of democracy, the United States expects its courts to remain reliable and adhere to democratic principles. No doubt there is some uncertainty about identification of democratic principles in environmental issues, climate litigation in particular.⁵⁷ The discussion there is mainly scaled down to who should be making decisions regarding climate change. Is it the court that should determine rights and responsibilities? Or should they leave all such choices to Congress or government agencies? Or should the citizens be allowed to challenge governmental action or inaction through the courts?⁵⁸

India, however, is still silent, as I have already suggested, on this issue. The trend in the United States may certainly be branded as a new variety of environmentalism addressing the more complex and contentious environmental problems like climate change for future generation. This is understandable as the triumph of environmentalism is very much reflected in laws it has repealed or enacted or altered nowhere more effectively than in United States.⁵⁹ Political scientist Richard Inglehart has described it as post materialistic trend.⁶⁰ In India, on the other hand, reaction against environmental degradation is mainly influenced by unequal exchange, poverty and population growth.⁶¹ Climate change as a recent phenomenon

55. See, Marilyn Averill, *Climate Litigation: Ethical Implications and Societal Impacts*, 85Denv. U. L. Rev. 899, 900 (2008).

56. *Ibid.*

57. *Ibid.*, 908.

58. *Id.*

59. See, Ramchandra Guha, *Environmentalism: A Global History*, (2001, 2nd rep.) (discussing the history of environmentalism).

60. Guha et al., *supra* note 25, at 34.

61. *Id.*

is yet to form a part of mainstream litigation here. It is undeniable that judicial activism of India in environmental matters actually has shaped the environmental law tremendously and owes its debt in many ways to the active social movements. This may be the reason why, in spite of possibilities, the nuisance or negligence or others yet to encompass climate change in them.

VI.] CONCLUSION

For India the egotistical propaganda regarding the urgent need for development has remained constant since Stockholm. Indeed, no one would dare to argue that the desire was unjust thirty or even fifteen years ago. But one can easily put forward a self-assessing question now: Has anything changed in 37 years? In the era of free trade with an expanding market, India is one of the hotspots for global economy. Consumer society in India is growing rapidly and so is the population of the country which is outweighing economic gain. One side of the coin represents the affluence and the other, the insidious misery of millions of the wretched poor inundated by “effluents of affluence”. Certainly, the meaning of development becomes paradoxical here unless backed by strong sense of self-determination. Knowing one’s environmental rights is of primary importance particularly in the milieu of rapid economic activities giving birth to new and complex ecological problems almost every day. This article only sought to outline a broad spectrum of the future of climate change litigation in India. The strategies discussed are not exhaustive yet may be treated as a starting point of the discussion. The prosperity ahead truly depends on the growing awareness of the common people and fashioning of foolproof risk management techniques. In the middle of the locus standi controversy, both plaintiffs and defendants acknowledge the importance of scientific data in legal schemes. Indeed, keeping in mind the growing importance of science, to establish public nuisance or negligence, the parties, lawyers and judges are needed to established a more simply structured standing doctrine.