

The Principles of Climate Legislation

DRAFT DISCUSSION PAPER

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Introduction

The recent instalment of the Intergovernmental Panel on Climate Change (IPCC) science report states that in spite of significant global reduction in GHG emissions, the Earth's surface temperature will cross 1.5°C above 1850-1900 levels; and assuming the persistence of our middling efforts, that we will cross the 2°C mark before this century's close.¹ The report shows not a linear but exponential relationship between increase in temperature and extreme weather events: that 'projected changes in extremes are larger in frequency and intensity with every additional increment of global warming'.² These general facts about global climate vulnerability bear, in orders of magnitude, on India, whose diverse and climate-sensitive ecosystems, from the foothills of the Himalayas to the coasts of the Malabar, loom ominously over its teeming poor.³

At the same time, it is becoming increasingly clear that the climate crisis brings in its wake a train of positive opportunities – particularly, in developing contexts.⁴ Investment of thought, effort, and capital in green growth in the present can prevent future dependence on high-carbon infrastructures. In a rapidly developing country like India, where the material foundations of the economy are yet to settle into a stable form, a green transformation has the potential to unveil many possibilities, particularly in employment and industry, that may not be apparent from a study of past development narratives. A proactive climate policy will likely make India more competitive in the global low-carbon economy of the future.

Both the dangers and opportunities thrown up by climate change demonstrate the need for legislation that addresses the issue directly, urgently, and comprehensively. There has been a rush of climate laws around the world in recent years – just in 2021, governments and economies as diverse as Canada and Russia passed new climate acts. India, however, has but a patchwork of institutions and laws that bear marginally on the issue of climate. Perhaps the most explicit instrument in this regard is the National Action Plan on Climate Change (NAPCC) (2008). The NAPCC was envisioned initially as a cross-governmental instrument for mainstreaming mitigation and adaptation across sectors; but many of its missions now have lapsed into disuse.⁵ Although it has proved a useful landmark for bolstering some pro-environmental judgments of the NGT, the NAPCC is not legally binding either.⁶ "Following the NAPCC", argue Dubash et. al.,

many ministries have established climate cells but, for the most part, they have been thinly staffed and with limited capacity. In addition [...] coordinating institutions have waxed and waned over time. During the era of a Prime Minister's Special Envoy (2007-2010), there was active coordination led by the PMO around a few missions. While the MoEFCC is formally authorised to coordinate for climate change, implicit ministerial hierarchies limit its ability to fully play this role.⁷

Our inability in the last decade to forge enduring policies and institutions for adaptation and low-carbon growth has demonstrated the imminent need of legislative intervention.

¹ IPCC, *Sixth Assessment Report*, SPM-17.

² IPCC, *Sixth Assessment Report*, SPM-23.

³ See Badrinarayana, 'Policy in India', 690.

⁴ See Urge-Vorsatz et al., 'Measuring the Co-benefits'; von Stechow et al., 'Integrating Global Climate Change'; Arif Hasan et al., 'The Synergy Between Climate Change'; Halsnæs, 'Development Based Climate Change'; and Linnér et al., 'Reducing Greenhouse Gas Emissions'.

⁵ Bhushan and Gopalakrishnan, 'Environmental Laws', 55.

⁶ Bhushan and Gopalakrishnan, 'Environmental Laws', 19.

⁷ Dubash et. al., 'Climate-ready Indian State', 12.

There do exist environmental laws in India that serve certain functions of a potential climate law. The Electricity Act (2003), for instance, promotes energy efficiency, and the Disaster Management Act (2005) recommends proactive adaptation.⁸ Although the Environmental Protection (1986), Air (1981), and Water (1974) Acts do not pronounce upon GHGs, they establish institutional structures, such as impact assessment reports and pollution control boards that may be adapted for purpose.⁹ Judges too have mentioned climate benefits by invoking India's international obligations, such as the Kyoto Protocol, the Paris Agreement, SDG's, NAPCC, and the NDC's.¹⁰ It may thus be said that climate change is gradually entering the vocabulary of both statute and common law in India. But, argues Ghosh, 'the courts' reliance on [international] instruments is not always accompanied by strong judicial reasoning that explains how India has violated, or is required to comply with, an international obligation'.¹¹ These factors compound to identify the present as both opportune and pressing for addressing the climate question directly and comprehensively by means of law.

The Challenge

Designing a climate law for the Indian political context is a complex and fraught task. Given India's low per-capita emissions,¹² high global GHG contribution, strong potential to avoid locking into high-carbon futures, and extreme vulnerability to climate-events,¹³ the law must perform a delicate dance between development, mitigation, and adaptation. It must, in other words, balance many considerations that do not feature in the commonplace association of climate laws with simple emissions caps. The atrophying institutions of environmental governance need to be reanimated, lasting cooperation between various sectors implicated in mitigation and adaptation must be established, uninterrupted funding for technology transfer and green development has to be secured, and much more.

But before attempting to piece together this puzzle, we must have in mind a full concept of what climate legislation can and should look like if it is to justly and effectively address the issue. The current approaches to this question, wherein climate law is treated either as an empty pot to be filled with ingredients palatable to various stakeholders or as a construct to be borrowed whole from international models, are not adequate to the challenge. A methodical approach is required wherein we weigh the comparative advantage of broad conceptual options to determine *what kind* of legislative intervention would work best for India before hashing out the particulars.

Such an exercise will require answers to a host of important questions of policy and principle: what kind of laws are law-makers obliged to make in the arena of climate change and what should those laws aim to achieve? What balance should a climate law strike between adaptation and mitigation, and how can mitigation and development outcomes be made to complement one another?¹⁴ By unravelling the complexities lurking in these and other such questions, this paper will aim to make a case for reasoned debate and discussion before a hasty enactment of climate legislation in India.

We will in this paper consider the following three essential questions of principle. (1) Should we pass a framework climate law or amend existing laws to address climate change? (2) Should the climate law guarantee a 'right to

⁸ Ghosh distinguishes between 'environmental laws' and 'laws governing [...] sources of energy' (Ghosh, 'Climate Litigation', 349), both of which I have conflated here.

⁹ See Sahithi (CPR Intern), 'List of Central Acts that Interact with Climate Change'.

¹⁰ Bhushan and Gopalakrishnan, 'Environmental Laws', 16-18.

¹¹ Ghosh, 'Litigating Climate', 49.

¹² It is globally 127th, as of 2019 (World Bank, 2019).

¹³ See Badrinarayana, 'Policy in India', 690, and Narula, 'Integrating Risks', 90.

¹⁴ See footnote 4.

climate' or aim to maximise utility/low-carbon development? (3) Should it articulate an 'outcome duty' to cap GHG emissions by a stipulated date or design 'procedural duties' to mainstream the climate issue across government?

A. Dispersed Upgrade vs Framework Legislation

Despite propitious circumstances for weaving climate-consciousness into the fabric of Indian law,¹⁵ the manner and nature of climate law appropriate to the Indian context is far from clear. The first question we will explore in this regard is whether India should initiate a series of upgrades to existing laws through amendments to make their jurisdiction over the climate issue explicit or pass 'an overarching law that create[s] a unifying basis for climate policy'?'¹⁶ The latter, whose most exemplary iterations are South Korea's, Peru's, and the UK's climate acts,¹⁷ has come to be known among environmental law experts as a 'framework law' on climate change.

Dispersed Upgrade: There are two (related) arguments in favour of the dispersed upgrade approach.

The first is judicial minimalism. The assumption here is that the legal system of a nation is most robust when proceeding by small interpretations away from precedent; and that superfluity – which a new climate law would constitute, when existing environmental laws can be suitably amended – is harmful to the fitness of law. Minimalists would argue that in India, the right to environment lives in the constitution's enumerated rights and duties; they would note that judges have already interpreted this right from Articles 21, 48A and 51A(g) on a few occasions. If this right should exist in India as a matter of common and constitutional law, it seems as if the government's duty to protect its citizens from the devastating effects of climate change will organically, through gradual legislative amendments, become a matter of fact.

Second, in almost all the areas of governance where climate action is required, whether mitigative or adaptive, there are laws in existence that can be amended to reflect necessary functions. Apart from laws on air, electricity, disaster, energy, and forests, which have already been categorised by the Grantham Institute as 'climate acts', there is potential for a 'climate upgrade' in many other existing laws in the field of aviation, water, biodiversity, transportation, housing, and more.¹⁸ The creation of Central and State Pollution Control Boards under the Water Act, the ability to ban the burning of fossil fuel in 'air pollution' controlled areas under the Air Act, the Environmental Impact Assessments mandated by the Environmental Protection Act, the basis for the nationwide promotion of renewable energy in the Electricity Act, the principle of intergenerational equity animating the National Mineral Policy, and the Coal Cess established (originally) to fund renewable energy research, when seen together, seem to constitute an adequate institutional foundation for climate-readiness.¹⁹ Although the aforementioned have proven inadequate thus far in addressing climate change, they can be amended for purpose. And given the Environmental Protection Act gives sweeping powers to the Central Government to 'take all such measures as it deems necessary to protect the environment',²⁰ it seems the natural seat for a renewed focus on climate policy and the coordination of various acts therein.

Framework Legislation: There are four main arguments in favour of a framework climate law.

¹⁵ Climate-related action has been addressed in 5 acts in force (Bhushan and Gopalakrishnan, 'Environmental Laws', 16-18) and an increasing number of judgments, as well (Ghosh, 'Litigating Climate', 49).

¹⁶ Nachmany et. al., 'Global Trends', (n 11) 22.

¹⁷ See appendix for comparison of significant climate laws around the world.

¹⁸ Sahithi (CPR Intern), 'List of Central Acts that Interact with Climate Change'.

¹⁹ Bhushan and Gopalakrishnan, 'Environmental Laws', 33-51.

²⁰ Section 3(1), EPA (1986). Consequently, its definition of 'environmental pollutant' in Section 2(b) can quite plausibly include GHGs.

First, the desirable outcomes of mitigation and adaptation are shaped by developmental choices that typically sit substantially outside the scope of environmental regulation. That is, climate action, in recruiting almost all sectors of the state's central nervous system – energy, water, land-use, urban planning, transportation – is more pervasive an issue than many other environmental pursuits.²¹ Consequently, the climate threat entreats a more generous attitude to trade-offs than is typically granted in development-environment conundrums. Enacting a framework law that reflects the multifarious nature of the threat will be a clear indication that climate change is an issue that can and should transcend traditional environmental regulation.

Second, and closely related, a newly framed law that conceptualises climate change as a broad context for the nation's developmental path can, in practical terms, penetrate and interweave climate consciousness into various existing sectors and administrative structures of implementation.²² Let us take city planning and transportation, which are crucial frontiers for low-carbon development. A framework law could set in motion coordinated actions that reinforce capacity for mitigation in each individual domain – the installation of electric vehicle charging points is an obvious instance of concurrence between these sectors.²³ Similarly, law and policy governing land-use, water management, and public safety will have to cooperate to manage the inland translocation of coastal populations and the consequent strain on water-supply.²⁴ Scotford and Minas discuss such problems that 'do not fit into existing legal categories and typically require bespoke legal approaches [...]. This is even more so in the case of climate change, which is [...] disruptive to existing legal frameworks, including its polycentric causes and effects'.²⁵ Given the hydra of climate change relentlessly sprouts new – mostly menacing but at times, felicitous – heads, a single, lumbering update to the EPA, for instance, will not prove sufficient to tackle the evolving nature of the threat. Instead of repeatedly patching together an overextended and brittle paradigm of environmental law in India, the lasting approach would be to establish a new paradigmatic law that has worked into itself a method for continual extension and adaptation.

Third, there is precedent in India for the establishment of paradigmatic environmental laws on the basis of international resolutions. Both the Air Act and EPA were inspired by the 1972 UN Conference in Stockholm.²⁶ The Paris Agreement would, in this tradition, seem momentous enough to inspire new legislation that addresses specifically the threat of climate change.

Fourth, a framework law, and the government will that that evinces, can exercise significant influence on the private sector: the law can even – as the South Korean climate law does – heavily induce market investment in green technology.²⁷ Private firms are in the natural course of things wont to 'underinvest in disruptive new technologies such as electric cars or solar panels' – the high R&D costs of green technology often necessitate the intervention of political or legal intent.²⁸ Conversely, negative impacts on polluting industries can also be managed under the shelter of a framework law. A law mandating government action to a definite end lends political cover for the short-term costs of certain necessary measures while also providing the foreknowledge to soften the blow on sectors affected by the policy.

²¹ See appendix for a list of sectors usually recruited by climate laws around the world.

²² Bowen, 'Case for Carbon Pricing'.

²³ Bowen and Fankhauser, 'Low-carbon Policy', 129.

²⁴ Ruhl, 'Climate Change', 1016.

²⁵ Scotford and Minas, 'Probing the Hidden Depths', 72.

²⁶ Bhushan and Gopalakrishnan, 'Environmental Laws', 35 & 37.

²⁷ Bowen and Fankhauser, 'Low-carbon Policy', 129.

²⁸ Aghion et al., 'Carbon Tax', find evidence of such path dependence in the automotive industry.

Table 1: Dispersed Upgrade vs Framework Legislation

DISPERSED UPGRADE	FRAMEWORK LEGISLATION
<ul style="list-style-type: none"> • Judicial Minimalism • Existing legal raw material 	<ul style="list-style-type: none"> • Uniqueness of climate change • Cross-sectoral coordination • International obligations • Green investment

B. Rights vs Utility

The development of constitutional law in India has seen an unusual reliance on the moral language of rights. It has been observed that ‘the Indian Constitution is one of the few in the world that contains specific provisions on the environment. The Directive Principles of State Policy and the Fundamental Duties chapters explicitly enunciate the national commitment to protect and improve the environment’.²⁹ Three constitutional provisions are material to this discussion: the right to life and liberty in Article 21, the state’s duty to protect the environment in Article 48A, and the citizens’ duty to care for the environment in Article 51A.³⁰

From these provisions, the courts have inferred a range of duties owed to citizens that are often expressed in terms of rights.³¹ These various and loose formulations, such as the ‘right of enjoyment of pollution-free water and air’, the right to ‘live in healthy environment with minimal disturbance of ecological balance’, have come to collectively be termed the ‘right to environment’.³² We must now decide whether climate legislation in India is to rest on, or emanate from, a ‘right to environment’, implying in so doing an auxiliary ‘right to climate’.

Almost all the global advocates of climate-based rights concede the many challenges that climate change poses to the language of rights.³³ These discussions, however, are rarely theoretically robust and often end by seeking refuge in the empirical accretion of the rights-language in climate legislation and case law around the world.³⁴ We will thus attempt in this section to take the debate – between climate change as an issue of individual/group rights versus collective welfare – to its full logical conclusions.

Rights-based Approach: There are three main arguments in favour of a rights-based approach to climate legislation.

First, doing so would be consistent with the organic development of jurisprudence in India. Ghosh has shown that the trade in environmental rights has become increasingly popular in the Indian Supreme Court,³⁵ and a climate law based on the right to environment would seem to flow neatly from the zeitgeist.

²⁹ Sondhi et. al., ‘Indian Law’.

³⁰ Ghosh, ‘Climate Litigation’, 360.

³¹ Bhullar, ‘The Judiciary’, 21–54.

³² Lord Carnwarth lists many wild constructions of climate rights around the world in his Garner lecture (2013).

³³ See the following: McInerney-Lankford, ‘Climate Change and Human Rights’, 433; Knox, ‘Climate Change and Human Rights’, 167; Ahmad Mir, ‘From Shehla Zia to Asghar Leghari’, 288; Savaresi and Hartmann, ‘Using Human Rights Law’, 86; Galparin and Kyser, ‘Uncommon Law’, 23-6; Peel and Osofsky, ‘Climate Change Litigation’, 29; Peel and Osofsky, ‘Rights Turn in Climate Change’, 46; Mayer, ‘Construing International Climate’, 121; Green, ‘Normative Foundations’, 88; Pernot, ‘Right to Environment’, 155; Posner, ‘Climate and International Human Rights’, 1926–29; and Varvastian, ‘Right to a Clean and Healthy Environment’.

³⁴ The closest a proposal comes to a viable fix is that ‘human rights may be used as a “gap filler” until other areas of law satisfactorily address the harm associated with the adverse impacts of climate change’ (Savaresi and Hartmann, ‘Using Human Rights Law’, 74): but even here, while that gap in legislation is being filled, the theoretical and practical dissonance between climate change and rights (to be discussed) are not overcome – at best, such a solution makes the irrationality of laws temporary.

³⁵ Ghosh, ‘Climate Litigation’, 350-51.



Second, an interesting feature of Indian jurisprudence is its willingness to extend *locus standi* to non-human entities.³⁶ The principle of ‘ecocentrism’ that views the consequences of government action in a greater context than that of human society, was explicitly invoked to justify the decision in *T.N. Godavarman vs Union of India*: ‘Environmental justice could be achieved only if we drift away from the principle of anthropocentri[sm] to ecocentri[sm] [...] non-humans ha[ve] intrinsic value’.³⁷ Similarly, the Uttarakhand High Court, in 2017, recognised the legal personhood of the Ganga and Yamuna river ecosystems.³⁸ If the principle of ecocentrism indeed lives in the unusually nature-friendly Constitution of India, it follows that India’s biodiversity is owed explicit legal protection from man-made climate change.

Third, rights enter the equation without controversy if it is noted that a number of more well-established rights, the right to life, to food, and water, are likely to be undermined by climate change.³⁹ A right to climate could thus be seen as a manifestation of more fundamental rights.

Utility-based Approach: There are three main arguments against the rights-based approach to climate legislation – these implicitly favour the default purpose of any new law, which is the maximisation of utility or the common good.

The first two (related) problems with basing climate law in the framework of rights are the ascription of duty and the establishment of causation. Without a corresponding duty and means of accountability, a ‘right to climate’ would be an empty cipher. The assumption that this political trump is somehow sufficient, with or without a climate law, to protect Indian citizens from the dire consequences of climate change is dangerously flawed.

First, in the absence of a duty to restrict emissions to a certain numerical limit by a specified date – that is, an ‘outcome duty’ – the declaration of a right alone guarantees little actual protection. But even if the law decrees an outcome duty, this creates technical issues that weaken the promise; of which hereafter. Many legislators often overlook these facts and promise environmental rights, perhaps for their rhetorical valency. The Mexican climate law, for instance, proclaims to issue from and guarantee ‘the right to a healthy environment’. But this promise is backed only by the ‘implementation of public policies on climate change adaptation and mitigation’. A ‘public policy’ exists to guide action to a desirable outcome of public good. The protection of rights requires, at the very least, legal compulsion or prohibition.

Second, the problem of accountability. Given the protean complexities of the climate system, there are ‘many uncertainties and potential interventions in the causal chain between stocks of greenhouse gases (GHGs), degrees of warming, climate hazards and impacts on persons’ well-being’.⁴⁰ Although climate science is able to establish a consensus on global phenomena such as strong correlation between industrial activity and rising global temperatures, tracing local meteorological aberrations to a nation’s CO₂ output is a deeply fraught scientific and judicial endeavour.⁴¹ Given the linchpin of judicial reasoning is the ability to weigh culpability, the law would do well to avoid granting rights where it cannot rationally establish their infringement.

Third, it is unclear that the ‘climate’ meets any sound criterion for rights-based protection. Dworkin, for instance, provides a neutral criterion for rights: ‘Individuals have rights when, for some reason, a collective goal is not a sufficient justification for denying them what they wish, as individuals, to have or to do, or not a sufficient

³⁶ Sondhi et. al., ‘Indian Law’.

³⁷ *TN Godavarman v Union of India* (2012) 4 SCC 362.

³⁸ *State of Uttarakhand v. Mohd Salim* (2017); See Kauffman and Martin, ‘When Rivers have Rights’, 11.

³⁹ Chosh, ‘Climate Litigation’, 360.

⁴⁰ Green, ‘Normative Foundations’, 88; See also Feess et. al., ‘Environmental Liability’.

⁴¹ ‘Climate attribution’ is still in very fledgling science and it is not clear that it will be successful.

justification for imposing some loss or injury upon them'.⁴² One may thus argue that in conditions of scarcity, 'keeping the majority healthy' is not sufficient justification to deny food to a segment of the population; just so, that security is seldom a satisfactory defence for censorship. But unlike discriminable commodities like food and speech that can lapse into uneven distribution, and over whose use citizens of a commonwealth can claim political privilege in the form of rights to food or speech, it is not clear how an agreeable environment or climate can be selectively granted or protected by a government. That is, the advocates of climate rights have yet to demonstrate how the collective good in climate policy would be *at odds* with the basic protections of individuals or groups.⁴³

Table 2: Rights-based Approach vs Utility-based (non-rights) Approach

RIGHTS-BASED APPROACH	UTILITY-BASED (NON-RIGHTS) APPROACH
<ul style="list-style-type: none"> • Legal precedent • Non-human standing • Protecting more fundamental rights 	<ul style="list-style-type: none"> • No corresponding duty • Lack of accountability • Criterion for rights not satisfied

C. Outcome vs non-Outcome Duties

A decision between rights and utility will influence the central provision of the climate legislation. This is to do with the nature of duty that the law will ascribe.

Statutory duties imposed on public authorities have taken myriad forms in the past. Reid, however, identifies in the development of climate law the proliferation of a new kind of duty he terms an 'outcome duty'. He defines this as 'a duty not just to do something but to ensure the achievement of a specified outcome which depends on the cumulative conduct of a wide range of parties'.⁴⁴ For instance, the UK Climate Act has 'now established a legally binding target of at least an 100% cut in GHG emissions by 2050, to be achieved through action in the UK and abroad'.⁴⁵ Outcome duties introduce novel challenges to the enforcement of law. But if the judiciary recognises a right to the enjoyment of a certain range of climatic conditions, the government's duty to restrict carbon emissions to a definite level becomes almost axiomatic.

Framework legislation, however, can have many duties that are not outcome-based: 'a) "operational" duties require authorities to carry out specific tasks', b) "procedural" duties set out the procedure which must be followed to achieve certain tasks', c) "relationship" duties establish the relationship between different authorities by requiring consultation or establishing a hierarchy in terms of reporting, guidance or directions', d) "have regard" duties require authorities to have regard to certain things in the exercise of their functions (but not to go beyond that to give them overriding weight)', e) "purposive" duties set out the general objective to be pursued in carrying out a task or by an authority as a whole', and more.⁴⁶ Such duties, in different blends, go into the formation of 'climate institutions', and their careful framing will generally contribute to the longevity of the institution that the law serves to create. A growing amount literature suggests that institutions contribute to mitigation less by suppression and

⁴² Ronald Dworkin, *Taking Rights Seriously*, 8.

⁴³ Unless, of course, one maintains that climate catastrophe is good for the majority – as long as the fossil fuel-based economy carries on – except for few vulnerable communities: but this would be an absurd position for an advocate of climate rights to occupy; and what is more, it would be very difficult indeed to adduce scientific or economics literature to back such an assumption.

⁴⁴ Reid, 'A New Sort of Duty', 1.

⁴⁵ Grantham Institute, 'Climate Change Laws of the World: UK Profile'.

⁴⁶ Reid, 'A New Sort of Duty', 1-3.

more through positive feedback loops that mainstream climate consciousness into the workings of government and industry.⁴⁷ Our question here is whether a target and deadline should be specified in the Indian climate law.

Pro-outcome: There are two arguments in favour of an ‘outcome duty’.

First, as with the framework law itself, the urgency and scale of action required to halt climate change demands sustained attention on end-goals and outcomes. Given the alternative, not achieving the desired outcome is in this case not an option.

Second, enterprising scientists have attempted to calculate the global ‘carbon budget’ available to meet the Paris objective of staying within 2°C of pre-industrial temperatures: they settled on 1,000 Gt of CO₂.⁴⁸ If this number can for the sake of action be taken seriously, it would give India a quantifiable share in the global burden and a clear benchmark for which to aim. Multiple laws around the world, such as the German and UK Climate Acts, have announced their government’s entry in the race.⁴⁹ An unsuccessful climate change bill was introduced even in the Indian parliament (2015) that proposed carbon budgets.⁵⁰ Were new climate legislation to set a definite outcome goal for India, it could be a powerful symbolic instrument to rally the nation and a useful diplomatic instrument to attract international funding.

Anti-outcome: There are four main problems with the inclusion of an outcome duty in the climate law.

First, there is great uncertainty about whether a hard, time-bound cap (a necessary concomitant to an outcome duty) might in the Indian context impose major development costs, particularly on the poorest. Given India’s limited historic contribution to the problem and low per-capita emissions, a carbon cap, which may be seen as restricting energy choices, is unlikely to win broad political support.

Second, and consequent upon the first, any target set is likely to be relatively modest, and fail to induce transformative change. If, somehow, despite these considerations, an ambitious target is stipulated, it is not clear that, given the peripheral place of climate change in Indian politics, it would inspire the requisite large-scale cooperation. Procedural duties that build institutional capacity and mainstream the climate issue into the routine machinations of government are more likely to find efficient ways of maximising India’s mitigation capacity.⁵¹

The third issue with outcome targets flows from the contradictions inherent in a right to climate, and that is its justiciability. Even if it seems obvious that a target will not be reached by the stipulated deadline, any action brought before the date might be deemed by the courts premature. On the other hand, it is unclear whether an outcome duty continues to have legal meaning after the deadline has passed. Reid says ‘the specific wording of [...] “outcome” duties militates against the argument that they are imposing continuing obligations. Any legal action after that stage could be regarded as futile and thus not be entertained by the courts’.⁵² It is for similar reasons that the Irish Climate Change Response Bill, for instance, was rejected: it being declared that the outcome duties therein set out ‘shall not be justiciable’.⁵³

⁴⁷ See González-Rico and Gosseries, *Institutions*; Grubb et. al., *Planetary Economics*; and Lockwood, ‘Political Dynamics of Green Transformation’.

⁴⁸ Bowen and Fankhauser, ‘Low-carbon Policy’, 126.

⁴⁹ See appendix.

⁵⁰ Bhushan and Gopalakrishnan, ‘Environmental Laws’, 81-2.

⁵¹ See appendix for examples of reporting duties, an important species of procedural duties.

⁵² Reid, ‘A New Sort of Duty’, 11.

⁵³ Climate Change Response Bill 2010 (No.60 of 2010), s.3(2).

Fourth, in a democratic system, it is generally inadvisable to blur the line between laws and decrees. South Korea, for instance, has a separate law for green growth and decree for emission-targets.⁵⁴ While decrees of this kind, and even time-bound ordinances, are apt to abound in the course of managing large, unwieldy democracies like India, passing major legislation that is in form only decree risks eroding the foundations of liberal democracy. Reid argues that ‘the imposition of unqualified legal duties on Ministers to achieve certain outcomes which can be met only as the result of a complex aggregation of legislation, decisions, actions and public spending over an extended period’⁵⁵ does not in principle seem fair.

Table 3: Pro-outcome vs anti-outcome

PRO-OUTCOME	ANTI-OUTCOME
<ul style="list-style-type: none"> • Urgency of threat • Symbolic/rallying instrument 	<ul style="list-style-type: none"> • Development costs • Insufficiency/unattainability of target • Not justiciable • Decree masking as law

Conclusion

More than a decade of ephemeral policies and withering structures of climate action in India has demonstrated the necessity of climate legislation for a coherent and lasting effort. The stream of climate laws issuing from developed nations, particularly Europe, has fixed an almost standard template in the popular imagination of what a climate law must be. New fields of law – particularly one attempting to countenance so intricate, layered, and yet supervening an issue as climate change – however, must come about in methodical fashion. Legislative craft, before stitching together bits and pieces that seem bold and appealing, begins with a vision of ultimate form and purpose: what does an Indian climate law need to achieve? How is it likely to achieve this given the political context? What are the full logical and practical implications of the frames and phrases employed to those ends? Once these large questions have been settled, the actual provisions of the law can be decided on a firm and rational basis. A breakdown of the features of a representative selection of climate laws around the world can be found in the appendix – a follow-up essay will attempt to situate these features in a logical train, draw them out, that is, from the principles of climate legislation.

In this paper, we have examined such foundational questions as any climate law should be shaped from and around. Given the acute vulnerability of many (and specific) sections of Indian society, we have considered whether the state has a duty to articulate a ‘right to climate’. At the same time, given the moment is opportune for the Indian economy to lock into low-carbon pathways, we have conceded that the focus might need to doggedly be on maximising sustainable development. As the third highest emitter of CO₂ in the world, climate laws and policies in India may have to in time take the notion of country-wise carbon budgets seriously. Nevertheless, given the inertia that meets the lumbering state in the course of any large-scale enterprise, the more effective approach might be to first design procedural duties to prime the relevant sectors and levels of governance to meet a low-carbon prospect with competence. Debating these and like questions is thus a step in the drafting procedure that cannot be passed over if our legislative intervention in climate change is to see long-term success.

⁵⁴ See appendix.

⁵⁵ Reid, ‘A New Sort of Duty’, 17.

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Appendix I: Salient Features of Climate Law: A Preview

Once we have a clear idea of what form the Indian climate law should assume, we can, based on the decisions made, move to the specific elements of the law that would best suit local contexts. If we settle on a framework law, for instance, we can contemplate what and how institutions should be recruited for coordinating which sectors of the economy. If we decide against outcome duties, procedural duties can be designed not to a predetermined end but to mainstream the climate issue in the existing architecture of governance.

Below is a table that summarises the main features that comprehensive climate laws around the world display. Studying their modes, contexts, and relative success will help the Indian case.

Features/ Countries ⁵⁶	Outcome Duties	Reporting Duties	Rights	Cross-Sectors ⁵⁷	Centre-State	Climate Body's Status
Canada (2021) ⁵⁸	Net Zero by 2050.	Minister ⁵⁹ submits progress and assessment reports WRT each target before Parliament.	Takes into account rights of indigenous peoples with respect to mitigation plans.	Sectoral strategies included in Emission Reduction Plan.	Suggests cooperative measures or agreements with provinces.	Independent.
Germany (2019, 2021) ⁶⁰	Net Zero by 2045 (from 1990 levels).	Fed gov. to submit Climate Action and Projections report to the Bundestag.	'Subjective rights and actionable legal positions are not established by or on the basis of this Act'.	Energy, industry, transport, buildings, agriculture, waste and others.	States can follow their own Climate Acts without prejudice to the federal act.	Independent.
Ireland (2015, 2021)	No.	Periodic review report submitted by body to Minister & Minister to government for approval of plans.	No.	Concerned minister will submit sectoral mitigation and adaptation measures.	National CC ⁶¹ Framework will specify measures for local authorities.	Independent.
Kenya (2016)	No.	Body ⁶² submits progress report to President & Parliament.	'Right to Environment' (which establishes non-impacted standing).	Climate change responses are mainstreamed into sectoral functions.	State depts. to integrate CC Action Plan into plans and projects.	Chaired by President.

⁵⁶ Climate Acts have not been cited in this paper to avoid clutter. They can be easily accessed online, particularly in the LSE database: <https://climate-laws.org/>

⁵⁷ Where sectors are not identified by name, the mechanism for lateral reach will be specified.

⁵⁸ The dates record their original passing into law; some in this list have since been amended.

⁵⁹ "Minister" means Minister of Environment or national equivalent.

⁶⁰ Where the law has been amended, the italicized date indicates the year of latest amendment; the table reflects the latest version of the laws, unless otherwise specified.

⁶¹ "CC" stands for Climate Change.

⁶² "Body" refers to the nodal climate authority established or enabled by the Act.

Mexico (2012, 2018)	No. (New type of duty: 'indicative objective' or 'aspirational goal' of reducing its GHG emissions by 50% by 2050 (from 2000 levels).	Bodies create an annual report on the state of climate action and publish on a website.	Guarantees 'right to a healthy environment'.	Forests and water, energy, food, transportation, urban development, agriculture, and waste.	Separate, analogous series of duties enumerated for Fed, States, and Municipalities.	Chaired by Fed., composed of ministers (secretariats).
Peru (2020)	No.	Plan and progress reports submitted by Minister before Congress.	On the basis of 'Human Rights'.	Sectoral authorities incorporate climate into strategic sector plans & budgets.	Federal, state, and local government to prepare their own strategies given overall ambition.	Chaired by Minister.
South Africa (2018) ⁶³	No. (Minister must later determine GHG threshold and allocate carbon budgets)	Include climate report within budget bill.	On the basis of 'Right to Environment'.	Minister will set Sectoral Emissions Targets for GHG emitting sectors.	Every organ of state must coordinate and harmonise the plans of the national, provincial and local spheres of government.	Peopled by various ministers.
South Korea (2010, 2016)	No. (Separate decree: 37% reduction in GHGs by 2030 (below business-as-usual projection for 2030))	Progress report to National Assembly.	No.	Infrastructure, transportation, roads, ports, waterworks and sewerage.	Local government shall fully cooperate in the State's measures.	Under PMO
UK (2008, 2019)	80% by 2050, amended to 100% (from 1990 levels).	Body submits annual progress reports to Parliament on state of targets.	No.	Body advises how carbon budget should be divided amongst sectors (e.g.: buildings, transportation, waste).	Local authorities are not formally obliged to do anything on climate change by law.	Independent.

⁶³ This refers to the South African Climate Change Bill (2018) which is yet to become law.