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THE RIGHT TO CLEAN AIR IN INDIA: FROM CONSTITUTIONAL PROMISE TO ENFORCEMENT CRISIS

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ABSTRACT

Every winter, the Indo-Gangetic Plain, home to hundreds of millions of people — chokes under a toxic blanket of smog. Courts intervene, tribunals issue directions, commissions are constituted, and yet the air remains hazardous. This paper examines why. Drawing on a close reading of Indian constitutional jurisprudence, the structure of key regulatory institutions, and the evolving distinction between air pollution litigation and climate litigation, it argues that India's central problem is not the absence of law but the collapse of its enforcement. The right to clean air, already embedded within Article 21 of the Constitution through decades of judicial expansion, is doctrinally secure. What it lacks is the administrative architecture to make that right real. This paper traces the anatomy of that gap through the Delhi winter smog crisis, the functioning of the National Green Tribunal and the Commission for Air Quality Management, and the emerging phenomenon of 'backdoor climate litigation', where health-based Article 21 claims are increasingly doing the work that explicit climate litigation has not yet attempted. It concludes that the distinction

between air pollution law and climate law, though conceptually important, is collapsing in practice, and that this convergence presents both an opportunity and a responsibility for Indian courts and legislators alike.

Keywords: Article 21, Right to Clean Air, Climate Litigation, National Green Tribunal, Enforcement Gap, Indo-Gangetic Plain, CAQM, Environmental Constitutionalism

I. INTRODUCTION

Indian environmental law is a paradox in many ways. The country's constitutional jurisprudence on environment is one of the largest in the world, having, over the last four decades, incorporated the right to clean air directly into the right to life, defined the Precautionary Principle as domestic law and played a part in a range of issues from vehicular fuel standards to banning firecrackers. The NGT, a body created in 2010, was aimed at providing technical inputs and speed in environmental adjudication. But, still, the air quality is among the worst in any major city on earth in Delhi and the winter smog crisis comes again, each November, in a grimly predictable manner.

India is too big, too poor, or too federally divided to be governed effectively in terms of the environment, that's the easy answer. This paper does not reject that explanation, since the lack of resources and scale do not explain the specific and traceable failures that have made the law such a failure. The issue is not what the law actually says. It is actually the law in action.

This paper is a legal case study of the air pollution problem in the North of India. It poses three questions: one, what has Indian environmental litigation done in the face of the Delhi smog crisis, and two, what hasn't it done? Second, what do the structural restrictions in the two main regulatory bodies, the National Green Tribunal (NGT) and the Commission for Air Quality Management (CAQM) tell us about environmental governance? And third, what is the relationship between air pollution litigation and the newer, more ambitious category of climate litigation and does that distinction still hold in the Indian context?

The argument is divided into 5 parts. Section II delves the Delhi smog issue in two specific cases: the stubble burning case between Punjab, Haryana and Delhi and the judicial response to the

pollutants of the urban area including Arjun Gopal v. Union of India and Vardhaman Kaushik v. Union of India. In Section III, the NGT's institutional nature, its actual strengths and its structural weaknesses are examined. In Section IV, the authors examine the CAQM, a new institutional initiative that the government has created as its official institutional response to the NCR air crisis, and consider how it has fared when compared with the institutional failures that came before it. In India, as noted in Section V, the two concepts are coming together in a manner that has real legal implications, with a conceptual separation between air pollution litigation and climate litigation. Section VI defines the enforcement gap as a systemic problem, rather than a single problem that was isolated, and explores why litigation alone, even when creative, has proven insufficient.

II. THE DELHI WINTER SMOG: A LEGAL ANATOMY

A. The Stubble Burning Deadlock

The Delhi winter smog is, at its core, a federalism problem wearing an environmental disguise. Every October and November, farmers in Punjab and Haryana burn the residue of their paddy harvest to clear fields before the next sowing cycle. The smoke travels south into Delhi and the surrounding National Capital Region, combining with vehicular emissions, construction dust, and industrial discharge to produce a thick, acrid haze. The legal question — who is responsible and who must act — is fiercely contested, and that contest is itself part of why nothing moves.

Under the Air (Prevention and Control of Pollution) Act, 1981[1], primary enforcement authority rests with State Pollution Control Boards. This means that each state is responsible for what happens within its borders, even when the consequences of that activity land, quite literally, in someone else's lungs. The jurisdictional structure was designed for a different era and a different understanding of pollution. It treats air quality as a state subject when, in ecological fact, air does not stop at the Punjab-Delhi border.

The Supreme Court's response to this deadlock is exemplified by Aditya Dubey v. Union of India (2021)[2], in which the Court expressed — not for the first time — its frustration at the blame-

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[1] The Air (Prevention and Control of Pollution) Act, No. 14 of 1981, ss. 4–17 (establishing Central and State Pollution Control Boards and their respective enforcement jurisdictions).
[2] Aditya Dubey (Minor) & Anr. v. Union of India & Ors., W.P. (Civil) No. 1135 of 2020

shifting between state governments. The Court's criticism was pointed, but its remedy was limited. Directions were issued, timelines were set, and officials were summoned. And the following winter, the crisis returned. Part of the problem is that the Court's instinct, understandably, was to reach for punitive measures — including directing the registration of criminal cases against farmers who burned stubble. This missed the point. The farmers burning their fields are not environmental criminals in any meaningful sense. They are responding rationally to an agricultural calendar, an economic squeeze, and the absence of viable alternatives. Machines like the Happy Seeder[3] exist and work, but they require capital investment that most small farmers cannot afford without state subsidy. Until the incentive structure changes, no amount of FIR registration will clear the air.

The better legal framework here is the Precautionary Principle, already part of Indian domestic law since Vellore Citizens' Welfare Forum v. Union of India (1996).[4] Applied properly, it shifts the burden: the state cannot wait for a definitive apportionment of blame across pollution sources before acting. The uncertainty itself — about exactly how much stubble smoke contributes to PM2.5 on any given day — is not a reason to delay. It is a reason to act now. Courts have said this repeatedly. Governments have acknowledged it. The gap is in the doing.

B. Urban Pollutants and the Limits of Proportionality

The Delhi smog is far from being just an agricultural issue. This is significantly contributed by vehicular emissions, industrial discharge, construction work and road dust. Urban sources have led to some of the most controversial environmental judgments in India.

The Supreme Court made restrictions on sale and use of firecrackers during festive season in the case of Arjun Gopal v. Union of India (2017)[5]. The constitutional arguments relied on the Precautionary Principle, and the settled balance between the right to health and the right to trade in Article 19(1)(g). The Court correctly ruled that commercial and even cultural pursuits can be proportionately limited when there is "serious" and "evidence-based" risk to public health. The

[3] The Happy Seeder is a tractor-mounted machine that cuts and lifts paddy straw, sows' wheat into the bare soil, and deposits the straw as mulch. For adoption barriers and cost data, see Indian Council of Agricultural Research (ICAR), *Happy Seeder Technology for Managing Paddy Straw* (2019); see also Punjab Agricultural University, *In-Situ Management of Paddy Straw* (2020).
[4] Vellore Citizens' Welfare Forum v. Union of India, (1996) 5 SCC 647.
[5] Arjun Gopal v. Union of India, (2017) 1 SCC 412.

move garnered criticism in the name of being populist and targeting specific communities; and because targeted prohibitions on firecrackers could not have a significant impact on a pollution problem which had multiple, larger sources. These two criticisms are valid. They are criticisms of the policy design, and not the constitutional principle. Don't forget the principle that clean air has of toppling commercial freedom.

The more significant was the Vardhaman Kaushik case before the NGT, which led to the institutionalisation of the Graded Response Action Plan (GRAP). In its concept, GRAP is indeed a novel innovation. It shifts the focus of environmental regulation from a reactive, after-the-fact approach to an anticipatory one: If pollution increases within certain thresholds — 'poor,' 'very poor,' 'severe,' 'severe+' — pre-specified measures turn on automatically. Construction is halted. Schools close. Heavy vehicles are not permitted. The concept is for the triggers to be established beforehand and to stop politics getting in the way of taking action until it is too late to have a significant impact.

GRAP has actually functioned somewhat poorly. It has been called after the fact, used inconsistently, and often sidestepped. The real shortcoming is that it is an emergency management tool and not a governance structure for the long term. GRAP can limit construction during a pollution episode, but not correct the errors of urban planning that resulted in the need for construction or the errors of energy use that make it possible. It addresses symptoms but NOT the disease.

III. THE NATIONAL GREEN TRIBUNAL: EFFICIENCY WITHOUT EFFICACY

Adopted under the National Green Tribunal Act, 2010, the NGT was envisioned as an ambitious and well-defined forum for the speedy adjudication of environmental disputes, which would blend legal and technical aspects in a manner not achievable by a generalist court. In its own fashion (speed and specialization) the Tribunal has delivered. In months, cases which may have languished years in High Courts have been addressed. The hybrid bench setup, which brings together the judges and experts from the field, has generated orders that are based on scientific evidence which the Supreme Court, despite its activism, sometimes cannot.

But efficiency and efficacy are not the same thing. The NGT can only make a decision, it is not an order that it can make come about. It's expected that the Government of the United States (U.S.) will delegate the responsibility for implementing to the very agencies that are usually the ones that cause the case to come before the Tribunal in the first place – the state pollution control boards, the municipal authorities, and the central ministries. No separate policing authority. The NGT inspectors are not in the country. If a state government fails to comply with a direction the Tribunal has little option but to summon officials to appear before it and face charges of contempt — a process that is slow, politically contentious and likely to fail to achieve the environmental effect that the order was intended to have.

This is exacerbated by the accessibility issue. The NGT was conceived as a national body, with a regional outstretch. However, with time, the role of the benches has shrunk and more cases have now been funneled to the Principal Bench in Delhi. That's not an inconvenience for communities in Jharkhand, Odisha or the industrial parts of Tamil Nadu. It's a real obstacle to justice. The environmental damage is not limited to the neighbourhoods of the capital and a tribunal which can be used only by those who can afford to go to Delhi to take a case is one which does not serve a large section of its electorate.

The tension between the functioning and the design of the NGT sits not very comfortably with the principles of the Aarhus Convention which although not binding on India, is a statement of internationally recognized principles of access to environmental justice. A right to information, meaningful public participation and access to remedies are not amenities in the field of environmental governance, they are a requirement for the governance system to function. If an institution is not distributing access, and is concentrating power, it is not serving those ideals.

IV. THE CAQM: NEW INSTITUTION, OLD PROBLEMS

The establishment of the Commission for Air Quality Management (CAQM) in 2020 [6], both by ordinance and subsequently by statute, was designed to be the end-of-institutional fragmentation plague in the NCR. It succeeded the EPCA, which was seen as being under-powered and reactive,

[6] The Commission for Air Quality Management in National Capital Region and Adjoining Areas Ordinance, 2020, was promulgated on October 28, 2020 and later replaced by the Commission for Air Quality Management in National Capital Region and Adjoining Areas Act, No. 29 of 2021.

and was operating under judicial supervision. Unlike the EPCA, the CAQM was granted the power to give binding directions contrary to those of the State pollution control boards.

On paper, that's huge. It was hoped that the inter-state coordination issue which has been a plight of pollution management in the NCR, which was where the blame game was going on (Punjab blaming Delhi, Delhi blaming Haryana, Haryana blaming both) would be addressed by an empowered body above them all. The CAQM is able to advise state governments, local authorities and private sector bodies. In principle, their decisions can't be overruled by the very state agencies that have a political interest in not enforcing them.

In reality, the CAQM has lacked the ability to do more than be a well-crafted response mechanism in case of emergency. But unsurprisingly, its interventions are strongest in October and November. The same tool kit that GRAP uses, but with institutional heft added. But the fundamental issue - persistent heavy fossil fuel use in certain industries, heavy reliance on fossil fuels in the NCR's energy mix, and continued on-going agricultural incentives - has not been addressed. The Centre for Research on Energy and Clean Air (CREA) reports a continued unfulfilled reduction of emissions in key NCR sectors over the years.

The structure of the CAQM has another democratic accountability issue. It's an authority that operates with basically no transparency and outside involvement. A commission not easily subject to scrutiny is making decisions that impact millions of people across several states. But it is not an argument against expert bodies — expertise is of pivotal importance in environmental regulation — it is an argument that expertise without accountability is not governance.

The truthfully is that the CAQM is yet to make the paradigm shift that it was designed to. It could still make it, but the paradigm shift will need to be made from emergency response to year-round structural regulation, from top-down directives to coordinated enforcement down to the district level, and from sector-specific fixes to a framework where air quality becomes a continuous, measurable obligation and not a seasonally occurring crisis to be managed.

V. AIR POLLUTION LAW AND CLIMATE LITIGATION: A CONVERGENCE IN PROGRESS

There is a difference between air pollution litigation and climate litigation, and it makes a difference in the legal strategy. These are air pollution litigation, M.C. Mehta cases[7], GRAP disputes, Aditya Dubey proceedings – immediate, local and measurable harms. Pollutant(s) involved is (are) PM2.5 or SO_2. The damage is respiratory illness, cardiovascular injury, etc. and early death. There is a scientific causal chain and a legal tractable causal chain. Courts can order cleaner fuels, limit the use of cars, stop construction – these orders have a direct and measurable link to the rights being protected under Article 21.

That's a different kind of litigation, namely climate litigation. It's about greenhouse gas emissions, the most important of which are CO_2 and methane — the diffuse, cumulative and long-term effects of which. It's not a cough, it's rising sea levels, more intense monsoons, collapsing agricultural systems and threats to the ecological foundations of the economy. The causal chain of events from a specific emitter's actions to a specific type of damage is more complicated to establish, the timeline is generational and the laws and policies (Paris Agreement promises, NDCs, sustainability laws) are more aspirational rather than immediately enforceable.

These two areas of the law have grown side by side in most jurisdictions. However, in India they are starting to merge and for a reason unique to India's energy and industrial landscape. The big power stations that emit the most GHGs are also the most prominent industrial polluters in the region. They release CO_2, SO_2 and PM from the same stack. In essence, a claim arising under Article 21 based on the immediate health consequences of air pollution caused by a thermal power plant is also an attack on the energy sector's overall carbon path.

This is what one could refer to as “back door climate litigation”. It functions by a rights-based claim, the right to clean air — to bring regulatory results which also meet climate goals, while not giving the court a more uncertain doctrinal field of climate specific duties. The good thing about this strategy is that it is tractable – the health harms are real, present and court provable. The downside of incompleteness: it cannot tackle the harms of climate that aren't locally expressed as air pollution (like emissions from aviation, shipping, land use change or the wider thermal economy).

[7] M.C. Mehta v. Union of India (Vehicular Pollution Case), (1998) 6 SCC 63.

Whether Indian Courts will ultimately uphold a separate climate obligation, as a duty on the State not to just manage air quality but its carbon economy in a manner consistent with the Paris Agreement and intergenerational fairness, is a question yet to be answered. The fact is that today, air pollution litigation is partially doing the work, and the line between in-the-moment and existential air pollution is becoming more blurred in India's legal landscape. Beware of this convergence for lawyers representing future litigants, and for judges deciding future cases.

VI. THE ENFORCEMENT GAP: WHY PILS HAVE NOT CLEARED THE AIR

For the past 40 years, Public Interest Litigation has been the driving force of Indian environmental law. It has led to remarkable judicial decisions, forced governments to respond to evidence which they would otherwise have suppressed or ignored, and provided to ordinary people a means of holding their governments to account which was not available before. It would be an understatement to say that if there was no PIL, India's right to clean air would be even more a paper right than it is today.

However, PIL is not a system of governance, it is a pressure valve. It is effective when it can make a government take a specific and limited action: convert the buses to CNG; shut a specific factory; force an authority to publish data which it has been hiding. Does not apply effectively when the issue is systemic, chronic, and entrenched within the incentive systems of several agencies in several jurisdictions. The air pollution situation in Delhi is all of these.

There are a number of parts to the enforcement gap which are definite to identify. There is the imbalance between activism and capacity of the executive. Courts hand down orders, which the same agencies responsible for the failed enforcement attempt are the ones that must now enforce it. Pollution control boards are also underfunded, understaffed, often subjected to political pressures from the industries they are tasked to regulate, and not equipped with the technical means to enforce compliance on the fly. With those bodies not reformed, judicial orders are architectural drawings of buildings that no one is contracted to build.

Second, PIL has a geographical issue. It is found in the capital cities and is a phenomenon of urban areas. This is because it is in the rural and peri-urban areas where informal workers are most

exposed to pollution in the air, where children have had lung development permanently compromised by the effects of chronic exposure to pollution, and where environmental damage does not seem to draw the same level of litigation. Enforcement is not equal. It is most devastating on the least empowered to access the courts.

Third, the economic incentive framework has not been changed for polluters. The Polluter Pays Principle which has been adopted in India's environmental law through the case of Vellore Citizens' Welfare Forum and later on should in theory make sure that the cost of pollution is borne by the polluter. In reality, environmental compensation levies are often taken as an operating expense rather than being avoided and incorporated into the business model. These are insufficiently high to incentivize behaviour change, often not collected, and not tied to the real health impacts of the air pollution they appear to be charging for.

Finally, the issue of litigation as performance. In November every year, when the smog builds up and hospitals become crowded, the courts are summoned to action again. Orders are issued. Officials are summoned. Commitments are made. As the air clears and news cycles change in February, the cracks in the system that caused the crisis are still there. This is repeated the next October. This is not a lack of imagination, certainly not a lack of will on the part of the judiciary. It is an outcome of governments' pretending they were confronting a legal issue rather than an administrative, fiscal and institutional one — of expecting a right order, to be issued by a right court, to be the answer to the governance problem that they actually are.

VII. CONCLUSION

This paper has contended that the air pollution problem in north India is fundamentally a governance problem, and not a law one. Right to clean air is constitutionally anchored, strong in court and — now converging with climate litigation, which is taking on doctrinal breadth. It is missing the institutional infrastructure that could make it a reality in the lives of its target beneficiaries.

This analysis gives rise to three conclusions. The design of regulatory institutions is very important, and India’s existing ones, NGT and CAQM, have structural flaws which are not going

to be cured by judicial goodwill. The NGT requires better regional access and independent enforcement capabilities. The CAQM must shift from the acute, crisis management approach to a year-round, data-driven, continuous regulatory process. If they are to be accountable, they must have effective public engagement procedures.

Second, the convergence of air pollution litigation and climate litigation that is taking place is a phenomenon that Indian courts and practitioners must pay attention to. There are existing legal frameworks that can respond to the acute health harms that are occurring. The question is whether it can be expanded (with care, attention to the different evidential requirements) to cater to the longer term, systemic dimension of the environmental challenge in India. The conceptual link is provided by the principles of intergenerational equity and precautionary principle, which are already enshrined in the Indian legal system.

Third and most fundamentally, courts will not be the sole guardians of the promise of the right to clean air. Litigation can establish standards, force disclosure and force governments to deal with what they'd rather ignore. It can never be able to establish an administrative state that can impose those standards every day in a nation of 1.4 billion people, against strong economic interests. This institutional change, fiscal restructuring and political determination is not the court's responsibility. Laws, decrees and, ultimately, citizens. What the law can do is make sure that the work is accomplished. But will it be done is another question, and a more difficult one.

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