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Corporate Climate Litigation in India: Traversing the Private-Public Law Divide

Umakanth Varottil

v.umakanth@nus.edu.sg

Professor, Faculty of Law, National University of Singapore

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Umakanth Varottil[*]

Abstract

From a normative perspective, the private-public law paradigm in the context of climate litigation offers elegant conceptual clarity, but a positive account reveals constant boundary-blurring. The goal of this chapter is to demonstrate this point using India as a case study. It finds significant challenges in parties' ability to bring private law claims of the conventional type grounded in common law in India. No private law claims have, therefore, arisen as yet in the realm of climate change. At the same time, private law concepts and principles have formed the bedrock of public law adjudication in India in dealing with issues pertaining to the environment, thereby performing a supporting role than playing the lead act. Equally, novel developments in public law in the climate space could infuse fresh life into private law concepts relevant to corporate climate litigation, thereby signifying a cross-pollination of ideas between private and public law.

Key words: private law, public law, environmental law, climate change, India, polluter pays principle, absolute liability, precautionary principle

1. Introduction

At a global level, litigation has emerged to the forefront in combating the adverse effects of climate change.[1] In one type of litigation, claimants assert "horizontal" rights against private actors (such as companies emitting greenhouse gases) that are based on private law.[2] These actions are generally brought before the civil courts invoking principles involving tort,

[*] Professor, Faculty of Law, National University of Singapore. I thank Olha O. Cherednychenko, Sroyon Mukherjee, and Param Pandya for comments on a previous draft of this paper. Any errors or omissions remain mine.

[1] Anita Foerster, 'Climate Justice and Corporations' (2019) 30 *King's Law Journal* 305, at 306.

[2] Robert F. Blomquist, 'Comparative Climate Change Torts' (2012) 46 *Valparaiso University Law Review* 1053, 1053.

property, contract or corporate law.[3] In another litigation type, claimants champion "vertical" rights premised in public law against the state whose actions are found to be inadequate in curbing the ill-effects of climate change.[4] From a normative perspective, the private-public law paradigm in the context of climate litigation offers elegant conceptual clarity, but a positive account reveals constant boundary-blurring.[5] The goal of this chapter is to demonstrate the point using India as a case study.

The chapter finds significant challenges in parties' ability to bring private law claims of the conventional type grounded in common law in the context of India. Not only are there substantive barriers in the form of requirements relating to causation and measure of damages, but significant procedural hurdles such as high costs of litigation and inordinate delays in India's ordinary civil courts tend to stymie claimants' efforts. No private law claims have, therefore, arisen in India as yet in the realm of climate change.[6]

At the same time, private law concepts and principles have guided India's higher judiciary while dealing with public law claims relating to the environment (and, by extension, to matters pertaining to climate change). These include the polluter pays principle, the precautionary principle and the rule of absolute liability in matters of tort law and stakeholder rights and corporate social responsibility in matters of corporate law.[7] In that sense, while private law has been inactive on a standalone basis, it has formed the bedrock of public law adjudication in dealing with issues pertaining to the environment, thereby performing a supporting role than playing the lead act.

The dominance of public law in climate litigation is attributable not only to claimants' choice of invoking the writ jurisdiction of High Courts and the Supreme Court (applicable to constitutional cases), which do not suffer as much from the inadequacies faced by civil

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3 Monika Hinteregger, 'Civil Liability and the Challenges of Climate Change: A Functional Analysis' (2017) 8(2) *Journal of European Tort Law* 238, at 245; Jim Rossi and JB Ruhl, 'Adapting Private Law for Climate Change Adaptation' (2023) 76 *Vanderbilt Law Review* 827, 831.

4 Marc-Phillipe Weller and Mai-Lan Tran, 'Climate litigation against companies' (2022) 1:14 *Climate Action* 1, 2-3.

5 Lee Godden, et al, "Law, Governance and Risk: Deconstructing the Public-Private Divide in Climate Change Adaptation' (2013) 36 *UNSW Law Journal* 224, 224.

6 Shibani Ghosh, 'Climate Litigation in India' in F. Sindico and M. M. Mbengue (eds), *Comparative Climate Litigation: Beyond the Usual Suspects* (Springer 2021) 347, 347.

7 These are discussed in detail in sections 3 and 4 below.

courts, but also to the judicial elasticity displayed by judges of higher courts in framing innovative solutions in constitutional law to intractable social and economic problems. Approaches adopted by the higher judiciary have also permeated the specialist National Green Tribunal (NGT) that has been legislatively tasked with adopting tort law ideas such as the polluter pays principle.

Overall, the chapter finds that the cross-over of private law into the public law domain, while conceptually unsatisfying, holds promise in overcoming the barriers to corporate climate litigation in India. At a conceptual level, as the chapter demonstrates, courts have veered away from well-established principles in tort law and corporate law, such as causation, measure of damages and the content of directors' duties, in devising somewhat unsystematic approaches on matters of environmental litigation, thereby further stultifying the growth of private law in the climate arena. At the pragmatic level however, the reshaping of private law principles in the hands of India's constitutional courts while adjudicating public law rights and duties could lead to further advancements in addressing issues of climate change where private law could play but a secondary role.[8] Equally, novel developments in public law in the climate space could infuse fresh life into private law concepts relevant to corporate climate litigation.

Section 2 of this chapter offers a background to the private-public law divide in India in the context of climate change, highlighting the nature of the interrelationship between the two legal bodies. Moving to specific areas of private law, section 3 focuses on the evolution of principles of tort law in public law litigation, but by drawing upon and extending doctrinal principles from common law. Section 4 addresses the debates in corporate law involving the stakeholder orientation of corporate boards in India under company law as well as the concept of social responsibility in tackling climate issues. Section 5 touches upon how contracts can not only be interpreted to address climate issues, but how regulatory nudges in the contractual arena can motivate parties to achieve net zero goals through the adoption of renewable energy. Section 6 brings all these areas of private law together and finds a cross-pollination of ideas with public law, the combination of which would provide a unique legal environment for corporate climate litigation in India, and section 7 briefly concludes.

[8] Pia Rebelo and Xavier Rebelo, 'Rights-Based Climate Change Litigation Against Private Actors' in Kim Bouwer, et al (eds), *Climate Litigation and Justice in Africa* (Bristol, UK: Bristol University Press, 2024) 191.

2. Climate Change and the Private-Public Law Divide in India

In 2024, the Supreme Court in *MK Ranjitsinh v. Union of India*[9] (hereinafter "*Ranjitsinh 2024*") recognised a "right against the adverse effects of climate change" as a fundamental right under the Indian Constitution.[10] It noted with reference to the Constitution:

> Article 21 recognises the right to life and personal liberty while Article 14 indicates that all persons shall have equality before law and the equal protection of laws. These articles are important sources of the right to a clean environment and the right against the adverse effects of climate change.[11]

This landmark ruling follows nearly four decades of Indian jurisprudence that recognised the right to a pollution-free environment.[12] In *Ranjitsinh 2024*, the Supreme Court took a monumental step by extending the right to a clean environmental to the broader remit of climate change. While recognising a distinct climate right, the Court observed that "this right and the right to a clean environment are two sides of the same coin".[13] This approach reemphasises that the jurisprudence surrounding environmental law continues to hold considerable sway in an analysis of the law pertaining to climate change.[14]

A key follow on question, one that is central to this chapter, is whether the so-called climate right is exercisable by affected parties only against the state (i.e., vertically) or even against private parties such as corporations that operate in a manner that amounts to a breach of the constitutional right (i.e., horizontally). The exercise of horizontal constitutional rights by affected parties would offer claimants an additional opportunity to assert their claim over and above horizontal rights they may have under private (common) law.

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9 2024 INSC 280.

10 For the sake of brevity, this is referred to henceforth as the "climate right".

11 *Ranjitsinh 2024* (n 9) [20].

12 See, *Rural Litigation and Entitlement Kendra, Dehradun v. State of U.P.* 1985 INSC 49.

13 ibid [24].

14 Parul Kumar, 'Striving Towards the "The Good Life": What Environmental Litigation in India Can Tell Us About Climate Litigation in the Global South' (2024) 13 *Transnational Environmental Law* 636, 647.

In an earlier ruling in *Kaushal Kishor v. State of Uttar Pradesh*,[15] the Supreme Court had occasion to examine whether constitutional rights have an impact over relationships between private actors (whether individuals or corporations). A five-judge (constitution) bench of the Court ruled that a fundamental right under Article 21 of the Constitution "can be enforced even against persons other than the State or its instrumentalities".[16] Such an approach grants the Indian judiciary's imprimatur to the horizontal application of the fundamental rights enshrined under the Indian Constitution.

A conjoint reading of the rulings of the Supreme Court in *M.K. Ranjitsinh 2024* and *Kaushal Kishor* leaves open the possibility that the constitutional climate right as articulated by the Supreme Court would be justiciable not just against the state but also against errant corporations,[17] in the latter case through the "horizontal effect".[18] Hence, victims of actions or inactions by corporations in the climate context can either bring a constitutional claim for breach of fundamental rights or can assert claims under private law (to the extent available).

An enthusiast of private law might be keen to determine the possibility of asserting climate rights through common law (or statute as applicable to private parties), but that question is less interesting in the Indian context for reasons this chapter elaborates later on. The more important question is how Indian private law will help shape the exercise of the constitutional climate right. The reason is that through a longstanding tradition of public interest litigation, the Indian courts have used tort law principles in case involving acts or omissions by the state, as it enables courts to award compensations to victims of violations of fundamental rights.[19] Effectively through a "merger of constitutional law and tort law",[20] the Indian Supreme Court's "approach in public interest litigation cases [has] started bearing a stark

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15 2023 INSC 4.

16 ibid [78] (*per* V. Ramasubramanian, J). However, a separate opinion cautioned that fundamental rights may not be justiciable horizontally in a constitutional case except where those rights have been statutorily recognised. ibid [43] (per B.V. Nagarathna, J).

17 Maya Nirula, 'Pioneering Decision from the Indian Supreme Court Recognizing Freedom from the Adverse Effects of Climate Change as a Fundamental Right' *Climate Law: A Sabin Center Blog* (28 August 2024): https://blogs.law.columbia.edu/climatechange/2024/08/28/guest-blog-pioneering-decision-from-the-indian-supreme-court-recognizing-freedom-from-the-adverse-effects-of-climate-change-as-a-fundamental-right/.

18 Stephen Gardbaum, 'Horizontal Effect' in Sujit Choudhary, et al, *The Oxford Handbook of the Indian Constitution* (Oxford: Oxford University Press, 2016) 609-610.

19 Shyamkrishna Balganesh, 'The Constitutionalisation of Indian Private Law' in Sujit Choudhary, et al, *The Oxford Handbook of the Indian Constitution* (Oxford: Oxford University Press, 2016) 686.

20 ibid.

resemblance to traditional private-law based tort claims."[21] At the same time, the Court's innovative focus on constitutional jurisprudence led to the dereliction of substantive private law, especially tort law.[22] This conundrum has been exacerbated by the fact that, when faced with the prospect of choosing between public law remedies and private law ones, claimants are prone to resort to constitutional actions because they are not only brought directly before the Supreme Court and the High Courts by way of writ actions, but the higher judiciary has also demonstrated a track record of devising innovative mechanisms for remedying breaches of constitutional rights.

Given this scenario, private law concepts under Indian law are likely to play a greater role enunciating horizontal constitutional claims brought against the state to which non-state actors such as corporations could be added as defendants against whom appropriate remedies are sought. In that sense, private law principles under Indian law are likely to support constitutional climate actions. While the possibility of standalone private law actions on climate matters continue to remain, they are likely to be more the exception than the norm.[23]

Against this backdrop, the chapter delves into three areas of Indian private law, viz., tort law, corporate law, and contract law, to demonstrate how they have formed the bases for constitutional litigation under environmental law and, by extension, are relevant to the assertion of the climate right.[24]

3. Tort Law in India: Compensatory and Preventive Mechanisms

Conventional wisdom suggests that tort law likely plays a crucial role in combating the adverse effects of climate change. Its benefits include a compensatory effect that allows victims to redress losses suffered as a result of actions or omissions of tortfeasors, and a preventive effect that will disincentivise potential greenhouse gas emitters from jeopardising

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[21] ibid 687.

[22] ibid 691-692.

[23] There have been but rare instances of cases involving negligence and nuisance, both public and private. See e.g., *Municipal Council, Ratlam v. Vardhichand* 1980 INSC 138.

[24] A fourth area of private law, viz., property law, is omitted from the analysis not only because of its limited utility in the Indian climate context, but also due to constraints of space. At the same time, it is noteworthy that courts have evolved concepts such as the public trust doctrine which are relevant in climate arena. See, e.g., *M.C. Mehta v. Kamal Nath* 1996 INSC 1482 [17].

their long-term commercial interests.[25] In other jurisdictions, tort law has been utilised to address the risks emanating from climate change, whether or not the claims have ultimately succeeded.[26] In the Indian context, though, tort law is replete with impediments (both substantive and procedural) that have prevented its extensive use as a private law remedy.[27] Most notably, the inadequacies of the Indian tort system came to the fore in the aftermath of the Bhopal gas tragedy.[28]

Through some deft maneuvering, the Indian Supreme Court converted the shortcomings of the Indian private law of torts into an opportunity by shifting the ground to public law. In a series of rulings, the Court adopted principles of Indian tort law in constitutional cases and moulded them to overcome the traditional shackles. In doing so, it revolutionised the use of tort law principles in cases involving environmental matters, but through the lens of public law.

3.1 Innovative Tort Law Concepts in the Environmental Context

The first indication of the Supreme Court's novel approach emerged in *M.C. Mehta v. Union of India*[29] (hereinafter the "*Oleum Leak Case*") where a public interest litigant[30] filed a

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[25] Monika Hinteregger, 'Climate change and tort law' in Eva Shulev-Steindl, et al, *Climate Change, Responsibility and Liability* (Nomos, 2022) 385.

[26] *Shell Plc v Milieudefensie et al*, ECLI:NL:GHDHA:2024:2100 (Court of Appeals, The Hague, 12 November 2024), (unofficial English translation)(the Appeal Judgment): https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2024/20241112_8918_judgment.pdf; *Smith v Fonterra* [2024] NZSC 5.

[27] Marc Galanter, 'India's Tort Deficit: Sketch for a Historical Portrait' in David M Engel and Michael McCann (eds), *Fault Lines: Tort Law as Cultural Practice* (Stanford University Press 2009) 47; Deepa Badrinarayana, 'The Jewel in the Crown: Can India's Strict Liability Doctrine Deepen Our Understanding of Tort Law Theory?' (2017) *Louisville Law Review* 25, 26.

[28] S. Muralidhar, 'Unsettling Truths, Untold Tales: The Bhopal Gas Disaster Victims "Twenty Years" of Courtroom Struggles for Justice' *International Environmental Law Research Centre Working Paper 2004/5* (2004): https://www.ielrc.org/content/w0405.pdf. Note that tort law in India is uncodified and relies on common law principles, except in specific areas that have witnessed partial codification, for example through the Public Liability Insurance Act, 1991 and the National Green Tribunal Act, 2010.

[29] 1986 INSC 281.

[30] The concept of public interest litigation in India allows an individual or group to represent victims of breaches of fundamental rights under India's Constitution who are unable to represent themselves before a court. See, e.g., Sarbani Sen, 'The "Public Interest" in India: Contestation and Confrontation before the Supreme Court' (2024) 60 *The Boundaries of Law. Justice, Powers, and Politics* 27.

constitutional claim before the highest court[31] for environmental damage seeking the award of compensation for the victims of escape of oleum gas from the facility belonging to a company. After finding that the court has the power to award compensation to victims of breach of fundamental rights in exceptional circumstances, the Supreme Court developed the standard of "absolute liability" by departing from the narrower "strict liability" rule propounded in the common law decision in *Rylands v. Fletcher*.[32] The absolute liability rule applies "where an enterprise is engaged in a hazardous or inherently dangerous activity and harm results to anyone on account of an accident in the operation of such hazardous or inherently dangerous activity".[33] To ensure a deterrent effect on polluting enterprises, the Court noted that the "measure of compensation" in such circumstances "must be co-related to the magnitude and capacity of the enterprise".[34] It sought to impose a higher measure of compensation on enterprises that are "larger and more prosperous".[35] Thus emerged a succession of public law cases that adapted tort law principles to address environmental harms in public law actions.

Nearly a decade later, the Supreme Court extended the concept of absolute liability from the *Oleum Leak Case* to formulate the "polluter pays" principle. In *Indian Council for Enviro-Legal Action v. Union of India*,[36] the Court was concerned with damage to soil and underground water caused by chemical plants in the State of Rajasthan. It observed that the "polluter pays" principle has "gained almost universal recognition", apart from the fact that it has been stated in absolute terms in the *Oleum Leak Case*.[37] Hence, the "polluter pays" principle was set out as the law of the land.

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[31] Such constitutional claims are filed before the Supreme Court in exercise of its writ jurisdiction under Article 32 of the Constitution. The High Courts too similarly enjoy writ jurisdiction under Article 226 of the Constitution.

[32] (1868) LR 3 HL 330.

[33] *Oleum Leak Case* (n 29) [31].

[34] ibid [32].

[35] ibid. This is also referred to as the "deep pocket" theory. See Usha Tandon, 'Green Justice and the Application of the Polluter-Pays Principle: A Study of India's National Green Tribunal' (2020) 13 *OIDA International Journal of Sustainable Development* 35, 42.

[36] 1996 INSC 237.

[37] ibid [69].

Subsequently, in *Vellore Citizens Welfare Forum v. Union of India*,[38] the Supreme Court articulated the nexus between the absolute liability and polluter pays principles. It noted:

> The "Polluter Pays" principle as interpreted by this Court means that the absolute liability for harm to the environment extends not only to compensate the victims of pollution but also the cost of restoring the environmental degradation. Remediation of the damaged environment is part of the process of "Sustainable Development" and as such polluter is liable to pay the cost to individual sufferers as well as cost of reversing the damaged ecology.[39]

Vellore Citizens Welfare Forum is also known for its enunciation of the "precautionary principle" which requires the state to "anticipate, prevent and attack the causes of environmental degradation".[40] Here, the Court categorically stated that "the precautionary principle and the polluter pays principle are part of the environmental law of the country."[41]

In a subsequent line of cases, the Supreme Court adopted a flexible approach towards determination of compensation in public law cases involving environmental damage, thereby refraining from adhering to age-old concepts in tort law on measure of damages. For instance, in *T.N. Godavarman Thirumulpad v. Union of India*,[42] the Court observed:

> The damage to the environment is a damage to the country's assets as a whole. Ecology knows no boundaries. It can have impact on the climate. The principles and parameters for valuation of the damage have to be evolved also keeping in view the likely impact of activities on future generation[s].[43]

Later on, the Supreme Court wholeheartedly embraced the flexibility it availed in determining compensation in environmental claims under public law in a number of different ways. For instance, in *Goa Foundation v. Union of India*[44] where ecological damage was alleged due to mining activity, the Court ordered that "10% of the sale proceeds of the iron

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38 1996 INSC 952

39 ibid [12].

40 ibid [11].

41 ibid [14].

42 2005 INSC 439.

43 ibid [80]. This ruling also alluded to the "public trust" doctrine and the principle of "intergenerational equity", which are recognised under Indian law. A discussion of these is beyond the scope of this chapter.

44 (2014) 6 SCC 590.

ore excavated in the State of Goa" ought to be appropriated towards a fund earmarked "for the purpose of sustainable development and inter-generational equity" in the State of Goa.[45] In another high profile case of *Sterlite Industries (India) Ltd v. Union of India*,[46] the Court assessed the "magnitude, capacity and prosperity" of the defendant company and imposed a liability of INR 1 billion (equivalent in present terms of USD 11.8 million) for polluting the environment in the vicinity of the plant which was operated without the requisite permits.[47]

The environmental tort law principles devised by India's apex court also received statutory recognition. In 2010 the Indian Parliament enacted the National Green Tribunal Act (hereinafter the "NGT Act") to establish a separate tribunal for dealing with cases pertaining to "environmental protection and conservation of forests and other natural resources".[48] This followed calls for a separate judicial set up for dealing with environmental matters that possesses the requisite expertise and is also free from the delays and other challenges faced by the ordinary civil and criminal courts.[49] The NGT has jurisdiction to deal with civil cases arising out of a direct violation of a statutory environmental obligation, including the enforcement of right pertaining to the environment.[50] More interestingly, the NGT Act stipulates that the NGT "shall, while passing any order or decision or award, apply the principles of sustainable development, the precautionary principle and the polluter pays principle",[51] thereby statutorily espousing the environmental (and by extension climate-related) doctrines framed by the Supreme Court using the foundations of tort law.[52] In terms of remedial actions, the NGT is authorised by statute to exercise its jurisdiction to "provide compensation or relief to the claimants and for restitution of the damaged property or

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45 ibid [63].

46 2013 INSC 204.

47 ibid [39].

48 See NGT Act, Preamble.

49 See *Indian Council for Enviro-Legal Action* (n 36) at para 70.

50 NGT Act, ss 2(m), 14.

51 NGT Act, s 20.

52 Charu Sharma and Vishavjeet Chaudhary, 'Liability' in Phillipe Cullet, Lovleen Bhullar, and Sujith Koonan (eds) *The Oxford Handbook of Environmental and Natural Resources Law in India* (Oxford: Oxford University Press, 2024) 186.

environment",[53] as well as to order relief or compensation for any death, injury or damage under several specified heads.[54]

Over the last decade and a half, the NGT has moved forward the Supreme Court's expansion of compensatory jurisprudence in cases involving environmental law. For instance, in *Goel Ganga Developers India Pvt Ltd v. Union of India*,[55] the tribunal imposed damages of the higher of INR 1 billion or 10% of the project cost for construction carried out in violation of the environmental clearance granted.[56] Similarly, damages were imposed on bottling units of a corporation for illegal groundwater extraction.[57] In a high profile case, though, NGT's award of compensation has attracted criticism on the ground that the compensation was reduced to INR 50 million (equivalent to approximately USD 0.6 million) from an initial estimate of INR 1.2 billion (equivalent to approximately USD 14.1 million) to address the impact of a mass cultural event on a riverbank and floodplain.[58]

While the judicial innovation in the use and extension of tort law principles to public law to address serious environmental concerns is evident, questions arise about the credibility of such an approach utilised by India's higher judiciary as well as the NGT. In its zeal to overcome the constraints imposed by conventional tort law, the expanded jurisprudence in the public law domain may have had the effect of muddying the doctrinal waters in tort law. This arguably does disservice to the core of private law jurisprudence, but it might also represent a unique window of opportunity in the legal fight against climate change, albeit principally in the public law domain.

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53 NGT Act, s 15(4).

54 NGT Act, s 17(1) read with Schedule II.

55 2018 INSC 696.

56 ibid [59].

57 *Sushil Bhatt v. Moon Beverages Ltd*, 2022 SCC OnLine NGT 76 [381].

58 *Manoj Mishra v. Delhi Developmental Authority* . For a critique of this ruling, see Raghuveer Nath & Armin Rosencranz, 'Determination of Environmental Compensation: The Art of Living Case' (2019) 12 *NUJS Law Review* 1.

3.2 Doctrinal Distortions in Tort Law: Challenges and an Opportunity

Globally, considerable challenges confront the use of tort law to address climate change. These include (i) identifying appropriate causes of action, (ii) proving causation and (iii) determining the amount of compensation payable in a specific case.[59] Climate litigants have encountered challenges in tort-based climate actions in other jurisdictions.[60] Commentators have, therefore, cautioned that if corporate climate litigation is to be effective under private law, "the elements of tort law need to be interpreted in a loose way".[61] While the Indian approach to tort law in the environmental context has attracted a great deal of criticism on the ground that it is unprincipled and somewhat arbitrary,[62] the judiciary's approach to unshackle itself from some of the vestiges of narrow tort law doctrines could very well present an exceptional chance to push the boundaries of tort law in the climate context, whether grounded in private law or extended to the public law domain (as normally occurs in Indian jurisprudence). Each of the specific facets of a tort law action mentioned earlier is discussed in sequence.

First, the now well-established precautionary principle, polluter pays principle and the absolute liability rule constitute judicially conceived causes of action in tort law that are capable of being asserted in private law tort claims as well as in public law constitutional actions, in each case horizontally against greenhouse gas emitters. While the jurisprudence in this arena thus far is limited to environmental law, the Supreme Court has already opened the door for extension of such principles to climate change by establishing a close nexus between the two concepts.[63] Hence, Indian tort law (albeit derived via public law) already provides a strong jurisprudential platform for initiation of climate-related tort actions. Unlike seen in the

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[59] See Hinteregger (n 25) 386; Centre for Climate Engagement, Hughes Hall, University of Cambridge, 'Tort Law and Climate Change' *Law and Climate Atlas* (July 2024): https://lawclimateatlas.org/resources/tort-law-and-climate-change/.

[60] See e.g., *Shell plc* (n 26).

[61] See e.g., Riccardo Fornasari, 'The Legal Form of Climate Change Litigation: An Inquiry into the Transformative Potential and Limits of Private Law' (2024) 4 *Journal of Law and Political Economy* 820, 823.

[62] Madhuri Parikh, 'Global Perspectives on Corporate Climate Legal Tactics: India National Report', *British Institute of International and Comparative Law* (February 2024), 41; Nath and Rosencranz (n 58) 14.

[63] See, *M.K. Ranjitsinh 2024* (n 9).

context of other jurisdictions, the Indian courts do not need to go so far as to carve out a new tort that imposes a climate duty.[64]

Second, upon finding a specific duty, one needs to assess the element of causation, which "requires a sufficient causal link between the defendant's activity and the harm sustained by the victim."[65] This is often difficult to establish in a climate change scenario as the loss may be attributable to a number of different factors apart from the actions or omissions of a single business enterprise.[66] Hence, there has been a global momentum to ease the complex issues involving causation that is steeped in the complexity of the scientific evidence.[67] Thus far, while Indian courts have adhered to the general principles of causation in customary tort actions,[68] they have not had the occasion to expound on the matter in environmental or climate-related actions.[69] Although how the Indian courts will react on the issue of causation in climate litigation is essentially a matter of speculation, its track record thus far on environmental matters leaves considerable room for possible innovation and modernisation of approach to keep pace with scientific developments in the climate arena.[70]

Third, concerns abound regarding the methodology for quantification of damages for climate-related harms. While the matter of quantification is yet to receive the required attention worldwide, the Indian courts and tribunals have followed a diversity of approaches in determining the amount of compensation to be awarded once an environmental harm has been established. The Supreme Court has adopted a number of methods.[71] The first involves the "deep pockets" theory that correlates with the magnitude of the business of the violator of

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64 *Shell plc* (n 26); *Smith* (n 26).

65 Hinteregger (n 3) 254.

66 Blomquist (n 2) 1057.

67 Jim Rossi and Michael Panfil, 'Climate Resilience and Private Law's Duty to Adapt' (2022) 100 *North Carolina Law Review* 1135, 1206; Fornasari (n 61) 2.

68 *Rajkot Municipal Corporation v. Manjulben Jayantilal Nakum* 1997 INSC 34 [63].

69 Lovleen Bhullar, 'The Polluter Pays Principle: Scope and Limits of Judicial Decisions' in Shibani Ghosh (ed), *Indian Environmental Law: Key Concepts and Principles* (Orient Black Swan, 2019).

70 For a discussion on the application of the precautionary principle despite the absence of scientific certainty, see Kanika Jamwal, 'Precautionary Principle and its tryst with the Indian judiciary' *Mongabay* (19 August 2020): https://india.mongabay.com/2020/08/commentary-precautionary-principle-and-its-tryst-with-the-indian-judiciary/.

71 Dhvani Mehta and Debadityo Sinha, 'Penalties and Compensation' in Phillipe Cullet, *The Oxford Handbook of Environmental and Natural Resources Law in India* (Oxford: Oxford University Press, 2024) 793.

an environmental (or climate) right and the financial capacity of the relevant enterprise. The second involves pegging the quantum of the compensation either as a percentage of the sale proceeds[72] or the project cost.[73] Third, the Court has adopted a delegation approach whereby rather than determining the quantum of the compensation itself, it appoints a committee of experts to investigate matters to come up with the compensation payable. In some cases, it has even delegated the quantification responsibility to appropriate government or regulatory officials.[74]

These methods have percolated to the quantification of damages by the NGT as well. As critics have noted, not only does the estimation often lack scientific analysis,[75] but the judicial bodies admittedly cannot measure compensation "with exactitude and precision", thereby resulting in "hypothesizing or guess work".[76] In the absence of any prescribed formula for computing compensation for environmental and climate torts, there would be a greater onus on the judicial bodies to offer reasons for arriving at a quantification.[77] But on occasion, no reasoning is offered at all,[78] leading to considerable uncertainty. Such an *ad hoc* approach to the quantification of damages would likely have a deleterious effect in bringing as well as defending tort actions for climate matters, whether under public law or private law. On the one hand, the uncertainty might disincentivise claimants from bringing otherwise worthy actions, thereby adversely affecting their ability to redress climate-related grievances. On the other, it could alter the deterrent effect on climate-agnostic business enterprises by either overreaching or underreaching through incorrect quantification of the compensation.

3.3 Procedural Considerations in Tort-Based Actions

Before concluding this section, it would be useful to address certain procedural considerations in bringing tort actions before the Indian courts. Tort actions under private law

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72 See e.g., *Goa Foundation* (n 44).

73 See e.g., *Goel Ganga Developers* (n 55).

74 Sroyon Mukherjee, 'How Much Should the Polluter Pay? Indian Courts and the Valuation of Environmental Damage' (2023) 35 *Journal of Environmental Law* 331, 343.

75 Nath and Rosencranz (n 58) 11.

76 Harshita Singhal and Sujit Koonan, 'Polluter Pays Principle in India: Assessing Conceptual Boundaries and Implementation Issues' (2021) 7 *RGNUL Student Law Review* 33, 42.

77 Tandon (n 35) 42.

78 Mukherjee (n 74) 350.

(especially those arising in common law) are asserted before the regular civil courts. These cases undergo a full-fledged trial with appeals available in justifiable cases to the High Courts and thereafter to the Supreme Court. Given that India's regular court system is overburdened with an astonishingly large number of pending cases,[79] there is bound to be significant delays in achieving judicial resolution in ordinary tort cases in private law. Moreover, claimants bringing regular civil suits are required to incur the cost of court fees and stamp duties, which vary from state to state.[80] Judges in ordinary civil courts tend to adhere closely to the procedural law with limited flexibility.[81] Most civil suits are decided at the level of the lower courts. Only some of them make it to the High Court, while even fewer are appealed all the way to the Supreme Court. Hence, the opportunity to the higher judiciary in "laying down the law" in the private law arena is rather limited. These procedural factors could play a significant role in inhibiting claimants from seeking private law remedies for climate-related claims.[82]

Turn to the public law arena and the procedural ramifications vary drastically. Litigants are able to directly petition the relevant High Court[83] or the Supreme Court[84] for breach of fundamental rights under the Constitution. In that sense, the higher judiciary is seized of the matter at the outset in the exercise of its writ jurisdiction. The delays and costs the litigants suffer in such public law claims are of a much lower of magnitude compared to private law suits before the regular courts. Other procedural advantages for litigants before the constitutional courts include a considerable relaxation of the prerequisites pertaining to standing for claimants that has enabled an upsurge in public interest litigation in India. Evidentiary requirements are less stringent in public law actions as cases are decided on the basis of affidavit evidence without the requirement of testimony from witnesses.[85] High

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[79] According to Government statistics, there are nearly 5.8 million civil suits pending before various Indian courts. National Judicial Data Grid: https://njdg.ecourts.gov.in/njdgv3/ (accessed 25 March 2025).

[80] Saiesh Kamath, 'Court Fees and Access to Justice: A Re-Examination', *The Journal of Indian Law and Society* (10 February 2021): https://jilsblognujs.wordpress.com/2021/02/10/court-fees-and-access-to-justice-a-re-examination/.

[81] Code of Civil Procedure, 1908.

[82] Wherever there is a demonstrable violation of specific environmental statutes, parties do have the option of seeking redress before the NGT, which does not suffer from the level of delays and costs as the regular court system.

[83] Constitution of India, art 226.

[84] Constitution of India, art 32.

[85] Balganesh (n 19) 687.

Courts and the Supreme Court are able to exercise the flexibility to mould the relief suited to the circumstances that the lower civil courts lack.[86]

Combined with the substantive differences, the wide gulf in the procedural requirements lend more reason for litigants to access the public law remedies for climate related torts rather than to rely on private law. Hence, while theoretically climate change can be addressed through corporate litigation involving the private law of torts, there is a greater likelihood that litigants will rely on invoking the writ jurisdiction of the higher judiciary which has more than keenly displayed its propensity to adopt tort law mechanisms to address constitutional issues on matters pertaining to environmental law, and it is not unreasonable to expect the courts to adopt a similar approach on matters of climate change.

4. Corporate Law in India: Stakeholder Responsibility

Another tool available in climate litigation against corporations lies under corporate law, particularly the duties of directors on corporate boards "to act on climate change, to transition away from carbon-intensive business models, to invest capital and resources in clean energy practices."[87] Unlike tort law duties that are more remedial in nature, corporate law duties seek to regulate *ex ante* the conduct of business to ensure it meets with the requisite climate goals.[88] While corporate law duties are useful on a standalone basis, anecdotal evidence indicates that the directors' duties under corporate law may be embellished through "the use of human rights as a reflexive interpretative tool".[89]

Although there has been no climate-related corporate law claim that has been brought before the Indian courts, the role of corporate law in addressing climate risks has been the subject-matter of considerable attention both from academics as well as practitioners.[90] Among

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[86] See e.g., Constitution of India, art 142 (which stipulates that the Supreme Court "in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it").

[87] Foerster (n 1) 307.

[88] ibid.

[89] See e.g., Rebelo and Rebelo (n 8) 212 (discussing the example of South Africa).

[90] See e.g., Umakanth Varottil, *Directors' Liability and Climate Risk: White Paper on India* (Commonwealth Climate and Law Initiative, 2021; Shyam Divan, Sugandha Yadav and Ria Singh Sawhney, Legal Opinion: Directors' obligations to consider climate change-related risk in India (7 September 2021).

others, two specific aspects of Indian corporate law are relevant in the climate change context. The first relates to the duties of directors on corporate boards. Section 166(2) of the Companies Act, 2013 states as follows:

> A director of a company shall act in good faith in order to promote the objects of the company for the benefit of its members as a whole, and in the best interests of the company, its employees, the shareholders, the community and for the protection of environment.

This provision not only requires the directors to act in the long-term interest of the company, but the fact that "the protection of the environment" commands its own space in the statutory provision is indicative of the fact that directors are obligated to garner their attention towards the topic of climate regardless of the associated financial implications. In other words, section 166(2) now treats climate change, which has already gained a status of eminence within the environmental discourse under Indian law, as an end in itself, and not merely as a financial risk. In this sense, Indian corporate law is arguably different from that of other Commonwealth jurisdictions, wherein the treatment of directors' duties in the context of climate change is etched in the detection and treatment of financial risk.

The second aspect in Indian company law relates to corporate social responsibility (CSR) in terms of section 135 of the Companies Act, 2013. By virtue of this statutory provision, India is one of only a handful of jurisdictions to require large companies to spend a stipulated amount—at least two per cent of average net profits made during the three immediately preceding financial years—in pursuance of their CSR policy towards specified activities, which include "ensuring environmental sustainability, ecological balance, protection of flora and fauna".[91] At a broad level, these mechanisms make Indian corporate law stakeholder-oriented rather than purely shareholder-centric.[92]

Similar to the phenomenon witnessed in tort law, the Indian Supreme Court has enunciated these corporate law duties, albeit in a public law action. In *M.K. Ranjitsinh v. Union of*

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[91] Companies Act, 2013, sch VII.

[92] Mihir Naniwadekar and Umakanth Varottil, 'The Stakeholder Approach towards Directors' Duties under Indian Company Law: A Comparative Analysis' in Mahendra Pal Singh (ed.), *The Indian Yearbook of Comparative Law* (Oxford University Press, 2016).

India[93] (hereinafter "*M.K. Ranjitsinh 2021*"), the Supreme Court was faced with a writ petition to protect a rare species of bird called the Great Indian Bustard (GIB). In particular, the existence of overhead power lines in the State of Rajasthan posed a hazard to the GIB as the birds regularly collided with the power lines due to their limited frontal vision and lack of maneuverability, thereby resulting in their deaths. The petitioners sought that wherever possible "diverters" be installed on existing power lines in the long term and that the lines be undergrounded in the long term to protect this rare species. A principal concern arose that these measures would involve a significant outlay by the power companies involved. In dealing with this constitutional case, the Supreme Court invoked the CSR obligations and the directors' duties under the Companies Act, 2013. In particular, the Court noted that the "word 'environment', though not defined in the Companies Act, has to be given the meaning assigned to it under the Environment (Protection) Act, 1986".[94]

The width of this definition is adequately capable of accommodating the risks corporations face due to climate change. In their legal opinion, legal counsel Divan, Yadav and Sawhney underscore the significance of the Court's ruling:

> The Supreme Court's order in the Bustard case is the first to explain the broad scope of directors' duty to the environment under section 166. The Bustard case demonstrates that there is no fixed hierarchy in the duties owed to the company and other stakeholders identified under section 166. A decision taken seemingly in the financial interest of the company and its shareholders, but which is detrimental to the environment, may transgress section 166. Such a decision may additionally expose the company to litigation risk, transition risk from tightening regulations, and render the company's assets stranded.[95]

Hence, consideration of matters such as climate risk and other environmental protection is not merely an option for directors on Indian companies that they may account for on a voluntary basis, but it is an obligation, which they can afford to ignore only at risk of liabilities for breach. *M.K. Ranjitsinh 2021* is, therefore, salient because the Supreme Court seized the opportunity available to it under a public law dispute to expound on the duties of directors on Indian companies in protecting the environment (and, by implication, in climate mitigation

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93 2021 INSC 257.

94 ibid [14]. Section 2(a) of the Environment (Protection) Act, 1986 defines the word "environment" to include the "inter-relationship which exists among and between water, air and land, and human beings, other living creatures, plants, micro-organisms and property."

95 Divan et al. Opinion (n 90) 13.

and adaptation). In that sense, the broader interpretation of section 166 adopted by the Court in *M.K. Ranjitsinh 2021* would guide the manner in which directors of Indian companies ought to incorporate an analysis of climate risk in the board decision-making.

Although the stakeholder oriented duties of corporate directors in India have been devoid of extensive judicial analysis as yet, their public (rather than mere private) nature has attracted attention even in corporate disputes. In the high profile corporate (private law) litigation in *Tata Consultancy Services Limited v. Cyrus Investments Pvt. Ltd.*,[96] the Supreme Court accepted the opportunity to expound on the "public" elements of Indian company law, especially directors' duties. The Court noted that "the history of evolution of the corporate world shows that it has moved from the (i) familial to (ii) contractual and managerial to (iii) a regime of social accountability and responsibility."[97] In doing so, it continued the tradition of the Supreme Court recognising the nature of an Indian corporation to be very different from the shareholder-orientation displayed in Anglo-American corporate law. For example, over three decades ago, the Court articulated this somewhat unique approach in India observing that "the old nineteenth century view which regarded a company merely as a legal device adopted by shareholders for carrying on trade or business as proprietors has been discarded and a company is now looked upon as a socio-economic institution wielding economic power and influencing the life of the people."[98] Section 166(2) of the Companies Act, as interpreted by the Supreme Court very much adopts this tenor. In fact, in *Tata Consultancy Services Limited*, the Court went on to state that "[w]hat is ordained under section 166(2) is a combination of private interest and public interest".

The limited jurisprudence available in India regarding the duties of corporate directors to consider matters pertaining to the environment or climate reveals a bi-directional relationship between private law and public law. Signals emanating from *M.K. Ranjitsinh 2021* clearly indicate that in dealing with public law issues, the Supreme Court is willing to not only draw upon private law principles such as the statutorily codified directors' duties but that it is also keen to use the opportunity to expound on the interpretation of section 166(2) in the environmental context. Concomitantly, in dealing with a private dispute in *Tata Consultancy*

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96 2021 INSC 217.

97 ibid [19.25].

98 *National Textile Workers' Union v. PR Ramakrishnan* 1983 INSC 57 [4].

Services Limited, the Court has unhesitatingly clarified the "public" nature of company law, including directors' duties.

The procedural constraints in corporate law are less stark compared to tort law. Most corporate disputes are litigated before the National Company Law Tribunal (NCLT) (which is the equivalent of the NGT, but in the corporate law arena). At the same time, jurisdiction of the NCLT is quite narrow and confined to pure corporate law disputes in the private arena. Climate litigants may encounter constraints in seeking to resort to the NCLT when it can instead assuage concerns by bring public law dispute through the assertion of constitutional rights to be protected against the adverse effects of climate change. Hence, it is reasonable to assume there will be greater play in corporate law concepts from the private domain being used to support public law dispute resolution, much in a similar way one expects with tort law.

5. Contractual Arrangements: Regulatory Nudges

Existing literature suggests that contract law can address issues pertaining to climate change in two distinct ways. First, climate change might affect existing contracts, for instance where performance may be made impossible due to climate events.[99] Second, contractual mechanisms may have the effect of facilitating contracts that propel companies towards a net zero transition.[100] In the latter case, the facilitation may occur through government regulation that mandates companies to enter into climate-friendly contracts. While the first category of cases falls largely within the exclusive domain of private law, the second category attracts an admixture of private and public laws, as evident in the context of India.

With existing contracts, companies could face climate transition risks that make the performance of such contracts financially unprofitable or even unviable if the risks threaten the continued operation of the company's business. These cases would be governed by customary *force majeure* and "change in law" clauses, apart from the deployment of the

[99] Centre for Climate Engagement, Hughes Hall, University of Cambridge, 'Contract Law and Climate Change' *Law and Climate Atlas* (July 2024): https://climatehughes.org/law-and-climate-atlas/contract-law-and-climate-change/ (last accessed 26 March 2025).

[100] ibid; David Howarth, 'Environmental Law and Private Law' in Emma Lees and Jorge E. Viñuales (eds), *The Oxford Handbook of Comparative Environmental Law* (Oxford, Oxford University Press, 2019) 1096.

frustration principle, which under Indian law is governed by section 56 of the Contract Act, 1872. Although key issues pertaining to these clauses have made all their way up to the Supreme Court,[101] none involves issues pertaining to the environment or climate change.

On the other hand, the Indian Supreme Court has confronted disputes where government regulation has mandated that companies contract for renewable energy in specific circumstances with a view to facilitate energy transition. Understandably, companies subject to the governmental regulation have mounted a challenge on constitutional grounds leading this otherwise contractual private law matter to spill over into the domain of public law. In *Hindustan Zinc Ltd v. Rajasthan Electricity Regulatory Commission*[102] the Court had to decide the constitutional validity of certain regulations issued by the Rajasthan Electricity Regulatory Commission (RERC) that required captive power generation companies and certain open access consumers to purchase a minimum quantity of energy from renewable sources or, alternatively, to pay a surcharge to the extent of shortfall in the renewable energy commitment.[103] Having established its own captive generation plant, Hindustan Zinc refused to take up the renewable energy commitment and challenged the validity of the RERC regulations. The Supreme Court observed that the said regulations were framed to "encourage generation and consumption of green energy" bearing in mind that the government must discharge its fundamental duties to protect and improve the environment.[104] It noted:

> The impugned Regulations have been enacted in order to effectuate the object of promotion of generation of electricity from renewable sources of energy as against the polluting sources of energy … The provisions requiring purchase of minimum percentage of energy from renewable sources of energy have been framed with an object of fulfilling the constitutional mandate with a view to protect the environment and prevent pollution in the area by utilizing renewable energy sources as much as possible in the larger public interest.[105]

More interestingly, the Court was cognisant of the financial implications of such a ruling. It noted that with the promotion of renewable energy "larger public interest must prevail over

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[101] See e.g., *Energy Watchdog v. Central Electricity Regulatory Commission* 2017 INSC 338; *Maharashtra State Electricity Distribution Co. Limited v. Adani Power Maharashtra Limited* 2023 INSC 400.

[102] (2015) 12 SCC 611.

[103] ibid [3].

[104] ibid [15], [16], [29].

[105] ibid [44].

the interest of the industry herein which will in any case pass on the extra burden, if any, … as part of the cost of its products".[106]

Another ruling of the Supreme Court involving contractual interpretation in a regulatory context was premised on the push towards renewable energy. *Gujarat Urja Vikas Nigam Limited v. Renew Wind Energy (Rajkot) Private Limited*[107] involved a scenario where a party to a power purchase agreement (PPA) involving renewable energy sought modifications to the PPA upon an amendment to the relevant electricity regulations that had an impact on the computation of tariff. In denying such modifications, the Court relied on the push towards "solar and other renewables [to] potentially transform the energy landscape".[108] Implicit in the Court's outlook is an eye on addressing the issues arising from climate change and impelling a net zero transition.

Contract law has received limited attention as a form of private law measure in addressing matters pertaining to climate change in India. However, regulatory nudges pushing companies to facilitate transition measures through contracting for renewable energy have generally been affirmed signifying the indirect contractual green impetus galvanised by the Indian Supreme Court, albeit through the use of public law measures.

6. The Future of Climate Change and Private Law in India

World over, a discourse has emerged as to the extent to which private law will motivate climate mitigation and adaptation. In the United States, scholars have argued

> that doctrines and practices central to the private law of torts, property, and contracts will and should play an important role in developing policy and resolving disputes regarding how individuals, businesses, and other private actors respond to and manage the harms of climate change …[109]

[106] ibid [49].

[107] 2023 INSC 366.

[108] ibid [38].

[109] Rossi and Ruhl (n 3) 832.

A wave of litigation, admittedly much of it yet unsuccessful, has been initiated in various jurisdictions under various forms of private law, predominantly tort law and corporate law, and the efforts may likely continue in this direction. However, scholars have cautioned that climate litigation in the Global North and the Global South "differs because of its context and content".[110] The narrow focus on private law that is prevalent in the Global North in addressing issues of climate change may not work in jurisdictions in the Global South despite the fact that "the legacies (and persistence) of colonialism and imperialism have partially crafted those legal systems on the model of the western ones."[111] For instance, in the South African context it has been argued that the interpretation of the Constitution, in particular its horizontal application to private parties, would open the door for a more flexible rights-based private climate litigation by offering a legal framework for "greening private law".[112] The argument asserts that the interpretation of the bill of rights under the South African constitution would operate as a catalyst for more private rights-based litigation in the climate context.[113]

At the outset, it is difficult to be entirely sanguine about the role of corporate climate litigation on its own in fostering the transition towards a net zero economy in India. While claims under tort, corporate, contract or property law are eminently possible in the Indian context, they suffer from hurdles as discussed in the chapter. It is nobody's case that pure private law remedies are unavailable in India, but it is just that the likelihood of its effective use in the climate context ought to be viewed with some level of skepticism. This is attributable to two reasons. First, private law remedies are subject to constraints, both substantive and procedural, as outlined in this chapter. Second, and more importantly, there is a strong culture spanning decades of the use of public law remedies to stimulate social change, especially when it comes to matters of the environment. Hence, it is realistic to expect litigation, even of the variety that is brought against corporations in the climate change space, to occur in the public law arena through the exercise of horizontal rights against private defendants invoking the writ jurisdiction of the constitutional courts.

[110] Fornasari (n 61) 5.

[111] ibid.

[112] Rebelo and Rebelo (n 8) 191.

[113] ibid 217.

At the same time, it is reasonable to deduce that private law principles will have an important role to play in the climate context, albeit in conjunction with public law rather than on a standalone basis. This story suggests a cross-pollination of ideas, philosophies and doctrines between Indian public law and private law through a bi-directional symbiotic relationship between the two bodies of law. On the one hand, private law has already provided (and will likely continue to provide) the intellectual legal foundations for the evolution of novel public law remedies. In that sense, private law has strongly supported the evolution of Indian environmental (and, in turn, climate) jurisprudence from the outside by way of a reinforcement mechanism to help evolve suitable public law remedies. On the other hand, the idea flow is likely to occur in the reverse direction as well, whereby the well-established public law mechanisms are likely to propel a wider and more flexible interpretation of private law concepts (whether in statute or common law) to place them in a greater state of readiness to address climate change. This requires a reorientation of several private law concepts, whether by an expansive reading of statutory provisions or novel ways of shaping common law doctrines, if private law were to be the focus of achieving climate transition. Here, already demonstrated innovations in public law will likely provide the impetus in private law actions, were they to be brought in India in the climate space.

As examined in detail in this chapter, the Supreme Court painstakingly development a rich jurisprudence surrounding environmental law by not only adopting, but also expanding, private law principles in adjudicating public law cases. In doing so, its innovative approaches resulted in the evolution of principles such as absolute liability, which were stretched from the well-known tort law rule of strict liability. In other instances, the Court incorporated the then established international concepts such as the precautionary principle and the polluter pays principle and entrenched them as an integral part of Indian law. These judicially designed law was then statutorily codified in the NGT Act, 2010, following which the NGT has also been implementing these principles germinated from private law.

Given the Indian higher judiciary's track record, there is sufficient reason to believe that advancements in the jurisprudence surrounding climate litigation is likely to emanate more effectively in public law cases than private law ones. As one commentator astutely observes:

> The constitutional and statutory powers of Indian courts are broadly worded and allow them to exercise jurisdiction in innovative ways in situations that are not necessarily

> governed by black letter law. Indian courts have not shied away from using this discretionary space in adjudicating environmental disputes, and they are likely to extend this proactive approach to climate claims as well. The framework of environmental rights and legal principles that the Indian judiciary has developed over the past three decades is well placed to support climate litigation.[114]

This is more so given that the Indian Supreme Court has recognised horizontal litigation in constitutional law matters against private actors. This will offer more opportunity to claimants to initiate constitutional claims using the writ jurisdiction of the High Courts and the Supreme Court in the climate context against companies that are emitters of greenhouse gases. Not only is the enforcement of public law measures likely to be swifter, but they may very well be comparatively more effective. If the incremental measures devised by the Indian higher judiciary over the last few decades in environmental law is anything to go by, one can expect a similar approach in the area of climate change as well. The exercise of writ jurisdiction by the higher courts offers ample opportunity for the judiciary to make modest but crucial improvements. For instance, one set of authors argues "that the Indian judiciary through a step-change or a small win process underpinned by the environmental rule of law contributes towards an evolving climate change transformation."[115]

While its utility is likely to be marginalised by the expansion of constitutional rights, private law actions would continue hold some limited sway in corporate climate litigation. Actions in tort using the absolute liability or polluter pays principles or those in corporate law involving breaches of directors' duties to consider stakeholder interests are not altogether out of the question. If at all these actions become prevalent, they are likely to draw heavily from the public law jurisprudence already developed by the courts. For instance, one can imagine that any tort law action would rely heavily on public law jurisprudence that has taken the narrow common law of breaches of duty, causation and quantification of damages and stretched them considerably in the environmental context. Hence, defendants in private law actions might be inhibited from rely extensively on the doctrinal constriction of tort law concepts in private law in evading potential climate claims. In that sense, the constitutionalisation of tort law in India has expanded the boundaries of common law doctrine. Another example is that the

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[114] Shibani Ghosh, 'Litigating Climate Claims in India' in Symposium on Jacqueline Peel & Jolene Lin, 'Transnational Climate Litigation: The Contribution of the Global South' (2020) 114 *American Journal of International Law Unbound* 45, 49.

[115] Gitanjali N. Gill and Gopichandran Ramachandran, 'Sustainability transformations, environmental rule of law and the Indian judiciary: Connecting the dots through climate change litigation' (2021) 23 *Environmental Law Review* 228, 239.

recognition of the fundamental right to be protected against the adverse effects of climate change in *M.K. Ranjisinh 2024* could be used imaginatively to form the bulwark in the assertion of a private climate right in an action under tort law or corporate law. This way, the removal of at least some of the substantive constraints of private law doctrine in the climate space by infusion of doctrinal nourishments from public law could potentially lead to a greater utility of private law in corporate climate litigation. This, of course, assumes that some of the procedural hurdles of private law are removed as well, if not by the regular courts at least by the specialist NGT.

7. Conclusion

Private law is receiving greater recognition as a tool in the action against climate change. In the Global North, companies are facing the prospect of increased private law litigation. In countries such as India, however, private law is likely to play a rather unconventional role in corporate climate litigation. Given that most advancements in environmental law have occurred in public law in the Indian context, but by borrowing heavily from private law concepts, one can reasonably anticipate the same trend to continue in the climate space as well. At the same time, it would be imprudent to forsake the utility of private law on its own. Private law would likely play a greater role in moderating the behavior of private actors like corporations to address *ex ante* the challenges arising from climate change. This suggests that, in addition to playing a secondary role in supporting public law, the concepts in tort, contract, property and corporate law in India have to be reengineered to the extent they can be deployed in the mitigation and adaptation of climate risks.

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