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**CONSTITUTIONAL LIMITATIONS ON ENVIRONMENTAL GOVERNANCE IN INDIA**- Ameesha Malhotra<sup>1</sup>**ABSTRACT**

The article aims to address the underlying issues with respect to environmental governance in India and lack of constitutional protection granted to address the new environmental concerns that the world is facing today. It also seeks to address the problem of poor awareness and implementation of environmental laws at local level due to the centralization of environmental institutions. Through this article, a conclusion is drawn to understand what is required to protect the rights of both state and the centre with respect to regulating laws on environmental protection and address the changing needs of the world and the requirement to enact laws relating to new global concerns such as Climate Change, which can be implemented at both the centre and state level.

**INTRODUCTION**

Prior to the Stockholm declaration, there were no laws governing environmental concerns in India. It was only after the <sup>2</sup>**UN Conference on Human Environment**, popularly known as the <sup>3</sup>**Stockholm Conference**, held in Sweden in **1972**, which led to emergence of environment as a major cause of concern for India and various other countries. Right to healthy environment was recognised as a basic right and India incorporated the right as a part of right to life guaranteed under <sup>4</sup>**article 21** of the constitution. The conference prompted the nation to enact laws aimed at preserving the environment. In pursuance of <sup>5</sup>**article 253** of the Indian Constitution, the centre implemented the decision taken at the conference and introduced the **42<sup>nd</sup> amendment** which led to introduction of certain provisions in the

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<sup>2</sup>*Declaration of the United Nations Conference on Human Environment*, UN Audiovisual Library of Intl' law (2012).

<sup>3</sup>*Stockholm Conference 1972*, SpringerReference.

<sup>4</sup> INDIA CONST. art. 21.

<sup>5</sup> INDIA CONST. art. 253.

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constitution relating to protection of environment in India. <sup>6</sup>Article 48A and <sup>7</sup>51A(g) were inserted pursuant to the amendment under <sup>8</sup>Part IV of the Constitution dealing with DPSP. While <sup>9</sup>art. 48A confers duty on the state to protect and improve the environment including forests and wildlife of the country, art. <sup>10</sup>51 A(g), confers duty on the citizens to protect and improve the environment and respect all living creatures. The amendment also inserted 2 new subjects in the concurrent list under <sup>11</sup>clauses 17 A and <sup>12</sup>17 B which dealt with forests and protection of wildlife. Hence, certain subjects which were earlier a part of the state list now became a part of the concurrent list, to enable the both the centre and state to enact laws on those areas. This was also done to reduce burden of states as they already had the power to make laws on various aspects of environmental protection.

However, despite of the new awareness generated in India and enactment of new laws in our country to deal with environmental governance, there are many limitations in the constitution which are acting as a hindrance in the protection of environmental laws in the country. This article seeks to address these concerns in detail and emphasises on the dire need to enact laws on new subjects of global concern as well as reconcile the conflicting interests between centre and state with respect to enacting laws on environment protection.

## CONTENT

One of the constitutional limitations relating to environmental governance is that laws relating to environment in India are confined to forest conservation, wildlife, fisheries, mineral, and water resources. The constitution of India has failed to address one of the major global concerns affecting the world today, i.e., **global warming** and the resulting **climate change** and how it is affecting the eco-system. The impact of climate change in India has been rampant as it has resulted in increasing droughts, heavy rainfall, rise in sea level etc. Despite of the catastrophe caused due to climate change, the constitution is silent regarding it and no law has been enacted yet, either at the state or central level governing climate change. It was

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<sup>6</sup> INDIA CONST. art. 48 A, *amended by* The Constitution (Forty -second Amendment) Act, 1976.

<sup>7</sup> INDIA CONST. art 51 A, cl. (g), *amended by* The Constitution (Forty second Amendment) Act, 1976.

<sup>8</sup> Ins. by the Constitution (Forty second Amendment), Act, 1976.

<sup>9</sup> Supra note 3.

<sup>10</sup> Supra note 4.

<sup>11</sup> Ins. by the Constitution (Forty Second Amendment) Act, 1976.

<sup>12</sup> Ibid note 8.

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only post 1992, that the <sup>13</sup>UN Framework Convention on Climate Change was set up and a new awareness about climate change was generated. Apart from this, there are also many rights in the constitution which conflict with the right to environment guaranteed under <sup>14</sup>art. 21. Balancing and reconciling these rights in order to protect the interests of the citizens is an arduous task imposed on the Judiciary. Moreover, since most of the subject matters relating to forests, wildlife and population control falls under the concurrent list, the centre exercises an upper hand in making legislations on these subjects and hence states do not get a say if the central law contradicts it. Most of the institutions for climate change in India are headed by the PM and there is no specialised authority dealing with it. This is also one of the major drawbacks behind poor implementation of environmental laws in India. <sup>15</sup>The National Board of Wildlife and the <sup>16</sup>National Disaster management authority are headed by Prime Minister, instead of some specialised officer being appointed for that purpose. The <sup>17</sup>Environment Protection Act, 1986 which has been enacted in India pursuant to the Stockholm Conference, confers vast powers on the Central Govt. to take measures for protection and improvement of environment. The central govt. has further powers of appointing specialised officers and agencies for the purpose of carrying out these measures. Hence there is limited control of the local bodies over the environmental laws as it only talks about conditional delegation and centre retains most of the control. Conflicts often arise between centre and state laws with respect to imposing regulations on environment protection and courts are bestowed with the task of maintaining federal balance. The Environmental Impact Assessment initiative which has the statutory backing of <sup>18</sup>Environment Protection Act, 1986, is only implemented by the Central govt. Local govt. has no authority to deal with it.

## CRITICAL ANALYSIS

The Constitution of India does not provide for effective laws on environmental compliance in India. Some of the limitations resulting in poor compliance of environmental laws in India include:

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<sup>13</sup>*Adaptation under the UN Framework Convention on Climate Change*, Fairness in Adaptation to Climate Change (2006).

<sup>14</sup> Supra note 1.

<sup>15</sup>THE OFFICIAL WEBSITE OF MINISTRY OF ENVIRONMENT, FOREST AND CLIMATE CHANGE, <https://moef.gov.in/en/division/forest-divisions-2/wildlife-2/introduction/> (last visited Feb 6, 2003).

<sup>16</sup>*National Disaster Management Authority*, Home I NDMA Gol.

<sup>17</sup>The Environment (Protection) Act, 1986, No. 29, Acts of Parliament, 1986 (India).

<sup>18</sup>The Environment (Protection) Act, 1986, No. 29, Acts of Parliament, 1986 (India).

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1. **Inelasticity in existing legislations**—due to unachievable standards of environmental laws, firms are often discouraged from making investments in environment related projects.
2. **Ineffective enforcement**— non- existent or weak enforcement results in poor response of firms towards compliance of environmental norms.
3. **Poor monitoring**— lack of technically skilled manpower
4. **Ineffective punitive measures** for violation of environment related laws
5. **Insufficiency of funds** to invest in environmental projects

The Constitution nowhere talks about establishment of **environmental courts** at regional level having jurisdiction to deal with environmental problems. Establishing such courts on regional basis would result in speedy and effective adjudication of environmental disputes and would prevent ordinary courts from being overburdened with cases. Despite India ratifying various treaties on environment protection, lack of implementation at domestic level is the reason for its poor enforcement.

### **Constitutional limitations relating to laws governing climate change in India**

Climate policy making in India is a cumbersome task as the country has double climatic identity. It is regarded as a vulnerable country with respect to climate change due to its high annual emissions, and its small contribution to the problem when considering historical and per capita emissions.

Annual emissions of India are regarded as the 4<sup>th</sup> largest in the world but India's contribution to global emissions of greenhouse gases remains quite low as compared to US. India experiences widespread impact of climate change due the variations in rainfall and the sudden increase in extreme events like floods, droughts, cyclones etc. However due to India's low per capita as well as historical emissions, it has a low level of responsibility internationally. This has assisted India in creating a space for domestic policy growth while shielding it from external pressures to reduce GHG emissions.

The reason for poor position of India as a result of climate change was due to the lack of formal institutional links between domestic and foreign policy.

India's approach towards climate change is aimed at integrating climate change into developmental decisions so that developmental activities can go on side by side while

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maintaining climatic balance. This approach has been laid down in <sup>19</sup>**National Action Plan on Climate Change (NAPCC)**, implemented in 2008. This plan lays down the importance of clear institutional transmission mechanisms from policy to execution, for policies and strategies to begin to be put in action. Unfortunately, Indian constitution does not provide for any laws which talk about setting up of institutional mechanisms to deal with climate change. This is because the developing countries, under the principle of **Common but Differentiated responsibility (CBDR)**, shifted the entire burden of global warming and climate change on the developed countries and made them responsible for worldwide increase in greenhouse gas emission. Developing countries like India felt that its economic development would be affected if it was forced to share in the loss caused by the developed countries by cutting down its carbon emissions. It was primarily due to this reason that Indian constitution does not contain any provision to control climate change. The <sup>20</sup>**Clean Development Mechanism** was a turning point in breaking isolation of India's domestic politics from global climatic politics. As Indian's saw opportunity for them in this new mechanism, **National Clean Development Mechanism Authority** was established in 2003. However, the policy was not effective as there was limited coordination, strategic planning, and implementation. India's constant engagement with the subject was seen when Jairam Ramesh got appointed as Minister of Environment and Forests (MOEF). During this time, two high-level policy formulation and coordination institutions were established: the <sup>21</sup>**Prime Minister's Council on Climate Change (PMCCC)** and the **PM Special Envoy on Climate Change**, which brought institutional change. At the level of MOEF, many additional supportive bodies were also put in place. The PMCCC was bestowed with the responsibility of formulating a national strategy to address climate change. However, the council had its own shortcomings and only played a limited substantive and analytical role.

On the other hand, the office of **PM's Special Envoy on Climate Change** worked within the PMO and was able to take advantage of the PMO and played an important coordinating role by integrating domestic and international climate policy. However, neither of these

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<sup>19</sup>*National action plan on climate change (NAPCC)*, PRESS INFORMATION BUREAU, (Feb 6, 2023). <https://static.pib.gov.in/WriteReadData/specificdocs/documents/2021/dec/doc202112101.pdf>.

<sup>20</sup> UNFCCC INT., <https://unfccc.int/process-and-meetings/the-kyoto-protocol/mechanisms-under-the-kyoto-protocol/the-clean-development-mechanism> (last visited Feb 6, 2023).

<sup>21</sup> PM chairs meeting of the Council on Climate Change, PMINDIA, (Jan 19, 2015), [https://www.pmindia.gov.in/en/news\\_updates/pm-chairs-meeting-of-the-council-on-climate-change/](https://www.pmindia.gov.in/en/news_updates/pm-chairs-meeting-of-the-council-on-climate-change/).

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institutions were able to function effectively and fully as institutes of planning due to lack of research capacity and analytical role.

Hence, we can say in a nutshell that India has adopted a **reactive model** with respect to climate change instead of shifting to a **proactive and deliberate approach** like other countries like **China**. Instability and discontinuity of institutions is another drawback of India's climate policy. The current climate change crises can only be combatted through an interlinkage with other environmental issues such as **agriculture, industrialisation, energy** etc. It has also been recommended by an expert committee that "**environment protection**" must be included as a specific entry in concurrent list, to widen the ambit of laws relating to environmental governance. Absence of effective environmental laws dealing with climate change are also affecting other constitutional rights of Indians such as <sup>22</sup>article 21 of the constitution.

### **Conflicting fundamental rights in the Constitution**

- There have also been conflicts between rt. to religion and compassion for living beings. Compassion for living creatures was incorporated under <sup>23</sup>**art.51 A(g)** by the **42<sup>nd</sup> amendment, 1976**. Prior to this enactment, SC had passed a judgement in **1958** which stated that total prohibition of cow slaughter was not in public interest. However, this view was overturned in **2005** in the case of <sup>24</sup>*State of Gujarat v. Mirzapur Moti Kureshi Kesab Jamat*, to give effect to art 48 and 51(A)(g).
- This problem of slaughter of animals again came up in the case of <sup>25</sup>*Akhil Bharat Goseva Sangh (3) v. State of A.P*, where the SC held a contrary view as the need for boosting meat export and promoting large scale slaughter was emphasised. The court held that DPSP and fundamental duties cannot make redundant a legislation or policy.
- Refusal to grant license to carry out a business activity can be justified if refusal is made for protection and improvement of environment.

### **CONCLUSION**

Hence, we see that scope of environmental protection under Indian Constitution is very narrow and excludes within its ambit laws relating to climate change. This is seen as one of

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<sup>22</sup> Ibid note 1.

<sup>23</sup> Ibid note 4.

<sup>24</sup> State of Gujarat v. Mirzapur Moti Kureshi Kesab Jamat, (2005) 8 SCC 534.

<sup>25</sup> Akhil Bharat Goseva Sangh v. State of A.P, (2006) 4 SCC 162.

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the major limitations of the Constitution. Apart from this, our constitution suffers from various other drawbacks. There are many conflicting rights within the constitution and it is often difficult for courts to strike a balance between them. The right to environment often comes in conflict with right to freedom of speech and expression, freedom of trade as well as right to religion. This shows the conflict arising between various rights enshrined in the constitution acts a hindrance for developing environmental laws in the country. Since most of the subject matters dealing with environmental protection, now fall under the concurrent list, the centre exercises an upper hand in enacting laws on these subjects and can even intrude upon areas where state govt. is empowered to legislate. Thus, the state is not left with any power when the centre intervenes. Moreover, in a federal set up, different states have a duty towards each other to recognise their responsibility towards the other state whenever an interstate project is undertaken.

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